CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO. 88483 OF 2014

(Arising out of Order-in-Appeal No. 543/PD/14 dated 22.04.2014 passed by the Commissioner, Central Excise & Service Tax, Mumbai-I, Mumbai)

M/s. Arcelor Mittal Stainless (I) P. Ltd., **...Appellant**
(Now Known as M/s. Arcelor Mittal
Distribution Solutions India Private Limited)

Versus

Commissioner Service Tax **...Respondent**
Mumbai-II

APPEARANCE:

Shri V. Sridharan, Senior Advocate, Shri Vinay Jain and Shri Somesh Jain, Advocates for the Appellant.

Shri Anand Kumar, Authorized Representative for the Department.

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)
HON'BLE MR. P.A. AUGUSTIAN, MEMBER (JUDICIAL)

Date of Hearing: 17.04.2023
Date of Decision: 09.06.2023

INTERIM ORDER NO. 26/2023

JUSTICE DILIP GUPTA:

M/s. Arcelor Mittal Stainless International India Pvt. Ltd.[1], the appellant, is a wholly-owned subsidiary of Arcelor Mittal Stainless International, Paris, France[2]. It was appointed as a sub-agent by Arcelor France, a commission agent for steel mills situated outside India, for procuring sale orders for the products manufactured by these mills from customers across the world. Arcelor France does not

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1. **Arcelor India**
2. **Arcelor France**

have any office in India. A prospective customer in India is either approached by Arcelor India or a prospective customer contacts Arcelor India regarding stainless steel requirement, but in either case the request is forwarded by Arcelor India to the foreign steel mills with the technical requirements of the Indian customer. Once the foreign mills and the Indian customer come to an understanding on the terms and conditions of supply, a written contract is executed between the Indian customer and the foreign mills or a purchase order is placed on the foreign mills. The documents are prepared by the foreign mills in the name of the Indian customer and the Indian customer, in turn, pays the foreign mills. Thus, the goods directly pass from the foreign mills to the Indian customer.

2. A part of the commission received by Arcelor France, as the main agent, from the foreign mills is paid to Arcelor India based on the volume of sales in each quarter in convertible foreign currency. A dispute arose in relation to such commission received by Arcelor India from Arcelor France for the period from April 2005 to January 2009. According to Arcelor India, there is no privity of contract between it and the steel mills located outside India and it received the consideration only from Arcelor France. It, therefore, did not collect or pay service tax on the commission received from Arcelor France from April 2005 to January 2009. The department, however, believed that service tax was leviable on the commission received by Arcelor India from Arcelor France since the services were performed and consumed in India and they would not qualify as 'export of service' under the Export of Service Rules, 2005[3]. Arcelor India believed that it was not required to pay service tax on the commission received

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3. the 2005 Export Rules

from Arcelor France as the service qualified as 'export of service'. However, Arcelor India paid service tax under protest during investigation for the period April, 2005 to January, 2009 with interest, but subsequently filed refund claims. The refund claims were rejected, against which the present appeal was preferred before the Tribunal.

3. The division bench, while hearing the appeal, noticed that:

> "5.9 The services provided by the appellant to AMSI France are in relation to business activities relating to the specified territories in India, Bangladesh and Sri Lanka. **When the appellant are providing the services to the AMSI, France which is consumed by the AMSI, France for developing its business in India, we would not be in position to agree with the arguments of the appellant, stating that services provided by them have been consumed/used by the recipient of services outside India."**
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> **(emphasis supplied)**

4. After placing reliance upon the decision of the Supreme Court in **GVK Industries Ltd.** vs. **Income Tax Officer**[4], the division bench observed:

> "5.9 ***** **In view of the principle of law stated by the Apex Court in the above decision its crystal clear that the services received or provided by the foreign entity even if he is located outside India are in relation to his business activities in India. We are very clear that in the present case the services received by the AMSI, France from the appellant, were for development of their business in India and hence were used/ consumed by them in India.** The concept of residency outside for the purpose of taxation has been given a go by the Apex Court in this decision. **Hence the foremost condition that needs to be satisfied by the appellant for claiming the services to be export of service is vis a vis the usage/**

4. 2015 (2) TMI 730 (Supreme Court)

> **consumption of service by the service recipient. If the consumption of service is in relation to the activities of foreign entity/ resident located outside but for his business in India, then the appellant will not be entitled to the benefit of export of service as the service is not exported as provided for by the Export of Service Rules, 2005** as they existed at material time."
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> **(emphasis supplied)**

5. The division bench, after noting that the aforesaid view expressed by it would run contrary to the views expressed earlier by the division benches of the Tribunal in **M/s. Gap International Sourcing (India) Pvt. Ltd.** vs. **Commissioner of service Tax**[5], **Blue Star Ltd.** vs. **Commissioner of Central Excise, Bangalore**[6]**,** and **Mapal India Private Ltd** vs. **Commissioner of C. Ex., Bangalore**[7], observed as follows:

> "5.11 **Appellant counsel have in written submissions filed relied heavily on the decision of Tribunal in case of Mapal India Pvt Ltd. holding as follows:**
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> *****
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> **The said decision relies upon the decisions in case of Blue Star and ABS International and also two circular issued by the CBEC. We are not in agreement with the law laid down by the decisions as stated in para 5.10 above.** Secondly the circulars are only clarification and not exposition of law. They have got limited validity. The circular of 2009 was issued with reference to the provisions of Export of Services Rules, 2005 as they existed then. Without even referring to the Export of Service Rules, 2005 and the manner in which they got amended tribunal has chosen to make the said circular applicable from 2003 onwards. Such an approach

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5. 2015 (37) S.T.R. 757 (Tri. - Del.)
6. 2008 (11) STR 23 (Tri. Bang.)
7. 2011 (22) S.T.R. 454 (Tri. - Bang.)

> is contrary to the law laid down by the Apex Court in case of Ratan Wire & Melting [2008 (231) ELT 22 (SC)]."
>
> **(emphasis supplied)**

6. The division bench, accordingly, referred the following questions of law to be determined by a larger bench of the Tribunal:

i. What is extant and scope of phrase "such taxable services which are provided and used in or in relation to commerce or industry and the recipient of such services is located outside India" used in Rule 3(3)(i) of Export of Services Rules, 2005 upto 18.04.2006.

ii. What is extant and scope of phrase "such service is delivered outside India and used outside India" used in Rule 3(2)(a) of Export of Service Rules, 2005 from 19.04.2006 to 28.02.2007.

iii. What is extant and scope of phrase "services provided from India and used outside India" used in Rule 3(2)(a) of Export of Services Rules, 2005 from 01.03.2007 onwards.

iv. Whether the services rendered to foreign entity located outside India for development of its business in India will qualify as Export of Service in terms of the above phrases used in the Export of Services Rules, 2005 from time to time and the decision of Apex Court in case of GVK Industries?

7. What has to be examined is whether the service provided by Arcelor India would be 'export of service' under the 2005 Export Rules, but before proceeding to analyse the various legal provisions and the decisions, it would be useful to briefly consider the history of 'export of services' under the service tax law.

8. The Central Government had issued a notification dated 28.02.1999 granting exemption to taxable services provided in respect of which payment was received in convertible foreign exchange. This notification was superseded by a notification dated 09.04.1999, which extended the same exemption but added a proviso that the exemption will not apply when the payment received in convertible foreign exchange was sent outside India. This notification dated 09.04.1999 was subsequently rescinded by a notification dated 01.03.2003.

9. There was an apprehension in the industry that 'export of services' will become taxable because of the withdrawal of the aforementioned notification dated 09.04.1999. The Central Board of Excise and Customs[8], thereafter, issued a Circular dated 25.04.2003 to clarify the position with regard to the 'export of service'. It clarified that since service tax is a destination based consumption tax, it would not be applicable on 'export of services' and these services would continue to remain tax free even after the withdrawal of the notification dated 09.04.1999. The relevant extract of the Circular is as follows:

> "The Central Government has issued Notification No. 2/2003 dated 1-3-2003 in the current year's Budget rescinding the earlier Notification No. 6/99 Service Tax dated 9-4-99 which exempted taxable services from payment of service tax so long as payment for services rendered is received in convertible exchange which is not repatriated outside India. Consequent to the issue of Notification No. 2/2003 cited above, service tax would be leviable on all taxable services consumed or rendered in India, irrespective of whether the payment thereof is received in foreign exchange or not.

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8. CBEC

> 2. In this regard various representations have been received by the Board raising apprehension that because of the withdrawal of the Notification No. 6/99, export of service would be affected as it would be costlier in the international markets.
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> 3. **The Board has examined the issue. In this connection I am directed to clarify that the Service Tax is destination based consumption tax and it is not applicable on export of services. Export of services would continue to remain tax free even after withdrawal of Notification No. 6/99, dated 9-4-99…**"
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> **(emphasis supplied)**

10. On the same day the aforesaid Circular was issued, the Hon'ble Finance Minister also made a statement in the Lok Sabha clarifying that services exported out of India would not be leviable to service tax. The relevant extract of the speech of the Hon'ble Finance Minister in the Parliament is as follows:

> "Some Hon. Members as also some trade representatives have also expressed apprehension that the withdrawal of exemption from service tax arising from payments received in convertible foreign exchange could affect out export of services. **I want to clarify that a service tax is location based. Whatever service is exported abroad whether it be through outsource computer or medical, it will, by law, be outside the proposed code of service tax. Therefore, there ought to be no apprehension or worry in this regard."**
>
> **(emphasis supplied)**

11. Thereafter, the exemption extended by notification dated 09.04.1999 was again reintroduced by a notification dated 20.11.2003. This notification dated 20.11.2003 is reproduced below:

> "In exercise of the powers conferred by Section 93 of the Finacne Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the

> public interest so to do, hereby exempts the taxable services specified in sub-section (105) of section 65 of the said Act, provided to any person in respect of which payment is received in India in convertible foreign exchange, from the whole of the service tax leviable thereon under section 66 of the said Act.
>
> Provided that nothing contained in this notification shall apply when the payment received in India in convertible foreign exchange for taxable services rendered is repatriated from, or sent outside, India."

12. The aforesaid Notification was, however, rescinded by Notification dated 03.03.2005 and the Export of Service Rules, 2005 were framed in exercise of the powers conferred by section 94(2)(g) of the Finance Act, 1994[9] to achieve the destination based consumption tax concept and consequently provide exemption from payment of service tax to service exported out of India.

13. The main allegation in the show cause notice issued to Arcelor India is that the condition specified in the 2005 Export Rules that the order for provision of service should be made by the recipient of such service from offices located outside India is not fulfilled since there is no written contract between Arcelor India and Arcelor France and the condition that the service is delivered outside India and is used outside India is also not fulfilled.

14. The adjudicating authority found that the requirement of rule 3(2) of the 2005 Export Rules was not satisfied since Arcelor India had performed service in India for ultimate consumption in India. In this context, the adjudicating authority considered whether the two conditions set out in the 2005 Export Rules were satisfied and the findings are as follows:

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9. the Finance Act

"28. *****

Condition 1 i.e. the recipient should be located outside India, is not satisfied

As discussed above the noticees are acting as sub-agent for AMSI France, and that the services provided by the noticees were only to the benefit of the consumers of Indian territory and the same were provided for and on behalf of the Arcelor Mittal Stainless International. **The end user of service being located in India and need of such consumers being met by the noticees for and on behalf of its foreign principal, such services appears to have been provided in India and there is no export of service.** It is also observed that the foreign principal acted through its agent, i.e., assessee. The principal was not the beneficiary. A service provider acting directly or indirectly through its agent is not the beneficiary of service so provided while providing of service is its contractual obligation under terms of contract with clients/customers. Therefore, in the instant case, no service had occasioned to move out of India to a place outside India. Further to provide service, expenses were incurred in India for which the assessee got reimbursements by way of commission.

Condition 2 i.e. the service should be used outside India, is not satisfied

Had the service been provided to the foreign principal not resulting in ultimate supply of goods or provision of service to the consumer in India, such services might have assumed the character or nature of export of service from India. **But in instant case the noticee is an intermediary meant to provide well-defined services to its clients/customers in India with the technical assistance of foreign principal. Thus it is observed by me that the noticee had performed service in India for ultimate consumption thereof in India by its clients/customers in India.** The service was destined to exhaust in India and extinct soon after performance thereof."

(emphasis supplied)

15. The Commissioner (Appeals) also held that Arcelor India had performed service in India for ultimate consumption in India by the customers in India and the observations made by the Commissioner (Appeals) are as follows:

> "16. In the instant case, I find that the Appellants are receiving commission in convertible foreign currency in two different situation, in respect of the orders booked by the prospective customers with the foreign supplier directly, but through the Appellants, whereby the goods are directly exported by the supplier outside India and payments are made to them directly by the customers in India and in another situation where the goods are imported directly by the Appellants for trading purposes for which they are holding dealers' Registration under Central Excise. **Thus, I am of the view that the Appellants had performed the service in India for ultimate consumption thereof in India by its customers in India.**"
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> **(emphasis supplied)**

16. The submissions advanced by Shri V. Sridharan, learned senior counsel for the appellant assisted by Shri Vinay Jain and Shri Somesh Jain, and Shri Anand Kumar, learned authorized representative appearing for the department have been considered.

17. It is not in dispute that Arcelor India is a sub-agent of Arcelor France, which is the main agent of the steel mills located outside India. The services provided by Arcelor India would, therefore, be covered by the definition of 'business auxiliary service'[10] defined under section 65(105)(zzb) of the Finance Act.

18. In order to appreciate the rival contentions, it would be appropriate to reproduce the relevant portions of the 2005 Export Rules as they existed prior to 27.02.2010.

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10. BAS

19. BAS is covered by rule 3(3) of the 2005 Export Rules. The relevant portion of rule 3 of the 2005 Export Rules, as it is existed prior 19.04.2006, is as follows:

> "**3. Export of taxable service** – **The export of taxable service shall mean –**
>
> (1) *****
> (2) *****
>
> (3) in relation to taxable services, other than,-
>
> (i) *****
> (ii) *****
>
> of clause (105) of section 65 of the Act.
>
> **(i) such taxable services which are provided and used in or in relation to commerce or industry and the recipient of such services is located outside India:**
>
> Provided that if such recipient has any commercial or industrial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of services only if –
>
> (a) order for provision of such service is made by the recipient of such service from any of his commercial or industrial establishment or any office located outside India;
>
> (b) service so ordered is delivered outside India and used in business outside India; and
>
> (c) payment for such service provided is received by the service provider in convertible foreign exchange;
>
> **(ii)** such taxable services which are provided and used, other than in or in relation to commerce or industry, if the recipient of the taxable service is located outside India at the time when such services are received."
>
> **(emphasis supplied)**

20. Rule 3 of the 2005 Export Rules was substituted w.e.f. 19.04.2006 and the relevant portion is reproduced below:

"**3 (1) Export of taxable service shall, in relation to taxable services, –**

(i) *****
(ii) *****
(iii) **specified in clause (105) of section 65 of the Act**,

*****

When provided in relation to business or commerce, be provision of such services to a recipient located outside India *****

Provided that where such recipient has commercial establishment or any office relating thereto, in India, such taxable service provided shall be treated as export of service only when order for provision of such service is made from any of his commercial or industrial establishment or any office located outside India

(2) **The provision of any taxable service shall be treated as export of service when the following conditions are satisfied:**

(a) **such service is delivered outside India and used outside India; and**

(b) **payment for such service provided outside India is received by the service provider in convertible foreign exchange"**

(emphasis supplied)

21. Rule 3(2) was thereafter amended by Notification dated 01.03.2007 and the relevant portion of the Notification is reproduced below:

"2. In the Export of services Rules, 2005, in rule 3, for sub-rule (2), the following sub-rule shall be substituted, namely:-

(2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-

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

(b) **payment for such service provided outside India is received by the service provider in convertible foreign exchange.**

Explanation.- ********"

(emphasis supplied)

22. Rule 4 of the 2005 Export Rules provides that any service, which is taxable under clause (105) of section 65 of the Finance Act, may be exported without payment of service tax.

23. The Circular dated 24.02.2009 issued by CBEC deals with applicability of the provisions of the 2005 Export Rules in certain situations, including that provided under rule 3(1)(iii) and rule 3(2). The relevant portion of the said Circular is reproduced below:

"In terms of rule 3(2) (a) of the Export of Services Rules 2005, a taxable service shall be treated as export of service if 'such service is provided from India and used outside India'. Instances have come to notice that certain activities, illustrations of which are given below, are denied the benefit of export of services and the refund of service tax under rule 5 of the Cenvat Credit Rules 2004 (Notification No 5/2006-CE (N.T.) dated 14-3-2006 on the ground that these activities do no satisfy the condition 'used outside India',-

(i) Call centers engaged by foreign companies who attend to calls from customers or prospective customers from all around the world including from India;

(ii) **Medical transcription** where the case history of a patient as dictated by the doctor abroad is typed out in India and forwarded back to him;

(iii) **Indian agents who undertake marketing in India of goods of a foreign seller. In this case, the agent undertakes all activities within India and receives commission for his services from foreign seller in convertible foreign exchange;**

(iv) **Foreign financial institution desiring transfer of remittances to India,** engaging an Indian

organisation to dispatch such remittances to the receiver in India. For this, the foreign financial institution pays commission to the Indian organisation in foreign exchange for the entire activity being undertaken in India.

The departmental officers seem to have taken a view in such cases that since the activities pertaining to provision of service are undertaken in India, it cannot be said that the use of the service has been outside India.

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

> treatment for other Category III [Rule 3(1)(iii)] services as well.
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> 4. All pending cases may be disposed of accordingly. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned. These instructions should be given wide publicity among trade and field officers."
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> **(emphasis supplied)**

24. The Circular dated 24.02.2009 issued by CBEC extensively deals with the issues relating to rule 3(1)(iii) and rule 3(2)(a) of the 2005 Export Rules. It notices that in cases where Indian agents undertake marketing in India of goods of a foreign seller, the Indian agent undertakes all the activities within India and receives commission for his services from the foreign seller in convertible foreign exchange. The officers of the department, however, were taking a view that since the activities pertaining to the provision of service were undertaken in India, the use of service would not be outside India. The CBEC Circular clarifies that for the services to fall under rule 3(1)(iii) of the 2005 Export Rules, the relevant factor is the location of the service receiver and not the place of performance and the phrase 'used outside India' should be interpreted to mean that the benefit of the service should accrue outside India. Thus, in this category 'export of service' may take place even when all the relevant activities take place in India so long as the benefit of these services accrues outside India.

25. Having noted the aforesaid facts, it would be appropriate, at this stage, to first refer to the decisions referred to by the learned senior counsel for the appellant to support the contention that the

services rendered by Arcelor India were export services under the 2005 Export Rules and, therefore, not leviable to service tax.

26. In **GAP International**, the dispute before the Tribunal was for the period from 19.04.2006 to 31.05.2007. The service provided by the appellant situated in India to GAP International was in relation to procurement of goods from India and for this purpose the appellant conducted survey of the manufacturers of various products required by GAP, USA and recommended vendors who could supply the goods. The appellant also conducted inspection of the export consignments and issued the inspection certificates. It was, therefore, not in dispute that the services provided by the appellant were BAS. The dispute, however, was whether the services qualified as export of service in terms of the 2005 Export Rules and, therefore, not taxable in India. It is in this context that the Tribunal held that the services provided by the appellant in India were obviously meant for and were used by GAP, USA for their business and, therefore, these services would be treated as exported out of India. The contention of the department that the condition "used outside India" was not satisfied as they were being performed in India was not accepted by the Tribunal and the relevant portions of the decision of the Tribunal are reproduced below:

> "6. **The service provided by the appellant to M/s GAP, U.S.A., is in relation to procurement of goods from India.** For this purpose, the appellant conduct the survey of the manufacturers of various products required by M/s GAP, U.S.A., and recommend the vendors who can supply the goods of the desired quality. xxxxxxx. Thus, the services being provided by the appellant to their principal are the services in relation to procurement of the goods and there is no dispute that these services are Business Auxiliary Services covered by Section 65 (105)

(zzb) read with Section 65 (19) of the Finance Act, 1994. The only point of dispute is as to whether the services are taxable in India or the same are export of service outside India in terms of Service Rules, 2005 and for this reason are not taxable in India. Though the services have been performed in India, these services being Business Auxiliary Services are in respect of the business of the appellants principal located abroad. **The services being provided by the appellant are obviously meant for and are used by M/s GAP, U.S.A. for their business. The services being provided by the appellant are covered by Clause (iii) of Rule 3 (1) of Export Service Rules, 2005, as these services are in relation to business or commerce and in terms of this clause, readwith sub-rule (2) of Rule 3, these services would be treated as exported out of India if the recipient is located outside India and the same have been delivered outside India and used India and payment for the same has been received by the service provided in convertible foreign exchange.** There is no dispute that the payment for these services has been received in convertible foreign exchange and the payment has been made by M/s GAP, U.S.A. located abroad, not having any establishment or branch in India. **The department"s contention, however, is that the conditions of delivery outside India and use outside India are not satisfied, as the services have been performed in India and the same are not capable of being used in territory other than the place where the same have been provided.** Xxxxxxxxx.

7. **In our view the arguments of the department are absurd as the DR has not mentioned as to who is the consumer of the services in India, if the services, in question, provided in India by the appellant have not been used and consumed by their principal in U.S.A. When the appellant identify the vendors for their principal abroad** on the basis of the quality of their products, their manufacturing infrastructure, compliance with child labour laws and pollution control norms and also provide the services of inspection of the export consignments, besides identifying the logistic service providers for smooth transportation of the goods purchased to the port for their export, **the user**

> **and beneficiary of all these services is their principal abroad.** It would be absurd to say that the recipient and user of these services are the persons in India and not M/s GAP, U.S.A. for whom all these services provided by the appellant are meant, who have used these services for their business and have made payment for these service in convertible foreign exchange."
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> **(emphasis supplied)**

27. In **Commissioner of Service Tax, Mumbai-VI** vs. **A.T.E. Enterprises Pvt. Ltd.**[11], the substantial question of law framed by the Bombay High Court was whether the services provided by the respondent, in accordance with various contracts entered into with overseas manufacturers, is classifiable under BAS and if so, whether the said services provided can be treated as export of services or not. To answer this question of law, the High Court referred extensively to the findings recorded by the Tribunal as also the decisions relied upon by the Tribunal in **Paul Merchants Ltd.** vs. **Commissioner of C. Ex., Chandigarh**[12] and **GAP International** and held that no case had been made out by the appellant -Commissioner of Service Tax, Mumbai to interfere with the reasoning of the Tribunal. The reasoning contained in the decision of the Tribunal against which the appeal was filed before the High Court is reproduced below:

> "8. We find from the records that the appellant does not engage himself in assembling and organizing of the imports. **His duty as is ascertained from the agreement, indicates that he is supposed to procure the orders and pass it on to the overseas manufacturers; on receipt of such orders, the overseas manufacturers executes the same on his own and the consideration for such supplies is directly paid to the overseas manufacturers by the person who has placed the order. The entire transaction in our considered opinion seems to be of**

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11. 2018 (8) G.S.T.L. 123 (Bom.)
12. 2013 (29) S.T.R. 257 (Tri. - Del.)

> **only procurement of orders and the rendering of services, if any, by the appellant is towards the foreign or overseas manufacturers. In our view, this activity though culminates in supplies to Indian company, cannot be considered as services provided in India. We are fortified in our view by the ratio of the Tribunal in the case of Vodafone Essar Cellular Ltd. (supra).**
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> 9. In this case we find that there was an agreement between the appellant and the foreign telecom service provider as per which the appellant had agreed to provide telecom services to the customers of foreign telecom service provider when he is in India and using the appellant telecom networks. Revenue held a view that the consideration for services rendered in India is taxable under Business Auxiliary Service. The Bench after considering the provisions of "Export Services Rules" and Board clarifications, and the decision of Microsoft Corporation (I) Pvt. Ltd. case held in favour of the assessee by recording as under : ***** "
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> **(emphasis supplied)**

28. It clearly transpires from the aforesaid decision of the Bombay High Court in **ATE Enterprise** that in a case where the Indian entity only helps the foreign entity to place orders on an Indian Company and it is the foreign entity which actually executes the orders with the Indian Company and the consideration for such orders is directly paid to the foreign entity, the activity may culminate in supplies to the Indian company but this would not mean that services have been provided in India and the services rendered by the Indian entity to the foreign entity would qualify as export of service under the 2005 Export Rules.

29. In **Commissioner of Service Tax-VII** vs. **Wartsila India Ltd.**[13], it was noticed by the Bombay High Court that the respondent-

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13. 2019 (24) G.S.T.L. 547 (Bom.)

Wartsila India was receiving commission from foreign based principals for promotion of sale of the products/goods in India. The Department was of the view that the services provided by the respondent would fall under the category of BAS chargeable to service tax. The case of the respondent-assessee, however, was, and which case was accepted by the Commissioner of Service Tax, that the services rendered by the respondent to its foreign principals would constitute export of service covered by the 2005 Export Rules, and so no tax could be levied. The Bombay High Court, after referring to the decision of the Bombay High Court in **A.T.E Enterprises** and the Circular dated 24.02.2009, dismissed the appeal that had been filed by the department. The relevant portion of the decision of the High Court is reproduced below:

> "8. We find that the issue raised herein is no longer res integra. **An identical nature of services as rendered by the respondent to its foreign clients, had come up for consideration before this Court in Commissioner of Service Tax, Mumbai v. ATE Enterprises (P) Ltd., 2018 (8) G.S.T.L. 123 (Bom.). This Court followed its earlier decision in SGS India (P) Ltd. v. Commissioner of Service Tax - 2014 (34) S.T.R. 554 (Bom.) and held that services of procuring orders and passing it to its overseas principal/parties and receiving payments for the same in foreign exchange, is an activity of export of services covered by the Export of Services Rules, 2005. Therefore, the issue stands concluded in favour of the respondent and against the appellant by the decision of this Court in ATE. Enterprises (P) Ltd. (supra). Further, Circular No. 111 of 2009, dated 24th February, 2009 issued by the C.B.E. & C. also supports the case of the respondent.** Nothing has been shown to us as to why above Circular cannot be read in the manner in which the Commissioner of Service Tax and the Tribunal has read it.

> 9. The decision of the Tribunal in the case of Blue Star Ltd., rendered on 24th September, 2014 [2008 (11) S.T.R. 23 (Tribunal)] which was also a subject matter of appeal before this Court being Commissioner of Service Tax, Mumbai VII, Commissionerate v. M/s. Blue Star Ltd. (Central Excise Appeal No. 173 of 2017). This appeal on an identical issue, was dismissed on 11th September, 2018, as not giving rise to any substantial questions of law."
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> **(emphasis supplied)**

30. The Delhi High Court in **Verizon Communication India Private Limited** vs. **Assistant Commissioner of Service Tax, Delhi**[14] approved the view taken by the Tribunal in **Paul Merchants,** and the relevant portion of the decision is reproduced below:

> "50. **The decision of Larger Bench of CESTAT in Paul Merchants Ltd. v. CCE, Chandigarh (supra) may be referred to at this stage.** The period with which the dispute in that case related to was between 1st July, 2003 and 30th June, 2007. It involved, therefore, the interpretation of the ESR, 2005 as amended and applicable during the said period. **There the assessees were intermediary agents providing money transfer services to foreign travellers who were the end user on behalf of their principals. The contention of the Department that this did not qualify as 'export of service' was rejected by the CESTAT. It noted that the C.B.E. & C. had to issue a clarification Letter No. 334/1/2010-TRU, dated 26th February, 2010 acknowledging the difficulties that were faced by the trade in complying with the condition that the services had to be 'used outside India'. It was clarified that "as long as the party abroad is deriving benefit from service in India, it is an export of service."**
>
> **51. In the considered view of the Court, the judgment of the CESTAT in Paul Merchants Ltd. v. CCE, Chandigarh (supra) is right in holding that "The**

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14. 2018 (8) GSTL 32 (Delhi)

service recipient is the person on whose instructions/orders the service is provided who is obliged to make the payment from the same and whose need is satisfied by the provision of the service." The Court further affirms the following passage in the said judgment in Paul Merchants Ltd. v. CCE, Chandigarh (supra) which correctly explains the legal position:

> 'It is the person who requested for the service is liable to make payment for the same and whose need is satisfied by the provision of service who has to be treated as recipient of the service, not the person or persons affected by the performance of the service. Thus, when the person on whose instructions the services in question had been provided by the agents/sub-agents in India, who is liable to make payment for these services and who used the service for his business, is located abroad, the destination of the services in question has to be treated abroad. The destination has to be decided on the basis of the place of consumption, not the place of performance of Service.' "

(emphasis supplied)

31. In **Blue Star Ltd.**, the appellant booked orders for its principal in foreign countries and after the orders were booked in India, the parties directly got in touch with the foreign suppliers who exported the goods to India and received payments. The appellant was paid commission in convertible foreign exchange and it is this payment on which service tax was levied by the department for the reason that the appellant had not exported service. The Tribunal rejected the contention of the department and held that the appellant had exported service under the 2005 Export Rules. The relevant portions of the decision of the Tribunal are as follows:

> "4. **The appellants filed a refund claim with the Department to the tune of Rs. 9,87,235/- on the ground that the services rendered by them amounts to Export of Services in terms of Rule 3(2) of the Export of Services Rules, 2005 and, therefore, they**

> **are entitled for the refund of the Service Tax already paid by them. The learned Advocate stated that the appellants actually book orders for their Principal in USA/UK/other countries. The orders are booked in India and after the orders are booked, the parties concerned directly get in touch with the foreign suppliers. Once the foreign suppliers export the goods to India and receive their payments, a commission is paid to the appellant. It was urged that the service which is rendered by the appellant amounts to Business Auxiliary Service. However, the service is provided from India and used outside India.** Further, the payment for such service has been received in convertible foreign exchange. The learned advocate invited my attention to the documents which are available in the Paper Book to show the details of the transactions. He has also furnished the Chartered Accountant's Certificate.
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> 6. On a very careful consideration of the matter, **I find that the appellants have produced documentary evidence to show that they had rendered the services to their foreign principals by booking orders in India for their goods. I have also perused the details of the refund application. They all relate to the goods supplied by the foreign principals based on the orders booked by the appellant. Moreover, in the Agreement relied on by the Revenue, para 9 relates to the services rendered** by the appellant. This para has not been referred to by the Commissioner (Appeals) in his order at all. On the basis of the records, I am convinced that the services rendered have been exported in terms of Rule 3(2) of the Export of Services Rules, 2005. Hence, the appellants are entitled for the refund of the Service Tax already paid. Therefore, I allow the appeal with consequential relief, if any."

32. In **Mapal India**, the appellant identified customers for the goods manufactured in Germany for the Indian customers to place purchase orders on the German company, for which the appellant

received commission in convertible foreign exchange. The Tribunal held that the appellant had exported service.

33. The aforesaid decisions clearly hold that where persons residing in India provide service to foreign entities to enable them to book orders for supply of material to customers in India, the person residing in India would render BAS to the foreign entities and such service would be treated as export of service under rule 3(1)(iii) of the 2005 Export Rules since the foreign entities are located outside India and the payment is received by such persons in India in convertible foreign exchange. Thus, even though the activity may ultimately result in supplies to persons in India, it would not be considered as services provided in India.

34. The Circular dated 24.02.2009 issued by CBEC regarding rule 3(i)(iii) of the 2005 Export Rules also supports Arcelor India. The Circular clarifies that the relevant factor to examine whether the service rendered is export of service is the location of the service receiver and not the place of performance. It also clarifies that for service to qualify as export of service, the benefit of service should accrue outside India and that export of service may take place even when all the relevant activities take place in India but the benefit of the service accrues outside India.

35. Learned authorized representative appearing for the department, however, relied upon the decision of the Supreme Court in **GVK Industries** to contend that the services rendered by Arcelor India are services performed and consumed in India and so they would not qualify as 'export of service' under the 2005 Export Rules. This decision was also relied upon by the division bench of the Tribunal while referring the issues to the Lager Bench of the Tribunal.

36. It would, therefore, be necessary to examine this judgment of the Supreme Court. GVK Industries, which is a company whose object is to generate and sell electricity, sought services of a consultant and eventually entered into an agreement with a Non-Resident Company in Switzerland[15]. For the services so provided NRC, Switzerland was to be paid "success fee" at the rate of 0.75% of the total debt financing. After successful rendering of services, NRC, Switzerland sent invoices to GVK Industries for payment of success fee amount to the extent of US $ 17,15,476.16. After the receipt of the said invoice, GVK Industries approached the concerned Income Tax officer, for issuing a No Objection Certificate to remit the said sum pointing out that NRC, Switzerland had no place of business in India; that all the services rendered to it were from outside India; and that no part of success fee could be said to arise or accrue or deemed to arise or accrue in India attracting the liability under the Income-Tax Act, 1961[16]. Since the foreign consultant had no business in India and had provided all the services from outside India, GVK Industries believed that tax liability would not arise under the Income Tax Act. The issue framed by the High Court was whether 'success fee' payable by GVK Industries to NRC, Switzerland was chargeable to tax under the provisions of the Income Tax Act. This issue was answered by the High Court in favour of the department by placing reliance upon section 9(1)(vii)(b) of the Income Tax Act in the following manner:

> "Thus from a combined reading of clause (vii)(b) Explanation (2) it becomes clear that any consideration, whether lump sum or otherwise, paid by a person who is a resident in India to a non-resident for running any managerial or technical or consultancy service, would be

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15. NRC, Switzerland
16. the Income Tax Act

> the income by way of fees for technical service and would, therefore, be within the ambit of "income deemed to accrue or arise in India". **If this be the net of taxation under Section 9(1)(vii)(b), then 'success fee', which is payable by the petitioner-company to the NRC as fee for technical service would be chargeable to income tax thereunder.** The Income-tax officer, in the impugned order, held that the services offered by the NRC fell within the ambit of both managerial and consultancy services. That order of Income-tax officer found favour by the Commissioner in revision. In the view we have expressed above, we are inclined to confirm the impugned order."
>
> **(emphasis supplied)**

37. Before the Supreme Court, the constitutional validity of section 9(1)(vii)(b) of the Income Tax Act was challenged on the ground of legislative competence and the matter was referred to a Constitution Bench for examination of the constitutional validity. The first question framed was whether the Parliament was constitutionally restricted from enacting legislation with respect to extra territorial aspects or causes that do not have, nor expected to have, any direct or indirect, tangible or intangible impact on or consequences in the territory of India. This was answered by the Constitution Bench in the following manner:

> "The answer to the above would be yes. **However, Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes - events, things, phenomena** (howsoever commonplace they may be), resources, actions or transactions, and the like - that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres **outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects** or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, only

> when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for:
>
> (a) the territory of India, or any part of India; or (b) the interests of, welfare of, well-being of, or security of inhabitants of India, and Indians."
>
> **(emphasis supplied)**

38. After upholding the validity, the Supreme Court examined whether the payment made by the appellant to NRC, Switzerland as 'success fee' would be deemed to be taxable in India under section 9(1)(vii) of the Income Tax Act. It is in this context that the Supreme Court observed:

> "28. Coming to the instant case, it is evident that fee which has been named as "success fee" by the assessee has been paid to the NRC. It is to be seen whether the payment made to the non-resident would be covered under the expression "fee for technical service" as contained in Explanation (2) to Section 9(1)(vii) of the Act. The said expression means any consideration, whether lump sum or periodical in rendering managerial, technical or consultancy services. It excludes consideration paid for any construction, assembling, mining or like projects undertaken by the non-resident that is the recipient or consideration which would be taxable in the hands of the non-recipient or non-resident under the head "salaries". In the case at hand, the said exceptions are not attracted.
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> *********
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> 37. As the factual matrix in the case at hand, would exposit the NRC had acted as a consultant. It had the skill, acumen and knowledge in the specialized field, i.e., preparation of a scheme for required finances and to tie-up required loans. The nature of activities undertaken by the NRC has earlier been referred to by us. **The nature of service referred by the NRC, can be said with certainty would come within the ambit and sweep of the term 'consultancy service' and, therefore, it has been rightly held that the tax at source should have been deducted as the amount paid as fee could be**

> **taxable under the head 'fee for technical service'.** Once the tax is payable the grant of 'No Objection Certificate' was not legally permissible. Ergo, the judgment and order passed by the High Court are absolutely impregnable."
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> **(emphasis supplied)**

39. The aforesaid judgment of the Supreme Court in **GVK Industries** would not be applicable to the facts of the present case. As noticed above, **GVK Industries** had hired a consultant called NRC, Switzerland to provide a range of services including advice on the financial structure and arranging financing for the projects to be executed in India. The consultant was paid a fee of 0.75% of the total debt financed. The contention of GVK was that tax was not required to be deducted on payments made to NRC, Switzerland since the consultant had no place of business in India and had provided all services from outside India and, therefore, income tax liability did not arise in India under the Income Tax Act.

40. It is not in dispute that the income of NRC, Switzerland did not accrue or arise in India. However, the Income Tax Department contended that as per section 5(2) read with section 9(1)(vii)(b) of the Income Tax Act, the income of NRC, Switzerland would be deemed to have accrued or arisen in India and hence, GVK Industries was liable to deduct tax. GVK India challenged the constitutional validity of section 9(1)(vii)(b) of the Income Tax Act on the ground of legislative competence. The Supreme Court held that the Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, within the territory of India, and also with respect to extra-territorial aspects or causes that have a nexus with India. It is in exercise of such a power that the Parliament had

enacted a deeming fiction under section 9(1) of the Income Tax Act. The Supreme Court found that since the services were provided by the consultant in relation to setting up a gas-based power project in Andhra Pradesh, there existed a territorial nexus with India and so relief was not granted to GVK Industries.

41. In the present case, there is no dispute regarding the competence of the Parliament to enact the law. The Finance Act levies tax on service provided or to be provided under section 65(105). Section 64 provides that the provisions extend to whole of India, except Jammu and Kashmir. Thus, the Parliament has chosen to levy tax only those services which are provided or to be provided in India and there is no deeming fiction treating extra-territorial transactions as taking place in India. The only issue in the present appeal is regarding the interpretation of the phrase 'such service is delivered outside India and used outside India' used in rule 3(2)(a) of the 2005 Export Rules from 19.04.2006 to 28.02.2007 and the phrase 'services provided from India and used outside India' used in rule 3(2)(a) of the 2005 Export Rules from 01.03.2007 onwards. Any reference to **GVK Industries,** which decision is based on a deeming fiction under section 9(1)(vii)(b) of the Income Tax Act is, therefore, misplaced.

42. Having extensively referred to the relevant provisions of the 2005 Export Rules, the decisions relied upon by the learned senior counsel for the appellant and the learned authorized representative appearing for the department and the Circular dated 24.02.2009, it would be appropriate to now answer the reference.

43. It needs to be remembered that service tax is a value added tax which is a destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the

consumer. Service tax is levied at the place where the service is consumed, rather than the place where it is provided. This is what was observed by the Supreme Court in **All India Fedn. of Tax Practitioners** vs. **Union of India**[17] and the relevant portions of the decision is reproduced below:

> **"6.** At this stage, we may refer to the concept of "Value Added Tax" (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.
>
> **7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based** consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax."

44. The concept that service tax is a destination based consumption tax is also in conformity with international practice in respect of value added taxes. Thus, in a destination based consumption tax, the tax is levied only at the place where the consumption takes place. It is for this reason that exports are not taxed and imports are taxed on same basis as domestic supplies.

45. The 2005 Export Rules were introduced to achieve the destination based consumption tax concept and so exemption is provided from payment of service tax to services exported out of India. The 2005 Export Rules set out various conditions for a service to qualify as export of service. Basically, the service recipient should be outside India; service should be provided from India and delivered outside India; and payment should be received in foreign currency.

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17. 2007 (7) STR 625 (S.C.)

46. Prior to 19.04.2006, under rule 3(3) of the 2005 Export Rules, the export of taxable service would mean, in relation to taxable services, such taxable services which have been provided and used in or in relation to commerce or industry and the recipient of such service is located outside India. For the period between 19.04.2006 and 01.03.2007, export of taxable service in relation to business or commerce, is the provision of such service to a recipient located outside India when such service is delivered outside India, and used outside India; and payment for such service provided outside India is received by the service provider in convertible foreign exchange. However, as the phrase 'delivered outside India' in rule 3(2)(a) did not provide clarity with respect to intangible services, this expression was replaced w.e.f. 01.03.2007 by 'is provided from India and used outside India'. The Circular dated 29.04.2009 issued by CBEC clarifies that the relevant factor is the location of the service receiver and not the place of performance and the phase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. The term 'used outside India', therefore, means that the service is provided to such a service recipient who is located outside India. It is the location of the service-recipient which determines where the service is used. The use of intangible services should be seen with respect to the location of the service recipient and not the place of performance.

47. In the present case, Arcelor India is a sub agent of Arcelor France which is an agent for the steel mills situated outside India. For procuring sale orders for the products manufactured by the foreign mills from customers in India, the requests of prospective customers identified by Arcelor India is forwarded to the foreign mills who,

thereafter, directly get in touch with the Indian customer to determine the terms and conditions and execute a contract after which the goods are supplied by the foreign mills directly to the Indian customers. For this provision of service, Arcelor India receives consideration from Arcelor France in convertible foreign exchange. Thus, there exists a relationship of service provider and service recipient between Arcelor India and Arcelor France.

48. A service recipient is a person who makes a request for a service, in exchange of a consideration. In fact, he is the person who is liable to pay for the services received. Service recipient is not a person who is affected by the performance of the service. The Finance Act does not define the term 'service recipient'. However the same has been clarified in the CBEC Education Guide as follows:

> "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."

49. It is, therefore, clear that the recipient of service is the person at whose desire the activity is done in exchange for a consideration, i.e., the person who is obliged to make payment for the service. The recipient of service would, therefore, be a person at whose instance and expense the service is provided, whether or not he is the beneficiary of the service.

50. Arcelor France and Arcelor India act as main agent and sub-agent for foreign mills and not as an agent or service provider for the customers in India. There is no contractual relationship between Arcelor India and the customers in India. Therefore, even though the

goods in the form of steel products are being supplied to customers in India, the actual recipient of BAS provided by Arcelor India is Arcelor France. Arcelor France has used the services of Arcelor India to provide services as main agents to the mills located outside India.

51. The reasoning adopted by the department is that the services of commission agent were used in India to cater to the Indian markets. It is not possible to accept this reasoning of the department. The Circular dated 24.02.2009 also categorically states that for the services to fall under rule 3(1)(iii) of the 2005 Export Rules, the relevant factor is the location of the service receiver. In other words, the place of performance of the service or the place where the customers of the service receiver are located is irrelevant.

52. As noticed above, it was the consistent view of the High Courts and the Tribunal that export of service would take place under rule 3(1)(iii) of the 2005 Export Rules if a person residing in India provides a service to a foreign entity to enable it to book orders for customers in India. This is for the reason that the foreign entity is located outside India and the payment is received by the person residing in India in convertible foreign exchange.

53. The division bench, while making the reference, intended to deviate from this settled position of law only because, in its considered view, the decision of the Supreme Court in **GVK Industries**. The division bench, after recording a finding that there was no dispute that Arcelor India was providing BAS to Arcelor France, noted that the dispute was only as to whether the service rendered by Arcelor India will qualify as export of service in terms of the 2005 Export Rules. The division bench concluded that since the services provided to Arcelor France was for developing its business in

India, the services received by Arcelor France, even though it is located outside India, would be in relation to business activities in India in view of the decision of the Supreme Court in **GVK Industries**. Reliance placed by the division bench on **GVK Industries,** as noticed above, is misplaced. The decision of Supreme Court in **GVK Industries** is based on an interpretation of Explanation (2) to section 9(1)(vii)(b) of the Income Tax Act, under which the income is deemed to have accrued in India. The Finance Act and the 2005 Export Rules do not contain a provision providing a deeming fiction. The distinguishing features of the decision of the Supreme Court in **GVK Industries** have been pointed in the earlier paragraphs of this order. The decision of the Supreme Court in **GVK Industries**, therefore, cannot be applied to the facts of the present case.

54. The four issues raised in the reference order have been dealt with extensively and as they are intermingled, the reference is answered in the following manner:

(i) Arcelor India, a service provider, is providing BAS service to Arcelor France, which is a service recipient. Arcelor India is, therefore, providing service to Arcelor France which is situated outside India and Arcelor India receives consideration in convertible foreign exchange. The service provided by Arcelor India is, therefore, delivered outside India and used outside India as is the requirement under the 2005 Export Rules prior to 01.03.2007 and Arcelor India provides services from India which are used outside India as is the requirement after 01.03.2007. It cannot, therefore, be doubted that Arcelor India provides 'export of service' as contemplated under rule 3 of the 2005 Export Rules; and

(ii) Arcelor France is an agent of the foreign steel mills and Arcelor India is its sub-agent. Arcelor India provides the necessary details of the customers in India to the foreign steel mills and, thereafter, the foreign steel mills and the Indian customers execute a contract for supply of the goods. The goods are directly supplied by the foreign steel mills to the Indian customers. Arcelor India also satisfies condition (b) of rule 3(2) as payments for such service have been received in convertible foreign exchange.

55. The appeal may now be listed for hearing before the division bench.

(Order pronounced on **09.06.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.J. MATHEW)
MEMBER (TECHNICAL)

(P.A. AUGUSTIAN)
MEMBER (JUDICIAL)

Shreya, JB