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**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**WEST ZONAL BENCH : MUMBAI**
**3RD, 4TH, & 5TH FLOOR, JAI CENTRE, 34 P. D'MELLO ROAD,**
**POONA STREET, MASJID BUNDER (E), MUMBAI- 400 009.**

(16)

From : The Assistant Registrar, CESTAT, MUMBAI. Dated: 31/03/2022

File No.:-**ST/85229/2015, ST/85230/2015, ST/85231/2015, ST/85232/2015, ST/85613/2015, ST/86387/2015, ST/86711/2015, ST/87194/2015(ST/CROSS/91019/2015, ST/CROSS/91018/2015, ST/CROSS/91020/2015, ST/EH/85410/2020, ST/CROSS/91029/2015, ST/EH/85411/2020, ST/CROSS/91039/2015, ST/EH/85012/2021, ST/CROSS/91138/2015, ST/EH/85005/2021,)**

**In the matter of :-**

**COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX-PUNE-III** **(Appellant)**

**Vs**

**TECH MAHINDRA LTD.**
PLOT NO.1RAJEEV GANDHI INTECH PARKPHASE-III HANJEWADI PUNE PIN CODE - 411 057 **(Respondent)**

I am directed to transmit herewith a certified copy of Order No. : **A/85255-85262/2022** dated : **04/03/2022** passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

Assistant/ Deputy Registrar,
Service Tax Appeal Branch
CESTAT - MUMBAI

Copy To :-
1. Commissioner Customs & Central Excise (Appeal) :**COMMR.SERVICE TAX -I PUNE**
2. Master File
3. M/s Centax Publications Pvt. Ltd.
4. Taxmann Allied Services (P) Ltd.
5. Additional Party's Name & Address :
6.Advocate/(s) / Consultant/(s) / Representative:-

**Lakshmi Kumaran & Sridharan**
2nd Floor B & C Wing Cnergy IT Park
Appasaheb Marathe Marg Near Century Bazar
Parbhadevi Mumbai - 400025

lsbom@lakshmisri.com

**2-D** Prepared By :-

Final Order No. : **A/85255-85262/2022** dated : **04/03/2022**

| S No. | Case No. | Appellant | Respondent | Representatives |
|---|---|---|---|---|
| 1 | ST/85230/2015<br>ST/CROSS/91018/2015 | -COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX--PUNE-III<br>- | TECH MAHINDRA LTD. PLOT NO.1RAJEEV GANDHI INFOTECH PARK PHASE -III HINJEWADI PUNE PIN CODE - 411 057,,<br>, | |
| 2 | ST/85231/2015<br>ST/CROSS/91020/2015<br>ST/EH/85410/2020 | -COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX--PUNE-III<br>- | TECH MAHINDRA LTD. PLOT NO.1RAJEEV GANDHI INFOTECH PARK PHASE -III HINJEWADI PUNE PIN CODE - 411 057,,<br>, | |
| 3 | ST/85232/2015<br>ST/CROSS/91029/2015<br>ST/EH/85411/2020 | -COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX--PUNE-III | TECH MAHINDRA LTD. PLOT NO.1RAJEEV GANDHI INFOTECH PARK PHASE -III HINJEWADI PUNE PIN CODE - 411 057,, | |

| | | | | |
|---|---|---|---|---|
| | | - | , | |
| 4 | ST/85613/2015<br>ST/CROSS/91039/2015<br>ST/EH/85012/2021 | -COMMRSERVICE TAX -I PUNE<br><br>- | TECH MAHINDRA LTD.<br>Plot No.1Rajeev Gandhi Infotech Park Phase -III Hinejwadi Pune Pin Code - 411 057,,<br><br>, | |
| 5 | ST/86387/2015<br>ST/CROSS/91138/2015<br>ST/EH/85005/2021 | -COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX--PUNE-III<br><br>- | TECH MAHINDRA LTD.<br>PLOT NO.1RAJEEV GANDHI INFOTECH PARK PHASE -III HINJEWADI PUNE PIN CODE - 411 057,,<br><br>, | **Lakshmi Kumaran & Sridharan**<br>2nd Floor B & C Wing Cnergy IT Park Appasaheb Marathe Marg Near Century Bazar Parbhadevi Mumbai - 400025 |
| 6 | ST/86711/2015 | -COMMRSERVICE TAX -I PUNE<br><br>- | TECH MAHINDRA LTD.<br>Sharda Centreoff .Karve RoadPune Pin Code - 411057,,<br><br>, | **V. Sridharan,**<br>401 404 Kakad Chambers 132 Dr Annie Besant Road Worli Mumbai 400 018 |
| 7 | ST/87194/2015 | TECH MAHINDRA LTD<br>Shrada Center Off Karve Road Erandwane Pune Pin Code - 411004<br><br>- | -COMMR.SERVICE TAX -I PUNE<br><br>-COMMISSIONER OF SERVICE TAX -I PUNE<br>I.C.E. HOUSE 41/A SASSON ROAD PUNEPUNE Pin Code - 411001 | **Lakshmi Kumaran & Sridharan**<br>2nd Floor B & C Wing Cnergy IT Park Appasaheb Marathe Marg Near Century Bazar Parbhadevi Mumbai - 400025 |

# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
## REGIONAL BENCH

**Service Tax Appeal No. 85229 of 2015**
**And**
**ST/Cross/91019 of 2015**
(On behalf of Respondent)

(Arising out of Order-in-Appeal No. PUN-EXCUS-003-APP-075 to 078-14-15 dated 29.09.2014 passed by the Commissioner of Central Excise (Appeals), Pune-III)

**Commissioner of Cen. Ex. & ST, Pune-III** **Appellant**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Vs.

**M/s. Tech Mahindra Ltd.** **Respondent**
Plot No.1, Rajeev Gandhi Infotech Park,
Phase-III, Hinjewadi, Pune 411 057.

WITH

**Service Tax Appeal No. 85230 of 2015**
**And**
**ST/Cross/91018 of 2015**
(On behalf of Respondent)

(Arising out of Order-in-Appeal No. PUN-EXCUS-003-APP-075 to 078-14-15 dated 29.09.2014 passed by the Commissioner of Central Excise (Appeals), Pune-III)

**Commissioner of Cen. Ex. & ST, Pune-III** **Appellant**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Vs.

**M/s. Tech Mahindra Ltd.** **Respondent**
Plot No.1, Rajeev Gandhi Infotech Park,
Phase-III, Hinjewadi, Pune 411 057.

WITH

**Service Tax Appeal No. 85231 of 2015**
**And**
**Service Tax Miscellaneous Application (EH) No. 85410 of 2020**
(On behalf of Appellant)
**ST/Cross/91020 of 2015**
(On behalf of Respondent)

(Arising out of Order-in-Appeal No. PUN-EXCUS-003-APP-075 to 078-14-15 dated 29.09.2014 passed by the Commissioner of Central Excise (Appeals), Pune-III)

**Commissioner of Cen. Ex. & ST, Pune-III** **Appellant**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Vs.

**M/s. Tech Mahindra Ltd.** **Respondent**
Plot No.1, Rajeev Gandhi Infotech Park,
Phase-III, Hinjewadi, Pune 411 057.

WITH

**Service Tax Appeal No. 85232 of 2015**
**And**
**Service Tax Miscellaneous Application (EH) No. 85411 of 2020**
(On behalf of Appellant)
**ST/Cross/91029 of 2015**
(On behalf of Respondent)

(Arising out of Order-in-Appeal No. PUN-EXCUS-003-APP-075 to 078-14-15 dated 29.09.2014 passed by the Commissioner of Central Excise (Appeals), Pune-III)

**Commissioner of Cen. Ex. & ST, Pune-III** **Appellant**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Vs.

**M/s. Tech Mahindra Ltd.** **Respondent**
Plot No.1, Rajeev Gandhi Infotech Park,
Phase-III, Hinjewadi, Pune 411 057.

WITH

**Service Tax Appeal No. 85613 of 2015**
**And**
**Service Tax Miscellaneous Application (EH) No. 85012 of 2021**
(On behalf of Appellant)
**ST/Cross/91039 of 2015**
(On behalf of Respondent)

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-0028-14-15 dated 16.02.2015 passed by the Commissioner of Central Excise (Appeals), Pune-III)

**Commissioner of Cen. Ex. & ST, Pune-III** **Appellant**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Vs.

**M/s. Tech Mahindra Ltd.** **Respondent**
Plot No.1, Rajeev Gandhi Infotech Park,
Phase-III, Hinjewadi, Pune 411 057.

WITH

**Service Tax Appeal No. 86387 of 2015**
**And**
**Service Tax Miscellaneous Application (EH) No. 85005 of 2021**
(On behalf of Appellant)
**ST/Cross/91138 of 2015**
(On behalf of Respondent)

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-0007-15-16 dated 15.04.2015 passed by the Commissioner of Central Excise (Appeals), Pune-III)

**Commissioner of Cen. Ex. & ST, Pune-III** **Appellant**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Vs.

**M/s. Tech Mahindra Ltd.** **Respondent**
Plot No.1, Rajeev Gandhi Infotech Park,
Phase-III, Hinjewadi, Pune 411 057.

WITH

**Service Tax Appeal No. 86711 of 2015**

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-0063-15-16 dated 06.07.2015 passed by the Commissioner of Central Excise (Appeals), Pune-I)

**Commissioner of Service Tax, Pune-I** **Appellant**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Vs.

**M/s. Tech Mahindra Ltd.** **Respondent**
Plot No.1, Rajeev Gandhi Infotech Park,
Phase-III, Hinjewadi, Pune 411 057.

AND

**Service Tax Appeal No. 87194 of 2015**

(Arising out of Order-in-Appeal No. PUN-SVTAX-000-APP-0063-15-16 dated 06.07.2015 passed by the Commissioner of Central Excise (Appeals), Pune-I)

**M/s. Tech Mahindra Ltd.** **Appellant**
Plot No.1, Rajeev Gandhi Infotech Park,
Phase-III, Hinjewadi, Pune 411 057.

Vs.

**Commissioner of Service Tax, Pune-I** **Respondent**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Appearance:

Shri Shambhoo Nath, Principal Commissioner, Authorised Representative, for the Appellant
Shri V. Sridharan, Senior Advocate, with Shri Vinay Jain, Advocate, for the Respondent

**CORAM:**

**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**
**HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)**

Date of Hearing: 04.03.2022
Date of Decision: 04.03.2022

**FINAL ORDER NO.** A/85255-85262/2022

PER: SANJIV SRIVASTAVA

The appeals as indicated in the table below are directed against Order-In-Appeal of the Commissioner of Central Excise (Appeals), Pune. By the impugned order, the Commissioner (Appeals) has modified the refund orders made in terms of Rule 5 of CENVAT Credit Rules, 2004 as amended. Aggrieved by such modification, Revenue has filed seven appeals. The eighth appeal in the table has been filed by the respondents.

| Appeal No. | Order-in-Appeal No. & date | Admissible Refund. | Refund already sanctioned in the corresponding Order-In Original | Further Refund Admissible |
|---|---|---|---|---|
| ST/85231/15-Mum | PUN-EXCUS-003-APP-075 to 078-14-15 dated 29.09.2014 | 63,42,72,694 | 35,72,99,075 | 27,69,73,619 |
| ST/85232/15-Mum | | 39,48,90,011 | 23,84,23,310 | 15,64,66,701 |
| ST/85229/15-Mum | | 60,37,55,970 | 36,01,84,513 | 24,35,71,457 |
| ST/85230/15-Mum | | 38,44,78,858 | 16,78,94,641 | 21,65,84,217 |
| ST/85613/15-Mum | PUN-SVTAX-000-APP-0028-14-15 dated | 73,80,82,659 | 33,04,89,118 | 40,75,93,541 |

| | | | | |
|---|---|---|---|---|
| | 16.02.2015 | | | |
| ST/86387/15-Mum | PUN-SVTAX-000-APP-0007-15-16 dated 15.04.2015 | 154,02,14,580 | 71,88,27,386 | 82,13,87,194 |
| ST/86711/15-Mum | PUN-SVTAX-000-APP-0063-15-16 dated 06.07.2015 | 220,86,90,949 | 129,97,36,943 | 90,89,54,006 |
| ST/87194/15-Mum | | This appeal is filed by the respondent assessee in above appeals mainly challenging the imposition of interest on erroneous refund | | |

2.1 Respondent is engaged in providing of taxable service viz. "Management Consultant Services", "Business Auxiliary Services", "Renting of Immovable Property Service" and "Information Technology Software Services" and are holding centralized Service Tax Registration. Besides this, they are also engaged in exporting "Information Technology Software Services" which is a taxable service under the Finance Act, 1994 (hereinafter referred to as the Act).

2.2 They filed refund Claims under the provisions of Rule 5 of CENVAT Credit Rules, 2004 read with Notification No. 27/2012-CE (NT) dated 18.06.2012, pertaining to the period as mentioned in the Table below, on the ground that during the said period they had exported taxable output services and due to exports they were not in a position to utilize the said CENVAT Credit availed on Service Tax paid on input services which were used in providing the output services exported without payment of Service Tax.

2.3 Original authority after considering the nature of supply of services, i.e. onsite and offshore, the value of onsite supply of services was not treated as export and the same was excluded from the Export turnover. The Total turnover was taken as declared by the Appellant which included onsite turnover, offshore turnover, link charges, India Income, Onsite FMBT, Software Product Sale and Domestic Service Sale. Further, CENVAT credits availed on the invoices pertaining to services for personal use of employees, rent a cab, telecommunication

services availed for personal use of employees, general insurance services for the employees, outdoor catering services and the services such as Accommodation, Restaurant, Laundry, Guest House, Event Management were disallowed considering the same as not related with services exported. Thus original; authority modified the refund claims and sanctioned them in part.

| Period/ Quarter | Order-in-Original No. & date | Refund | | |
|---|---|---|---|---|
| | | Claimed | Sanctioned | Rejected |
| July 2012 to September 2012 | R/572/STC/PIII/2013 dated 21.11.2013 | 64,08,30,509 | 35,72,99,075 | 28,35,31,434 |
| October 2012 to December 2012 | R/630/STC/PIII/2013 dated 20.12.2013 | 40,09,94,954 | 23,84,23,310 | 16,25,71,644 |
| January 2013 to March 2013 | R/148/STC/PIII/2014 dated 10.04.2014 | 60,63,65,422 | 36,01,84,513 | 24,61,80,909 |
| April 2013 to June 2014 | R/205/STC/PIII/2014 dated 16.05.2014 | 38,53,34,756 | 16,78,94,641 | 21,74,40,115 |
| July 2013 to September 2013 | R/250/STC/PIII/2014 dated 16.06.2014 | 73,89,32,179 | 33,04,89,118 | 40,84,43,061 |
| October 2013 to December 2013 | R/404/STC/PIII/2014 dated 30.09.2014 | 154,58,54,886 | 71,88,27,386 | 82,70,27,500 |
| January 2014 to March 2014 | R/445/STC/PIII/2014 dated 29.12.2014 | 221,37,77,469 | 129,97,36,943 | 91,40,40,526 |
| | | **Order adjusts interest on erroneous refund** | | |

2.3 Aggrieved by the impugned orders, revenue has preferred seven appeals and the appellants have preferred one appeal as indicated in the table in para 1 above..

3.1 We have heard Shri Shamboo Nath, Principal Commissioner, Authorized Representative for the revenue and Shri V Sridharan, Senior Advocate along with Shri Vinay Jain, Advocate for the respondents.

3.2 Arguing for the revenue learned authorized representative while re-iterating the submissions made in appeals, submits that

- as regards Model-I, the Commissioner (Appeals) has erred in treating that the value of 'on-site services' provided to overseas clients by the subsidiary of the appellant located outside India, is to be considered as export.
- Appellant and their subsidiaries or branches are two separate legal entities, and that they had entered into agreement to perform the services outside the territorial boundary of India, i.e. on-site, since certain services involving activities such as clients requirements study, implementation & up-gradations, testing and certification, maintenance and repairs etc. are to be performed physically onsite and cannot be performed from India. The total activity related to the onsite services are outsourced by the assessee to their subsidiaries as it is physically not viable to be performed from India. Further, since the activities of the subsidiaries are separate and are carried out by a different legal entity, that part of the services which are performed outside the territorial boundaries of India i.e. on-site, do not qualify to be 'Exports' conducted by the assessee. Therefore, since the services of the subsidiaries are performed locally (as they are located in the country where services are to be provided) and procured, utilized as well as get consumed abroad, these services do not get covered in the ambit of the taxable services exported from Indian Territory as claimed by assessee.
- As per the provisions of Rule 6A(1) of the Service Tax Rules, 1994, the provision of any service provided or agreed to be provided shall be treated as export of service if it satisfies all the following six conditions –

(a) The provider of service is located in the taxable territory,

(b) The recipient of the service is located outside India.

(c) The service is not a service specified in Section 660 of the Act

(d) The place of provision of provision of service is outside India

(e) The payment for such service has been received in convertible foreign exchange and

(f) The provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of Clause 44 of Section 65B of the Act.

- However, in case of 'onsite services', it appears that the condition (a) and (e) are not satisfied and therefore, the test of exportability within the meaning of Rule 6A fails.
- As regards condition (a) of Rule 6A of Service Tax Rules, 1994, that the provider of service is located in the taxable territory, in the present case, the 'onsite service' component is actually provided by the overseas subsidiary or branch and therefore, the provider of service is either the overseas subsidiary or the branch, who is separate legal entity carrying out their business as per the laws of the respective countries where they are located. The provider of service, i.e., overseas subsidiary or branch are not located in the taxable territory of India, therefore, it appears that the condition (a) of Rule 6A is not fulfilled. Further, as regards the conclusion of the Commissioner (Appeals) that in view of the definition under Clause (44) of Section 65B of the Act, the overseas subsidiary cannot be called as provider of services in respect of 'onsite service' component and that the assessee in India was the provider of service, it appears that the provisions of Clause (44) of Section 65B of the Act, would not be applicable to the overseas subsidiary and is required to be considered only in respect of the assessee in the taxable territory of India and would not apply to the person (subsidiary or branch) outside India. Consequently, the conclusion of the Commissioner (Appeals) that the assessee has satisfied the condition (a) of Rule 6A of Service Tax Rules, 1994, appears to be incorrect and not legal.
- Similarly, as regards condition (e) of Rule 6A of Service Tax Rules, 1994, that the payment for such service has been received in convertible foreign exchange, the onsite component of the service is rendered/ performed by the overseas subsidiary or branch and as the assessee in India is not fulfilling the condition (a) of Rule 6A of Service Tax Rules, 1994, therefore, even though they have received

payment in convertible foreign exchange for onsite services, they are not actual service provider. Therefore, the conclusion of the Commissioner (Appeals) that the appellant has satisfied condition (e) of Rule 6A of Service Tax Rules, 1994, is incorrect

- As all the six conditions of Rule 6A are not fulfilled by the assessee in respect of onsite services provided under Model-I, the onsite services provided by the subsidiary/ branches, do not constitute export of services and hence the value of 'onsite services provided by the overseas subsidiaries and branches cannot be treated as exports and accordingly cannot be considered as a part of "Export Turnover' of the assessee.
- Thus Commissioner (Appeals) has erred in treating that the onsite activity of the subsidiary as that performed by the assessee, merely because the assessee has entered into agreement with the overseas clients and raised invoices for the entire contract. He has failed to appreciate and lost sight of the fact that the services have been provided, as per the contract by two distinct legal entities. Therefore, it cannot be justified that the onsite work order of overseas clients carried out by the subsidiary would form part of export turnover of the assessee, and that consequently the benefits of treating this as export activity would illegitimately flow to the assessee. The only activity which would to qualify as exports would be those work orders which are executed by the assessee themselves and not through their subsidiary, who are neither their agents, nor are they having any legal binding from the clients for execution of work order.
- Hon'ble CESTAT, Mumbai vide Order No.A/347 367/13/CSTB/C-I dated 28.01.2013/7.3.2013 in the assessee's own case, has also held in Para 4.6 that *M/s Tech Mahindra Ltd.'s (TML) subsidiaries located outside India are independent contractors. They are not the agents as contended. Even the contract between M/s Tech Mahindra Ltd and its overseas subsidiaries does not support its contention that its overseas subsidiaries are acting on its behalf i.e. they are providing services to its*

*overseas customers as agents on behalf of M/s Tech Mahindra Ltd. The agreement dated 27.03.2008 between M/s Tech Mahindra Ltd (TML) and Tech Mahindra (America) clarifies this position. Clause 19 of the Agreement provides for relationship between them and reads as follows "Relationship":- All dealings between Parties shall be in accordance with the arm's length standard and nothing contained herein shall be construed as constituting any relationship of agency or joint venture or partnership between the parties or management of any operation of M/s Tech Mahindra Ltd in America relating to this agreement or otherwise, by Tech Mahindra Inc. (America)". This relationship clause implies that the export turnover claimed by the appellants would be restricted to the extent of those work orders executed by the appellants themselves for their overseas clients. It would not include the part of work orders executed by the on-site/overseas subsidiary. Hence, the export turnover related to the onsite services performed by the subsidiary is liable to be severed from the calculation of the eligibility of refund claim erroneously granted by the Commissioner Appeals. This will therefore not get covered in the ambit of 'Export of Services Rules; 2005, as they do not qualify as exports having been performed by another person and also outside the taxing jurisdiction of Indian Territory. The nexus with the export activity in relation to the above services are not established in the appellant's subject case, hence the question of further going into the merits of the other clauses, such as whether the amounts received by assessee are remitted in convertible foreign exchange to qualify as exports, would not arise under Export of Service Rules 2005.*

- Since the services of the subsidiaries of the assessee cannot be treated as 'export of services' in view of the facts that they are performed, utilized and delivered from a place outside India to the overseas clients of the assessee based upon a separate contract / agreement, the value of 'Export Turnover' increases and thus the as assessee would get higher refund claim. The services

provided by the subsidiaries of the assessee to the clients of the assessee, being procured, supplied, utilized and consumed outside the territorial boundaries of India, performed by another legal entity, cannot be included in the Export turnover of the assessee. Just because the assessee have raised invoices of the full amounts towards the services (including those which they have claimed as 'input services' requisitioned from their subsidiary and also considered as part of export by them, which is actually not related to either] to their clients including the cost incurred for the part executed by the subsidiary, when in fact the orders/ contracts are actually completed by two separate legal entities. Thus, the Department has been able to establish that it is neither "export services" nor "export turnover".

- Thus aforesaid Order-in-Appeal passed by the Commissioner (Appeals) holding that 'onsite service provided by the overseas subsidiaries / branches, were exported by the assessee and the value of these services is includible in the 'Export Turnover' for calculating the refund under Rule 5 of CCR, 2004 read with Notification No. 27/2012-CE(NT), dated 18.6.2012.
- As regards services under Model-II, although the Commissioner (Appeals) has accepted the stand taken by the refund sanctioning authority, that the onsite services provided by the overseas subsidiaries / branches do not qualify to be termed as 'export services', it appears that he has erred in excluding the value of these services from the value of "total turnover", while calculating the admissible refund claim amount as per the formula under Rule 5 of Cenvat Credit Rules, 2004.

3.3 Arguing for the respondents learned counsel submits that-

- Issue in respect of Model I and Model II has been considered by the tribunal in their own case and the matter is no longer res-integra. Revenue has filed these appeals placing reliance on para 4.6 of the order of tribunal, which in fact are the submissions made by the revenue. However the findings have been recorded para 5

onwards rejecting the said submissions. A proper appreciation of the said order has been done by the Commissioner (Appeal) in his order. Hence the appeals filed by revenue on these ground needs to be dismissed.

- Against the order of tribunal both revenue and them-selves had filed the appeals before Hon'ble Bombay High Court. Appeals filed by both have been dismissed by the Hon'ble High Court upholding the order.
- The position has not changed after introduction of negative list regime of taxation of services and introduction of Rule 6A in Service Tax Rules, 1994. Since the position do not change the said decision is squarely applicable in present proceedings too.
- The appeals filed by the revenue need to be dismissed following the decision referred above.
- In their appeal they have mainly challenged the imposition of interest on the erroneous refund in terms of Section 11AA, granted to them earlier. They do not dispute any other findings in the said order, as the amount of refund which was denied to them they have already taken the credit and transferred the same to their GST account. matter in respect of imposition of interest needs to be reconsidered by the original authority and for that purpose only the matter be remanded back

4.1 We have considered the impugned order along with the submissions made in appeals and during the course of arguments.

4.2 Commissioner (Appeal) has vide his identically worded order on the same issue have held as follows:

*"The main issues to be decided in these four appeals are as under:*

*i. Whether the Onsite services provided by subsidiary or branch of the Appellant located outside India can be treated as "Export of Services" and turnover thereof can be included in the Export Turnover of the Appellant under Rule 5 of the CCR.*

*ii. Whether CENVAT credit has been correctly disallowed by the Ld. Respondent in respect of various input*

*services procured domestically, as mentioned in Para 3 of this Order.*

*19. It has been contended by the Appellant, as well as recorded in the Orders-in-Original, that the Appellant have been providing service to their overseas clients in two manners - which are named as Model-I and Model-II by the Appellant. These Models were shown by way of diagrams by the Appellant in these appeals proceedings. Copies of these diagrams have been annexed to this Order as Annexure 'A' (for Model-I) and Annexure 'B''(for Model-II), for ease of reference. The primary difference in the two Models is that under Model-I the foreign customer enters into an agreement (contract) with the Appellant and under Model-II the foreign customer enters into an agreement with the subsidiary for a particular set of services (particular project). Further, the Appellant initially stated that 98 percent of their provision of Information Technology Software Services to overseas clients is through Model-I. During the Personal Hearing held on 03.06.2014, the Appellant were requested to give breakup of turnover in respect of both models. Accordingly, vide their letter dated 11.06.2014, the Appellant clarified that there were no material transactions during the period covered by these appeals under Model-II. However, subsequently when further details were sought from the Appellant, they have given figures of transactions made under Model-II during the relevant periods and it is seen that there were transactions under Model-II also, during each of the relevant periods, though the quantum of these transactions is much less, as compared to the quantum of transactions under Model-I. Therefore, I proceed to discuss the eligibility of refund in respect of onsite services provided by the Appellant under both the Models, one by one.*

*20. In Model-I, the Appellant enters into a direct contract with the overseas client and invoices are raised for the entire value of services, i.e. onsite and offshore services, against which payment is received by the Appellant from the overseas client for the full value of invoices raised by them as per the contract. The services which are provided onsite are provided by the Appellant through their subsidiary / branch as per the Ld. Respondent. The*

*Appellant have contested the same on facts. They have contended that in respect of the said onsite services, provided through their subsidiary, there is another contract between the subsidiary and the Appellant in respect of the said onsite services; that as per that contract, the onsite services are provided at the client's site abroad but the invoices are raised for the said services by the subsidiary on the Appellant and there is no contract between the subsidiary and the overseas client. Further, the Appellant have contended that in the case of Branches, no services per se are provided by the Branches and no invoice is raised by the Branch in the name of the Appellant. In other words, the Appellant have contended that no services are rendered onsite by the Branches. It is also a fact that the Appellant had been discharging Service Tax under reverse charge mechanism on the invoices received by them from their subsidiaries and wherever the Appellant had not paid the said Service Tax under reverse charge mechanism, the Department has issued Show Cause cum Demand Notice for the same. This stand of the department in respect of onsite component of the services has been recorded in para 10 of the Order-in-Original No. R/572/STC/PII/2013 dated 20.11.2013 and Order-in-Original No. R/630/STC/PIII/2013 dated 20.12.2013 as well as in para 9 of the Order-in Original No. R/148/STC/PIII/2014 dated 10.04.2014 and Order-in-Original No. R/205/STC/PII/2014 dated 16.05.2014, wherein the Appellant have been accepted as the deemed recipient of the onsite services, while simultaneously mentioning that the same were rendered onsite to the overseas clients of the Appellant, by the subsidiaries, on behalf of the Appellant. This conclusion of the Ld. Respondent is self-contradictory as he has considered both, the Appellant as well as the overseas client, as the receiver of the same onsite services. Obviously, there can be only one recipient of any particular service. The said conclusion of the Ld. Respondent is legally incorrect too, in view of the statutory definition of "Location of the service receiver" as contained the clause (i) of Rule 2 of POP Rules. The said statutory definition of location of service receiver dictates that the location of the service receiver must be unambiguously identified and it leaves no room for holding two distinct entities, viz. Appellant and their overseas client, to be*

*called service recipient for the same set of onsite service, as done by the Ld. Respondent.*

*21. The necessary six ingredients to treat any provision of service as an export of service are given in Rule 6A of the Service Tax Rules, 1994. The same have also been discussed in detail in the impugned Orders-in-Original. Regarding the following clauses of the said Rule 6A, the Ld. Respondent has held that the said ingredients are present in the case of onsite services provided to the overseas clients:*

*(b) The recipient of the service is located outside India,*

*(c) The service is not a service specified in the Section 66D of the Act,*

*(d) The place of provision of the service is outside India,*

*(f)The provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act.*

*I have examined the factual position and I find that the above conclusions of Ld. Respondent are correct.*

*22. Only in the case of clauses (a) and (e) of the said Rule 6A of the Service Tax Rules 1994, the Ld. Respondent has held that the Appellant have not fulfilled the conditions mentioned therein. Clause (a) requires that the provider of service should be located in the taxable territory. In this regard, I find that as per the definition of the Service contained in clause (44) of Section 65B of the Finance Act, 1994, service means any activity carried out by a person for another, for consideration. As there was no contract between the subsidiary and the overseas client in Model-I, no invoice was issued by the subsidiary to the overseas client and the subsidiary had not received any consideration from the overseas client under Model-L Therefore, in the absence of any consideration, as per the definition of service contained in said clause (44) of action 65B, no service could have been rendered by the subsidiary to the overseas clients under Model-I. Accordingly, the subsidiary cannot be called the provider of service in respect of the onsite component of the services provided under Model-I and the conclusion of the Ld. Respondent in this regard is not correct. As there was a valid contract between the Appellant and the overseas client, against which services were provided for consideration, the Appellant are*

*the provider of service for the entire set of services, i.e. onsite services as well as the offshore services, under Model-I, as per the said clause (44) of Section 65B of the Finance Act, 1994. As the Appellant have taken centralized registration for their premises in Pune, their location is within the taxable territory as per the provisions of clause (h) of Rule 2 of the PoP Rules. Thus it is clear that for Model-I, for the onsite services too, the Appellant are fulfilling the condition contained in clause (a) of Rule 6A of the Service Tax Rules, 1994.*

*23. The Ld. Respondent has also held that the Appellant have not fulfilled the condition contained in clause (e) of Rule 6A of the Service Tax Rules, 1994 as the provider of service in case of onsite services are the subsidiary / branches of the Appellant. The Ld. Respondent has further concluded that therefore even though the Appellant had received the payment in convertible foreign exchange for the onsite services, they are not the actual provider of the service. I find that this conclusion of the Ld. Respondent is incorrect as he has admitted the receipt of payment by the Appellant in convertible foreign exchange and the only ground for not accepting the fulfillment of the said condition is by treating the subsidiary / branch as the provider of service in the case of onsite services. As concluded in Para 22 above, in respect of onsite services also, the Appellant were the service provider and therefore consequent to receipt of payment for the onsite services in convertible foreign exchange, the Appellant have fulfilled this condition also. Thus, I find that all the six conditions contained in Rule 6A of the Service Tax Rules, 1994 have been fulfilled by the Appellant for onsite services provided under Model-I and accordingly their value is includable in the 'Export Turnover', as defined under clause (D) of Rule 5(1) of the CCR. Further, as stated above, since in Model-I there is no contract between the subsidiary and the overseas client, accordingly no invoices are raised by the subsidiary in the name of the overseas client. From this factual matrix it clearly emerges that under Model-1, the foreign subsidiary of the Appellant acts as sub-contractor of the Appellant for providing the onsite component of the entire set of Information Technology Software Services for which the Appellant have entered into the contract with the overseas client. Thus, I find that there is neither any*

*documentary basis (like contract or invoice between the subsidiary and the overseas client) nor the statutory provisions support the conclusion of the Ld. Respondent that the onsite services were provided by the subsidiary to the overseas client of the Appellant.* ***Accordingly for Model-I, I conclude that the entire services were exported by the Appellant to their overseas client, as per their contract and the entire payment has been received by the Appellant from the said overseas client against the invoices raised by the Appellant for the entire contract value.***

*24. In the case of Model-II, there is a contract between the subsidiary of the Appellant and the overseas client for full value of the services received by the overseas client (i.e. onsite plus offshore services). The subsidiary directly provides the onsite service component of the services and also enters into a contract with the Appellant (called back to back contract by the Appellant) for the entire value of the service received by the overseas client. Therefore, at the outset it is clear that in the case of Model-II, as there is no contract between the Appellant and the overseas client, no invoices are raised by Appellant in the name of the overseas client, no payment consideration) is received by the Appellant from the overseas client and Therefore no service is provided by the Appellant to the overseas client, including for the offshore component of the services. Further, as per the ongoing contract (Agreement) between the Appellant and their subsidiary, they raise invoices for the full value (onsite plus offshore) in the name of their subsidiary and receive payment against the same from the subsidiary. As per the said contract (Agreement) between the subsidiary and the Appellant, the subsidiary has issued invoices in favour of the Appellant, after addition of a fixed percentage of mark-up, of the value of the onsite component of the services provided by the subsidiary. This onsite component had been actually provided by the subsidiary to the overseas customer in terms of the original contract between them (i.e. between the subsidiary and the overseas customer). Also, this onsite component of services was provided from a non-taxable territory, by a distinct legal entity (subsidiary) incorporated in that non-taxable territory, to a foreign customer located in that non-taxable territory, under a*

*valid contract between them. The invoices raised by the subsidiary in favour of the foreign customer, include the value of these onsite services and it has also received payment from the foreign customer, in that country only, i.e. in the non-taxable territory, against those invoices, as per the contract between them. Thus, it is clear from this factual position that this component of onsite services under Model-II was not exported from India, as neither the service was provided from India nor the payment was received in India nor the entity which provided the service (subsidiary) was located in India (i.e. in the taxable territory). As the contract between the subsidiary and the foreign customer is the primary contract between the provider of service and the receiver of service, it needs to be discussed in a bit detail, followed by discussion on the contract between the Appellant and the subsidiary i.e. the back to back contract).*

*25. With their appeal memorandum, in respect of Model-II transactions, the Appellant have submitted sample copies of 'Contract Service Provider Agreement between the Appellant and their subsidiary and 'Master IT Services Agreement between subsidiary and the foreign customer. On perusal of Master IT Services Agreement between M/s YTL Communications SDN. BHD., Malaysia and M/s Tech Mahindra SDN. BHD., Malaysia which was made on 12.04.2011, it is noticed that in para 4 of the said agreement, obligations of the parties are described. As per sub para 4.1, it is clear that the entire responsibility for carrying out and completion of the service order is on the subsidiary (Tech Mahindra SDN. BHD., Malaysia). Further, from various paras of the said agreement it is clear that the subsidiary (Tech Mahindra SDN. BHD., Malaysia) alone are responsible to the foreign customer for matters like project management and instructions, title and risk, warranty, ownership and intellectual property rights, general indemnification, termination, confidentiality, notices, amendments, dispute resolution and financial matters. Thus, it is clear that this is the primary agreement (contract) for provision of specific services to a specific customer (M/s YTL Communications SDN. BHD., Malaysia) and is a very comprehensive agreement with respect to the specific services to be provided to the said foreign customer. As compared to the said agreement between the*

*subsidiary and the foreign customer, the Contract Service Provider Agreement, sample copy of which is enclosed with these appeals, the latter is very brief and it has no correlation with any specific contract for provision of any specific service to any particular foreign customer. This Contract Service Provider Agreement between the Appellant and its subsidiary is a general running agreement to establish a working relationship of providing services jointly, between the two legal entities incorporated in different countries so as to provide services to various customers in those countries. Since, refund under Rule 5 of the CCR is in respect of specific services exported during the relevant period and is based on the CENVAT credit taken during that relevant period and the export proceeds received during that relevant period, this general agreement between the Appellant and their subsidiary, viz. the Contract Service Provider Agreement dated 27.03.2008, is of limited value for identifying the recipient of service under Model-II. The relevant invoices and the receipt of export proceeds by the Appellant from the subsidiaries, being the primary documents, have to be considered for the purpose of refund under Rule 5 of the CCR. The Agreements between the Appellant and their subsidiaries are running contracts and have to be examined only with reference to the invoices raised and payments received in respect of the offshore services provided by the Appellant and against which payments were received in convertible foreign currency. Though the Appellant have raised invoices for the total value of services, i.e. onsite plus offshore, but the subsidiary has also simultaneously issued invoices in the name of the Appellant for the onsite component of the said services after adding their mark. up as a percentage of value of onsite services. (For various subsidiaries incorporated in various countries, the said mark up varies between 5% and 7%. However, as this mark up is not the value of onsite services provided by the subsidiary to the foreign customer, it will not form part of the value of onsite services provided by the subsidiary). Thus, due to this arrangement, under Model-II, there is one set of invoices raised by the Appellant on their subsidiaries (for full value of services, i.e. onsite plus offshore), and simultaneously another set of invoices raised by the subsidiary on the Appellant for the value*

*of onsite services alone. Against these two sets of invoices, payments in convertible foreign currency had accordingly come into the Appellant's account and had gone out of the Appellant's account, respectively. This unusual accounting method between the Appellant and their subsidiary has to be considered by understanding the true nature of these invoices and the value of onsite services has to be deducted from the total value of services, (i.e. onsite plus offshore), to arrive at the correct value of offshore services provided by the Appellant to an entity (subsidiary) located outside India, i.e. in a non-taxable territory. In their words, only the offshore services are eligible to be considered as export under Model-II and their value has to be arrived at by deducting the value of onsite service provided by the subsidiary, from the total value of services as reflected in the invoices raised by the Appellant on their subsidiaries. To illustrate, let us assume that the overseas subsidiary enters into a contract of Rs.100/- with the overseas client and receives payment of Rs.100/- abroad from the overseas client, against the invoice of Rs.100/- raised by the subsidiary in the name of the overseas client Out of that contract, say services worth Rs.30/- were provided by the subsidiary onsite and services worth Rs.70/- were offshore services provided from India by the Appellant, as sub-contractor of the subsidiary. However instead of entering into a contract worth - Rs.70/- for the offshore service: provided by the Appellant to their subsidiary as a sub-contractor, the Appellant have entered into a contract worth Rs.100/- and have raised invoices worth Rs.100/- (under the back to back contract) for entire value of services (onsite plus offshore) and their subsidiary has issued invoices worth Rs.30/- showing services imported by the Appellant from their subsidiary. In effect, the contract of Rs.100/- between the Appellant and their subsidiary is contradictory to the main contract between the subsidiary and the overseas client, as it seeks to camaflouge and invert the true relationship between the subsidiary (who are the main contractor providing the services to the real eventual service recipient, i.e. the foreign client) and the Appellant (who are the sub-contractor providing only the off-shore component of the services to the subsidiary) in respect of that original contract of Rs.100/- between the subsidiary and the*

*overseas client. Accordingly, I conclude that these unusual set of transactions between the subsidiary and the Appellant are more in the nature of paper transactions, created only for accounting purposes. It is a fact that under Model-II, the Appellant are providing services only to their subsidiary and receiving payment only from their subsidiary. Thus, I find that the Appellant's claim that the component of onsite services actually provided the subsidiary to the overseas client directly under a valid contract between those two legal entities (subsidiary and overseas client), is an input service imported by the Appellant, is a hollow claim when examined in light of the factual position, as described above. Accordingly, for Model-II, I conclude that the onsite services were not provided by the Appellant to the foreign customer and the value of the onsite services is not includable in the 'Export Turnover? as defined under clause (D) of Rule 5(1) of the CCR. Further, since the said onsite services were actually provided by the subsidiary (a distinct legal entity) and were not provided by the Appellant, to the foreign customer, the same cannot be part of the value of total turnover of the Appellant for the relevant period. In other words the value of the said onsite services provided under Model-II will be required to be deducted from the value of export turnover as well as from the value of total turnover of the Appellant for the relevant periods. The same has been done in the calculations for admissible refund as per Annexure 'C' to this Order. To conclude, under Model-II, it is clear from the documents and the factual matrix that the Appellant have provided services only to their subsidiary and not to their overseas client. In other words, under Model-II, the subsidiary is the main contractor for providing services to the foreign customer and the Appellant are their sub-contractor in respect of the offshore component of the said service. The Appellant have claimed that they exercised control over the subsidiary during negotiation and finalization of the contract between the subsidiary and the overseas client, but they have not submitted any documentary proof in this regard. On the other hand, on perusal of the sample contract between the subsidiary and the overseas client, a copy of which was submitted by the Appellant during these appeals proceedings and as already described in this para, the same is not found*

*true. No clause of the said contract supports this claim of the Appellant. Thus, I reject the said claim of the Appellant as having been made without any basis. In fact, under Model-II transactions, the said contract puts the entire responsibility on the subsidiary. However, as already concluded in this para, whatever services were provided by the Appellant to their subsidiary under Model-II (i.e. offshore services), the same were provided to a distinct legal entity outside the taxable territory and the payment for the same was received by the Appellant in convertible foreign currency. Thus said offshore services provided under Model II have to be considered as export of service. V*

*26. The Appellant have relied upon the decision of Hon'ble CESTAT in their own case 2013-TIOL (543) - CESTAT-MUM) and have contended that the ratio of the same is applicable on the present appeal also. This decision of Hon'ble CESTAT has been upheld vide two Orders dated 15-09-2014 of Hon'ble High Court of Bombay whereby the appeals filed by the Appellant as well as by the Department against the said Order of Hon'ble CESTAT were dismissed by the Hon'ble High Court. I have gone through the said Orders of Hon'ble CESTAT and Hon'ble High Court of Bombay. I find that the same were given by interpreting the provisions of Export of Service Rules, 2005 and for the period prior to 01.07.2012. The entire regime of Service Tax underwent a paradigm shift w.e.f. 01.07.2012 with the introduction of Negative list of services and the introduction of POP Rules. Simultaneously, the Export of Service Rules, 2005 were rescinded and Rule 6A of the Service Tax Rules, 1994 was introduced. Further Section 65B was inserted in the Finance Act, 1994, w.e.f. 01.07.2012 and 'Service was defined under clause (44) of the said Section 65B. In addition, in the PoP Rules introduced w.e.f. 01.07.2012 the terms 'Location of Service Provider' and 'Location of Service Receiver' were also defined vide clause (h) and clause (i) of Rule 2 of the POP Rules. Further, Rule 5 of the CCR was also substituted w.e.f. 01.04.2012. Thus, it is clear that the entire gamut of legal provisions in the context of which the said decision were given by the Hon'ble CESTAT/ High Court, have undergone complete overhaul. Therefore the ratio of the said decision of the Hon'ble*

*CESTAT/ High Court is not applicable on the present appeals and the conclusion of the respondents in this regard is correct."*

4.3 From the facts as above we refer to the decisions of the CESTAT relied by the revenue in their appeal, Tech Mahindra [2014 (36) S.T.R. 332 (Tri. - Mumbai)]. Relavant paragraphs of the order are reproduced below:

*'' 4. The ld. Special Consultant appearing for the Revenue makes the following submissions :*

*4.1 .... 4.5*

*4.6 Thirdly, TML's subsidiaries located outside India are independent contractors. They are not its agents, as contended. Even the contract between TML and its overseas subsidiaries does not support its contention that its overseas subsidiaries are acting on its behalf, i.e. they are providing service to its overseas customers as agents on behalf of TML. The Agreement dated 27-3-2008 between TML and Tech Mahindra (America) clarifies this position. Clause 19 of the said Agreement provides for relationship between them and reads as follows :-*

*"19. Relationship :*

*All dealings between the Parties shall be in accordance with the arm's length standard and nothing contained herein shall be construed as constituting any relationship of agency or joint venture or partnership between the Parties or management of any operations of TML in America relating to this Agreement or otherwise, by TM Inc. America."*

*On a plain reading of the above clause, there cannot be any doubt that TML's subsidiaries located in America are independent contractors and they are independently providing software development service to TML's overseas customers. Therefore, TML's contention that its overseas subsidiaries are acting as its agents is hollow and bereft of any merit.*

*4.7....4.11*

*5. We have carefully considered the rival submissions.*

*5.1 The case before us relates to refund claims filed under Rule 5 of the Cenvat Credit Rules, 2004, read with Notification No. 5/2006-C.E. (N.T.), dated 4-3-2006 in respect of input services used in providing the output service, which is exported. There are 21 refund claims, of which 16 claims pertain to the period prior to 27-2-2010 starting from the month of November, 2008 and the remaining 5 claims are for the period post 27-2-2010. Since the transactions are exports, the meaning of the term 'export' has to be ascertained as provided for in the law. 'Explanation' to Rule 5 defines exports of output service as "the output service exported in accordance with the Export of Services Rules, 2005."*

*5.2 .....*

*5.3 It is the first principle of interpretation that a statute should be read in its ordinary, natural and grammatical sense. As observed by the Supreme Court of India, -*

*"In construing a statutory provision the first and foremost rule of construction is the literary construction. All that the Court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision, the legislative intent is clear, the Court need not call into aid the other rules of construction of statues. The other rules of construction are called into aid only when the legislative intent is not clear."*

*The principle of strict interpretation of taxing statutes is best enunciated by Rowlatt J., in his classic statement :*

*"In a taxing statute one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

*It is these principles that one has to adopt while interpreting the scope of the term "exports" as defined in the Export of Service Rules, 2005 and none else.*

*5.4 From the legal provisions as extracted above, it may be seen that for the period post 27-2-2010, the only condition required to be satisfied to constitute export of service is that payment for such services should be received by the service provider in convertible foreign exchange. There is no dispute in the present case that the appellant has received the consideration for the service rendered from the service recipient abroad in convertible foreign exchange both in respect of offshore services and onsite services rendered by them. There is no condition relating to place of provision of service post 27-2-2010. Even if the service is rendered from a place outside India, so long as the consideration is received in convertible foreign exchange, the transaction is treated as export. In other words, the rule does not differenciate between "onsite services" and "offsite services". Therefore, there cannot be any denial of refund claims filed by the appellant for the period after 27-2-2010. In view of this legal position, Order-in-Appeal No. PIII/RS/120/2012, dated 30-3-2012 (ii) PIII/RS/128/2012, dated 17-4-2012 (iii) PIII/RS.154/2012, dated 30-4-2012 & (iv) PIII/RS/181/2012, dated 29-5-2012 cannot sustain and the appellant will be eligible for the refund amounts covered by these orders which has been denied to them for the reason that the refund claims pertain to the period after 27-2-2010 and the condition of export as provided in Rule 3(2) has been satisfied. Similarly, the appellant would also be eligible for the refund of Rs. 10,19,568/- for the period March, 2010, which was denied to them vide Order-in-Appeal No. PIII/RS/198-2007/2011, dated 25-7-2011. Thus, what is left for consideration is only the refund claims pertaining to the period prior to 27-2-2010 covered by Order-in-Appeal No. PIII/VM/227-280/2010, dated 20-10-2010 against which Revenue has filed the appeals and Order-in-Appeal No. PIII/RS/198-2007/2011, dated 25-7-2011 against which TML has filed the appeals.*

*5.5 For the period prior to 27-2-2010, for a transaction to be considered as 'export', two conditions were required to be satisfied, namely, (i) such service is provided from India and used outside India and (ii) payment for such service provided outside India is received by the service provider in convertible*

*foreign exchange. In the present case, there is no dispute about satisfaction of the second condition. The dispute is only with respect to the first condition, i.e., whether the service has been provided from India. It is clear that in respect of overseas customers, the subsidiaries performed the onsite services on behalf of the appellant at the customers' premises abroad. The appellant's subsidiaries located outside India are independent entities and they are not appellant's agents. This position is clear from the agreement entered into between the appellant and its subsidiary in America, namely, Tech Mahindra America dated 27-3-2008. Para 19 of the said agreement specifically states that all dealings between the parties shall be in accordance with the arms length standard and nothing contained herein shall be construed as constituting any relationship of agency or Joint venture or partnership between the parties or the management of any operation of TML in America relating to this agreement or otherwise by TM Inc. America. This clause in the agreement clearly evidences the fact that the subsidiary located in America is an independent contractor and is providing software development service to the appellant's overseas customers as such. Therefore, it cannot be said that the onsite services provided by the subsidiary have been rendered from India to the appellant's customers abroad. Thus the first condition that the service should be provided from India to constitute export is not satisfied. It is further seen from the records that when similar services are provided by the appellant's own branches abroad, they discharge the local taxes and do not pay any service tax under the reverse charge mechanism. In fact the appellant has filed an affidavit to this effect before us. This also goes to show that the service rendered abroad by way of onsite services cannot be treated as service 'provided from India'. In our view, whether a service is provided abroad or not cannot be decided on the basis of who is the service provider and it would be highly illogical to accord different treatment to the same service on the basis of who provided the service. In other words if the service provided by TML's branches abroad are not treated as "exports", the very same service provided by TML's subsidiaries also cannot be treated as "exports".*

*5.6 Further, as per the details of the service provided by the appellant's subsidiaries abroad, it is seen that they relate mainly to "Maintenance, Defects and Updates (Installation, Enhancements and Bug fix), Testing (Integration test, system test, end to end test, performance test, regression test, user acceptance test and deploy solution test) and Test coordination". From the nature of the activities, it is obvious that these services cannot be performed from India at all as the service recipient's systems are located abroad. Maintenance, testing, removal of defects, etc. of the systems located abroad has to be done at the site where the systems are located. Thus from the nature of the activities undertaken with respect to onsite services, it is seen that they cannot be performed in or provided from India. The appellant had also referred the matter to the Central Board of Excise and Customs seeking clarification in this regard and the C.B.E. & C. vide letter dated 23-11-2009 had clarified that if the services are rendered partly offsite and partly onsite, then only that operation provided from India (off-shore service) can be treated as export. The C.B.E. & C. clarification was also based on the RBI Circular No. 54, dated 29-6-2002. This clarification issued by the C.B.E. & C. makes the matter abundantly clear that onsite services rendered in respect of IT software services cannot be considered as export for the purposes of claiming export benefits. To a specific query raised by the bench during the course of arguments, it was clarified that while the off-shore services have been certified as export by the competent authorities (softex bills of export certified by the competent authorities), no such certification exists for the on-site services rendered abroad. This also corroborates the fact that on-site services are not exported from India.*

*5.7 The appellant has relied on a number of provisions/decisions pertaining to Customs, EXIM policy, Income-Tax, OECD guidelines, decision of the European Court, etc. in support of the contention that onsite services performed abroad amounts to export. However, these decisions are of no consequence in the present case. Firstly, these laws/decisions are not pari materia to the Service Tax provisions applicable in India. Secondly, the Export of Service Rules, 2005 defines what*

constitutes exports for different categories of services. Thus the definition of export given in the said Rules alone shall apply and "export of service" has to be construed and interpreted in terms of the provisions of the said Rules as they stood at the relevant time. The reliance placed on Paul Merchants Ltd. case by the appellant, in fact, goes against them. The ratio of the said case decided by the Tribunal was that the term "export" has to be understood strictly in terms of the provisions of Export of Service Rules, 2005. If that is done in the present case, in respect of "onsite services", it may be seen that since the said services are rendered abroad at the site of the customer by agencies located outside India, the same cannot be construed as provided from India. The appellant has also relied on the decision of this Tribunal in the case of National Building Construction Corporation of India Ltd. However, the said decision did not deal with a cross border transaction as in the instant case. Therefore, the ratio of the said decision has no relevance to the facts of the present case. The reliance placed by the appellant on the Education Guide published by the C.B.E. & C., relating to the Place of Provision of Services Rules, 2012, also does not help since the said Rules were not in existence when the impugned transactions took place and came about much late. There cannot be a retrospective application of a law unless the law itself specifically provides for the same. Every law has to be construed and interpreted based on the language used at the relevant time. If the language is unambiguous and clear, there is no need to refer to any external aids to interpret the law. In the present case, for the period prior to 27-2-2010, to constitute exports, two conditions were required to be satisfied, namely the service should be provided from India and used outside India and consideration for the service rendered should be received in convertible foreign exchange. There is no ambiguity in the language used. As far as the service rendered on site abroad, the first condition is not satisfied and therefore, on-site services cannot be considered as export during the relevant period and we hold accordingly. If the intention of the legislature was to treat onsite transactions as exports, then the legislature would have stated the same explicitly as in the case of category II services, where even if the services are partly performed in India

*and partly outside, it is treated as performed outside India. Such a provision does not exist in respect of category III services. Therefore, in respect of category III services, if the services are partly performed in India and partly abroad, then the services performed abroad cannot be said to have been performed from India and we hold accordingly. The appellant has also sworn an affidavit wherein they have categorically stated that when the onsite services are performed by their branches abroad, they pay the local taxes there and does not treat the transaction as having been provided from India. If that be so, why should the same transaction be treated differently as export merely because it is performed by the appellant's subsidiaries. It is highly illogical to determine the situs of a service based on the status of the service provider as contended by the appellant, especially when TML themselves are treating the transactions differently.*

*5.8 In view of the above, we are of the considered opinion that the appellant has not satisfied the terms and conditions of export as defined in the Export of Service Rules, 2005, in respect of onsite services for the period prior to 27-2-2010 and therefore, they are not eligible for refund of Service Tax in respect of such services rendered abroad. Accordingly, Order No. PIII/VM/227-280/2010, dated 20-10-2010 passed by the lower appellate authority has to be set aside and the Revenue's appeal against the same has to be allowed. Similarly, Order No. PIII/RS.198-2007/2011, dated 25-7-2011 needs to be upheld in respect of the claims of the appellant for the period prior to 27-2-2010 and the TML's appeals in this regard merit to be rejected."*

4.4 Upholding the above order oif CESTAT, Hon'ble Bombay High Court has vide its order reported at [2014 (36) STR 241 (BOM)] held as follows :

*''61. There is substitution as we have said above and what we find is that below Rule 3(1) and it's clauses, Rule 3(2) has been substituted with effect from 1-3-2007 by Notification No. 2/2007-ST, dated 1-3-2007. Rule 3(2)(a) has been omitted with effect from 27-2-2010. The words "such service is provided from India and used outside India; and" were omitted with effect from 27-2-2010 by Notification No. 6/2010-ST, dated 27-2-2010.*

*Thereafter, the only condition remained to be satisfied and for the purpose of being qualified or termed as export of taxable service is that any taxable service specified in sub-rule (1) of Rule 3 shall be treated as such when the payment for such service is received by the service provider in convertible foreign exchange. We are concerned with the situation prior to this omission. We are of the view that if Mr. Sridharan's submissions have to be accepted, then, we must ignore this omission.*

*62. The Export of Services Rules, 2005 have been amended and substituted on several occasions after they came into force on 15-3-2005. We have noted these amendments carefully. In that regard we have referred to the Notification No. 28/2005-S.T., dated 7-6-2005 and we have also referred to the Notification published in the Official Gazette on 19-8-2009 bearing No. 25/2009-S.T. notifying the Rules entitled "Export of Services (Amendment) Rules, 2009". We have also noted the Notification dated 31-3-2011 bearing No. 22/2011-S.T. published in the Official Gazette and in addition to one noticed above. We are of the view that the Tribunal was right in it's conclusion that the services provided do not satisfy the requirement of the Export of Services Rules, 2005 as prevailing prior to their amendment with effect from 27-2-2010. In such circumstances any wider questions or controversy need not be gone into and decided. The Written Submissions of the Appellants referred to the services in relation to immovable property and based on that the arguments are canvassed. We are of the view that there was no Rule 3(1)(ii) of the Export of Services Rules, 2005 as initially introduced. There was Rule 3(1)(i) and (iii). We are not in agreement with Mr. Sridharan that the business establishment of the service provider is in India and final consumption and consumer is outside India. We find that the provider of service is also a subsidiary outside India and recipient is also outside India. In such circumstances we do not see any reason for placing reliance on these Rules and the Tribunal has rightly negatived such arguments in paragraph 5.5 of the impugned order. The view taken is in consonance with the material placed on record including clauses of the agreement. Apart from the fact that the subsidiaries are being termed as independent entities what we*

*find that onsite services provided admittedly by them have not been rendered from India. The Appellants' customers are abroad and the services provided to them are also not rendered from India. In such circumstances the reasoning in paragraphs 5.5 and 5.6 of the impugned order cannot be said to be perverse or vitiated by any error of law apparent on the face of record. Any larger controversy as held above need not be addressed.*

*63. We are not with Mr. Sridharan in his submission that the amendments/deletions made with effect from 27-2-2010 are clarificatory and would govern all pending claims as well. For the reasons that we have assigned and finding that the omission was made with effect from 27-2-2010 so also the reasons for the same that this contention of Mr. Sridharan cannot be accepted."*

4.5 Commissioner (Appeal) has in impugned order distinguished the above referred decisions of CESTAT/ Hon'b le High Court in para 26 of his order. Now by placing reliance on the submissions made by the revenue in that case while filing the appeal now, can be nothing but will be inferred to be a reading error of the order. The approach of Commissioner (Appeal) while analysing the facts case vis-à-vis the provisions of Rule 6A is in accordance with the Education Guide 2012, issued by the Board. It clarifies the issue in respect of the export of service as per Rule 6A, in following manner :

*"10.2.1 What does the export of a service mean under the new system?*

*Export of services shall now be governed by new provisions in the Service Tax Rules 1994, namely rule 6A. The essential requisites before a service can be designated as export service are:*

- *It must be a service as defined under sub-section 44 of section 65B*
- *by a service provider located in the taxable territory*
- *to a service receiver located outside India*
- *the service is not a service specified in the negative list*
- *the place of provision of the service is outside India*

- *the payment for such service is received by the service provider in convertible foreign exchange*
- *the service provider and service receiver are not merely establishments of a distinct person by virtue of item (b) of Explanation 2 of clause 44 of section 65B of the Act*

*The answer to all questions above must be yes to avail the status of export of service.*

*10.2.2 Can there be an export between an establishment of a person in taxable territory and another establishment of same person in a non-taxable territory?*

*No. Even though such persons have been specified as distinct persons under the explanation to clause (44) of section 65B, the transaction between such establishments have not been recognized as exports under the above stated rule.*

4.6 Commissioner (Appeals) has in respect of Model I specifically concluded that the services provided by the appellants to their overseas clients through their subsidiaries and branch offices located outside the taxable territory were in fact the services provided by the appellants to their client for which they were billing their clients and receiving the Foreign Exchange from their clients. The subsidiaries/ branch offices did not raised any bill/ invoice on the recipient of the services or received any payments from them. All the services provided by the appellant to their overseas client have been provided under umbrella of a single contract. The subsidiaries/ branch offices of the appellants located overseas do not provide any service to the clients of the appellant independently. No such contractual agreement exists between the subsidiaries/ branch offices of the appellant with the service recipient. The subsidiaries/ branch offices provide the said services to the appellant and raise bill for the same on appellant for which the appellant are also discharging the service tax on reverse charge basis treating them as import of services. Thus these services are input services to the appellant for providing the services to their client overseas. Hence in Model I we are in complete agreement with findings recorded by Commissioner (Appeal) in para 23.

4.7 In respect of Model II, Commissioner (Appeal) has concluded that these services cannot be termed to be export of services. Same is clarification as given by the education guide at para 10.2.2. Revenue has challenged the order of the Commissioner (Appeal) on the account of calculation error. The case of revenue is that the Commissioner (Appeal) has erred while determining the "total turnover" by deducting the value of onsite services provided by the overseas subsidiaries / branches directly to their clients, which do not qualify as export of services from the value of total turnover. In our view the stand is itself erroneous, the said services which were not provided by the appellants cannot be treated as part of "total turnover" of the Appellant and the hence the order of Commissioner (Appeal) cannot be faulted on this account.

4.7 In view of the discussions as above we do not find any merits in the appeals filed by the revenue.

4.8 Now we take up for consideration the appeal (ST/87194/2015) filed by the respondent. We take note of the fact that counsel is not pressing this appeal on any other ground other than on the ground of imposition of interest under Section 11AA, in respect of erroneous refund granted to them. This erroneous refund has arisen on account of the CESTAT/ Hon'ble Bombay High court referred earlier for the period prior to amendments made in 2010. The refund allowed earlier for the period prior to amendments made in 2010, was made goods by the appellant. Adjudicating authority has taken note of this fact. While taking note of this he have proceeded to demand interest, without expressing any view of the fact that this amount if not refunded would have been available in the CENVAT Credit account of the appellants and could have been utilized for payment of service tax on the services provided domestically. In our view demand for interest needs reconsideration on this account by the original authority and for this limited issue matter is remanded back to him.

5.1 Appeal No ST/85229, 85230, 85231, 85232, 85613, 86387, 86711/2015 filed by the revenue are dismissed.

5.2 `Appeal No ST/87194/2015 filed by the appellant is partly allowed as indicated in para 4.8 above and the matter of interest

liability on the erroneous refund recovered from the appellants is remanded back to the original authority for re-consideration. Original authority is directed to decide the issue afresh within three months of the receipt of this order.

5.3 All the cross objections filed by the respondent are disposed of. The early hearing applications filed by the Revenue are dismissed as infructuousa.

(Order pronounced in the open court)

Sd

**(Sanjiv Srivastava)**
**Member (Technical)**

Sd

**(P. Dinesha)**
**Member (Judicial)**

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उप रजिस्ट्रार
Deputy Registrar
सीमाशुल्क उत्पादशुल्क और
सेवाशुल्क अपील अधिकरण
Custom Excise & Service Tax
Appellate Tribunal

सीमाशुल्क, उत्पादशुल्क और सेवाशुल्क अपील अधिकरण Custom Excise & Service Tax Appellate Tribunal सत्यमेव जयते Mumbai मुंबई

31 MAR 2022

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