S.S.Kilaje

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3221 OF 2021

Vodafone Idea Limited
a company incorporated under the Companies Act, 2013 and having its office at 8, 8-12 Birla Centurion, Century Mills Compound, Pandurang Budhkar Marg, Worli, Mumbai-400 030. .. Petitioner

Versus

1. The Union of India
   through Secretary, Department of Revenue,
   Ministry of Finance, North Block,
   New Delhi-110 001

2. The Commissioner of CGST and C.Ex
   Mumbai Central, having his office at 4th Floor,
   GST Building, 115, M.K.Road,
   Mumbai-400 020

3. The Deputy Commissioner
   Division VIII, CGST & C. Ex.
   Mumbai Central, having his office at 8th Floor,
   Piramal Chamber, Lalbaug, Mumbai -400012

4. The Assistant Commissioner
   Division VIII, CGST & C. Ex.
   Mumbai Central, having his office at 8th Floor,
   Piramal Chamber, Lalbaug, Mumbai -400012

.. Respondents

WITH

WRIT PETITION (L) NO. 12860 OF 2022

Commissioner of CGST & Central Excise, Mumbai Central, An authority appointed under the provisions of the Central Goods and Service Tax Act, 2017, having his office at GST Bhawan, 115, M.K.Marg, Churchgate, Mumbai – 400020. .. Petitioner

Versus

Vodafone Idea Limited
a company incorporated under the Companies Act, 2013 and having its office at 8, 8-12 Birla Centurion, Century Mills Compound, Pandurang Budhkar Marg, Worli, Mumbai-400 030. .. Respondent

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. Mr. Darius Shroff, Senior Advocate a/w. Mr. Vaibhav Patankar and Mr. Prasad Paranjape i/by Patankar and Associates for Respondent in W.P. (L) No. 12860 of 2022 and for Petitioner in W.P. No. 3221 of 2021.

. Mr. Jitendra B. Mishra a/w. Mr. Satyaprakash Sharma and Mr. Ranjith Aithe, for Petitioner in W.P.(L) No. 12860 of 2022 and for Respondent Nos. 2 to 4 in W.P. No. 3221 of 2021.

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CORAM : K. R. SHRIRAM &
MILIND N. JADHAV, JJ.

DATE : 4th JULY, 2022.

JUDGMENT : (PER : K. R. SHRIRAM, J.)

1. Writ Petition No. 3221 of 2021 is filed by Vodafone Idea Limited seeking a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directing respondents to forthwith implement the order-in-appeal dated 18.08.2021 passed by Joint Commissioner (Appeals-II), CGST and Central Tax, Mumbai. By this order a Joint Commissioner (Appeals) has granted refund of Rs.1,02,74,14,843/- to Vodafone Idea Limited.

2. Impugning the said order dated 18.08.2021 passed by the Joint Commissioner (Appeals), Revenue has filed a writ petition being writ petition (L) No. 12860 of 2022. Revenue is seeking a writ of certiorari and praying for quashing the said order dated 18.08.2021. By the said order, the Joint Commissioner has disposed two appeals

being appeal Nos. 257 of 2021 and 258 of 2021 (hereinafter referred to as the "**said appeals**"). Appeal No. 257 of 2021 pertains to period - May 2019 to June 2019 concerning refund of Rs.50,30,92,587/- and Appeal No. 258 of 2021 concerning refund of Rs. 52,43,22,256/- pertains to period July 2019 of to September 2019.

3. Since we felt, if revenue's petition is admitted and we grant a stay to the impugned order, then the question of considering Vodafone Idea Limited's petition for refund would not arise. Therefore, we took up the petition filed by revenue as main petition.

4. Though the petitions are listed for admission, by consent are taken up for final hearing. Petition filed by revenue is taken as reply to petition filed by Vodafone India Limited.

5. Mr. Mishra submitted that the orders upon which reliance has been placed by the Joint Commissioner (Appeals) while allowing the appeals of Vodafone Idea Limited, have been challenged before this Court and Hon'ble Supreme Court of India and therefore the questions of law on the said issue are still open. In fairness, Mr. Mishra states that there is no stay granted in any of the orders and there is no fetter in entertaining and considering these two petitions before us.

6. Mr. Mishra submitted that order-in-original passed on 19.07.2021 by the Deputy Commissioner of Central GST & Central Excise Commissionerate was correct and the appellate authority was not correct. We have considered the said order-in-original passed on 19.07.2021 by the Deputy Commissioner of CGST & Central Excise Commissionerate and also the order in appeal dated 18.08.2021 passed by the Joint Commissioner (Appeals) and in our view the order passed in appeal by the Joint Commissioner (Appeals) is the correct order.

7. It is the case of Vodafone Idea Limited that under the telecommunication license received from Government of India, it provides telecom services. Vodafone Idea Limited provides, *inter-alia*, the services in the nature of international Inbound Roaming Services (IIR) and International Long Distance (ILD) Services to Foreign Telecom Operators (FTOs). Vodafone Idea Limited is registered under the "Maharashtra Goods and Services Tax Act, 2017" (for brevity "**MGST Act**") under registration No. 27AAACB2100P1ZX. The services provided by Vodafone Idea Limited is export of services within the meaning of section 2(6) of the "Integrated Goods and Services Tax Act, 2017" (for brevity "**IGST Act**").

8. As per section 16(3) of the IGST Act, a registered person making zero rated supply shall be eligible to claim refund under either of the following options:

(a) Supply of goods under bond or letter of undertaking (LuT) without payment of IGST and;

(b) Supply of goods with payment of IGST and claim refund of such tax paid.

Petitioner chose the second option and exported services on payment of Integrated Tax and claimed refund thereof.

9. During the period April- 2019 to September 2019, Vodafone Idea Limited filed applications dated 26.03.2021 and 20.05.2021 for refund of integrated tax paid on export of services under Form RFD-01A in accordance with the provisions of Section 54 of the "Central Goods and Service Tax Act, 2017" (for brevity "**CGST Act**") read with Rule 96 of the "Central Goods and Service Tax Rules, 2017" (for brevity "**Rules**"). Vodafone Idea Limited also submitted various documents along with the said applications. Subsequently deficiency memos were issued by respondent Nos. 3 and 4 and Vodafone Idea Limited was called upon to submit documents mentioned therein. Vodafone Idea Limited, vide letters dated 28.04.2021 and 18.05.2021, complied with the deficiencies and submitted the documents.

10. Respondent No.4 issued two show-cause-notices dated 14.06.2021 and 06.07.2021 calling upon Vodafone Idea Limited to show cause as to why its refund claims, for reasons mentioned in the show cause notices, should not be rejected. Respondent No.3, by a letter dated 22.06.2021, also called upon Vodafone Idea Limited to submit its explanation on the issues raised therein. Vodafone Idea Limited by letters dated 29.06.2021 and 13.07.2021 replied to the show-cause-notices. By two orders dated 16.07.2021 and 19.07.2021, respondent No.4 rejected refund claims of Vodafone Idea Limited. Respondent No.4 held, *inter-alia*, that the place of supply of services provided by Vodafone Idea Limited was the State of Maharashtra and cannot be considered as export of services. Further, an amount of Rs.29,98,63,922/- for the period April 2019 to June 2019 was rejected on the ground that the same was filed beyond the period of two years from the date of receipt of consideration in foreign currency.

11. Aggrieved by these two orders, Vodafone Idea Limited filed the said appeals before the Joint Commissioner of CGST and CX (Appeals). The Joint Commissioner (Appeals), by a common order dated 18.08.2021, allowed both appeals of Vodafone Idea Limited. In view of the said order Vodafone Idea Limited claims to have become eligible for refund of Rs. 1,02,74,14,843/- alongwith appropriate interest. It is this order that revenue has impugned in its petition.

12. It is Vodafone Idea Limited's case that by virtue of the IIR and ILD services provided by it, a person traveling to a country outside of his usual place of residence (where he is a regular subscriber of a telecom service provider) wishes to use telecom services from the same service providers (who usually provide services to that person in his / her usual place of residence) with the same contact number, so that his / her connection with the outside world was not interrupted, to cater to such need, almost all telecom service providers have an agreement with the other telecom service providers in different countries / circles to provide telecom services to their customers when he / she is traveling to other country and *vice versa*. The services are rendered under agreements with the service recipients and according to the agreement, Vodafone Idea Limited is contractually obligated only to the Foreign Telecom Operators (**FTOs**) for the services under the agreement. The consideration is payable to Vodafone Idea Limited by the FTOs and the consideration is payable in convertible foreign exchange.

To put it more precisely, the services rendered are in the nature of telecom services by way of allowing to make international long distance calls and roaming telecommunication services. The said arrangement can be explained with following example :

Home Operator ('HO') is licensed to provide telecom services only in the Telecom Circle of it's country and Foreign Telcom Operator ('FTO') is licensed to provide services in the Telecom Circle of respective country. Further, HO and FTO have entered into a roaming arrangement whereby a subscriber of HO, travelling to New York would be able to use the network of FTO, without being a telecom subscriber therein of FTO and when a subscriber of FTO travels to India, he/she will be able to seamlessly latch on to the network of HO and continue to use telecom services in India. Depending upon the usages of the subscriber and the arrangement between HO and FTO, FTO and HO would issue invoices on each other. Further, they would in turn recover service charges from their respective customers.

The services are contractually provided by HO and FTO's for allowing it's operators to make / receive calls while roaming. For these services, HO raises invoice on FTO's. In the given case, Vodafone Idea Ltd is the Home Operator and hence, Vodafone Idea Ltd raises invoices on FTO's.

For supply of above mentioned services, Vodafone Idea Ltd fulfills all the conditions as mentioned under section 2(6) of IGST Act to qualify said services as export of services."

13. The place of supply where the services are consumed, according to Vodafone Idea Limited, therefore is outside India. It was submitted that the place of supply of services, where the location of

supplier or location of recipient is outside India, is required to be determined in terms of Section 13 of the IGST Act. It is also submitted that, under sub-section 2 of Section 13 of the IGST Act, the location of the recipients of services rendered by Vodafone Idea Limited is that of FTO. Revenue relied upon sub clause (b) of sub-Section 3 of Section 13 to submit that the services are supplied to the customer of FTO.

14. It was also submitted on behalf of Vodafone Idea Limited that the conditions prescribed under section 2(6) of the IGST are also complied with. It was also submitted that IIR and ILD Services have always been considered as export of services.

15. Mr. Shroff also submitted that if revenue's view of considering the place of supply as within taxable territory for roaming services is to be accepted, it will turn out to be counterproductive. The reasons according to Mr. Shroff are as under:

> 1. The outward supply considered as export of service is with payment of IGST. Therefore, if the analogy of treating roaming services as domestic (non-export) it will lead to not only no refund but no consequent demand of tax as well.
>
> 2. The Vodafone Idea Ltd is also paying GST under reverse charge on receiving services from foreign operators. This will be discontinued considering the place of supply is

outside.

3. Vodafone Idea Ltd will also be liable for a cash refund to the extent of the tax paid under reverse charge. The refund shall be eligible since inception, i.e., 1st July 2017 as the relevant date shall be the date of the order which redefines the place of supply.

4. On one hand, there will be no refunds but on the other hand there will be no cash outflow of tax under reverse charge.

5. This suggests that the proposal to consider the place of supply for roaming services shall have corresponding effect on inward supply side also. If the roaming services are treated as domestic services and GST is levied on the same, there will be no GST payment in cash under reverse charge on inward supply of roaming services. Therefore, it is pertinent that a legal and balanced view is adopted in the interest of justice.

6. Therefore, the said roaming services technically and legally qualify as export of service.

16. Mr. Mishra submitted that, Export of services is defined in IGST Act in Section 2(6) where the following 5(five) conditions have been prescribed as necessary for a supply to qualify as export of service:

(i) the supplier of service is located in India;
(ii) the recipient of service is located outside India;

(iii) **the place of supply of service is outside India**;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and

(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8; One of the five conditions for a supply of service to be considered as "export of service" is that the place of supply of service is outside India."

17. Mr. Mishra submitted that the main condition is the place of supply of services outside India. According to Mr. Mishra since the customer of FTOs makes calls within the territory of Maharashtra, the place of supply of service is within Maharashtra and not outside India. Mr. Mishra also submitted that roaming services provided by Vodafone Idea Limited to customers of foreign entities are actually consumed in India only by those customers visiting India from abroad. Hence, in the light of Section 13(3)(b) of IGST, condition No. (iii) of Section 2(6) of IGST as the place of supply outside India has not been fulfilled. Therefore the said services cannot be treated as export of services. Mr.Mishra was candid to admit that payment for such service was received by Vodafone India Limited in convertible foreign exchange.

18. It will be useful to reproduce the relevant provisions which read as under:-

"Section 2(6) of the IGST Act, 2017
(6) "export of services" means the supply of any service when,-
(i) the supplier of service is located in India;
(ii) the recipient of service is located outside India;
(iii) the place of supply of service is outside India;
(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange [or in Indian rupees wherever permitted by the Reserve Bank of India]; and
(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;

Section 13 of the IGST Act, 2017
SECTION 13. Place of supply of services where location of supplier or location of recipient is outside India.

(1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.
(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

(3) The place of supply of the following services shall be the location where the services are actually performed, namely:—

(a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:

Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:

[Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process];"

(b) services supplied to an individual, represented either as the recipient of services or a person acting on

behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

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Section 2(24) of the IGST Act, 2017

(24) words and expressions used and not defined in this Act but defined in the Central Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act shall have the same meaning as assigned to them in those Acts;

Section 16 of the IGST Act, 2017

***SECTION 16. Zero rated supply** - (1) "zero rated supply" means any of the following supplies of goods or services or both, namely:—*

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:—

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or
(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder.

Section 20 of IGST Act, 2017

***SECTION 20. Application of provisions of Central Goods and Services Tax Act -** Subject to the provisions of this Act and the*

rules made thereunder, the provisions of Central Goods and Services Tax Act relating to,—

(i) scope of supply;
(ii) composite supply and mixed supply;
(iii) time and value of supply;
(iv) input tax credit;
(v) registration;
(vi) tax invoice, credit and debit notes;
(vii) accounts and records;
(viii) returns, other than late fee;
(ix) payment of tax;
(x) tax deduction at source;
(xi) collection of tax at source;
(xii) assessment;
(xiii) refunds;
(xiv) audit;
(xv) inspection, search, seizure and arrest;
(xvi) demands and recovery;
(xvii) liability to pay in certain cases;
(xviii) advance ruling;
(xix) appeals and revision;
(xx) presumption as to documents;
(xxi) offences and penalties;
(xxii) job work;
(xxiii) electronic commerce;
(xxiv) transitional provisions; and
(xxv) miscellaneous provisions including the provisions relating to the imposition of interest and penalty, shall, mutatis mutandis, apply, so far as may be, in relation to integrated tax as they apply in relation to central tax as if they are enacted under this Act:

Provided that in the case of tax deducted at source, the deductor shall deduct tax at the rate of two per cent from the payment made or credited to the supplier:

Provided further that in the case of tax collected at source, the operator shall collect tax at such rate not exceeding two per cent, as may be notified on the recommendations of the Council, of the net value of taxable supplies:

Provided also that for the purposes of this Act, the value of a supply shall include any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier:

Provided also that in cases where the penalty is leviable under the Central Goods and Services Tax Act and the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, the penalty leviable under this Act shall be the sum total of the said penalties.

["Provided also that where the appeal is to be filed before the Appellate Authority or the Appellate Tribunal, the maximum amount payable shall be fifty crore rupees and one hundred crore rupees respectively."]

Section 2(110) of the CGST Act, 2017

(110) "telecommunication service" means service of any description (including electronic mail, voice mail, data services, audio text services, video text services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electromagnetic means.

Section 2(93) of the CGST Act, 2017

(93) "recipient" of supply of goods and/or services means-

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration,
(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available, and
(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered, and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied.

Rule 96(9) of the CGST Rules, 2017

(9) The application for refund of integrated tax paid on the services exported out of India shall be filed in ***FORM GST RFD 01*** *and shall be dealt with in accordance with the provisions of rule 89.*

19. As per clause (a) of Section 2(93) of the CGST Act, "recipient" means where the consideration is payable for supply of goods or service, the person who is liable to pay the consideration. Clauses (b) and (c) of Section 2(93) is applicable when no

consideration is payable. In this case consideration is payable by the FTO for the services rendered to it. We find the adjudicating authority in his orders does refer to the terms of agreements with FTO. The services are rendered under agreements with the service recipients and according to the agreement, Vodafone Idea Ltd is contractually obligated only to the FTOs for the services under the agreement; the consideration is payable by the FTOs and the consideration is payable in convertible foreign exchange. There is no mention of any agreement with subscriber of FTO. Vodafone Idea Ltd has reiterated that there is no contract with subscriber of FTO making it liable to pay value of service to Vodafone Idea Ltd. We find that practically it is impossible for Vodafone Idea Ltd to have contract with subscriber of FTO. Therefore, the subscriber is not liable to make any payment to Vodafone Idea Ltd. In the impugned order it is stated "as per the agreement reproduced in para 16.1 (Appeal No.257/2021) and 13.1 (Appeal No.258/2021) of the impugned orders with M/s. Cello Partnership or M/s. Verizon Wireless USA D/B/A, for provision of service is payable by FTO." This is not controverted by Revenue. It is a fact that payment is received from FTO. Hence, subscriber of the FTO cannot be considered as recipient of service as held by Adjudicating Authority. FTO is undoubtedly the recipient of service.

20. The point of dispute is whether provisions of Section 13(2)

or Section 13(3) of IGST is applicable to the present case. Section 13(2) refers to the place of supply of services as the location of the recipient of services except in cases of Sub-section (3) to (13) of Section 13. Section 13(3) identifies the place of supply of services as the location where the services are actually performed. The provision of section 13(3)(b) is applicable in the case where services are supplied to an individual as Section 13(3) (b) starts with the words "service supplied to an individual". We find that in the instant case the said services were supplied to FTO and not to an individual. The FTO had supplied services to their subscriber (individual). Here, the supplier of services is Vodafone Idea Ltd and the recipient of the service is FTO as discussed above. Further, Vodafone Idea Ltd has no idea of subscribers of FTO and therefore question of supplying service to an individual (subscribers) does not arise. Vodafone Idea Ltd had issued invoices to FTO and not to any individual which substantiates that services were not provided to an individual.

21. We would agree with the concept that customer's customer cannot be your customer. In the case at hand customer of Vodafone Idea Limited is the FTO and the subscribers of FTO are the customers of FTO. When a service is rendered to a third party customer of FTO-your customer, the service recipient is your customer and not the third party customer of FTO. These issues have been considered by the

Central Excise and Service Tax Appellate Tribunal (CESTAT Act), West Zonal Branch, Mumbai and one of Banglore Tribunal. We accept the views expressed and law laid down by the Tribunals. The relevant portion reads as under :-

> *1. **Vodafone Essar Cellular Ltd. V. CCE** [1] (para 5.1, 5.2, 5.3 & 5.4)*
>
> > *5.1. We have perused the agreement entered into between the appellant and the foreign telecom service providers. As per the said agreement, the appellant has agreed to provide telecom services to the customer of the foreign telecom service provider while he is in India using the appellants telecom net work. The consideration for the service rendered is paid by the foreign service provider. There is no contract/agreement between the appellant and the subscriber of the foreign telecom service provider to provide any service. Since the contract for supply of service is between the appellant and foreign telecom service provider who pays for the services rendered, it is the foreign telecom service provider who is the recipient of the service. From the provisions of law relating to GST in UK and Australia, relied upon by the appellant, this position becomes very clear. Your customer's customer is not your customer. When a service is rendered to a third party at the behest of your customer, the service recipient is your customer and not the third party. For example, when a florist delivers a bouquet on your request to your friend for which you make the payment, as far as the florist is concerned you are the customer and not your friend.*
> >
> > *5.2. Export of Service Rules, 2005 defines export in respect of taxable services. For this purpose, the services have been categorized into 3. Category I deals with specified services provided in relation to an immovable property situated in India. Category II deals with specified taxable services where such taxable service is partly performed outside India and states that when it is partly performed outside India, it shall be treated as performed outside India. Category III deals with services not covered under category I and II. The telecom services fall under category III. As far as category III services are concerned, the transaction shall be construed as export when provided in relation to business or commerce to a recipient located outside India and when provided otherwise to a recipient located outside India at the time*

1 (2013) (31)STR 738(Tri-Mum)

of provision of such service. The additional conditions required to be satisfied are such services as are provided from India and used outside India; and consideration for the service rendered is received in convertible foreign exchange. As observed earlier, the service is rendered to a foreign telecom service provider who is located outside India and therefore, the transaction constitutes export and we hold accordingly.

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

> *"3. It is an accepted legal principle that the law has to be read harmoniously so as to avoid contradictions within a legislation. Keeping this principle in view, the meaning of the term 'used outside India' has to be understood in the context of the characteristics of a particular category of service as mentioned in sub-rule (1) of rule 3. For example, under Architect service (a category I service [Rule 3(1)(i)]), even if an Indian architect prepares a design sitting in India for a property located in U.K. and hands it over to the owner of such property having his business and residence in India, it would have to be presumed that service has been used outside India. Similarly, if an Indian event manager (a category II service [Rule 3(1)(ii)]) arranges a seminar for an Indian company in U.K., the service has to be treated have been used outside India because the place of performance is U.K. even though the benefit of such a seminar may flow back to the employee serving the company in India. For the services that fall under Category III [Rule 3(1)(iii)], the relevant factor is the location of the service provider and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service accrues outside India. Thus for category III services, it is possible that export of service may take place even when all the relevant activities take place in India so long as the benefits of these services accrue outside India.*

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

roaming facility, it is the MTNL/BSNL who charges the subscriber for the telecom services including service tax, even though the service is rendered abroad by the foreign telecom service provider as per the agreement with MTNL/BSNL.

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

2. ***CST v Bayer Material Science***[2] *(para 7)*

7. A similar issue came up before this Tribunal in the case of Vodafone Essar Cellular Ltd v. CCE, Pune-III - 2012(31) S.T.R. 738 wherein it was held that the telecom service provided in India to international in-bound roamers registered with foreign telecom network operator, payment received from impugned foreign telecom operators in convertible foreign exchange, in that set of facts this Tribunal has held that the service have been provided outside India as an export of service. In this case, the respondent is in a better footing that in the case of Vodafone Essar Cellular Ltd. (supra) wherein it was held that the service recipient is the foreign telecom service-provider and not the subscriber of the foreign telecom service in India and providing service in India and it is a case of export of service. In the circumstances, I hold that the learned Commissioner (Appeals) has rightly held that the case of export of service as per Rule 3(1) (iii) of Export of Services Rules, 2005. In the circumstances, I do not find any infirmity with the impugned order and the same is upheld. The

2 (2015) 38 STR 1206 (Tri-Mumbai)

appeal filed by the Revenue is dismissed.

3. ***ABS India Ltd. v CST***[3] *(para 4)*

> *The appellant is a company incorporated in India. They have a subsidiary company in Singapore. The appellant booked orders for the sales of the goods manufactured by the subsidiary situated in Singapore. For this purpose, they received certain commission and initially they paid the Service Tax. Later they realized that as they had exported the service, they would not be liable to pay Service Tax. Hence, they requested for refund of the amount. The refund was rejected by the Original Authority. The rejection order has been upheld by the Appellate Authority. Both the Original Authority and Appellate Authority have held that the service has been rendered in India and it has been utilized delivered in India and it is also used in India. The learned Advocate strongly argued that the understanding of the lower authority is not correct, the services have rightly been delivered abroad and they have been used by the Singapore Company. They relied on several case laws. They also stated that it should not be considered that the appellant and the company in Singapore are related, even though one is a subsidiary of the other, they are separate legal entities. They produced a large number of case laws on this subject. They also relied on the decision of this Tribunal in the case of M/s. Blue Star v. CCE vide Final Order No. 489/2008, dated 27-3-2008 [2008 (11) S.T.R.23] (Tribunal), wherein a similar situation was dealt with. The situation here also is similar. In this case, the Indian company is the principal and the Singapore Company is a subsidiary. The appellant 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. 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. There is absolutely no merit in the impugned order. Hence, we allow the appeal with consequential relief."*

3 (2009) 13 STR 65 (Tri Bang)

22. In our opinion, therefore Vodafone Idea Limited has provided services to FTOs and not to the individual subscribers of FTOs. Therefore Section 13(3)(b) is not attracted. Section 13(3)(b) on which reliance has been placed by the Deputy Commissioner is not applicable.

23. As per Section 13(2) of the IGST, the place of supply of services, except the services specified in sub-sections (3) to (13), shall be the location of the recipient of services. As discussed earlier, the recipients of the services is the FTO. We find that Vodafone Idea Limited has not supplied services specified in sub-sections (3) to (13) of Section 13. Therefore, the place of service or supply of service supplied by Vodafone Idea Limited is the location of recipient of the service, i.e., location of the FTO, which is outside India.

24. Mr. Mishra submitted that the subscriber and FTO are acting on behalf of each other. In this regard, there is nothing to substantiate that the subscriber is acting on behalf of the FTO. The relationship between the FTO and the subscriber is on principal to principal basis and not on principal and agent basis. In this case, if the subscriber notices any deficiency in service he cannot talk directly to Vodafone Idea Ltd as representative of the FTO. The subscriber has to approach the FTO for the purpose of rectifying the deficiency. We find that this

itself would substantiate that the subscriber is not representative or agent of the FTO. Further, we find no evidence to substantiate that the FTO has authorised its subscriber to be its representative.

25. From the above, it is therefore evident that in the instant case, sub-section(2) of Section 13 is applicable and not sub-section (3)(b) of Section 13. Therefore, performance of services has no relevance in this case.

26. In the circumstances, we dismiss the petition filed by revenue being writ petition (L) No. 12860 of 2022. Consequently petition filed by Vodafone Idea Limited namely writ petition No. 3221 of 2021 is allowed in terms of prayer clause (a) which reads as under :

> *"(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records and proceedings of the Appeal Nos. 257/2021 and 258/2021 before the Appellate Authority i.e. Joint Commissioner (Appeals-II), CGST & C.EX., Mumbai and after examining the legality and propriety of impugned Orders-in-Appeal (OIA) No. SS/JC/223-224/Appeals-II/MC/2021 dated 14.09.2021, be pleased to quash and set aside the same;"*

27. No costs.

28. Mr. Mishra seeks a stay of this order for a period of 8 weeks. This order is stayed upto 31.08.2022.

[MILIND N. JADHAV, J.] **[K. R. SHRIRAM, J.]**