

# ***Case Law: Microsoft Judgement – Export of Services***



**November 24, 2011**

## ***In Brief***

Microsoft Corporation India Pvt. Ltd (“the Appellant”) has had a case pending adjudication before the CESTAT Delhi (“the Tribunal”) for several months now. This case is being seen as a landmark case on the issue of export of services and the judgment has been keenly awaited for some months now.

The two member bench of Tribunal could not come to an agreement in the matter, and have referred the case to the third member of the Tribunal.

## ***Facts***

Microsoft Corporation India Pvt. Ltd. is a subsidiary of Microsoft Operation Pvt. Ltd. (“MO”) of Singapore.

MO entered into a Market Development Agreement with the appellant on July 1, 2005. Under the agreement, MO appointed the appellant for marketing Microsoft products in India.

The appellant claimed the above services were exports and did not pay Service tax on the same.

The appellant was served with a Show cause notice (“SCN”) dated April 24, 2008 covering the period July 9, 2004 to October 6, 2005 alleging that the appellant's claim of export of service was incorrect.

The Adjudicating authority in the matter passed an order dated September 23, 2008 confirming the allegations raised by the SCN.

Aggrieved by the order of adjudication, the appellant filed an Appeal to the Tribunal raising the principal grievance that the services provided by the Appellant to the foreign principal were exported under the provisions of Export of Service Rules, 2005.

## ***Issue***

Whether the Business Auxiliary Service of marketing products in India for a foreign principal was “delivered outside India” and “used outside India” in terms of the provisions of Export Service Rules, 2005?

## ***Tribunal's Ruling***

In the Tribunal the matter was heard by a two member bench. Taking into account the material on record and submissions presented by appellant and Adjudicating authority, the members have delivered their respective judgments on the matter on November 9, 2011 in which they have expressed opposing views.

## ***Member Judiciary***

*The Member Judiciary primarily expressed his views under the principle of equivalence, explained below.*

*Applying the principle of Equivalence as has been laid down by Apex court, the question of whether this activity constitutes an export of services should be decided on a similar basis as has been applied to test whether there has been an export of goods. Applying the principles of equivalence, the services rendered should have a foreign destination, whereas in this case market promotion activity ended in India upon identification of customer and does not qualify as export out of India.*

## **Member Technical**

*The Member Technical was unable to agree with the views of the Member Judicial. In his view, the Principle of Equivalence cannot be applied for all aspects of taxation of services. There are several differences between taxation of goods and services. The fundamental difference is that while goods are tangible, services are intangible. Therefore, it is difficult to conceive of services being taken across the border, unlike goods.*

*Accordingly, the Member Technical had the view that the services had been exported within the meaning of the Export of Services Rules.*

Considering the divergent opinions of two members on the matter before them the Tribunal has referred the case to a third member to form a final decision by majority of opinion.

## **Point of reference to third member**

The principal point of difference referred to third member is whether the service of promotion of market in India for foreign principal amounts to export of services in terms of the provisions of Export Service Rules, 2005 and article 286(1) of the Constitution of India.

The second question referred to the third member for consideration is whether the service was delivered outside India in terms of the provisions of the Export of Services Rules, 2005.

There are some additional questions that were posed to the third member, but the principal questions are what have been outlined above.

## **Conclusion**

It was expected that this Tribunal decision would clarify the issue of what constitutes export of services. Now, it appears that we would have to wait for the third member's decision before there might be clarity on the matter.

Additionally, this matter is relevant for the period prior to February 27, 2010 as the expression "Used outside India" was in force till February 26, 2010 and the expression "delivered outside India" was in force till February 28, 2007.

## **Contacts**

### **Delhi**

Vivek Mishra/R. Muralidharan  
Ph: +91(124) 3306000

### **Mumbai**

Dharmesh Panchal/S Satish  
Ph: +91 (22) 6689 1000

### **Kolkata**

Somnath Ballav/Siladitya Sarkar  
Ph: +91(33) 2357 9100/ 4404 6000

### **Bangalore**

Pramod Banthia  
Ph: +91(80) 4079 6000

### **Hyderabad**

Pramod Banthia/N V Raman  
Ph: +91(40) 6624 6394

### **Chennai**

Sriram B/Niranjan JV  
Ph: +91(44) 4228 5000

### **Pune**

Suresh Rohira/G.P Kawathekar  
Ph: +91(20) 4100 4444

### **Ahmedabad**

Dharmesh Panchal/Niren Shethia  
Ph: +91 (22) 6689 1000

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