## CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
## ALLAHABAD

REGIONAL BENCH - COURT NO.I

**Service Tax Appeal No.70054 of 2017**

(Arising out of Order-in-Original No.05/COMMISSIONER/ST/NOIDA/2016-17 dated 25.10.2016 passed by Commissioner of Service Tax, Noida)

**M/s Coperion Ideal Pvt. Ltd., .....Appellant**
(A-35, Sector-64, Noida, U.P.-201307)

*VERSUS*

**Commissioner of Service Tax, Noida ....Respondent**
(C-56/42, Renu Tower, Sector-62, Noida)

**APPEARANCE:**

Shri Atul Gupta, Advocate for the Appellant
Smt. Chitra Srivastava, Authorized Representative for the Respondent

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)**
**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

**FINAL ORDER NO.-70025/2025**

DATE OF HEARING : 30.07.2024
DATE OF DECISION : 16 January, 2025

**P. K. CHOUDHARY:**

The present appeal has been filed by the Appellant assailing the Order-in-Original No.05/COMMISSIONER/ST/NOIDA/2016-17 dated 25.10.2016 passed by Commissioner of Service Tax, Noida.

2. The facts of the case in brief are that the Appellant is registered with the Service Tax Department vide Registration No.AACCC3990NST001 and is regularly paying Service Tax on the services provided by it. The Appellant is in the business of guiding and advising the foreign parties for bidding and negotiations. For this purpose, the Appellant provides them with details of customers in India and information related to domestic market conditions so as to enable the foreign parties to prepare appropriate quotes for their customers so that the foreign parties can carry out the actual negotiations themselves. For the above purpose, the Appellant entered into Agreement with M/s Werner

Pfleiderer & Gmbh Co. KG, Germany and M/s Coperion Waeschle Gmbh & Co. KG, Germany dated 01.01.2007. The sequence of events as traced from the impugned Agreement is that; first the Appellant interacts with the customers in India, who place their orders with the group entity. Thereafter, the group entity exports the goods from Germany to the customers in India and raises the invoices directly on the customers. These orders materialize only when the acceptance or confirmation has been issued by the group entity to the customers and the Appellant cannot confirm these orders. Upon confirmation of the order, materials are dispatched to the customers directly by the group entity and payment related to the materials are dealt with directly by the buyer and the group entity. Thus, the Appellant's role is limited to acting as a bridge between the foreign parties and their customers in India and does not involve acceptance or confirmation of any order. The Appellant raises invoices for its commission on foreign parties in Germany as soon as the group entity informs the Appellant of having received the payment from the customer in India. The commission is based on an agreed percentage depending on the value of the goods sold and the same is paid by the group entity in convertible foreign currency. Documents evidencing the fact that the payment was received by the Appellant in convertible foreign currency have been enclosed as Annexure-6 of the paper book. During the course of AGUP Audit and Departmental Audit, vide their audit SOF No.37-A-B-2010-11 and IAR (SAP) No.190/2011-12, it was observed that the Appellant acted as a Commission agent for two foreign based companies, in pursuance of which Show Cause Notice C. No. V(15)Adj/Noida/Coperion/103/2011 dated 17.09.2012 was issued demanding service tax under 'Business Auxiliary Service[1]' on the commission received by the Appellant for the period from April, 2007 to June, 2012. Against the above mentioned SCN, the ld. Commissioner passed an order dated 11.03.2013 which was subsequently set aside by this Tribunal via Final Order No.71035/2018. In the Final Order, the Tribunal

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[1] BAS

agreed on the legal point that the Appellant was engaged in promoting market for foreign entities in India which amounts to export of service. After the above mentioned SCN, certain further communications took place and eventually the present SCN dated 22.09.2014 was issued to the Appellant for the subsequent period from July, 2012 to March, 2014. The SCN alleged that the Appellant is providing service as an intermediary. The Appellant filed a detailed reply denying the demands proposed in the present SCN. However, the Adjudicating Authority passed the impugned order dated 25.10.2016. Hence, the present appeal before the Tribunal.

3. The learned Advocate appearing on behalf of the Appellant submits that the SCN denied the benefit of export of service only on the ground that the place of provision of service is in India as the Appellant is providing intermediary service, though the SCN does not elaborate why the Appellant would be an intermediary. The impugned order holds that the Appellant is providing BAS and the Appellant acted as intermediary for arranging or facilitating a provision of BAS. The Appellant was earning a commission on all the transactions related to product effected during the validity period with the customers. The Appellant neither directly dealt with the supply of the goods nor they made negotiations with the potential customers for the sale of the goods, therefore, the Adjudicating Authority held that the Appellant acted as an intermediary for arranging or facilitating a provision of BAS and as such amendment made in the definition of intermediary w.e.f. 01.10.2014 is not relevant to the present case. It is submitted that as per the definition of intermediary, it does not provide its own services but arranges or facilitates services provided by one person to another person. The Adjudicating Authority clearly held that the Appellant is providing BAS. The Adjudicating Authority has not pointed out whose services and what kind of services of another person were arranged or facilitated by the Appellant. In absence of the determination of the fact whose services and what services were being arranged or facilitated by the Appellant, the finding that

the Appellant was acting as an intermediary is illegal and unjustified. The services referred to as BAS was the service of the Appellant themselves, therefore, there cannot be a service of another person which the Appellant facilitated or arranged. Thus, the findings of the Adjudicating Authority are without the application of the legal mind and the impugned order is liable to be set aside on this ground. It is further submitted that the Adjudicating Authority held that the Appellant was getting the fee/remuneration termed as commission on all the transactions related to the products affected during the validity period with the customers in view of the above said Agreements for the services provided by them. It is apparent from the finding that the commission received was directly related to the sale of goods, thus, the Appellant cannot be an intermediary before the amendment in the definition of intermediary w.e.f. 01.10.2014.

4. Learned Departmental Authorized Representative justified the impugned order and prayed that the appeal, being devoid of any merits, may be dismissed.

5. Heard both the sides and perused the appeal records.

6. We find that the issue is no more *res integra* and is squarely covered by the Tribunal's Final Order No.71035/2018 dated 28.02.2018 in the Appellant's own case for the previous period i.e. from April, 2007 to June, 2012. The present proceedings are for the period from July, 2012 to March, 2014. The relevant paragraphs of the impugned order are reproduced as under:-

> *"6. At the outset, ld. Advocate for the appellant submitted that the issue is no more res integra in view of the decision of Tribunal in the case of Sumitomo Corporation India Pvt. Ltd. v. Commissioner of S.T., Delhi [2017 (50) S.T.R. 299 (Tri.-Del.)], where the Tribunal has decided in favour of the appellant/assessee.*
>
> *Xxxxxxxxx xxxxxxxxxx*
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> *8. After hearing both sides and on perusal of the record, we find that the issue is decided by the Tribunal in favour of the assessee/appellant in the case of Sumitomo*

*Corporation of India Pvt. Ltd. (supra), wherein this Tribunal has held as under:-*

> *"8. We have heard both the sides and perused the appeal records. On the first two issues relating to liability of appellant/assessee for service tax under the category of BAS we note that the service tax liability and the activities similar to the ones undertaken by the appellant/assessee were subject matter of decision by the Tribunal in earlier cases. In Paul Merchants Ltd. (supra) it is recorded that Export of Service Rules, 2005 are in accordance with Apex Court's ruling to the effect that service tax is a value added tax which in turn is a destination based consumption tax in the sense that it is levied on commercial activities and it is not a charge on the business but a charge on the consumer. We note in the present case, the recipient of service are foreign entities and they are the consumers of these services provided by the appellant/assessee from India. The various persons in India to whom the goods were sold by the foreign entities or from whom various details and information were collected, were not to be considered as recipient of service provided by the appellant/assessee. In Airbus Group India Pvt. Ltd. v. CST, Delhi reported in 2016-TIOL-2312-CESTAT-DEL. = 2016 (45) S.T.R. 120 (Tri.-Del.), the Tribunal after referring to the decisions in Paul Merchants Ltd. (supra), Microsoft Corporation (I) (P) Ltd. v. CST, New Delhi reported in 2014 (36) S.T.R. 766 (Tri.-Del.) and Gap International Sourcing India Pvt. Ltd. reported in 2014-TIOL-465 CESTAT-DEL. = 2015 (37) S.T.R. 757 (Tri) held that what constitutes export of service is to be determined strictly in accordance with the "Export of Service Rules, 2005". It is the person who requested for the said service and is liable to make payment for the same, who has*

*to be treated as recipient of service and not the person affected by the performance of the service. The destination has to be decided based on place of consumption not the place of performance of service in the case of Category III, Business Auxiliary Service. The appellant/assessee were engaged in promoting market for foreign entities in India. This will amount to export of service.*

*9. In view of the settled position of law as discussed above, we find no merit in the impugned order in so far it confirms the demand against the appellant under BAS."*

7. In view of the above discussions, the impugned order cannot be sustained and is accordingly set aside. The appeal filed by the Appellant is allowed.

(Order pronounced in open court on…………………………………………………………………….)

**(P. K. CHOUDHARY)**
**MEMBER (JUDICIAL)**

**(SANJIV SRIVASTAVA)**
**MEMBER (TECHNICAL)**

*LKS*

**SANJIV SRIVASTAVA:**

8.0 I have gone through the order prepared by Learned Member (Judicial). Having considered the order though I concur with final outcome I would record following reasons..

9.0 For arriving at the findings recorded by the Learned Member (J) sole reliance has been placed on the decision in the appellant own case which was for the period April, 2007 to June, 2012, when the scheme of taxation of services was significantly different from the scheme of taxation of services during the period in dispute i.e. July, 2012 to March, 2014. By the said decision it was held that demand against the appellant cannot be confirmed under the category of Business Auxiliary Services as defined during the relevant period.

10.0 However, w.e.f. 1st July, 2012 there is no concept like Business Auxiliary, no definition of Business Auxiliary Services and every service which confirms to the definition as per Section 35B (44) is a taxation service unless and until it falls under the category of exempted services are in the negative list of services. Undisputedly, the services provided by the appellant are in accordance to the definition of services as defined by Section 65B (44) of the Finance Act, 1994 also do not fall under the category of exempted services or within the negative list specified.

11.0 The issue in the present case is vis-à-vis the service provided by the appellant and whether he can be considered as an intermediary for the services being provided. Undisputed fact is recorded in para 2 of the order by Learned Member (Judicial) clearly pointed out that

> "Appellant provides them with details of customers in India and information related to domestic market conditions so as to enable the foreign parties to prepare appropriate quotes for their customers so that the foreign parties can carry out the actual negotiations themselves. For the above purpose, the Appellant entered into Agreement with M/s Werner Pfleiderer & Gmbh Co. KG, Germany and M/s Coperion

Waeschle Gmbh & Co. KG, Germany dated 01.01.2007. The sequence of events as traced from the impugned Agreement is that; first the Appellant interacts with the customers in India, who place their orders with the group entity. Thereafter, the group entity exports the goods from Germany to the customers in India and raises the invoices directly on the customers. These orders materialize only when the acceptance or confirmation has been issued by the group entity to the customers and the Appellant cannot confirm these orders. Upon confirmation of the order, materials are dispatched to the customers directly by the group entity and payment related to the materials are dealt with directly by the buyer and the group entity. Thus, the Appellant's role is limited to acting as a bridge between the foreign parties and their customers in India and does not involve acceptance or confirmation of any order. The Appellant raises invoices for its commission on foreign parties in Germany as soon as the group entity informs the Appellant of having received the payment from the customer in India. The commission is based on an agreed percentage depending on the value of the goods sold and the same is paid by the group entity in convertible foreign currency."

12.0 From the facts as recorded above, it is evident that appellant is acting as an intermediary as defined by Rule 2 (f) of Place of Provision of Services Rules, 2012 but would fall under the excluded category as the services provided by them are in relation to the goods.. As per the Education Guide issued by Board, following has been clarified in respect of intermediary services:-

*"5.9.6 What are "Intermediary Services"?*

*Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time:*

*i) the supply between the principal and the third party; and*

*ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.*

***For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition."***

13.0 Thus appellant is intermediary, however, gets excluded from the said definition for the reasons as his services are in respect of the goods. This situation continued till the amendment was made with effect from 01.10.2014. In the case of Chevron Philips Chemicals India Pvt Ltd. [2021 (53) GSTL 268 (T-Mum)] following has been held:

> ***15.****The Ld. Advocate for the appellant has vehemently argued that while confirming the demand, the Learned Commissioner (Appeals) has referred to the amended definition of intermediary prescribed under Rule 2(f) of POPS Rules, 2012 for the entire period i.e. July, 2012 to Sept., 2015 when the said definition got amended w.e.f. 1-10-2014 to include 'goods' within the scope of said definition. Secondly, it is contended that even after 1-10-2014, also the appellant never acted as an 'intermediary' as is clear from the agreement between the appellant and the overseas company. The definition of 'Intermediary' under Rule2(f) of the POPS Rules, 2012 reads as under :*
>
> *Before amendment*
>
> *"(f)'Intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service on his account."*
>
> *After amendment w.e.f. 1-10-2014*

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

***16.****There is merit in the contention of the appellant that since 'goods' was not covered under the scope of definition of 'intermediary', therefore, for the period prior to 1-10-2014 confirmation of demand is bad in law. I find that the definition of intermediary cannot be made applicable to sale of goods for the period prior to 1-10-2014 in view of the principal law laid down by the Tribunal in Croda India Co. Pvt. Ltd. v. CST, Mumbai - 2019 (5) TMI 1139-CESTAT MUMBAI. It is observed as :*

*"4.4.12We cannot agree with the conclusion of the Commissioner, holding the services provided by the Noticee as "intermediary service". From the Rule 2(f) of Place of Provision of Services Rules, 2012, it is quite evident that service provided in relation to sale of goods by a commission agent cannot be classified as intermediary service. We are further supported in our view because para 5.9.6 of The Education Guide issued by the CBEC clearly states :-*

*"5.9.6What are "Intermediary Services"? Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time :*

*(i) The supply between the principal and the third party; and*

*(ii) The supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.*

*For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition."*

*Thus while it is true that intermediary includes intermediary in respect of sale of goods, but legislature has while framing these rules deemed it fit to exclude the intermediaries in respect of sale of goods from the definition of intermediary. Hence we cannot sustain the view expressed by the Commissioner, contrary to the express definition of intermediary provided by the Place of Provision of Services Rules, 2012. Hence in our view the services provided by the appellant in respect of the sale of goods of associated group companies cannot be said to be services provided by intermediary as defined by said Rules ibid. Since Rule 9 is applicable to specified services and the services provided in this case being not the intermediary services, this Rule will not be applicable for determination of place of provision of service."*

14.0 The concept of intermediary becomes relevant for the purpose of determination of the place of provisions of services as per Rule 9 of Place of Provision of Services Rules, 2012. In case of intermediary, it is the location of services provider which is considered as place of provision of services for the purpose of levy of service tax for the period when the appellant is covered by the definition of the intermediary, the place of provision of service, the location of service provider i.e. the taxable territory of India. Hence the benefit of export of services could not be extended to the an intermediary located in India.

15.0 For the period up till the date of this amendment which cover the period in demand, the services of appellant though of the intermediary are excluded from the said definition. In such cases, the fact whether the services are for export of services needs to be determined without treating the appellant as an intermediary. As per the Rule 3 of the Place of Provision of Services Rules in cases such cases the place of provision of service is location of the service recipient, which in the present case is outside India. Apellant are receiving payment against the provisions of these services in convertible foreign exchange. Thus, these services would qualify to get the benefit of export of services as per Rule 6 of the Service Tax Rules, 1994. Thus for this period there cannot be any levy of service tax and the demand made by the impugned order needs to be set aside.

16.0 Thus, I also concluded that during the relevant period of this demand the benefit of export of services would be available to the appellant, for the reasons stated above.

(Order pronounced in open court on-16/01/2025)

**(SANJIV SRIVASTAVA)**
**MEMBER (TECHNICAL)**

*akp*