

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 20430 of 2021

(Arising out of Order-in-Original No. MLR-EXCUS-000-COM-IA-16-2020-21 dated 26.02.2021 passed by the Commissioner of Central Excise and Central Tax (GST), Mangalore.)

M/s. Onmobile Global Ltd.

Tower – 1, 94/1C and 94/2 Veerasandra,
Attibele Hobli, Anekal Taluk,
Electronic City, Phase I,
Bangalore – 560 100.

Appellant(s)

VERSUS

**The Commissioner of Central Excise
and Central Tax**

Mangalore Commissionerate, Trade Centre
Bunts Hostel Road,
Mangalore – 575 003.

Respondent(s)

WITH

- (i) Service Tax Appeal No.20434 of 2021 (Mr. Rajiv Pancholy, Managing Director and Chief Executive Officer vs. Commissioner of Central Excise and Central Tax)**
- (ii) Service Tax Appeal No.20435 of 2021 (Mr. Praveen Kumar K.J, Chief Financial Officer vs. Commissioner of Central Excise and Central Tax)**
- (iii) Service Tax Appeal No. 20436 of 2021 (Sasikiran N, Senior Manager - Taxation vs. Commissioner of Central Excise and Central Tax)**

(Arising out of common Order-in-Original No. MLR-EXCUS-000-COM-IA-16-2020-21 dated 26.02.2021 passed by the Commissioner of Central Excise and Central Tax (GST), Mangalore.)

APPEARANCE:

Shri G. Shivadass, Sr. Advocate for the Appellant

Shri P.R.V. Ramanan, Special Counsel (AR) for the Respondent

**CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER
(TECHNICAL)**

FINAL ORDER NO. 21019 - 21022 / 2025

DATE OF HEARING: 27.01.2025

DATE OF DECISION: 18.07.2025

PER: R. BHAGYA DEVI

This appeal is filed by the appellant M/s. OnMobile Global Limited against Order-in-Original No. 16-2020-21 dated 26.02.2021 passed by the Commissioner of Central Excise and Central Tax, Mangaluru.

2. Briefly the facts are that the appellant is engaged in the business of providing certain 'Mobile Value-Added Services' (MVAS) to telephone service providers located in India and outside India and are registered for providing online information and database access services and retrieval services, business auxiliary services, GTA services, etc. The MVAS services are ring back tone services (RBT), missed call alert solutions, interactive voice response solutions, SMS and data access services for infotainment (news, cricket scores, horoscope, etc.,). On investigation, it was noticed that the appellant had not paid service tax on Online Information and Database Access or Retrieval (OIDAR) services provided by them from their Bangalore office to their customers located outside India, accordingly, show-cause notice dated 29.12.2017 was issued. After detailed analysis, the demand of Rs.99,95,26,779/- for the period 01.07.2012 to 31.07.2016 was confirmed along with interest and various penalties were imposed. Further, statement of demand dated 22.04.2019 was also issued based on which demand of Rs.4,71,18,400/- for the period 01.08.2016 to

30.11.2016 was confirmed in respect of the services provided to the customers located outside India and located in Jammu and Kashmir along with interest and penalty under Section 76 was imposed. Aggrieved by this order, the appellant is in appeal before us.

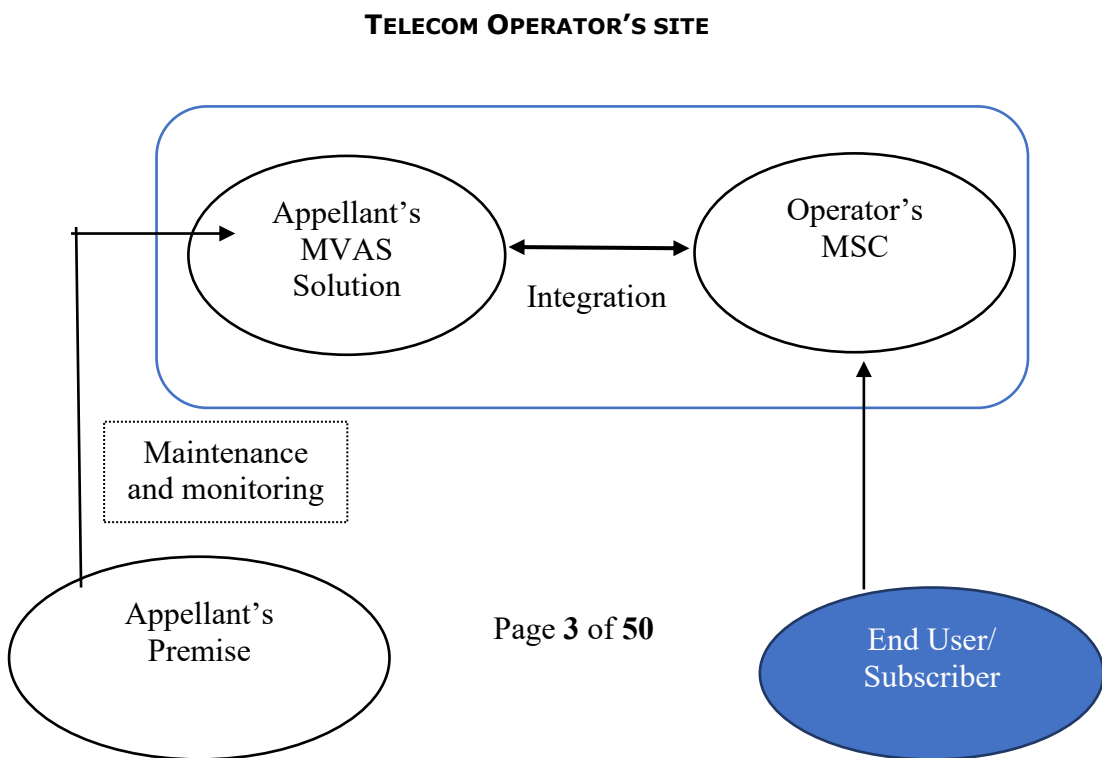
3. The learned Sr. Counsel explains the procedure undertaken by the appellant in terms of a flow chart.

STEP-1-Procurement of Content- The content is procured from a third party either by the Appellant or the telecom operator.

STEP-2-Uploading of content on the server of the Appellant for modification- The procured content will be uploaded by the Appellant on to the platform and requisite modifications to the format of the content are made for the provision of the services.

STEP-3- Ingesting the content onto the Hardware located at telecom operators premises- The modified content is then integrated using the software into the hardware at the telecom operators premises.

STEP-4- Playing of RBT when a caller calls the subscriber- When a caller calls a subscriber of RBT services, it will be connected to the MSC of the telecom operator and upon verification, the caller will hear the ring tone, which is available in the hardware located at telecom operators premise.



4. It is submitted that the contents would remain inaccessible till they are subscribed to by the end-user, it is only when the subscriber opts for any particular ring back tone, that would result in access of the said ring tone and then the telecom operator and the Appellant would share the Revenue. The Mobile Value Added Services (MVAS) platform, which has both software and hardware is monitored by the Global Support and Operations Centre (GSOC) of the Appellant and monitors the network and carries out trouble shooting activities and errors generated in the system and also errors faced by the end-user is redirected by the telecom operator to the Appellant for fixing the same and upon resolution is communicated by the telecom operator to the end-user.

5. The Appellant provides the services to the telecom operators outside India in the following manner:

Directly by appellant- Appellant enters into agreement with the telecom operator and provides services as per the terms of the Agreement and the invoice is raised directly by the Appellant

Through branch offices- The Agreement is entered into between the Appellants' overseas Branch office and the telecom operator. The invoice is raised by the branch office and the applicable taxes are discharged by the branch office as per the applicable laws of that country.

Through a Subsidiary Company incorporated in the respective Countries- The Appellant provides technology and support services such as Administrative, accounting, IT support, services, etc., to the subsidiary company by way of a transfer pricing agreement. The subsidiary company enters into an

agreement with the telecom operator and provides the services and raised invoice for the same. Expenses incurred by the subsidiaries is recovered by the Appellant from the subsidiaries on a cost-to-cost basis.

It is further stated that apart from the service fee, the Appellant also recovers certain reimbursements from its subsidiaries / branch offices which are towards expenses incurred by the Appellant on behalf of the overseas subsidiaries and overseas branch offices. These reimbursements are recovered in terms of the following agreements are undertaken:

- a. Market access fee agreement: At the time of setting up, for making available the necessary funds to the subsidiary, the Appellant makes payment(s) for and on behalf of such subsidiary. Such payments include one-time payments for the purposes of obtaining exclusive market rights to undertake MVAS service for telecom operator and certain other expenses. These expenses are cross charged by the Appellant on actual basis. The actual amortization of such fees is recovered by the Appellant from the subsidiaries on a cost basis.
- b. Administrative Services Agreement: The Appellant provides certain administrative support services to its overseas subsidiaries including accounting, procurement, legal, administrative, administration of human resources, strategic planning and methodology for undertaking business operations etc. The Appellant cross charges all expenses incurred for and on behalf of such subsidiary on actuals and claims reimbursement of the same from its subsidiary on a cost basis.

6. The Appellant entered into an agreement with Unitel S.A., who is a telecom operator outside India, to whom Value Added Services are provided. The extract of the relevant clauses of the agreement between the Appellant and Unitel S.A. is extracted below:

C. Customer is desirous of providing various classes of certain value added solutions to its Users (as defined below);

D. OnMobile and Customer are desirous of deploying the Solution on Customer's network....

3. SOLUTION ACCESS AND PERMITTED USE

3.1

3.2OnMobile hereby provides Customer with a royalty free, temporary, limited, non-exclusive, non-transferable, non-sub-licensable, non-delegate and conditional right to use the Solution for the sole purpose of providing Customer Services to its Users within the Territory.

7. The Appellant has also undertaken an agreement with Mobizone S.r.l. for provision of Value-Added Services (VAS) to WIND Telecomunicazioni, Italy and under the said agreement, they have agreed to be a technology and platform partner to Mobizone in providing VAS Solutions to WIND and is required to install the hardware and software required for VAS solutions at the premises of WIND. It is Mobizone's responsibility to fulfil all the content related obligations and to ensure free and safe access to such content by the Appellant. The consideration under the said agreement is in the form of revenue-sharing. It is further submitted that the Appellant being a technology infrastructure provider, there is no form of access or retrieval of the database/information made available by them. There is no

download of content, or any access of the content by the customers. The Appellant merely provides the software to the telecom operator who then renders the ring back tone to the end-users. For the purpose of provision of OIDAR services, the customer ought to be able to download the content. However, the customer cannot download the content from the platform. The telecom operator is required to deploy the mobile exchange for integration with the MVAS solution software for the customer to be able to access the MVAS services.

8. That the MVAS platform is a software which is deployed as the telecom operator's site and thereafter, integrated with the end customer's network. The hardware for the purpose of such deployment, is provided by the Appellant. The content herein is procured from third party content providers either by the Appellant or by the telecom operators. The same is delivered directly to the Appellant's server and the same is thereafter integrated with the MVAS platform. That the primary intention of the Appellant is provide ITSS. The other activities of procuring the content, integration of the same with the MVAS platform and further management, are ancillary to the MVAS platform services. The said services are provided as a package with the MVAS platform services and are naturally bundled in nature. The agreements entered into between the Appellant and various telecom operators incorporate clauses indicating that the services undertaken by the Appellant is provision of data. The main provider of services is the Appellant Companies server Atlantis, which integrates with the telecom operator's hardware, which is mostly linked with the storage of data rather than execution of programs with a tone player. As per the operating model of the Appellant, manner of invoicing and staff deployment, the services undertaken by the Appellant

towards telecom operators in India and abroad, qualify as OIDAR services. Considering the common interpretation and the details provided in the website of the Appellant, it was evident that the appellant is involved in the provision of content which may or may not be customized, classifying the said service under OIDAR services. The place of provision of the services is in India, owing to the presence of infrastructure developed for the purpose of monitoring the said services rendered to telecom operators. Therefore, for the services provided to telecom operators abroad and to Jammu and Kashmir, the same will be taxable under OIDAR services.

9. The Appellant submits that the definition of 'Information Technology Software Service' (ITSS) was introduced in the Finance Act, 1994 by way of an insertion made to Section 65(53a) in 2008. It is submitted that vide Letter D.O.F. No. 334/1/2008-TRU dated 29-2-2008, clarifications were provided by the CBEC with respect to 'ITSS', wherein it was specifically indicated that the said category of service includes adaptation, upgradation, enhancement, implementation and other similar services in relation to IT software. The Appellant submits that they provide subscription to MVAS through their software platform, wherein the content is uploaded onto the hardware available at the location of telecom operators. This is integrated with the software of the Appellant which aids in fetching and playing the RBT subscribed by the end-user whenever there is a call made to such subscriber. The Customer, i.e., the Telecom Operator is given the right to use the software in accordance with the terms of the agreement. Hence, the services provided is mainly that of provision of software which enables the provision of MVAS services and therefore, the same constitutes a service in the nature of ITSS. In this regard, the Appellant places

reliance on the decision in the case of **Innodata India Pvt. Ltd. vs. Commissioner of Central Tax, GST and Central Excise: (2024) 17 Centax 331 (Tri. – All)** wherein it was held that the services in the nature of data conversion services and IT enabled services provided by the Appellant fall under 'Business Support Services' and not under OIDAR. The relevant extract of the finding is reproduced below:

*"17. It is noted that using the internet, or some other electronic means of communication just to communicate processed data to the supplier and the owner of raw data/content does not mean that a business is providing **OIDAR services**. The suppliers/owners of raw data/content have all the rights to title, intellectual property rights and copy rights over the data before and after processing/digitization of data. The Appellant has no title or ownership over the processed data for being used over the internet for their business. OIDAR services as clarified by the CBEC in the Education Guide for Taxation of services on 20.06.2012 in Guidance Note 5.9.5 covers services which are automatically delivered over the internet or an electronic network where there is minimal, or no human intervention. In practice this can be: (i) where the provision of the digital content is entirely automatic, e.g. a consumer clicks the 'By Now' button on a website and thereupon the content may be downloaded on to consumer's device, or the consumer receives an automated e-mail containing the content, and small amount of manual process is only permitted.*

18. We find that Appellant has not maintained any website or electronic network to provide services which are essentially automated or involving minimal human intervention for public in exchange for any consideration. The Appellant is providing digitized, abstracted and indexed data out of raw data received from third parties using the internet or electronic means of communication just to communicate resultant digitized or converted data, which are input services for their customers

who may utilize the data for providing services under the category of OIDAR service (main service) by putting them on the internet for public/clients or for their personal use. The services rendered by appellant are therefore broadly covered under the category of Business support services or telecommunication services using tools of information technology, and shall not be covered under the category of OIDAR services."

10. The Appellant further submits that in the case of **L.M.L. Ltd vs. Commissioner of Customs** reported at **2010 (258) E.L.T. 321 (S.C.)**, the definition of software was analyzed to say that a software is a set of instructions, which renders the hardware functioning in a particular manner. In the present case also, the server containing the data pushes the content to the hardware located at the premises of the telecom operator and this content is accessed by using a software which has been developed by the Appellant and hence, the service provided by the Appellant is in the nature of 'ITSS'. Further, the Appellant submits that even the contract between the Appellant and the overseas telecom operator clearly indicates that the MVAS solution is actually a software application which enables the telecom operators to provide the MVAS to its end-users and the Appellant's service is specifically in relation to licensing of the software, its integration and customization to successfully deploy it on to the telecom operators network such that they are able to provide the value added services to its subscribers. Further, in certain contracts, the Appellant merely provides the platform and the content is either procured by the Telecom operator or any other service provider and the Appellant merely receives the data, undertakes necessary changes in the formatting and ingests the data onto the hardware maintained at telecom operators premises. Further, it is submitted that the as per

Section 66F of the Finance Act, 1994 provides that where number of services are bundled together, then the principal service, which gives the essential character to such bundled service will be the service which is deemed to be provided and the tax liability will be determined accordingly. In the present case, the Appellant mainly provides a software which establishes and maintains the technology infrastructure enabling the telecom operators to provide the RBT value added services to its end-user.

11. The Appellant referring to the definition of OIDAR services and the Instruction F.No. B.11/1/2001-TRU dated 09.07.2001 contends that inter-connectivity services provided by the one ISP to another ISP and the charged recovered from such services would not be subject to service tax and qualify as OIDAR services. The Appellant further submits that Circular No.54/3/2003-ST dated 21.04.2003 clarified that the Internet Telephony service, i.e., the transmission of two-way voice communication through a medium of internet would fall under the category of OIDAR services which was subsequently withdrawn by the Department vide Circular No.93/04/2007-S.T dated 10.05.2007. He also relied on the Service Tax Education Guide to state that the Appellant merely provides a software wherein the content is uploaded by a third party or the telecom operator or by the Appellant in very few cases, where the Agreement provides so.

12. The definition of OIDAR underwent a significant change vide Notification No.48/2016-S.T. dated 09.11.2016 to include various other types of services and the Circular No.202/12/2016-S.T. dated 9.11.2016, wherein it was stated that using the internet, or some electronic means of communication, just to

communicate or facilitate outcome of service does not always mean that a business is providing OIDAR services. In the facts of the present case, it is the telecom operator who provides the service to the subscriber and not the Appellant, as the Appellant merely provides a platform for provision of MVAS. In this regard, the Appellant places reliance on the following cases:

- **Philips Electronics India Ltd. Versus Commissioner Of S.T., Chennai: 2019 (21) G.S.T.L. 450 (Tri. - Chennai)**
- **State Bank of India v Commissioner of Service Tax, Mumbai-II reported at 2015 (37) S.T.R. 340 (Tri. - Mumbai)**
- **PVR Ltd. v. Commissioner of Service Tax, New Delhi 2021 (55) G.S.T.L. 435 (Tri-Del.)**
- **Globolive 3D Pvt. Ltd. v. Union of India & Ors., (2023) 117 GSTR 380**
- **M/s Focus Edu Care P. Ltd. v. The Principal Commissioner of Service Tax, 2024-VIL-1234-CESTAT-BLR-ST**
- **Trivedillc Marketing Pvt. Ltd. v. Commissioner of CGST & Central Excise, Bhopal 2024-VIL-1417-CESTAT-DEL-ST**
- **Toyota Kirloskar Auto Parts Pvt., Ltd vs. Commissioner of Central Excise, Customs and Service Tax Bangalore LTU, 2024-VIL-1750-CESTAT-BLR-ST**

13. The Appellant submits that the services provided outside India are out of the purview of taxability of the Finance Act, 1994 and therefore, cannot be subject to service tax. As per Section 66B of the Finance Act, 2012, for a service to be taxable under service tax, the same should have been provided in the taxable territory by one person to the other. The Place of Provision of Services Rules, 2012 ("PoPS Rules") Rule 3 of the PoPS Rules, the place of provision of service shall be the location of the recipient of service. The Appellant submits that Rule 9 of the PoPS Rules, which is applicable for the period under consideration, provided that the place of provision of service for OIDAR services will be the location of provider of services. Since the agreement for provision of

services is entered by the Subsidiary located in non-taxable territory with the Telecom operator and the invoices were issued by the overseas subsidiary, indicates that services were provided by that location. The Appellant, hence, submits that the services if construed to be in the nature of OIDAR, the place of provision of such service and the provider of said service will be both outside the taxable territory and the same cannot be subjected to Service tax in the hands of the Appellant. Further, it is submitted that as per the agreement between the Appellant and the overseas company, the Appellant shall provide the technology and business expertise to the subsidiary company and the same is used by the subsidiary company to further provide the services to the telecom operators on its own account. Therefore, it is submitted that the services which are provided by the Appellant for which consideration is received at arm's length pricing is for provision of ITSS services and not OIDAR and the place of provision for such ITSS services is determinable in terms of Rule 3 of the PoPS Rules, which is the location of subsidiary company and hence, the services are in the nature of export of services.

14. It is submitted that the Appellant has set up various branch offices overseas in order to provide seamless services to the telecom operators and to comply with the local laws of the respective countries. It is further submitted that for the services discharged by the said branch offices, requisite taxes are paid by them in their respective countries and no consideration is received by the Appellant from the branch offices. Hence, by applying the analogy as indicated above, OIDAR services, if any, is being provided by the branch offices and the place of provision such services will be the location of

the branch, which is non-taxable territory. In view of the above, it is submitted that the service provider being the respective branch offices and recipient for transactions which come under the aforementioned similar agreements are both located outside India i.e. non-taxable territory, therefore placing them outside the purview of the provisions of the Finance Act, 1994.

15. It was submitted that under the Finance Act, 1994 any activity shall qualify as a 'service' and liable to service tax only if such activity is undertaken by one person for the other for a consideration within the taxable territory and as these provisions are not applicable to the State of Jammu and Kashmir, and therefore, the place of provision of service in the present case shall be outside the taxable territory. Therefore, there shall not be any levy of service tax as the same would qualify as 'exempt service.'

16. The Appellant submits that prior to 2012, the services provided outside India was governed by the Export of Services Rules, 2005. As per the said provision, taxable services provided to a recipient outside India shall be considered as an export of service which were replaced by the PoPS Rules and 'export of services' was subsequently inserted and defined by the Service Tax Rules. Reliance is placed on **Principal Commissioner Of C. Ex., Pune-I v. Advinus Therapeutics Ltd 2017 (51) S.T.R. 298 (Tri. - Mumbai)**, wherein it was made clear that the intention of the legislation was never to deviate themselves from the foundational understanding of what qualifies as an export of service. Therefore, it is submitted that when the understanding and intent of the phrase 'export of services' remained the same throughout the

various enactments, a different interpretation cannot be made applicable to the case of the Appellant. Since the service rendered were outside the taxable territory, the Appellant has rightfully considered the same as 'export of services'.

17. The Appellant further submits that they have entered into a Market Access Agreement with its overseas subsidiaries under which the Appellant incurs various expenses on behalf of the subsidiaries, claimed as 'reimbursement' without any markup. Additionally, the Appellant has entered into an Administrative Services Agreement with its overseas group companies which include accounting, procurement, legal, administration, human resources, IT support, strategic planning, etc. and these expenses are recovered by the Appellant on actuals from the subsidiaries and such reimbursements cannot form part of the value. The Appellant submits that Section 67 of the Finance Act, 1944 which provides for the method of valuation of the taxable services for determination of the services tax was amended in 2015 vide Finance Act, 2015, w.e.f 14.05.2015 wherein the explanation for 'consideration' was amended and same read as follows –

(a) **"consideration"** includes-

- (i) any amount that is payable for the taxable services provided or to be provided;
- (ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;
- (iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee

or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.'

It is submitted that after the 2015 amendment, consideration was to include the reimbursement of expenditure or cost incurred by the service provider. But prior to 14.05.2015, reimbursement of expenditure or cost incurred by the service provider was excluded from the definition of 'consideration'. Therefore, for the period in question, i.e., from 01.07.2012 till 14.05.2015 there cannot not be any service tax on reimbursable expenses claimed as Section 67 of the Act did not provide for such an inclusion. Relies on **Intercontinental Consultants & Technocrats Pvt. Ltd. Versus Union of India: 2013 (029) STR 0009 (Del.)** and **UOI vs Intercontinental Consultants and Technocrats Pvt. Ltd.: 2018 (10) GSTL 401 (SC)**

18. The learned Sr. Counsel submitted that Appellant are engaged in rendering certain professional services like software development to its subsidiaries, licensing of software for royalty which are completely unrelated to the MVAS solution / ring back tone service provided by the Appellant to the telecom operators. The Appellant submits that as per the break-up of the service tax levied on the Appellant provided by the Respondent, it is evident that out of the demand of Rs. 104,66,45,179/-, only Rs. 17,10,78,097.63/- shall be liable to be discharged by the Appellant.

19. With regard to limitation, it is submitted that as per Section 73(1) of the Finance Act, 1944, the longer period of limitation is invocable only in cases where there is fraud, collusion or any wilful misstatement or suppression of facts on

the part of the Appellant. The Appellant submits that it was under a *bona fide* belief that they are not required to discharge service tax for services provided to telecom operators outside the country since the same are outside the taxable territory. Further, the services provided by the foreign branches and subsidiaries of the Appellant cannot be taxed at the hands of the Appellant since requisite tax have been discharged by the said offices in the respective countries. Therefore, it cannot be alleged that there was an element of fraud, collusion or any willful misstatement with the intent to evade payment of tax. With regard to this submission, they relied on the following decisions:

- **Pushpam Pharmaceuticals Company vs. Commissioner of Central Excise, Bombay: 1995 (78) ELT 401 (SC)**
- **Commissioner of Central Excise, Mumbai-III v. Essel Propack Ltd., 2015 (323) E.L.T. 248 (S.C.)**
- **Commissioner of Central Excise, Mumbai v. S. Narendra Kumar & Co., 2011 (267) E.L.T. 577 (S.C.)**

20. The Special Counsel on behalf of the Revenue makes the following submissions:

20.1. Appellant has its offices in Bengaluru, Mangaluru and other parts of India and is centrally registered with their Mangaluru based office and engaged in providing Taxable Service viz., 'Online Information & Database Access or Retrieval Services' to their customers located in India & Outside India. They have established a Global Network Operations Centre to capture the continuous Transaction (24X7) done by their customers and monthly Billing is raised to respective Customers, located in India and Outside India. Appellant is having branch offices in Countries like Bangladesh, South Africa, Malaysia, Spain etc., who co-ordinate with the local customer/Telecom Operator and enters into an Agreement For providing services and Invoice is raised,

after getting inputs from Bengaluru Reporting System office. Since the stated Outside India Customer wish to pay in Local Currency, the Appellant's stationed Local Branch office raises the Invoice to collect the Service charges. However, in respect of Country like Qatar, Malaysia, Angola etc., the Invoice is raised by Bengaluru Reporting System office to their customers based abroad.

20.2. Based on intelligence, DGGST began investigation of the services rendered by appellant since the introduction of the new Service Tax regime in the year 2012, when the POPS 2012 was introduced. It was found that in terms of Rule 9 of POPS 2012 read with Rule 6A of Service Tax Rules 1994, the OIDAR services rendered by appellant were taxable services and duty ought to have been paid by appellant, from July,2012 onwards, even where the services were availed of by customers abroad.

20.3. Referring to the statement dated 9/6/2016 by Shri Sasikiran, Manager, Taxation of appellant which were endorsed by Shri. Praveen Kumar. K.J, Chief Financial Officer of appellant in his statement dated 17/10/2016 and Shri V. A. Joji, AVP-Technology Solutions of appellant in his statement dated 16.06.2016, it is submitted that the nature of services rendered by the appellant emerges as follows:

- Basically, appellant provides the content to the customer through an on-line information and data access platform. The services rendered are generally called 'Mobile Value-Added services' (MVAS) or MVAS solutions.
- MVAS rendered by appellant includes providing, caller ring-back tone services, missed call alert solutions, IVR solutions, SMS, data access services for infotainment (news, jokes, horoscopes, games and sports updates etc.)

- appellant has its own on-line platform comprising Servers, Racks (memory devices), colour graphic cards etc., which are integrated with the network of Telecom operators by establishing connectivity thro' satellite links.
- Through this connectivity appellant provides the above services on real- time basis to the customers of / subscribers of the concerned telecom operators whether within or outside India.
- The number of accesses by the customers is captured by a billing Software tool and invoices are based on the same. The data is retrieved, consolidated and the bills are generated by the Bangalore Office of appellant.
- It is the responsibility of appellant to procure, maintain and operate the on-line platform with the required digital contents to be deployed.
- The contents (i.e. songs, ring tone music, horoscope related contents, sports-game related contents etc.) are stored in the servers and are accessible through their on-line real time platform to the telecom operators and customers.
- Appellant also deploys hardware and software which are connected to the telephone operator network.
- Appellant has a Global Network Operations Centre [GNOC] at Bangalore which manages the day-to-day operations of the on-line platforms deployed by OFL.
- It is connected on-line (24/7) to all the customer sites via communication lines i.e. leased lines, MPLS or internet bandwidth via VPN.
- By way of illustration, it may be stated that whenever the end customer (mobile user), who has opted for RBT (Ring

Back Tone), receives a call, the telecom operator sends a service signal to the RBT system of appellant and the system plays the song selected by the mobile user and this song can be heard by the person who is making the call. Each time the subscribed person receives a call, the calling party will hear the song which is accessed from their RBT system, on a real time basis. In a similar way, other services are also provided by appellant from their On-line Platform on a real time basis for access by the customer who has opted for the respective services with their telecom operators.

- The GNOC of appellant manages and executes operations like, Online monitoring of the MVAS, Reporting platform and Content distribution platform etc.
- On line monitoring is meant to monitor 24/7 any of the alarms or errors that arise in the on-line system and to resolve the issues.
- Reporting platform is meant to process the transaction data transferred by the telecom operators through the network on a daily basis for reporting and revenue monitoring purpose. Based on this data invoices are raised by appellant.
- Content distribution platform deals with the contents such as music, customized RBT, jokes, horoscopes, games, news-updates etc. These contents are procured or created by appellant or right to use is obtained by them.
- Appellant physically ingest the contents from the sources and carry out the necessary modifications in its Lab/Studios in Bengaluru, to enable them to be played on the telecom networks. These contents are then stored in the content management servers in Bengaluru which are the

shared via the communication lines to the respective operator locations in India or abroad, as per requirements. Whenever the subscribed customer accesses the contents, it is retrieved from the on-line system deployed at the customer site.

- Once the contents are procured and made ready for telecom access, the same are continuously stored and maintained in the content management servers. These contents get shared/distributed/pushed to the customers' sites as per the content agreements making them available for on-line access by the customers.
- In general, the services provided to Customers, i.e., telecom operators in India and foreign countries is the same with an exception in respect of services provided by the wholly owned services of appellant.

20.4. Appellant also vide letter dated 22/8/2016 projected that they appellant offer is a mix of hardware and software deployed at the customers' location which is used by the telecom operators and that the solution offered by appellant is not in the nature of OIDAR services. RBT service is provided by the overseas Customers to the end-users not by appellant. This write-up further states that the MVAS is in the nature of ITSS. However, from the excerpts from the web-site of appellant, it shows that they provide various types of contents e.g. music, games, sports, news, video platform, Fun trivia for games for mobile users, including sound solutions. From the processes involved in providing MVAS, it is clear that:

- (i) Appellant is providing data and various content to the customers through their on-line platform.
- (ii) The content is stored and maintained in appellant/s content Management servers.

- (iii) The content can be retrieved/accessed automatically without any manual intervention.
- (iv) appellant provides MVAS to the telecom operators and the consideration for such services are paid by the operators.
- (v) MVAS is provided in electronic form for access, retrieval or streaming through the electronic computer networks and gateways
- (vi) MVAS is not in the nature of telecom services; it is not related to sale of goods over internet, nor is it services rendered over internet or internet back bone/access services.
- (vii) The objective of MVAS is to provide access to and retrieval of the aforesaid content from an on-line platform set up, managed and maintained by appellant.

20.5. It has been stated that in the present case, appellant provides the software platform along with the content uploaded onto it by a third party or the telecom operator themselves, giving the telecom operator the right to use it in accordance with their agreement. Para B.14 of the Appeal Memo refers in this context. Further, it is stated that the content is merely ancillary to the MVAS solution. The main ground for advancing the argument that the services rendered by appellant to telecom operators is ITSS is that such operators get only a licence to use IT software for commercial exploitation from appellant. Also, it is stated that the service rendered is adaptation, upgradation, enhancement, implementation and other similar services in relation to IT software. It is submitted that the aforesaid line of argument lacks force since it is totally contrary to the factual position. Firstly, without content, the basic objective of mobile value-added services cannot be met. Use of hardware and

application software would be necessary since there is the use of electronic communication medium, but it is not the primary function of MVAS. The solution provided is essentially a composite solution where content is primary and software is ancillary to it. Software provides the key but the solution provided comprises in the main, storage, maintenance and management of content, which is accessed by using the appellant's MVAS platform. Secondly, adaptation, upgradation, enhancement, implementation and other similar services in relation to IT software refers obviously to an existing application software. It does not cover proprietary software loaded in APPELLANT's own hardware and located in the premises of operators for the use of the operators. Thirdly, this is not a case where appellant is merely 'providing the right to use, IT software for commercial exploitation" and collecting a licence fee. The services rendered include provision of content and other technical services. This clause is not applicable to the present case. The MVAS solution of appellant is not merely analysis, designing and programming of software or and implementation thereof. Integral to the solution is provision of content. For, if MVAS is only an IT software service, where is the need for the content management platform and the huge infrastructure comprising content management servers at Bengaluru. It cannot be denied that only content storage, maintenance and retrieval thereof gives identity to MVAS and the software residing in the hardware is only a tool. Hence, MVAS solutions rendered by appellant do not qualify as an ITSS.

20.6. Prior to July 2012, OIDAR services were defined under clause (75) of Section 65. After July 2012, the same definition is adopted under Rule 2 (I) of POPS Rules 2012 and reads as follows:

“online information and database access or retrieval services” means providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network”.

The definition predicates 4 characteristics of OIDAR. They are,

- (a) The services should provide data or information to any person.
- (b) The data or information should be retrievable or otherwise.
- (c) The data/information should be in electronic form.
- (d) The provision of data/information should be through computer network.

20.7 The content provided by appellant is a representation of information or facts or concepts as the content provided is RBT, jokes, horoscopes, games, sports or news updates. Information includes data, message, text, images, sound, voice, codes, computer programmes, etc. Hence, the content gets covered under data or information. The content is retrievable and can be accessed through the on-line platform of appellant. Further, MVAS are actually provision of content on subscription. The main provider of the content is appellant's Server, 'Atlantis' which integrates with the hardware of the telecom operators. The hardware provided by appellant is primarily used for storage rather than execution of programs with a tone player. Thus, characteristics as at (b) to (d) are also met. Viewed from the angle of invoicing, staff deployment, common understanding of provision of content, and website content as well the services rendered by appellant get covered by the definition of OIDAR.

21. As per Para 5.9.5 of the Education Guide 'OIDAR' services are services in relation to on-line information and data base access or retrieval or both, in electronic form through computer network, in any manner. These services are essentially delivered over the internet or an electronic network which relies on the

internet or similar network for their provision. The other important feature of these services is that they are completely automated and require minimal human intervention. The requirements stated above are fully met in the present case as the services rendered by appellant, viz. provision of proprietary s/w on hardware, for enabling access and charging per access network integration and management and provision of content, are certainly in relation to on-line information and access. In sum, therefore, the MVAS solutions rendered by appellant to telecom operators both within the country and abroad are squarely covered by the definition of OIDAR services.

21.1. Appellant has been describing the services i.e. MVAS solutions rendered by them under OIDAR since 2008. Copies of the ST-3s filed by them for the periods from 2007-2008 to 2015-2016, On MVAS services rendered to local customers appellant had been paying Service Tax under the head of OIDAR. No dispute has been raised by appellant in this context. However, they claimed that similar services provided to the Customers located outside India were covered under 'Export of Service'. Hence, no S Tax was paid by them on such services from July 2012 after the introduction of the 'negative List' regime. Only in the ST-3 for April-September, 2016 they described for the first time that the MVAS solutions i.e. OIDAR services, as 'Other Services' deviating from the past practice of description of services adopted by them from 2008. The revised description as above was adopted admittedly after the investigation was commenced by the DGGST in April 2016. ST-3 Return for 4/2016 to 9/2016 was, however, filed only on 22/1/2017, i.e. much beyond the due date. Shri. Sasikiran and Joji, concerned employees of appellant, both averred that the MVAS solutions provided by appellant were of the nature of OIDAR services as

the content provided by the solutions through the on-line platform of appellant were accessed by the customers of appellant through the communication/computer network. Apparently, this was the reason for describing the services rendered by appellant as OIDAR services in the ST-3 Returns. This practice was in vogue from 2008 to 2017. Appellant has not provided any sound reason for a change in this practice. In any case, the description in the ST3 cannot be revised retrospectively. Furthermore, for the same services, one rendered for domestic customers and another for foreign customers, divergent classifications or descriptions is not justified.

21.2. The content that may reside in the MVAS hardware of appellant, which is accessed through the s/w platform is not a one-time arrangement. It is not a stand-alone arrangement either. For RBT as well as other contents, requirements would be dynamic and for that purpose, accessing the CMS at Bengaluru which stores the contents, on real-time and 24/7 basis is inevitable. Thus, through the CMS, OIDAR services is provided to various Customers on continuous basis and MVAS platform at various locations would undergo changes almost continuously. It would not be appropriate to regard such services as ITSS. It was also submitted that appellant does not render the services to the end user and hence, appellant is not providing on-line access services. This argument does not stand because the definition of OIDAR nowhere provides that the services thereunder should be provided to the end-user. As per the agreements, the OIDAR services are provided by appellant and receivers of the same are telecom operators and in terms of Rule 9 of POPS,2012, what is relevant is the location of the provider in the case of OIDAR services.

21.3. In the case of branches of appellant set up in various countries, as stated by Shri. Sasikiran, there is revenue earned by appellant India, where appellant's MVAS solution as a whole, including the software platform and contents are used. Bills are stated to be raised to the customers for the consideration including the provision of the platform and content charges, though no break-up is available. Such revenue accrues to appellant India and the revenue earned for MVAS solutions supplied through the branches is exigible to S tax under OIDAR services. In the case of services provided to J&K customers, the nature of services is the same as MVAS solutions provided to customers in India and abroad. Such services would qualify to be called as OIDAR services. Exemption has been claimed by APPELLANT on the consideration that the Finance Act is not applicable to J&K. Going by appellant's argument, services provided in J&K would be similar to services provided in countries abroad. Hence, the services so rendered to J&K customers would not be eligible for exemption as claimed. Rule 9 (b) POPS Rules would apply in respect of such services.

21.4. In the case of wholly owned subsidiaries set up abroad by appellant, it is stated that the content is procured by them and the same is uploaded to their platform. Their billing on appellant India is stated to be only for the platform. In addition, the subsidiaries pay appellant India fees for 'market access' and charges towards 'administrative' services as per agreements between appellant and the subsidiaries. The revenue earned thus may not be includible as revenue from OIDAR services.

21.5. Prior to 1/7/2012, the place of provision of MVAS solutions provided by appellant to Telecom operators located

abroad, covered under OIDAR, was the place of the service receiver. Accordingly, the OIDAR services rendered by appellant to such operators were considered as services rendered outside the taxable territory. Consequently, no S Tax was payable on such services. With the introduction of the 'Negative list' regime for S Tax and the issue of POPS Rules 2012, in terms of Rule 9 thereof, the place of provision of such OIDAR services shall be the location of the service provider and not the service recipient. This would mean that the MVAS solutions provided by appellant to Telecom operators located abroad would be regarded as services rendered within the taxable territory. Consequently, S Tax becomes payable.

21.6. The period of dispute as per show-cause notice and the SOD is 1/7/2012 to 1/7/2016. The show-cause notice was issued on 29/12/2017. The tax demand for part of the period is within normal time and the defence of appellant that description of the services as OIDAR was a *bona fide* error is not acceptable. For 8 years appellant had described the services as OIDAR services and they sought reclassification as ITSS only when they realised that their services would be correctly regarded as services rendered in the taxable territory. This was clearly an afterthought to save tax liability. Besides, appellant had filed the ST-3 for the period from 7/2012 to 9/2012 on 10/4/2013 and for the period from 10/12 to 3/13 on 12/4/2016. This was immediately after the change in the tax regime. This shows that appellant was fully aware of the implications of the change, especially the introduction of the POPS Rules 2012. In terms of Rule 9 of these Rules they were required to pay tax on the services rendered to their foreign customers viz telecom service providers. There was a clear default on their part to evade S tax. Given the fact that appellants were working under the self-

assessment scheme the default cannot be condoned. Hence the invoking of the extended period of limitation cannot be faulted.

22. Heard both sides.

22.1 The demand in the present proceeding has been computed on the amounts which can be categorized as under:

Sl. No.	Particulars	Tax liability
1.	Revenue from foreign telecom operators for provision of RBT platform - where content is provided by the telecom operator	7,89,67,623
2.	Revenue from foreign telecom operators for provision of RBT platform - where content is paid by the Company	17,10,78,098
3.	Revenue from foreign subsidiaries of the Company for provision of RBT platform - as per the agreed transfer pricing model	25,58,49,203
4.	Revenue from other export services	2,14,33,340
5.	Re-imbursement / Recovery of expenses	25,64,92,411
	Sub-Total	74,87,16,847
6.	Tax on branch turnover	25,29,30,880
7.	Tax on turnover from the states of J&K	98,93,624
	Grand Total	1,04,66,45,179

22.2. The core issue is whether the services rendered by the appellant can be classified as 'Online Information Database Access and Retrieval Services' (OIDAR) as claimed by the Revenue or are they classifiable as 'Information Technology Software Services' (ITSS) as claimed by the appellant. It would, therefore, be appropriate to refer to the relevant provisions during the relevant period i.e. 01.07.2012 to 30.11.2016. Let's examine the relevant provisions. With effect from 16.05.2008 upto 30.06.2012, section 65(75) of the Finance Act stood as follows:

"65(75) - "on-line information and database access or retrieval"
(OIDAR) means providing data or information, retrievable or

otherwise, to any person, in electronic form through a computer network” and Section 65(105)(zh) of the Finance Act stood as follows:

“65(105)(zh) - Any service provided or to be provided to any person, by any person, in relation to on-line information and database access or retrieval or both in electronic form through computer network, in any manner”

Section 2(o) of the Information Technology Act, 2013 defined ‘data’ means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer”

Section 2(v) of the Information Technology Act defined ‘information’ “information” includes data, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer-generated micro fiche”

Section 2(r) of the Information Technology Act defined ‘electronic form’ with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device”

Section 2(j) of the Information Technology Act defined ‘computer network’ “computer network” means the interconnection of one or more computers through— (i) the use of satellite, microwave, terrestrial line or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained;”

22.3. A perusal of the Sections 65(75) and 65(105)(zh) of the Finance Act, 1994 and the above quoted provisions of the Information and Technology Act, it would show that an activity can be classified under the category of OIDAR service providing data or information which is provided to any person and such data or information should be accessible or retrievable or both and such data or information has to be provided in electronic form through computer network in any manner. It, therefore, follows that the expression "providing data/information" in the context of OIDAR service would mean to supply such data/information which was previously not available to the service recipient. Thus, what is of paramount is the ownership of such data/information intended to be provided. In other words, for rendering OIDAR services, the service provider should be able to provide data/information for access or retrieval by the service recipient only when such data/information belongs to the service provider.

22.4. On the other hand 'Information Technology Software Service' (ITSS) was brought under service tax w.e.f. 16-5-2008. Clause 65(105)(zzze) defines 'Information Technology Services' as follows :

"(zzzze) to any person, by any other person in relation to information technology software for use in the course, furtherance, of business or commerce include, —

- (i) development of information technology software,
- (ii) study, analysis, design and programming of information technology software,
- (iii) adaptation, upgradation, enhancement, implementation and other similar services related to information technology software,

- (iv) providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specification for a database design, guidance and assistance during the start up phase of a new system, specifications to secure a database, advice on proprietary information technology software,
- (v) acquiring the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products,
- (vi) acquiring the right to use information technology software supplied electronically.”

22.5. Having explained the relevant provisions of the disputed services, the simple exercise would be to examine whether the services rendered by the appellant fall under which of these categories. In order to decide the classification of the services, one needs to understand what are the services rendered by the appellant. The services rendered by the appellant which are elaborately described in the impugned order is not in dispute. The services rendered by the appellant is also categorically stated by various technical senior officers of the appellant in their statements which is not disputed, hence the same is reproduced here.

22.6. Shri. Sasi Kiran N, Senior Manager Taxation in his statements dated 09.06.2016 and 05.07.2015 stated as follows:

‘M/s. OnMobile has been engaged in providing the value added services to telecom operators in India and some other foreign countries. The services provided by the company are generally termed as the value added services to telecom operators. It mainly includes providing the

Ring Back Tone (RBT) to the telecom operators. Other than the RBT, the value added services provided by them also include providing alerts under different categories, like jokes, horoscopes, games and sports updates etc. with regard to the process of providing the aforesaid services, he stated that M/s. OnMobile has its own online platform comprising of Servers, Racks (memory devices) etc. in their Bengaluru premises which are integrated with the Telecom operators' network by establishing connectivity through satellite links. Through this integrated connectivity. M/s. OnMobile provides the above services on real-time basis to the customers/subscribers of the concerned telecom operators. For example. BSNI. is a telecom service provides in India. BSNL, enters into a contract with Mis. OnMobile for obtaining the RBT services to their subscribers. Accordingly, M/s. OnMobile will establish a real time connectivity between the online platform of M/s. OnMobile with BSNL telecom network. When a customer of BSNI. subscribes for RBT, the specific ring back tone will be played to the callers of such customer by accessing the customer specified ringtone directly from the online platform of Mis. OnMobile. Number of accesses by the customers of BSNI. from the online platform of M/s. OnMobile, are captured by a billing software tool. At the end of each month, the billing software tool provides them the data of the accesses during the month and based on such data. The invoices are raised by M/s OnMobile on that particular telecom operator, claiming the consideration for the said services rendered by them. In similar way, the company updates in respect of all the value added services (VAS) mentioned above to all the customers, whether they are located in India or located outside India. The data is retrieved, consolidated and the bills are generated from their aforesaid Bengaluru office, which is having the centralized service tax registration.

Regarding the infrastructure/contents required for providing the aforesaid value added services, he stated that as per the contracts, it is the responsibility of M/s. OnMobile to procure, maintain and operate the online real time platform with the required digital contents to be deployed. For this purpose, M/s. OnMobile had set up its own infrastructure including computer servers, memory racks, colour graphic

cards (CG cards), manpower etc. in their Bengaluru Central Infrastructure. Regarding the digital contents of RBT or other value added services he stated that M/s. OnMobile either generates the contents from its own sources or obtains the non-exclusive license from the copy-right or patent holders for the usage. The contents (ie. song, ring tone music, horoscope related contents, sports-game related contents etc.) are stored in their servers and accessible through their online real-time platform to their telecom operators/customers.

Regarding the content services received from abroad, he stated that many a times content is procured by them from foreign countries mostly for the purpose of operation in that particular country. The content is procured and received in their Bengaluru lab as explained earlier by their AVP-Technology Solutions. The invoices are raised by the supplier in foreign country to their Bengaluru office. They pay service tax in respect of such content services received under reverse charge. They also avail input service tax credit on the said content received by them as the same are also used by them towards providing the output services to their customers abroad."

22.7. Shri Verghese Antony Joji, Associate Vice-President-Technology Solutions in his statement dated 16.06.2016 submitted as follows:

'M/s OnMobile is a value added service provider in the telecommunication space in multiple telecom operators around the world. The company is based in Bengaluru and the central infrastructure is placed in Bengaluru offices and they have third party data centres also located in Bengaluru. He clarified that the third party data centres means where M/s. OnMobile has installed its servers, hardware and software in rented space provided by these third party data centres. Further, at the customers' site, M/s. OnMobile deploys hardware and software solutions which are connected to the Operator network (e. Telecom operators). The company has the Global Network Operations Centre (GNOC) at Bengaluru which manages the day to day operations of the online platforms deployed by the

company. The Central infrastructure deployed at Bengaluru is connected online (24/7) to all the customer sites via communications lines i.e. leased lines. MPLS or Internet bandwidth via VPN. They provide those services by operating and maintaining the solutions on a real time basis to the telecom operators for accesses by their and customers. For example, whenever the end customer (the mobile user) who has opted for Ring Back Tone receives a call, the telecom operator sends a service signal to their Ring Back Tone system and the Ring Back Tone system plays the song selected by the mobile user and this song can be heard by the person who is making the call. Each time the subscribed person receives a call, the calling party will hear the song which is accessed from their Ring Back Tone system, on a real-time basis. In similar way, the other services are also provided by them on a real time basis for access by the customer who has opted for the respective services with their telecom operators. Regarding the infrastructure installed/maintained by M/s.OnMobile for providing the aforesaid online value added services, he stated that they have the Central infrastructure at their Bengaluru location. Other than this, at the customer premises i.e. telecom operator's place) they also install the necessary infrastructure including the hardware, software and platform solutions which are integrated with the operators' network and are necessary to ensure the seamless functioning of the value added services. The customer premises can be in India or places outside India like Bangladesh. Malaysia. Qatar. Chile, Romania, Ecuador, Peru etc. The Central infrastructure in Bengaluru is connected to all the installations at customer premises (in India or outside India) through online communication lines. The Central infrastructure maintained online in Bengaluru office mainly includes various servers which are responsible for (i) online monitoring and operations of the value added services, (ii) reporting platform, (iii) the content distribution platform etc.

(i) Online monitoring and operations of the Value added services: They have 24/7 team responsible to monitor any of the alarms/errors that are generated from the online systems either in Bengaluru or in any of the customer premises. The 24/7 team will monitor and try to fix the issues

as and when they occur. In cases, where they are not resolved, the issues are escalated to the next levels for resolution.

(ii) Reporting platform: In respect of the all the services accessed by the customers/ telecom operators, the transaction details are captured by their platform and this data is transferred through the online network to Bengaluru on a daily basis for reporting and revenue monitoring purpose. Based on this transaction data, they raise invoices from their Bengaluru offices to their customers/operators on monthly basis.

(iii) Content distribution platform: Basically, they are providing online real time access of the contents to the customers. The contents can be music, customized ring back tones or non-music contents like jokes, horoscopes, etc. All these contents are either procured by them, created by them or the right to use are obtained by them. They physically ingest this content from the sources and carryout the necessary technical modifications in their Lab/Studios in Bengaluru, to enable them to be played on the telecom networks. These contents are then stored in the content management servers in Bengaluru which are then shared via the communications lines to the respective operator locations in India or abroad, as per requirements. Whenever the subscribed customer accesses the contents, it is retrieved from the online system deployed at the customer site.

The operations like online monitoring and operations of the Value added services. reporting platform, content distribution platform etc. are all managed and executed by GNOC from their Bengaluru Central Infrastructure. The persons posted in Bengaluru locations work on the areas like Technical (operations and engineering), product management, delivery (project management), content sourcing and operations, studio, account management, 11, Finance and other shared services like IIR, Administration, procurement etc. The persons posted at the customer locations are basically for day to day technical support operations and account management (management with the customers). The technical operation persons in the customer locations basically do the basic trouble shooting of hardware and other issues and also technical coordination

with the customers. They have an online monitoring system functioning from the Bengaluru location which receives alerts/alarms in respect of the problems from various customer locations and the same are addressed/rectified by the operations team from Bengaluru. Most of the issues are resolved from Bengaluru through online remote connectivity. The problems resolved at customer location are mostly related to hardware or network connectivity.

22.8. Shri. Praveen Kumar K.J., Chief Financial Officer in his statement dated 17.10.2016 stated:

'With regard to revenue from foreign subsidiaries of the company for provision of RBT Platform it was submitted that 'In this case, their subsidiaries abroad would procure the content and the same are uploaded to their platform. Since the content is not provided by them, their billing is only for providing the platform. In fact, their subsidiaries almond get the order from the telecom operators for providing content and the platform. Thereafter the subsidiaries procure the required content and upload the same to their RBT Platform. Some cases, the telecom operators (the customers of their subsidiaries) place the order on the subsidiaries only for providing the RBT Platform. In such cases the telecom operators procure the content and provide the same to the subsidiaries and the subsidiaries further upload the same on to their RBT Platform'.

22.9. Summing up the above statements, we find that the appellant mainly provides various Mobile Value Added Services (MVAS) such as the Ring Back Tone (RBT), providing alerts under different categories, like jokes, horoscopes, games and sports updates etc. The Global Network Operations Centre (GNOC) at Bengaluru i.e. the Central infrastructure located at Bengaluru is integrated with the operators' network located at various telecom operator premises and ensure the seamless functioning of the value

added services. The customer premises is either in India or abroad are connected to Central infrastructure in Bengaluru through online communication lines. The operations like online monitoring and operations of the Value added services, reporting platform, content distribution platform etc., are all managed and executed by GNOC from their Bengaluru Central Infrastructure. The technical operation persons in the customer locations basically do the basic trouble shooting of hardware and other issues and also technical coordination with the customers. It is also pertinent to note that the content services received from abroad, is procured from foreign countries mostly for the purpose of operation in that particular country. The content is procured and received in their Bengaluru lab through their AVP-Technology Solutions and the invoices are raised by the supplier in foreign country to their Bengaluru office on which service tax is paid in respect of such content services received under reverse charge. They also avail input service tax credit on the said content received by them as the same are also used by them towards providing the output services to their customers abroad.

23. Now, let's see the various relevant clauses of the agreement entered into by the appellant with Unitel S.A., which are reproduced below:

Clause 1.1.5 "Application" shall mean and include individual software components which will utilize the Platform in order to provide Customer Services. Each Application or group of Applications that utilizes the Platform shall be governed by a corresponding Service Level Agreement. An Application shall be referred to as an "OnMobile Application" or a "Customer Application" based on its origin;

Clause 1.1.6 "Application Services" shall mean services rendered by OnMobile towards the customization of existing Applications based on specified requirements (the "Customization Specifications") as set out by Customer, in accordance with the service levels and conditions prescribed under the corresponding Service Level Agreement;

Clause 1.1.7 "Billing Infrastructure" shall mean such suitable means as may be agreed upon between the Parties to record the usage of the Solution by Users and provide the requisite usage and network related inputs for determination of the consideration payable to OnMobile under this Agreement;

Clause 1.1.12, 1.1.12.1, 1.1.12.2 describe 'content' shall mean such content as his developed by OnMobile or procured from a third party by OnMobile specifically for delivery to users through the solution or created by or procured from third parties by customer for delivery to users or such third parties as users may request through the system.

Clause 1.1.24 "MVAS Solutions" or 'Solutions' shall mean and refer to the mix of the services, managed services software and support services provided by Onmobile to customer pursuant hear to. The list of the MVAS Solutions shall be set out at Annexure-A which is reproduced below:

Annexure A

MVAS Solutions Provided:

The project described in the Annexes herein will implement the personalizes ringback tone service in the UNITEL network. The following high level functional description summarizes the functional scope

RING BACK TONE (RBT)

OnMobile shall provide the Ringback Tone ("RBT") service to Unitel.

OnMobile will provide Unitel with RBT service with the following features:

- RBT provisioning through Voice, SMS, Web, WAP, USSD & Customer Care
- RBT for specific numbers or for group
- Copy a RBT on Voice
- Copy a RBT on SMS
- Shuffles
- Gifting a RBT on Voice
- Gifting a RBT on SMS
- RBT Viral
- Time of the day RBT
- Song Search on SMS, WAP, Web, Customer Care
- Social RBT
- Info RBT
- Multimodal numbers on IVR
- User based language preference on IVR
- Differential Charging based on access mode
- Any other new feature which is mutually decided between Unitel & OnMobile for deployment
- Service Lifecycle Management Services for RBT

Clause 1.1.19 hardware includes hardware system, platform, applications, customized applications as is specified at Annexure-B of the agreement. The service charges and revenue share details are provided at Annexure-C of the agreement.

Clause 1.1.27 states 'Platform' shall mean and refer to OnMobile proprietary voice portal platform software provided to customer under this agreement.

23.1. From the above clauses of the agreement read with the statements, the services rendered by the appellant clearly fall under the category of OIDAR services since the Mobile Value Added Services (MVAS) are owned by the appellant and allowed to be retrieved by the subscribers on payment through the telecom operators. This kind of online retrieval information of ringtones, horoscope, jokes, games etc., being the property of the appellant which are allowed to be retrieved through online by Global Network Operation Centre (GNOC) at Bangalore under no

circumstances can be considered as Information Technology Software Services (ITSS). As per the definition of OIDAR, data is to be owned and allowed to be retrieved through electronic form or computer networks which is exactly the services rendered by the appellant, therefore, we confirm the services rendered by the appellant is rightly classifiable as OIDAR services. It is also to be noted that the appellant had declared the very same services as OIDAR services since 2008 and only from 2016 onwards they claimed it as other services.

23.2. The fact that various data stored at GNOC Bangalore of the appellant is collected from various third parties also is not disputed. In fact, one of the senior technical persons has admitted that the third-party data obtained for the customers abroad has been imported on which service tax is paid under reverse charge mechanism. This clearly establishes the fact that the data meant for the subscribers abroad is incorporated at GNOC Bangalore from where the data is being retrieved by their units located at various locations abroad.

23.3. The appellant also submits that various telecom operators offer value added telecom services in addition to basic telephony services these value added services are offered by telecom operators to their subscribers and the telecom service providers in turn engage the services of the appellant to provide subscription to MVAS solution through which the telecom operators provide the value added services to their subscribers. The appellant provides the license to use the solution to telecom operators and such telecom operators provide the value added service to its subscribers through such MVAS solution and these value added services are content like audio content, video content etc; for these value added services the subscriber would

be required to pay a specific amount to enable him to enjoy the value added services.

23.4 The RBT provided to the subscribers is actually obtained from the third parties and such content is uploaded on to the appellant server and is managed by the appellant. The appellant carries out requisite modifications on the quality and then it is uploaded to the tone player which is a combination of hardware and software owned by the appellant which integrates with the telecom operators equipment. In other words, the mobile switching center of the telecom operator is connected to the MVAS solution pursuant to which the callers to the subscribers are able to hear the ringtone when a caller places a call to the subscriber of the telecom service the originator of the call i.e, the caller is connected to the MSG of the telecom service provider and is able to hear a ringing tone. In place of the ringing tone where the subscriber has opted for a customized ring back tone service, the customized tone would be played by the appellant servers through which the originator of the call shall hear the customized tone, this tone is heard until the subscriber answers the call. Under no circumstances, the above services rendered by the appellant can be considered as ITSS since this is not a simple process of hardware and software services. In fact, the third-party data obtained by the appellant is stored in their servers and based on the agreement with the telecom operators, the data stored in their services as per the requirements of the subscribers is retrieved by the telecom operators and forthwith forward it to the subscribers. This data retrieval from the appellant to the subscribers through that telecom operators is nothing but Online Information Data Access Retrieval service. Therefore, they are rightly classifiable under OIDAR Services.

23.5 The larger Bench in the case of **Air India Ltd (Earlier Known as Indian Airlines Ltd.), New Delhi Vs. Commissioner (Adjudication) Service Tax, New Delhi: 2025-TIOL-1131-CESTAT-DEL-LB** observed as follows:

"29. For OIDAR services to be taxable, it is mandatory that the CRS Companies should provide some information/data to the appellant for a stipulated consideration and this should be apparent from the terms and conditions of the contract between the appellant and the CRS Companies. It is not in dispute that in the present case the CRS Companies do not have any data of their own which they can provide. In fact, it is the CRS Companies that invite data from the participating airlines, which is thereafter standardized by the CRS Companies over a common platform. It is also a fact that it is the CRS Companies which encourage the travel agents to use the infrastructure created by the CRS Companies for booking of tickets.

30. The issue, therefore, that would arise for consideration is as to what is that information or data which was contractually agreed to be provided by the CRS Companies. What transpires from the agreement is that entire data base of the CRS Companies has been created by accessing information from the appellant and other various airlines. The appellant only intended to use the infrastructure set up by the CRS Companies to facilitate a better booking mechanism for travel agents. The CRS Companies were only obliged to ensure that the information of the appellant could reach the travel agents on 21 ST/52780/2014 real time basis. Thus, the transaction between the appellant and the CRS Companies cannot be treated as provision of OIDAR service by the CRS Companies to the appellant.

31. Once the ticket of the appellant is booked, the records of the appellant are also updated. There is an automatic and direct

decrement in the remaining seats of the flights of the appellant. Thus, what is perceived by the department as provision of some data to the appellant, is a data which is already existing with the appellant. The appellant, in fact, is not dependent on the CRS Companies to be informed of the tickets which are booked with the airlines of the appellant. There is, therefore, no provision of any data to the appellant. The appellant had not associated with the CRS Companies for receiving such data/information, for the purpose of the agreement was to promote and increase the number of bookings by providing seamless interface by the travel agents and the consideration is dependent on the number of bookings. Consideration is not payable for the provision of data. It also needs to be noted that data pertaining to other airlines is not provided to the appellant.

32. In any view of the matter, even if it is assumed that there is provision of some data from the CRS Companies to the appellant, then too such provision of data is only incidental to the primary purpose of the contract between the two parties and cannot change the nature of the agreement. If the ultimate intent of the parties to a contract is to achieve a particular objective and for such achievement, a consideration has been decided and paid, then all other activities undertaken in the course of achieving that ultimate objective would be treated as ancillary and would not determine the nature of the transaction. It is the substance of the contract that will prevail 22 ST/52780/2014 over incidental or ancillary activities to define the character of the transaction and consequent levy of service tax.

33. Learned counsel for the appellant also submitted that if data/information belongs to the service recipient itself, the service provider cannot render OIDAR service in relation to such data/information. Elaborating this submission, learned counsel pointed out that the expression "providing" data/information would mean to supply such data/information which was previously

not available with the service recipient. What has, therefore, been submitted is that an important condition to be covered under OIDAR service is that data/information must be provided, and such provision can be for either access or retrieval or both, but if the data itself belongs to the service recipient then the activity of disseminating such data by the service provider to the service recipient cannot be equated with 'providing' of data. It has, therefore, been submitted that it is the ownership over such data or information intended to be provided which is paramount.

34. A perusal of the sections 65(75) and 65(105)(zh) of the Finance Act and the above quoted provisions of the Information and Technology Act would show that an activity can be classified under the category of OIDAR service if: (i) (ii) It involves providing data or information; Such data or information must be provided to any person; (iii) Such data or information should be accessible or retrievable or both; and (iv) Such data or information has to be provided in electronic form through computer network in any manner.

35. The word providing data/information used in section 65(75) of the Finance Act connotes "to give or provide something which is previously 23 ST/52780/2014 available with the person who is providing and not available with the person who is receiving".

36. The meaning of the term "providing" in dictionaries is as follows:

Cambridge Dictionary	Providing: present participle of provide Provide: (verb): to give something to a person, company, or organization, or to make it available for them to use: to give someone something that they need.
Collins Dictionary	Provide Word forms: provides, providing, provided (3) Verb : If you provide something that someone needs or wants, or if you provide them with it, you give it to them or make it available to them.

Merriam-Webster Dictionary	provided; providing transitive verb a : to supply or make available (something wanted or needed)
Britannica Dictionary	provide verb provides; provided; providing a : to make (something) available : to supply (something that is wanted or needed)

37. Thus, “providing” necessarily means supplying or giving something to someone, which is needed or sought for. The phrase “to supply” has been defined in Strouds Judicial Dictionary, to mean, “pass anything from one who has it to those who want it”. 24 ST/52780/2014 38. It, therefore, follows that the expression “providing data/information” in the context of OIDAR service would mean to supply such data/information which was previously not available to the service recipient. Thus, what is of paramount is the ownership of such data/information intended to be provided. It cannot, therefore, be urged that foreign CRS Companies provided any data/information to the appellant.

39. It can be inferred from the above that that OIDAR service is rendered when there is provision of data or information from a database/ information base, for access/retrieval by the service recipient. For rendition OIDAR services, the service provider should be able to provide data/information for access or retrieval by the service recipient only when such data/information belongs to the service provider.”.

In view of the detailed discussions above with respect to the services rendered by the appellant, our decision to classify the same under OIDAR services is fortified as is held in the above decision of the larger bench.

24. The second question is whether the claim of the appellant that they are export of services needs to be analyzed for the disputed from 1/7/2012 to 31/7/2016.

Place of Provision of Services Rules, 2012 — Notification Nos. 9/2005-S.T. & 11/2006-S.T. superseded

In exercise of the powers conferred by sub-section (1) of section 66C and clause (hhh) of sub-section (2) of section 94 of the Finance Act, 1994 and in supersession of the notification of the Government of India in the Ministry of Finance, Department of Revenue, number 9/2005-ST, dated the 3rd March, 2005 published in the Gazette of India Extraordinary, Part II, Section 3, Sub-Section (i) vide number G.S.R. 151(E) dated the 3rd March, 2005 and the notification of the Government of India in the Ministry of Finance, Department of Revenue, number 11/2006-S.T., dated the 19th May, 2006 published in the Gazette of India Extraordinary, Part II, Section 3, Sub-Section (i) vide number G.S.R. 227 (E) dated the 19th May, 2006, except as respects things done or omitted to be done before such supersession, the Central Government hereby makes the following rules for the purpose of determination of the place of provision of services, namely :-

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

- (a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;
- (b) Online information and database access or retrieval services;
- (c) Intermediary services;
- (d) Service consisting of hiring of means of transport, upto a period of one month.

24.1. With the introduction of the Negative List and the issue of POPS Rules 2012 in terms of Rule 9 of the place of provision of OIDAR services shall be the location of the service provider and therefore, the data retrieved from the appellants GNOC location in India to be considered as service provider in India, hence, the OIDAR services rendered to the subscribers abroad also are liable to tax as the same cannot be considered as Export of Service. This definition read with Rule 6A of Export of Services Rules, the provision of any services provided or

agreed to be provided shall be treated as export of service when the above conditions are fulfilled. There is no dispute that the appellant is providing the above services to the customers both located in India and abroad. The appellant themselves admitted that MVAS is provided with the VAS solution comprising of proprietary software and hardware which is regularly monitored and controlled by the appellant through its Global Network Operations Center which is located at Bangalore and is integrated with the customers hardware, thus, it is evident that the place of provision of services is actually in India and hence, they are liable to service tax. With regard to services rendered to Jammu and Kashmir based on the location of the service provider the services rendered from Bangalore where the appellant is registered is the taxable territory to the customers located in Jammu and Kashmir, hence the same is chargeable to service tax.

24.2. In the case of subsidiaries, the appellant claims that the agreements for provision of services are entered by the Subsidiary located outside India in non-taxable territory with the Telecom operator and the invoices for the said services were issued by the overseas subsidiary, however, we do not find any discussion on this aspect in the impugned order. Therefore, the matter is being remanded for verification of these facts and accordingly redetermine the service tax liability.

24.3 With regard to the various branch offices in overseas, it is stated that in order to provide seamless services to the telecom operators and to comply with the local laws of the respective countries, requisite hardware and deployment / installation related activities with respect to provisioning of subscription to MVAS Solution is undertaken by such foreign

branch offices itself. However, as already noted, we find that the data retrieval happens from the GNOC located in Bangalore (India) and therefore, the location of the service provider is in India. As per the POPS Rules, the service provider's location is the criteria for deciding liability of service tax on OIDAR services. Hence, the demand during this period even for the branches needs to be sustained.

25. Now considering the ground of limitation, we find that show-cause notice was issued on 29.12.2017 for the period from 01.07.2012 to 01.07.2016. There is no dispute that the appellant had declared OIDAR services from 2008 onwards and only later reclassified them as ITSS services. The fact that they were regularly filing the ST-3 returns and declared these services from time to time is not in dispute. Considering these facts, we do not find any reason to invoke suppression with intention to evade payment of duty, since these facts were known to the Department through the ST-3 returns.

26. Summing up, we conclude that the services rendered by the appellant fall under OIDAR services and hence, the tax stands confirmed for the normal period. We also agree that certain reimbursable amounts based on the evidences placed on record needs to be excluded for levy of service tax. Considering all these observations, we find it a fit case to remand the matter for the purpose of re-determination of service tax liability in terms of our above observations and the demand is to be restricted to the normal period. Needless to say, that appellant needs to be given an opportunity of hearing before the proceedings are finalized. Since the issue is being remanded for redetermination of duty only for the normal period, we do not find any reason to sustain the penalties imposed on the

appellant including the personal penalties imposed on Mr. Shashi Kiran, Senior Manager Taxation, Mr. Praveen Kumar K.J, CFO and Mr. Rajiv Pancholy, the CEO of the appellant.

27. In view of the discussion, Appeal No. ST/20430/2021 is remanded and Appeal Nos. ST/20434, 20435 & 20436/2021 are allowed.

(Order pronounced in Open Court on 18.07.2025.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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