IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. III

Service Tax Miscellaneous Application No. 40127 of 2022
(on behalf of Appellant)
WITH
Service Tax Miscellaneous [CT] Application No. 40128 of 2022
(on behalf of Appellant)
In
Service Tax Appeal No. 41087 of 2015

(Arising out of Order-in-Original No. CBE/ST/02/2015-Commr. dated 04.03.2015 passed by the Commissioner of Central Excise, Customs and Service Tax, 6/7, A.T.D. Street, Race Course Road, Coimbatore – 641 018)

M/s. Vodafone Idea Limited **: Appellant/ Applicant**
[Formerly known as 'M/s. Vodafone Cellular Limited']
1046, Avinashi Road,
Coimbatore – 641 018

VERSUS

The Commissioner of Central Excise & Service Tax **: Respondent**
Coimbatore Commissionerate
6/7, A.T.D. Street, Race Course Road, Coimbatore – 641 018

APPEARANCE:

Ms. Shwetha Vasudevan, Advocate for the Appellant

Smt. Sridevi Taritla, Authorized Representative for the Respondent

CORAM:

HON'BLE MRS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. 40679/2023 dt. 16.08.2023
[INTERIM ORDER No. 40006/2022 dt. 27/09/2022]
DATE OF HEARING: 10.08.2022
DATE OF DECISION: 16.08.2023

Order : Per Hon'ble Smt. Sulekha Beevi C.S.

After disposing of the early hearing petition, the matter was taken up for hearing with the consent of both sides.

2. The miscellaneous application for change of cause-title filed by the appellant is allowed, as prayed for.

3. The issue involved in this appeal is whether international inbound roaming charges received by the appellant are subject to levy of Service Tax.

4. The appellant, M/s. Vodafone Idea Ltd. (formerly known as 'M/s. Vodafone Cellular Ltd.'), is engaged in the provision of Telecommunication Services, Business Auxiliary Services, Intellectual Property Services, etc. They are registered with the Service Tax Department and are filing ST-3 returns periodically in terms of Rule 7 of the Service Tax Rules, 1994.

5. On scrutiny of records, it was noticed by the Department that the appellant had provided roaming services to international inbound roamers and that the appellant received income for rendering such services from the home network of the visitors. It was observed that the appellant had not paid Service Tax on the international inbound roaming charges for the period from July 2012 to September 2013. On enquiry, the appellant informed that they have received income in foreign currency for rendering such services and that the services rendered by them qualify as 'export of services' in terms of the Export of Services Rules, 2005. According to the Department, the appellant charged an amount for 'international roaming' from their partner foreign network operators [for latter's customers while roaming in the taxable territory (India)]. Since these services were provided in India by the Indian service provider and consumed in the Indian taxable territory, the Department entertained a view that such services, in the nature of international inbound roaming services, are liable to Service Tax.

6. Show Cause Notice No. 36/2014-Commr. dated 16.10.2014 was issued to the appellant for the period from July 2012 to September 2013 proposing to demand Service

Tax on the international inbound roaming charges received by them, along with interest, and also for imposing penalties. After due process of law, the Original Authority vide order impugned herein confirmed the demand of Service Tax along with interest and imposed penalty. Aggrieved by such order, the appellant is now before the Tribunal.

7.1 On behalf of the appellant, Learned Counsel Ms. Shwetha Vasudevan appeared and argued the matter. She submitted that the dispute relates to Service Tax liability on international inbound roaming services provided by the appellant to Foreign Telecommunication Operator Companies (hereinafter referred to as "FTOs") under International GSM Roaming Agreements. The appellant receives consideration from the FTOs in convertible foreign exchange under the above agreements for the roaming facilities. That the above stated international roaming facility is a feature by which a person who subscribes to a Telecom operator in a country [commonly referred to as Home Network Operator (HNO)] gives access to the network of another Telecom operator in a different country [commonly referred to as Visited Mobile Telephone Operator (VMTO)]. The roaming agreements enable reciprocal arrangements for provision of Telecommunication Services whereby a person subscribing to the appellant's network in India are able to use the FTO's services in the foreign country. Vice versa, a person subscribed to the FTO's network (hereinafter referred to as "inbound roamer") will be able to use the appellant's network services in India. In other words, the appellant is the HNO for its subscribers in India and is a VMTO for inbound roamers, with whom a roaming agreement has been executed. That in such agreements, the VMTO keeps track of the calls and messages logged for the duration of the international travel and logs the corresponding charges. The VMTO raises invoices on the HNO for services provided to them.

7.2 She submitted that it is the allegation of the Department that the appellant provides the services to the inbound roamer, who is the 'actual beneficiary' of the appellant's services. The Department has taken the view that the FTO is merely a co-ordinator who arranges for the services to the inbound roamer; that the FTO would not become the service recipient merely because payments are made by the FTO to the appellant in convertible foreign exchange. That the authorities below have taken the view that the transaction would not amount to 'export of services' for the period from July 2012 to September 2013 because the service recipient (inbound roamer) is located in India for the entire duration when the roaming services are rendered. That the service is provided within India to the inbound roamer as per Rule 3 of the Place of Provision of Services Rules, 2012 ('POPS Rules'). It is concluded by the Department that the activity cannot be treated as an export of service under Rule 6A of the Service Tax Rules, 1994 because the conditions in Rule 6A(d) of the Service Tax Rules are not satisfied as the place of provision of service is within India.

7.3 She submitted that the Tribunal in the appellant's own case for the very same set of facts and issue, as reported in *M/s. Vodafone Cellular Ltd. v. Commissioner of G.S.T. and C.Ex., Coimbatore [2019 (25) G.S.T.L. 557 (Tribunal – Chennai)],* has decided the issue in favour of the appellant and held that the activity amounts to export of service and therefore, not exigible to Service Tax. She submitted that an appeal has been preferred against such order before the Hon'ble Supreme Court as Civil Appeal bearing Diary No. 40710/2019 by the Department. That though notice has been issued, no interim stay has been granted by the Hon'ble Apex Court.

7.4.1 It is further submitted by the Learned Counsel for the appellant that the decision of the Tribunal in the appellant's own case (*supra*) was not considered by the

authorities below stating that Notification No. 36/2007-S.T. dated 15.06.2007 and Circular No. 90/1/2007-S.T. dated 03.01.2007 were not taken into consideration by the Tribunal. The Learned Counsel for the appellant explained that these Notifications have no relevance in the present issue. That Notification No. 36/2007 provides that the services to international inbound roaming subscribers is not liable to Service Tax for the period from 01.07.1994 to 14.01.2007 and that the Circular No. 90/1/2007 clarified that the international inbound roaming services would be taxable under the erstwhile Telephone Services from 15.01.2007 onwards. Thus, Notification No. 36/2007 only stipulated the non-taxability of the transaction for the period from 01.07.1994 to 14.01.2007; it did not expressly state the taxability of the transaction. Further, in the framework of the Finance Act, 1994, it was held that the service recipient would be the FTO and therefore, the services have to be considered to be exported. Under such circumstances, Notification No. 36/2007 cannot be considered to determine the levy of Service Tax.

7.4.2 She adverted to the Circular No. 90/1/2007 to argue that the said Circular was withdrawn vide Circular No. 96/7/2007-S.T. dated 23.08.2007. The same has been noted in the decision rendered by the Hon'ble Delhi High Court in the case of *M/s. Verizon Communication India Pvt. Ltd. v. Asst. Commissioner of Service Tax, Delhi-III reported in 2018 (8) G.S.T.L. 32 (Del.).*

7.5 The Learned Counsel for the appellant was at pains to argue that in earlier matters, the appellant had paid Service Tax and filed rebate claims for the Service Tax paid on international inbound roaming services on the ground that these amounted to export of services in terms of Rule 5 of the Export of Services Rules, 2005 read with Notification No. 11/2005-S.T. dated 19.04.2005. That though the rebate claims were rejected by the Original Authority, the appellant had preferred a Revision

Application before the Government of India. After adjudication, the Revisional Authority allowed the rebate claims, which would establish that provision of international inbound roaming services is in the nature of export of services.

7.6 She argued that all these facts have already been considered by the Tribunal in the appellant's own case and the Tribunal has set aside the demand for the earlier period as well as subsequent periods. That the present dispute, which pertains to the period from July 2012 to September 2013, is the period sandwiched between the periods of dispute in the earlier cases.

7.7 She prayed that the appeal may be allowed.

8. Smt. Sridevi Taritla, Learned Authorized Representative for the Revenue, supported the findings in the impugned order.

9. Heard both sides.

10. The facts have already been narrated in detail and we find that the very same issue has been considered by the Tribunal in the appellant's own case for a different period in the case of *M/s. Vodafone Cellular Ltd. v. Commissioner of G.S.T. and C.Ex., Coimbatore [2019 (25) G.S.T.L. 557 (Tribunal – Chennai)]* wherein the Tribunal has analysed the very same issue for the periods from 01.04.2011 to 30.06.2012 and 01.10.2013 to 30.09.2014, where the demand was raised on international inbound roaming services. For better appreciation, the relevant paragraphs of the order are noticed as under:-

> *"2.1 The present issue pertains to International Inbound Roaming Services provided by VCL to Foreign Telecommunication Operator Companies ('FTOs'), for which consideration is paid by the FTOs to the appellant in convertible foreign exchange. To this extent, the appellant has executed International GSM Roaming Agreements (hereinafter referred to as 'Roaming Agreements') with FTOs overseas for providing their*

subscribers with roaming facilities during their stay in India. Under International Roaming Facility, a subscriber to a Telecom operator in a country, commonly referred to as Home Network operator ('HNO') obtains access to network of another operator in the countries they visit, commonly referred to as the Visited Mobile Telephone Operator ('VMTO'). The roaming agreements enable reciprocal arrangements for provision of telecom services, whereby persons subscribing to VCL's network in India are able to use the contracting telecom operators' services in the foreign country, and an Inbound Roamer is able to use the appellant's network services in India.

2.2 In other words, the appellant is the HNO for its subscribers in India, and is a VMTO for subscribers of FTOs ('Inbound Roamers') with whom a roaming agreement has been executed. Inbound Roamers would have access to appellant's network under the International In-bound Roaming Facility. In such arrangements, the VMTO keeps track of the calls and messages logged for the duration of the International travel and logs the corresponding charges. The VMTO raises invoices on the HNO for services provided to them. It is relevant to note that services are provided by the VMTO to HNO, and not to the subscribers. The consideration for the telecom services are received in convertible foreign exchange.

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5.1 The issue is whether the appellants are liable to pay service tax on the international inbound roaming services received by a subscriber of foreign telecom company who visits India. It is not in dispute that the appellant had received consideration from the foreign telecom company for providing such international roaming. In other words, department does not have a case that consideration was received by the appellant from the person who was on visit in India and was receiving services from appellant as a subscriber of foreign telecom company. The international inbound roamer is not a subscriber of the appellants. The department has proceeded with the view that the actual beneficiary of the service is the inbound roamers and the appellant being a service provider for such international roaming facility, the service would fall within the levy of service tax. In fact, even though the actual beneficiary of the service is inbound roamer, there is no agreement by the appellant to provide service to the actual inbound roamer. The agreement to provide service

is between the appellant and the foreign telecommunication company. Thus, for the appellant, the service recipient can only be the foreign telecommunication company and not the international inbound roamer. In case of any difficulty faced by the international inbound roamer he would call the customer care of the foreign telecom company to which he is a subscriber. Thus, as per the agreement, the appellant agrees to provide service to the foreign telecom company and therefore such foreign telecom company is the service recipient.

5.2 Since the service recipient is located outside India, as per Rule 3(iii) of Export of Services Rules, the said services would amount to export of service for the period prior to 1-7-2012. For the period after 1-7-2012, the Place of Provision of Services Rules, 2012 came to be introduced and as per Rule 3 of such Rules, the location of the service recipient has to be taken into account for deciding as to where the services have been provided. So for the entire period of dispute, since the service recipient is outside India, the same amounts to export of services.

5.3 In drawing such conclusion, we are assisted by the Master Circular dated 23-8-2007 issued by the department. It may be correct that in Circular No. 90/1/2007-S.T., dated 3-1-2007 such services of providing international inbound roaming facility has been clarified by the Board not to be export of service. However, in the subsequent master circular dated 23-8-2007, it is specifically clarified that the said master circular supersedes all earlier circulars. The relevant paragraph is extracted below :-

> *"6. This circular supersedes all circulars, clarifications and communications, other than Orders issued under Section 37B of the Central Excise Act, 1944 (as made applicable to service tax by Section 83 of the Finance Act, 1994), issued from time to time by the CBEC, DG (Service Tax) and various field formations on all technical issues including the scope and classification of taxable services, valuation of taxable services, export of services, services received from outside India, scope of exemptions and all other matters on levy of service tax. With the issue of this circular, all earlier clarifications issued on technical issues relating to service tax stand withdrawn."*

5.4 Though the Ld. AR has been at pains to argue that the above Master Circular was a clarification on technical issues only, on perusal of the above extracted portion, it is seen stated that the technical issues including the scope and classification of taxable services, valuation of taxable

services, export of services, services received from outside India also fall within the scope of the master circular. Further, in the case of Verizon Communication India Pvt. Ltd. (supra), the Hon'ble Delhi High Court had considered the issue whether the master circular supersedes the earlier circulars. The Hon'ble High Court had concluded that the circular dated 23-8-2007 makes it explicit that all circulars, instructions and communications issued from time to time stand superseded by the Master Circular. The relevant paragraph is extracted below :-

> *"42. Circular No. 90/1/2007, dated 3rd January, 2007 concerned provision of telephony services to subscribers of international telephone service providers who may be on a visit to India and are availing the inbound roaming services. The said Circular clarified that a telephone connection did not necessarily mean providing a telephone instrument or providing sim card. Even if a number was allocated temporarily to an inbound roamer and used internally it remained a service of a telephone connection. It was clarified that during the period of roaming, "the Indian Telecom service provides telephone service to an international inbound roamer. This service to an inbound roamer is delivered and consumed in India and, therefore, is not an export of service."*
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> *43. The said Circular dated 3rd January, 2017 did not deal with telecommunication services involving transfer of electronic data. Then came the Circular No. 96/7/2007-S.T., dated 23rd August, 2007. This was on the basis of the report of the Committee chaired by Shri T.R. Rustagi, former Commissioner of Customs & Central Excise and Director General (Inspection). On the basis of comments received, the C.B.E. & C. issued the above circular. Paragraph 6 of the said circular reads thus :*
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> *"6. This circular supersedes all circulars, clarifications and communications, other than Orders issued under Section 37B of the Central Excise Act, 1944 (as made applicable to service tax by Section 83 of the Finance Act, 1994), issued from time to time by the C.B.E. & C., DG (Service Tax) and various field formations on all technical issues including the scope and classification of taxable services, valuation of taxable services, export of services, services received from outside India, scope of exemptions and all other matters on levy of service tax. With the issue of this circular, all earlier clarifications issued on technical issues relating to service tax stand withdrawn."*

(emphasis supplied)

> *44. What this circular does is to indicate, in an Annexure thereto, the classification (by a three digit code) of services for the purposes of levy of service tax. The Annexure does not refer to "telecommunication services". This did not, however, mean that in relation to "telecommunication services", the earlier Circular dated 3rd January, 2007 continued to operate. Paragraph 6 of the Circular dated 23rd August, 2007 makes it explicit that "all circulars", clarifications and communications issued from time to time stands superseded. There is nothing to replace what has been superseded as far as the Circular dated 3rd January, 2007."*

(emphasis supplied)

5.5 In Para 54 of the said judgment, in sub-para (v), it has been categorically stated that with total repeal by the subsequent circular dated 23-8-2007, the earlier circular dated 3-1-2007 has no application. From the judgment rendered in Verizon Communication India Pvt. Ltd. (supra), we find that the master circular supersedes the earlier circulars issued by the Board and therefore the contention of the department that Circular dated 3-1-2007 has to be applied for levy of service tax is not sustainable.

5.6 The Ld. Counsel for appellant has also furnished the order passed by the revisionary authority in their own case vide Order No. 1-5/2018-ST/ASRA/Mumbai, dated 23-1-2018. It is submitted by the Ld. Counsel that the appellant was earlier paying service tax on these services and claiming refund/rebate. In such proceedings, wherein the refund claim was filed by the appellant after paying service tax, the revisionary authority has granted the refund after considering all the circulars as well as the decision in the appellant's own case and the case of Verizon Communication India Pvt. Ltd. (supra). Paragraphs 15 and 16 of the said revisionary order makes it clear that the revisionary authority has taken note of all the circulars of the Board as well as the decisions relied upon by the appellant to grant the refund for the period prior to 1-4-2011. After 1-4-2011, appellant stopped paying the service tax for which show cause notices have been issued. It is clear from the order of Revisionary authority that when the appellant had paid service tax and filed refund claims on the very same services, the department has granted refund holding the services as export of services. The department has granted refund upto the period 31-3-2011. The department therefore cannot contend that the services are not export of

services for the period from 1-4-2011 to 30-6-2012 and 1-10-2013 to 30-9-2014 which is the disputed periods in these appeals.

6. From the foregoing discussions, we are of the considered opinion that the services are not exigible to service tax being export of service. The impugned orders are set aside and the appeals are allowed with consequential relief, if any, as per law."

11. After considering the facts and evidence placed before us, we do not find any reason to take a different view from the decision rendered in the case of *M/s. Vodafone Cellular Ltd. (supra).* Following the same, we are of the considered opinion that the demand cannot sustain.

12. The impugned order is set aside.

13. The appeal is allowed with consequential reliefs, if any, as per law.

(Order pronounced in the open court on 27.09.2022)

Sulekha Beevi S

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Separate order

S. Jr

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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Customs, Excise & Service Tax Appellate Tribunal

PER: SANJIV SRIVASTAVA

1.1 I have gone through the order prepared by the learned Member (Judicial). However after going through the said order I find that the above order has been prepared placing compete reliance on the earlier decision of the CESTAT in the appellant own case. Reported at [2019 (25) GSTL 557 (Tri- Chennai)]. In para 10, Hon'ble Member has observed that there were two period of demands viz, 01.04.2011 and 30.06.2012 considered by the tribunal in the said decision, and tribunal has thus decided the period both prior and post 01.07.2012 both for the period post and prior to introduction of Place of Provision of Services Rules, 2012. Indeed in para 5.2, tribunal has observed, as follows:

"5.2 Since the service recipient is located outside India, as per Rule 3(iii) of Export of Service Rules, the said services would amount to export of service for the period prior to 1.7.2012. For the period after 1.7.2012, the Place of Provision of Services Rules, 2012 came to be introduced and as per Rule 3 of such Rules, the location of the service recipient has to be taken into account for deciding as to where the services have been provided. So for the entire period of dispute, since the service recipient is outside India, the same amounts to export of services."

Apart from this para, I do not find any discussion in the said order in respect of the provisions of law and facts for the period post 01.07.2012. The entire order discusses the issue vis a vis the master circular issued by the Board dated 23.08.2007, withdrawing/ superseding the earlier circulars including the Circular No. 90/1/2007 dated 03.01.2007. On the basis of the

decision of the Hon'ble High Court of Delhi in case of Verizon Communication 2017-TIOL-1863-HC-Del-ST, has concluded in para 5.5, that Master Circular has superseded the earlier Circulars and Circular 03.01.2007 cannot be applied.

1.2 Tribunal thereafter has referred to the order of Government of India, Order No order No.01-05/2018-ST/ASRA/Mumbai dated 23.1.2018, whereby the Government has allowed the refund/ rebate claims filed for the period prior to 01.04.2011, as they were paying service tax on the said services provided by them till 01.04.2011. However the order itself records that the appellant had stopped paying the service tax after 01.04.2011.

1.3 Commissioner has in the impugned order, observed as follows, for holding that the services provided by the appellant have been provided by the appellant to the service recipients within the taxable territory:

"9. I have given my earnest consideration to the issues agitated in the notice as well as the counter arguments presented by Vodafone. I find that the entire notice is an upshot of difference in understanding between the department and Vodafone on who the recipient of service is. At the cost of repetition, I may state that when a foreign visitor – who is a subscriber to a foreign mobile telecom operator in his country – comes on a short-term visit to India, he is not required to obtain a separate phone connection during his stay in India, thanks to the roaming agreement between the Indian MTO and the foreign MTO. The Indian MTO provides telecommunication connectivity to such foreign visitor

during his stay in India. As the inbound roamer will not have a usual place of residence in India, it is not practically possible for the Indian MTO to directly bill the inbound roamer for the services offered. However, in view of the subsisting agreement between the Indian MTO and the foreign MTO, the services charges are paid by the latter to the former and thereafter realised by the latter from its subscriber.

10. The practice in telecommunication industry is that when a subscriber of a foreign network visits India, the services are provided by the visited network (here Vodafone) by treating him as a subscriber on a temporary basis for the period of his/her stay in India. To facilitate the inbound international roamer for making or receiving a call, a unique identification number is assigned to the line/instrument of the visitor by the service provider, viz, the assessee. From the above, I find that the ultimate beneficiary of the service is the inbound roamer and not the foreign MTO. The foreign MTO merely acts as a coordinator in the scheme of things so that the inbound roamer is able to enjoy the roaming services seamlessly during his visit to India. Therefore, merely because the foreign MTO pays the service charges to Vodafone, it cannot be construed that the foreign MTO is the recipient of service. I find that this method of payment is dictated by convenience and not a legal requirement.

... ...

15. If Vodafone's argument that the inbound roamer is not the service recipient is to be accepted, then there is no need for the Central Government to issue

the above notification at all. "When a notification is issued by an executive authority in exercise of a power conferred by statute that notification is as much a part of the law as if it had been incorporated within the body of the statute at the time of its enactment", quoted the Supreme Court in the case of East India Commercial Co Ltd [1983 (13) ELT 1342]. The very issue and wordings of the above notification (emphasized above in bold) prove that the Service Tax law considers the inbound roamer – not the foreign telecom operator – as the service recipient. The notification had waived the non-collection of tax for the period up to 14-01-2007 only. This aspect has been clarified by the CBEC in its Circular No.90/1/2007-S.T. dated 03-01-2007, wherein it was noted that:

"During international roaming, the visiting network provides service to a person treating him as a subscriber on a temporary basis for the period during which service is availed of by such person from the visited network. The only difference is that the payment is not directly received from the subscriber, but the same is routed through the home network. However, this does not alter the essential characteristics of the service, which is of a telephone connection. As regards the argument that no telephone connection. .....

Therefore, during the period of roaming, the Indian telecom service provider provides telephone service to an international in-bound roamer. This service to in-bound roamers is delivered and consumed in India and, therefore, it is not an export of service. International practice treats the telephone service provided to an in-bound roamer by the visited

network, for purposes of taxation, in the same manner as a telephone service provided to any home subscriber.

Accordingly, the domestic telecom operators providing roaming service to international in-bound roamers are liable to pay service tax on the amount received through the home network on account of service provided to such international roaming subscriber.

The field formations may take action, for collection of service tax on the basis of this circular only in respect of such services which would be provided to an international in-bound roamer from 15-1-2007 onwards. For the period prior to this date, the matter is under examination of the Board."

…. …. …..

20.In view of the foregoing discussions, I hold that the bound roamer (not the foreign mobile telecom operator) is the recipient of the impugned services provided by Vodafone. As per Rule 3 of the POPS, the place provision of service is the location of the recipient of service. Since the impugned service is provided entirely during the stay of the inbound roamer in India, I find that the service is provided and consumed wholly in the taxable territory. In para 5.1.3 of the Education Guide, it is clarified by the CBEC that: "The essence of indirect taxation is that a service should be taxed in the jurisdiction of its consumption. This principle is more or less universally applied. Hence, I hold that the place of provision falls within the taxable territory.

21. Finally, I shall take up the claim of Vodafone that the services are to be treated as 'export of service" in

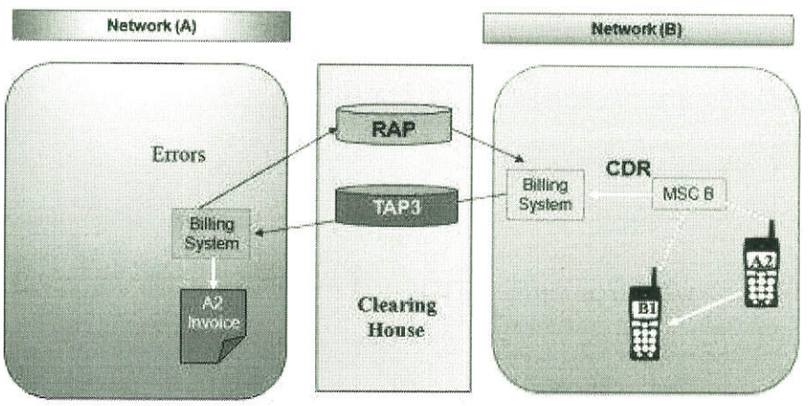
terms of Rule 6A of the eService Tax Rule, 1994 and hence not liable to tax. I find that Vodafone has not fulfilled condition (d) of Rule 6A (1) ibid, which reads as follows : "the place of provision of the service is outside India.". I have already given my findings that the place of provision is within the taxable territory and therefore I find that this condition is not satisfied by Vodafone. Therefore, the impugned services provided by them cannot be considered as 'export of service'. In any case, I may point out here tat Rule 6A ibid does not provide any exemption for export of services. This Rule merely enables the government to issue notification for the purpose of granting rebate of excise duty / service tax paid on inputs / input services used in providing services which are exported. Hence, I hold that Rule 6A of the Service Tax Rules, 1994 does not provide any relief to Vodafone in the present proceedings."

1.4 The finding of the Commissioner to that effect have not been considered and set aside by any authority. The finding of fact rendered by the Commissioner in respect of the manner of provision of the services clearly indicate that inland roaming services to the customer of the MTO located elsewhere, are provided through unique identification number assigned to the customer of the MTO located elsewhere without even assessing the network of the MTO located elsewhere shows that the customer of MTO is the recipient of service and is located in India. It is only the billing for the services so rendered that MTO, comes into picture, and is nothing but an intermediary in the provision of services. To understand the manner of provision of inland roaming services by the telecom operator's reference is made

to the technical literature available on the internet. For this purpose the information as available on the web page https://www.tutorialspoint.com/telecom-billing/roaming-billing.htm (assessed on 11.08.2022), is reproduced below:

"Roaming is the ability for a customer of mobile communications to automatically make and receive telephone calls, send and receive data, or access other services while travelling outside the geographical coverage area of the home network, by means of using a network of another operator.

Roaming can be either national roaming or international roaming. National roaming means that mobile subscribers make use of another network in geographical areas, where their own operator does not have coverage. This is, for example, used by operators, who do not have complete coverage in a country. International roaming is used when mobile subscribers travel abroad and make use of the network of an operator in the foreign country.



Roaming Network

How does it actually take place? If a service provider does not have a network coverage in a particular city or country, then this service provider makes a roaming agreement with another service provider

having network in that city or country. As per this agreement, another service provider provides all the available services to the roaming customer of first service provider.

CDRs generated in one roaming partner's area are collected and rated by that roaming partner and finally they are sent to the actual service provider of the roaming customer. Actual service provider charges the end customer for all the roaming services provided based on their predefined service charges.

Two roaming partners settle their financials on monthly basis by exchanging actual roaming CDRs and reports based on those CDRs.

HPMN and VPMN

The Home Public Mobile Network is the network from the operator by which a mobile subscriber has a subscription. The term is used as opposed to Visited Public Mobile Network (VPMN).

The Visited Public Mobile Network is the network used by a mobile subscriber while roaming. The term is used as opposed to Home Public Mobile Network (HPMN).

Clearing House

There are well known bodies like MACH who interface between different roaming partners to help them to exchange their CDRs, setting up roaming agreements and resolving any dispute.

Clearing houses receive billing records from one roaming partner for the inbound roamers and submit billing records to another roaming partner for which this roamer would be called outbound roamer.

What is TAP3?

Transferred Account Procedure version 3 (TAP3) is the process that allows a visited network operator (VPMN) to send billing records of roaming subscribers to their respective home network operator (HPMN). TAP3 is the latest version of the standard and will enable billing for a host of new services that networks intend to offer their customers.

Clearing house uses TAP3 protocol to exchange all the CDRs between different roaming partners. TAP3 defines how and what information on roamed usage must be passed between Network Operators. These files are exchanged using simple FTP connection.

There are different versions of TAP. TAP evolved from TAP1 through TAP2 and TAP2+ to TAP3. The latest release, TAP3, includes support for inter-standard roaming in a satellite network, WLAN and UMTS and other 3G technologies.

GSM TAP Standard TD.57 – GSM Transferred Account Procedure (TAP) defines the format and validation rules for transferring roaming usage information between mobile operators in different countries. TAP3 is the third specification version of the standard. The files transferred are termed TAP files.

GSM RAP Standard TD.32 – GSM Returned Accounts Procedure (RAP) defines the format for returning information on errors found within transferred TAP files/events and thereby rejecting financial liability for those files/events. The files transferred are termed RAP files.

Roaming Billing

Mobile subscriber travels to another country and creates usage on the foreign network. In order to bill the subscriber, this information has to be passed back

to the subscriber's home network. The foreign network will collect information on the usage from it's switches, etc., and then creates TAP files containing the information set out in the standard.

The files are then EXPORTED (on a regular basis, generally at least one file per day) to the home operator, who will IMPORT them and then use the information to invoice the subscriber. The foreign operator will rate the calls and then charge the subscribers home network for all the calls within a file. The home operator can mark up or re-rate the calls in order to make revenue."

1.5 To further understand the concepts of international roaming reference is made to *"GSMA – Information Paper Overview of International Roaming date 25 June 2012"* (The GSMA represents the interests of the worldwide mobile communications industry. Spanning 219 countries, the GSMA unites nearly 800 of the world's mobile operators, as well as more than 200 companies in the broader mobile ecosystem, including handset makers, software companies, equipment providers, internet companies, and media and entertainment organisations.) available and assessed by me on webpage: https://www.gsma.com/publicpolicy/wp-content/uploads/2012/10/GSMA-Information-Paper-on-International-Mobile-Roaming-for-ITU-T-Study-Group-3-FINAL.pdf, assessed on 25.08.2022. The relevant excerpts explaining the concept of international roaming, and the role of all the players is explained as follows:

2. What is IMR?

International Mobile Roaming (IMR) is a service that allows customers to seamlessly continue to use their mobile phone or other mobile device, to make and receive voice calls and text messages, browse the internet and receive emails, whilst visiting another country.

IMR effectively extends the coverage of a roaming customer's home operator's retail voice and SMS services, allowing the customer to continue to use their home operator phone number, and data services while in another country. This seamless extension of coverage is enabled by a wholesale roaming agreement between a roaming customer's home operator and the visited network in the visited country, which addresses the technical and commercial components required to enable the service.

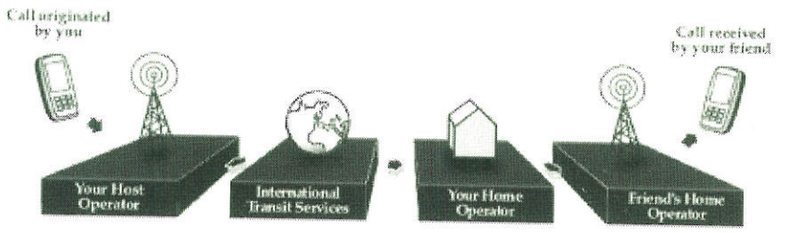
IMR is one service offered to consumers within a wider market of communications services while travelling abroad. The selection of communication services while travelling includes hotel services, public / private WiFi, single SIM multiple number products, national "travel" SIMs, and visited operator SIMs, amongst others. This paper does not directly address these other services. However, these other services need to be recognised as a part of any more robust analysis of the market for communication services while travelling abroad.

3. How does IMR work?

A large number of commercial and technical elements are required to support IMR. The following diagram illustrates how the key elements come together. The illustration is based on the scenario where "you" (on the left hand of the diagram) are roaming abroad, and

you make a call to "your friend" (on the right hand side of the diagram) who is in your home country. Furthermore, your friend is the customer of a mobile operator other than your home operator. This call scenario is common and more straight-forward than many of the other possible call scenarios, which is useful for later discussions regarding some of the costs to provide IMR. Furthermore, it incorporates the general elements common to SMS and data services.

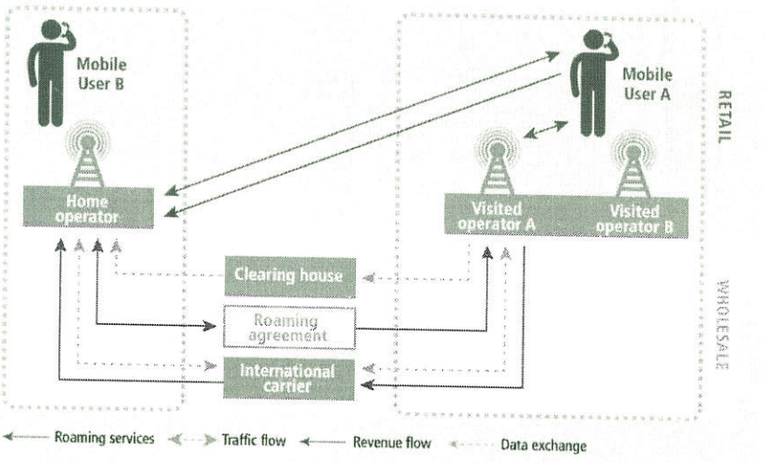
Figure 1. Overview of IMR technology and operations



As the above diagram illustrates, when you make the call to your friend, "your visited operator" will carry your call to the "international transit service". The international transit service will then carry the call between the visited country and your home country. The international transit service then passes the call over to "your home operator", which then connects the call to your friend's home operator, which terminates the call on your friend's phone.

The following diagram takes this calling back home scenario down a level into the commercial and technical detail. The diagram leaves out your friend and your friend's network, for simplicity, focusing on the IMR wholesale and retail arrangements.

Figure 2. Commercial links required for international mobile roaming



Working through each of the technical and commercial elements in the order shown on the above diagram:

1. You have IMR service with your Home Operator, and you are connected to the Visited Operator A while roaming. You would have been granted access automatically to the Visited Operator A network in the visited country when you arrived as a result of data provided by your home to the visited operator confirming that you are a roaming customer. The wholesale roaming agreement specifies how this data is to be provided to the visited operator. Your home operator is likely to have wholesale roaming agreements with more than one operator (i.e Operators A and B) in the country you are visiting. As a result of the wholesale roaming agreement, you can make a call back home using the Visited Operator's network, which in turn uses international transit services to carry the call back to your home country.

2. You pay a retail price to your Home Operator for the IMR service and pay nothing to the Visited Operator A. Your friend does not incur any charges for receiving a call from you while you are roaming.

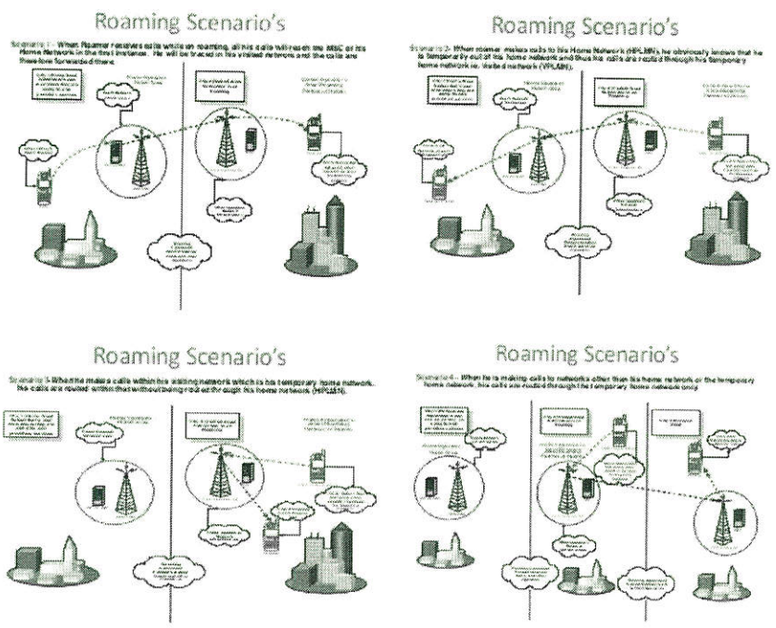
3. The Visited Operator A sends Transferred Account Procedure (TAP) files to a Clearing House which

forwards them to your Home Operator. TAP files are used for billing of calls while roaming.

4. Your Home Operator can then pay Visited Operator A wholesale charges as per call volumes in the TAP file and rates in the wholesale roaming agreement.

5. Visited Operator A pays the International Carrier for carrying the call and handing over the call to your Home Operator. The International Carrier in turn pays your Home Operator a termination rate for terminating the call in your home country."

1.6 Further in the presentation titled "Telecom Roaming Overview" available on https://www.slideshare.net/Shilpin-2014/telecom-roaming-overview, assessed on 25.08.2022 the presenter explains the concept of international roaming by way of illustrative diagrams which are depicted below:



1.7 From the perusal of each of scenario it is observed that the international roamer while roaming outside is home network gets hooked to the network

which is available and with whom the home network has made necessary agreement for providing the roaming services. Every time the international roamer makes the call he is calling the available network and all calls made by him are only routed through the available network in the place where he is located. In actual the calling facility is provided to the international roamer by the available network only and not by his home network. Thus the actual service recipient i.e. international roamer is getting the services from the available network. All the literature suggests that in the case of international roaming the Home Service Provider is only acting as the facilitator for getting the service provided through the available network in the place where the roamer is located through the network with whom he has agreement. The service recipient gets the service directly from the said available network. Thus in the present case the service provider i.e Vodafone is providing the services directly to international roamer when he is in India. The home network of the roamer has absolutely no role in the provision and delivery of the service to the recipient of service. The Home Network of roamer receives the details of the calls made by the roamer while roaming in the area where Vodafone network exists through clearing house mechanism, and also is billed for the provision of the service to the international roamer. Home network makes the payment to Vodafone as per the agreed tariff and in turn recovers it from his customer while raising the bill on him.

1.8 In view of the discussions as above I am of the view that findings of the Commissioner in the impugned order in respect of the location of service

provider and service recipient to be in accordance with the available technical literature on the subject and the same cannot be faulted with. In view of the above finding the question of law as to the services provided by the appellant to international roamer will be export of services or not needs to be considered.

1.9 The decisions relied upon by the appellant are for the period prior to 01.07.2012, and hence shall have no applicability to the present case which is for the period after introduction Place of Provision of Services Rules, 2012.

1.10 In the present appeal we are concerned with the period after 01.07.2012 (i.e. July 2012 to September 2013). In my view the issue needs to be reconsidered for the period in respect of the of the period post 01.07.2012 on the basis of the Place of Provision of Service Rules, 2012 and Education Guide 2012 issued explaining the said provision. The decision relied upon by the Appellant and Hon'ble Member (Judicial) in her order has been passed without consideration of the facts and the provisions of law on the subject hence being sub-silentio cannot be a binding precedent for the present case.

1.11 The relevant excerpts from the Education Guide are reproduced below:

5.1 Introduction

5.1.1 What is the relevance of the 'Place of Provision of Services Rules, 2012'?

The 'Place of Provision of Services Rules, 2012' specify the manner to determine the taxing jurisdiction for a service. Hitherto, the task of identifying the taxing jurisdiction was largely limited in the context of import or export of services. For this purpose rules were formulated which handled the subject of place of

provision of services somewhat indirectly, confining to define the circumstances in which a provision of service would constitute import or export. The new rules will, on the other hand, determine the place where a service shall be deemed to be provided, in terms of section 66C of the Finance Act, 2012, read with section 94 (hhh) of Chapter V of the Finance Act, 1994. Under Section 66B, a service is taxable only when, inter alia, it is "provided (or agreed to be provided) in the taxable territory". Thus, the taxability of a service will be determined based on the "place of its provision". The 'Place of Provision of Services Rules, 2012' will replace the 'Export of Services, Rules, 2005' and 'Taxation of Services (Provided from outside India and received in India) Rules, 2006.

5.1.2 For whom are these rules meant?

These rules are primarily meant for persons who deal in cross-border services. They will also be equally applicable for those who have operations with suppliers or customers in the state of Jammu and Kashmir. Additionally service providers operating within India from multiple locations, without having centralized registration will find them useful in determining the precise taxable jurisdiction applicable to their operations. The rules will be equally relevant for determining services that are wholly consumed within a SEZ, to avail the outright exemption.

5.1.3 What is the basic philosophy of these rules?

The essence of indirect taxation is that a service should be taxed in the jurisdiction of its consumption. This principle is more or less universally applied. In terms of this principle, exports are not charged to tax,

as the consumption is elsewhere, and services are taxed on their importation into the taxable territory. However, this determination is not easy. Services could be provided by a person located at one location, actually performed at another while being delivered to a person located at a third location, and occasionally actually consumed at a third location or over a larger geographical territory, falling in more than one taxable jurisdiction. For example a person located in Mumbai may buy a ticket on internet from a service provider located outside India for a journey from Delhi to London. On other occasions the exact location of service recipient itself may not be available e.g. services supplied electronically. As a result it is necessary to lay down rules determining the exact place of provision, while ensuring a certain level of harmonization with international practices in order to avoid both the double taxation as well as double non-taxation of services.

It is also a common practice to largely tax services provided by business to other business entities, based on the location of the customers and other services from business to consumers based on the location of the service provider. Since the determination in terms of above principle is not easy, or sometimes not practicable, nearest proxies are adopted to provide specificity in the interpretation as well as application of the law.

5.2 Basic Framework

5.2.1 How will a person determine the taxability of a service in terms of these rules? As stated earlier, in terms of section 66B, a service is taxable only when, inter alia, it is "provided (or agreed to be provided) in the taxable territory".

Thus, the taxability of a service will be determined based on the place of its provision. For determining the taxability of a service, therefore, one needs to ask the following questions sequentially:-

1. Which rule applies to the service provided specifically? In case more than one rules apply equally, which of these come later in the order given in the rules?

2. What is the place of provision of the service in terms of the above rule?

3. Is the place of provision in taxable territory? If yes, tax will be payable. If not, tax will not be payable.

4. Is the provider 'located' in the taxable territory? If yes, he will pay the tax.

5. If not, is the service receiver located in taxable territory? If yes, he may be liable to pay tax on reverse charge basis.

6. Is the service receiver an individual or government receiving services for a non business purpose, or a charity receiving services for a charitable activity? If yes, the same is exempted.

7. If not, he is liable to pay tax

5.3 Main Rule- Rule 3- Location of the Receiver

5.3.1 What is the implication of this Rule?

The main rule or the default rule provides that a service shall be deemed to be provided where the receiver is located.

The main rule is applied when none of the other later rules apply (by virtue of rule 14 governing the order of application of rules- see para 5.14 of this guidance paper). In other words, if a service is not covered by an exception under one of the later rules, and is consequently covered under this default rule, then the receiver's location will determine whether the service

is leviable to tax in the taxable territory. The principal effect of the Main Rule is that:-

A. *Where the location of receiver of a service is in the taxable territory, such service will be deemed to be provided in the taxable territory and service tax will be payable.*

B. *However if the receiver is located outside the taxable territory, no service tax will be payable on the said service.*

5.3.2 If the place of provision of a taxable service is the location of service receiver, who is the person liable to pay tax on the transaction?

Service tax is normally required to be paid by the provider of a service, except where he is located outside the taxable territory and the place of provision of service is in the taxable territory.

Where the provider of a service is located outside the taxable territory, the person liable to pay service tax is the receiver of the service in the taxable territory, unless of course, the service is otherwise exempted.

Following illustration will make this clear:-

A company ABC provides a service to a receiver PQR, both located in the taxable territory. Since the location of the receiver is in the taxable territory, the service is taxable. Service tax liability will be discharged by ABC, being the service provider and being located in taxable territory.

However, if ABC were to supply the same service to a recipient DEF located in non-taxable territory, the provision of such service is not taxable, since the receiver is located outside the taxable territory.

If the same service were to be provided to PQR (located in taxable territory) by an overseas provider XYZ (located in non-taxable territory), the service

would be taxable, since the recipient is located in the taxable territory. However, since the service provider is located in a nontaxable territory, the tax liability would be discharged by the receiver, under the reverse charge principle (also referred to as "tax shift").

5.3.3 Who is the service receiver?

Normally, the person who is legally entitled to receive a service and, therefore, obliged to make payment, is the receiver of a service, whether or not he actually makes the payment or someone else makes the payment on his behalf.

Illustration A lady leaves her car at a service station for the purpose of servicing. She asks her chauffer to collect the car from the service station later in the day, after the servicing is over. The chauffer makes the payment on behalf of the lady owner and collects the car. Here the lady is the 'person obliged to make the payment' towards servicing charges, and therefore, she is the receiver of the service.

5.3.4 What would be the situation where the payment for a service is made at one location (say by the headquarters of a business) but the actual rendering of the service is elsewhere (i.e. a fixed establishment)?

Occasionally, a person may be the person liable to make payment for the service provided on his behalf to another person. For instance, the provision of a service may be negotiated at the headquarters of an entity by way of centralized sourcing of services whereas the actual provision is made at various locations in different taxing jurisdictions (in the case of what is commonly referred to as a multi-locational entity or MLE). Here, the central office may act only

as a facilitator to negotiate the contract on behalf of various geographical establishments. Each of the geographical establishments receives the service and is obligated to make the payment either through headquarters or sometimes directly. When the payment is made directly, there is no confusion. In other situations, where the payment is settled either by cash or through debit and credit note between the business and fixed establishments, it is clear that the payment is being made by a geographical location. Wherever a fixed establishment bears the cost of acquiring, or using or consuming a service through any internal arrangement (normally referred to as a "recharge", "reallocation", or a "settlement"), these are generally made in accordance with corporate tax or other statutory requirements. These accounting arrangements also invariably aid the MLE's management in budgeting and financial performance measurement.

Various accounting and business management systems are generally employed to manage, monitor and document the entire purchasing cycle of goods and services (such as the ERP Enterprise Resource Planning System). These systems support and document the company processes, including the financial and accounting process, and purchasing process. Normally, these systems will provide the required information and audit trail to identify the establishment that uses or consumes a service.

It should be noted that in terms of proviso to section 66B, the establishments in a taxable and non-taxable territory are to be treated as distinct persons. Moreover, the definition of "location of the receiver" clearly states that "where the services are "used" at

more than one establishment, whether business or fixed, the establishment most directly concerned with the use of the service" will be the location. Thus, the taxing jurisdiction of service, which is provided under a 'global framework agreement' between two multinational companies with the business establishment located outside the taxable territory, but which is used or consumed by a fixed establishment located in the taxable territory, will be the taxable territory.

Illustration

The following example illustrates the above, by comparing the place of provision of services rendered under a Global Agreement

(A 'Global Contract or Agreement' is between two parent companies for provision of services from one to the other, where actual provision of services is to be made to subordinate offices of the recipient company in different tax jurisdictions.)

vis-à-vis a Global Framework Agreement

(A 'Global Framework Agreement' is between two parent companies for provision of services, but here, the 'framework agreement' only specifies the broad terms of the agreement i.e. fees, terms and conditions, the list of recipient branches/offices or even the details of provision of services to be made. The subsidiaries in different locations then enter into separate and independent business agreements, for provision of services and payments.).

AAA is a firm with its manufacturing unit and business establishment located in the taxable territory A. It has got two other manufacturing plants located in countries X and Y (say, AAA-X and AAA-Y respectively).

AAA wishes to obtain IT services for a new production process for its three manufacturing plants in the region. BBB is an IT firm located in the taxable territory (location of business establishment). BBB Ltd also has fixed establishments (subsidiaries) located in country X (say BBB-X) and in country Y (say, BBB- Y). AAA engages BBB for meeting its IT service requirement.

Scenario 1 [See Flow Diagram F 2 at the end of this section]

AAA enters into a Global (centralized purchasing) agreement with BBB for provision of IT services for the whole group. Following are the different transactions under which services are provided:-

a) Under the global agreement, some component of IT service is provided by BBB to AAA in country A (say, Transaction 1).

b) To meet the requirements of providing IT solutions specific to the plants AAA-X and AAA-Y in countries X and Y, BBB enters into agreements with its subsidiaries BBBX (in country X) and BBB-Y (in country Y), under which they provide IT services to BBB (say, Transaction 2 and Transaction 3). Though these services are provided by BBB-X and BBB-Y to BBB, these are rendered as under:-

- *By BBB-X to AAA-X (in country X)- under transaction 2, and*
- *By BBB-Y to AAA-Y (in country-Y) – under transaction 3.*

c) AAA enters into separate agreements with AAA-X and AAA-Y, under which AAA Ltd provides IT services to them (transaction 4 and transaction 5). The transactions and provision of service under each are

illustrated in the Flow diagram F2 titled 'Scenario1' at the end of this section.

Scenario 2 [See Flow Diagram F 3 at the end of this section]

AAA enters into a Framework Agreement with BBB for provision of IT services for the whole group. The Framework agreement covers the broad contours of supply between the two parties, payment milestones, obligations relating to confidentiality, penalty for default, limitations of liability and warranties etc, which would apply as and when group companies enter into separate agreements, in accordance with the terms envisaged in the framework agreement. BBB-X and BBB-Y could then enter into separate and independent business agreements with AAA-X and AAA-Y, in countries X and Y respectively, for provision of IT services. There are four agreements, but only three transactions involving provision of services, as indicated in the Flow diagram F3- Scenario 2 at the end of this section.

1.12 From the facts of the case and application of the Place of Provision of Service Rules, 2012, as explained by the Education Guide, as above, in the present case the service recipient being located in India, the place of location of service recipient will be the place of provision of service, though the payment for the service received by the international roamer is made by his Home Network to service provider. Illustrations at 5.3.3 and 5.3.4 make the issue clear without any iota of doubt that service recipient in the present case is the person who receives the service and not the person who is making the payment for the service provided. When the facts in the present case indicate that both the service provider i.e. the appellant and

the service recipient "international roamer" are located in the taxable territory, then by application of the Rule 8 of the Place of Provision of Service Rules, 2012, reproduce below, the location of the service recipient will be the place of provision of service.

"8. Place of provision of services where provider and recipient are located in taxable territory.- Place of provision of a service, where the location of the provider of service as well as that of the recipient of service is in the taxable territory, shall be the location of the recipient of service."

1.13 Looking from another angle, Home Network as per the illustrations referred in the para 14.6 above is not having any role in the provision of the service by the service provider to the international roamer. Home network who makes the payment for the service provided under the international Global agreement entered by it with the appellant has nothing to do with the service being provided and the service is delivered to the international roamer directly without any modification by the Home Network. The role of the Home Network is nothing but of an intermediary in the entire scheme for provision of the service. Intermediary is defined as per Rule 2 (f) of the Place of Provision of Service Rules, 2012 as follows:

"(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service on his account.;"

And Rule 9 of the said Rules, provide

9. Place of provision of specified services.- The place of provision of following services shall be the location of the service provider:-

(a) ....

(b) .....

(c) Intermediary services;

(d) .....

1.14 Thus based on the discussions as above I would concur with the view of the Commissioner in the impugned order to effect that benefit of export of services is not available in the present case. I find that the decision in the Appellants own case referred to by the Learned Member (Judicial) a part of demand period is after 01.07.2012, and Tribunal has made observation for that period in para 5.2, which in my view is sub-silentio and hence cannot be a binding precedent. In view of the findings as above the appeal needs to be dismissed.

(Sanjiv Srivastava)
Member (Technical)

tvu

1. I have perused the separate order recorded by Learned Brother Member (Technical) Shri Sanjiv Srivastava. It would not be proper if I do not state that the materials on which Learned Brother Member (Technical) has placed reliance, as noted by him from paragraph 1.4 onwards, so as to record the difference of opinion, was not argued by either of the parties and I did not have the opportunity to get myself clarified on the observations made. I have had the privilege of seeing the same only while perusing the separate order recorded by my Learned Brother.

DIFFERENCE OF OPINION

2. In view of the difference of opinion between the Members, the following questions are framed for resolution of the same, as under:-

(1) Whether the decision of the Tribunal in the appellant's own case on the same issue which covers the period from 01.04.2011 to 30.06.2012 and 01.10.2013 to 30.09.2014 [*M/s. Vodafone Cellular Ltd. v. Commissioner of G.S.T. and C.Ex., Coimbatore - 2019 (25) G.S.T.L. 557 (Tribunal – Chennai)]* has to be applied to this appeal which pertains to the period from July 2012 to September 2013 and the appeal has to be allowed, as held by the Member (Judicial)?

OR

(2) Whether the decision of the Tribunal in the appellant's own case (*supra*) is not a binding precedent for the reason that the observations made by the Tribunal in paragraph 5.2 of the said decision is *sub silentio* for the period after 01.07.2012 and the appeal has to be dismissed, as held by the Member (Technical)?

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Per: Dr. D.M. MISRA

Heard both sides at length on 20/04/2023. Perused the records and the written submission filed during the course of hearing and also after conclusion of the hearing.

2. The facts of the case have been narrated in the order of the learned Member(Judicial) and needs no further elaboration. The short question needs to be addressed is: whether the order passed by the Tribunal earlier in the appellant's own case for the period 01.04.2011 to 30.06.2012 and 01.10.2013 to 30.09.2014, holding that service tax is not leviable on the telecom(mobile) service received by an international roamer during their visit to the country, is not a binding precedent; hence not applicable to the period in dispute i.e. from July 2012 to September, 2013, and accordingly the Appeal to be dismissed.

3. Learned Member(Judicial), referring to the earlier Order and quoting from the same extensively, has observed that the facts involved in the present case being similar, hence the said judgment is applicable to the present period also and consequently held that the appeal is to be allowed with consequential relief.

4. Recording difference with the said view, the learned Member (Technical) referring to the web page https://www.tutorialspoint.com/telecom-billing/roaming-billing.htm narrated in detail the method of working of roaming network i.e.

International Mobile Roaming Service and also cited from the Education Guide circulated by the Board, after amendment to the scheme of Service Tax w.e.f. 01.07.2012, introducing the concept of negative list and notifying the Place of Provision of Service Rules, 2012 (POPS Rules, 2012, for short), was of the opinion that the judgment delivered earlier in the context of provisions prevailing the then would not be applicable to post-amendment era. He has further reasoned that the illustration provided in para 5.3.3 and 5.3.4 of the Education Guide in particular, and Rule 8 & 9 of POPS Rules,2012, if considered, then the location of the receiver of service i.e. the international roamer, who avail the facility by consuming the services while on his visit to India irrespective of payment for such services by the FTO, who is an intermediary for payment of the consideration, being in the taxable territory of India, hence service tax is applicable to such services.

5. In the earlier judgement of the Tribunal in the appellant's own case, even though the period covered post-01.07.2012, but a finding has been recorded mentioning that the view taken consistently by the Tribunal in the appellant's own case from time to time will also be applicable for the period after 01.07.2012. In the earlier order of the Tribunal reported at 2019(25) GSTL 557 (Tri. Chennai), at para 5.2, it is observed as follows:-

5.2 *Since the service recipient is located outside India, as per Rule 3(iii) of Export of Services Rules, the said services would amount to export of service for the period prior to 1-7-2012. For the period after 1-7-2012, the Place of Provision of Services Rules, 2012 came to be introduced and as per*

Rule 3 of such Rules, the location of the service recipient has to be taken into account for deciding as to where the services have been provided. So for the entire period of dispute, since the service recipient is outside India, the same amounts to export of services.

6. The learned Member(Technical) analysing Rules 8 & 9 of POPS Rules, 2012, is of the opinion that since the provider of service as well as that of the recipient of service (the international roamer) is located in the taxable territory itself, accordingly the service provided by the Appellant is taxable. Further, he is of the view that foreign telecom operator has no role in providing taxable service by the Appellant except making payment for the service provided under the International Global Roaming Agreement entered into with the appellant; thus his role is akin to that of an 'intermediary' as defined under Rule 2(f) of the POPS Rules, 2012.

7. In appreciating the point in issue, it is necessary to have glance of the relevant provisions made effective from 01.7.2012. The definition of **"service"** provided under Section 65B(44) of Finance Act,1994 reads as follows:-

> *(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*
>
> *(a) an activity which constitutes merely,—*
> *(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
>
> *(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or*
> *(iii) a transaction in money or actionable claim;*

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

The charging Section 66B reads as follows:-

66B. Charge of service tax on and after Finance Act, 2012.-
There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

By virtue of Section 66C of the Finance Act,1994 the POPS Rules, 2012 has been notified. The said Section 66C reads as follows:-

66C. Determination of place of provision of service:---

(1) The Central Government may, having regard to the nature and description of various services, by rules made in this regard, determine the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided.
(2) Any rule made under sub-section (1) shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory.

8. The Place of Provision of Service Rules notified vide Notification No.28/2012-ST dt. 20.06.2012 to ascertain the location of service provider as well as service receiver mostly for determination of tax liability of the international transaction, has been explained in the Education Guide circulated after introduction of the said Rules. It is clarified that the new rules are designed to

determine the place where a service shall be deemed to be provided in terms of Section 66C of the Finance Act read with Section 94(hhh) of Chapter V of the Finance Act, 1994. It is stated that under Section 66B, a service is taxable only when, inter alia, it is provided (or agreed to be provided) in the taxable area, though the taxable service will be determined based on the place of its provision. The POPS Rules, 2012 will replace "Export of Service Rules, 2005" and Taxation of Service Provided from Outside India and received in India. These rules primarily made for persons who deal with cross-border services.

9. Analysing the issue in the said backdrop, we find that it is the claim of the appellant is that prior to 01.07.2007 and also after 01.07.2007 the services(mobile roaming) have been provided by the appellant by an agreement with the FTO, to their(FTO's) subscribers on visit to India and for that purpose a specific amount agreed to be paid by the FTO to the appellant. The agreement between the appellant and the FTOs have been subject matter of consideration by this Tribunal under earlier provisions and in appellant's own case reported at 2013(31) STR 738 (Tri. Mumbai) it is observed at para 5.1 as follows:-

> ***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 appellant's telecom network. 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.(emphasis supplied)*

10. The question now needs to be answered is: whether, after notifying the POPS Rules,2012, the FTO is no more to be considered as the service receiver and the person who visits India and beneficiary of the said roaming service becomes the service receiver. The relevant POPS Rules,2012 referred in the Order i.e. Rule 3, 8, and 9 read as:

RULE 3. Place of provision generally. *— The place of provision of a service shall be the location of the recipient of service :*

Provided *that in case [of services other than online information and database access or retrieval services, where] the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.*

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RULE 8. Place of provision of services where provider and recipient are located in taxable territory. *— Place of provision of a service, where the location of the provider of service as well as that of the recipient of service is in the taxable territory, shall be the location of the recipient of service.*

RULE 9. Place of provision of specified services. *— The place of provision of following services shall be the location of the service provider :-*

(a).....

(b).....

(c) Intermediary services;

(d).....

11. In the present case the nerve chord of dispute rests on the issue is: who is the actual service receiver provided by the Appellant in India. At para 5.3.3 of the Education Guide, in answering who is the service receiver, it is stated that *"Normally, the person who is* ***legally entitled*** *to receive a service and, therefore, obliged to make payment, is the receiver of a service, whether or not he actually makes the payment or someone else makes the payment on his behalf"*. Illustration given thereunder amplifies the said answer. In the present case, the legal relationship is between the appellant and the overseas FTO for provision of the service, when their(FTO's) subscriber visits India and uses the services during his stay in India. The consideration/payment for the service flows from the FTO to the appellant, for the said service, under an agreement, even though the beneficiary for such service is subscriber of the FTO. Thus, the FTO is the person who is legally entitled to receive the service as per the agreement, even though the beneficiary is the customer of FTO on their visit to India. Therefore, in my view, there is no change of status of the FTO, from service receiver to an Intermediary, post introduction of POPS Rules,2012, when read in the context of the charging section 66B. The FTO who enters into a legal agreement with the appellant, for its customers to receive service during the Customers' visit to India and accordingly obliged to make the

payment for such service, and the Appellant agrees to provide the service, is the service receiver. Further, in my considered opinion, the FTO, in the present circumstances cannot be called as an 'intermediary', but is the actual service receiver, as per the agreement between them and the Appellant, the service provider. The illustration referred to under the Education Guide that the lady who owns the car and leaves at the garage for servicing; later when her chauffer collects the serviced car after making payment on behalf of the lady, cannot be called the service receiver. Undoubtedly, the service receiver is the lady; not the chauffer, who makes the payment, for the simple reason that she is the person legally entitled to receive the service. In other words, the decisive factor, is the agreement between the service station and the lady for servicing the car, under which she is obliged to make the payment in consideration of the service received. The mode/medium of payment of the obliged amount may be through the Chauffer. Thus, the illustration makes it clear, to identify the service receiver, who makes the payment for the service, is a factor immaterial, but who is legally obliged to make the payment, in pursuance to the agreement for rendition of the service, is the decisive factor. Examining the issue other way round, legally, if any deficiency in the service of the car, the lady can proceed against the service provider and not the chauffer who has made the payment on behalf of the lady, while taking delivery of the car. In the present case, it is the agreement between the appellant and the FTO; hence any deficiency in the service provided by the appellant to the Customers' of FTO, can only be proceeded by the FTO and not

the subscriber of the FTO, who is the beneficiary of the service during his visit to the taxable territory. Also, the subscriber of the FTO, cannot proceed against the Appellant for any deficiency, but only against the FTO with whom he has a valid agreement. Examining the issue from all angles, it cannot be said that the FTO is not the service receiver, but the visitors to India who use the service during their visit to India, are the service receiver. A somewhat similar principle can be noticed by the majority opinion of the Tribunal in the case ***Paul Merchants Ltd. Vs. Commissioner of C.Ex., Chandigarh*** [2013 (29) STR 257(Tri.-Del.)] later referred and endorsed by the Delhi High Court in ***Verizon Communication India Pvt. Ltd. Vs. Asst. Commissioner Service Tax, Delhi-III*** [2028 (8) GSTL 32(Del.)].

12. In view of above, I agree with the opinion of the Ld. Member(J) that the precedent in the Appellant's own case be followed and the Appeal deserves to be allowed. The matter be placed before the Division Bench for appropriate order accordingly.

10/8/2023

(D.M. MISRA)
MEMBER(JUDICIAL)

Raja...

MAJORITY ORDER

In view of the majority order, it is held that Tribunal's decision in the appellant's own case [*M/s.Vodafone Cellular Ltd.v. Commissioner of G.S.T and C.Ex. Coimbatore* – 2019 (25) G.S.T.L. 557 (Tribunal - Chennai)] has to be applied and the appeal is allowed with consequential relief, if any.

(Pronounced in court on 16.08.2023)

(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICAL)

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