CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70104 of 2023

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-338-2022-23 dated 09.01.2023 passed by Commissioner (Appeals) CGST, Noida)

M/s The PDQ Asia, **.....Appellant**
(Plot No.B-36, Unit-2208, Express Trade Tower-2,
Sector-132, Noida)

VERSUS

Commissioner of Central Goods &
Service Tax, Division-1, Noida **....Respondent**
(4th Floor, C-56/42, Renu Tower,
Sector-62, Noida-201301)

APPEARANCE:

Shri Rakesh Garg, Advocate & Shri Shubham Agarwal, Advocate for the Appellant
Shri Santosh Kumar, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.- 70296/2025

DATE OF HEARING : 07.03.2025
DATE OF PRONOUNCEMENT : 20.05.2025

The present appeal has been filed by the Appellant assailing the Order-in-Appeal No.NOI-EXCUS-001-APP-338-2022-23 dated 09.01.2023 passed by the Commissioner (Appeals), Central Goods & Service Tax, NOIDA. By the impugned order following has been held:-

"ORDER

12. In view of the above, I uphold the Order-in-Original No. 10/AC/CGST/DIV-1/NOIDA/2022-23 dated 10.06.2022 passed by the Assistant Commissioner, CGST, Divission-1, Noida and dismiss the appeal filed by the Appellant."

2. The facts of the case in brief are that the Appellant is engaged in providing business support services and professional services including making of designs and development of various products to foreign customers. The Appellant obtained voluntary

registration effective from 01.10.2014. Business support services are of the nature of "intermediary services in relation to goods", which became taxable with effect from 01.10.2014 with the amendment in the Place of Provisions of Services Rules, 2012[1]; hence the Appellant started paying tax with effect from 01.10.2014. Authorities below taxed the intermediary services in relation to goods provided by the Appellant for the period from 01.04.2014 to 30.09.2014. For the period 2014-15 to 2016-17, Appellant was also providing professional services in the nature of making of designs and development. The Appellant used to receive broad description of various products from the foreign customers; and based upon that description, the Appellant used to make two to three sample products, which were subsequently dispatched to the foreign customers. The Authorities below denied the claim of export of these services. Based upon the information received from the Income Tax Department, the Authorities below observed that the Appellant had not discharged its service tax Liabilities fully for the period from F.Y. 2014-15 to F.Y. 2016-17. Hence, letter dated 10.12.2020 was issued by the Service Tax Department asking the Appellant to furnish specified documents and give explanation for difference within five days. Since the Appellant failed to give reply in this short period, show cause notice[2] dated 27.12.2020 was issued by the Assistant Commissioner for demanding service tax of Rs.15,35,605/-, invoking the proviso to Section 73(1) of the Finance Act, being the extended period of limitation. The Appellant gave its reply dated 02.02.2021 and personally appeared before the Adjudicating Authority. Finally, on 10.05.2022, the Adjudicating Authority issued the Order-in-Original, confirming the SCN; however, giving the relief of cum duty tax. Final demand of service tax was adjudicated as Rs.13,54,282/- by passing the following order:-

> *(i) I confirm the demand of Service Tax amounting to Rs.13,54,282/- (including Educations Cess, Secondary & Higher Education Cess, Swatch Bharat Cess and Krishi Kalyan Cess) under proviso to Section 73(1) of the Act, 1994 read with Section 142, Section 173 and Section 174*

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[1] POPS Rules, 2012
[2] SCN

of the CGST Act 2017 and to recover the same from the party.

(ii) I confirm the demand of interest at the appropriate rate on the amount of service Tax mentioned at (i) above and to recover the same from the party under Section 75 of the Finance Act, 1994 read with Section 142, Section 173 and Section 174 of the CGST Act 2017.

(iii) I impose penalty of Rs. 13,54,282/- upon the party under Section 78(1) of the Finance Act, 1994 read with Section 142, Section 173 and Section 174 of the CGST Act 2017 for failure to pay tax & suppressing the facts and value of taxable service with intent to evade payment of service tax.

(iv) I impose penalty of Rs. 10,000/- upon the party under Section 77(1)(c) of the Finance Act, 1994 read with Section 142, Section 173 and Section 174 of the CGST Act 2017 for not maintaining proper records.

3. The demand of service tax pertains to the following two issues: -

(i) Intermediary services in relation to goods provided for the period from 01.04.2014 to 30.09.2014; service tax Rs.6,74,858/-, and

(ii) Design and development services provided by the Appellant; service tax being Rs.6,79,394/-.

4. Against the adjudication order dated 10.05.2022, the Appellant filed Appeal before the Commissioner (Appeals), CGST, Noida, which was dismissed vide the impugned order dated 09.01.2023. Earlier, audit of the Appellant was concluded for the period in dispute by the Service Tax Authorities. Letter dated 12.07.2019 was issued by the Service Tax Department for conducting Audit for the period from November, 2014 to June, 2017. Appellant filed replies and furnished documents as asked by the Audit Team, including those related to intermediary services and design and development services provided by him. The Appellant also paid additional service tax as detected by the Audit Team. On 30.01.2020, closure report of Service Tax Audit was issued. Aggrieved against the Appellate order dated 09.01.2023, the Appellant has filed this appeal.

5. We have heard Shri Rakesh Garg, Advocate and Shri Shubham Agarwal, Advocate for the Appellant and Shri Santosh Kumar learned Authorized Representative for the revenue.

6. The Appellant stated that following three issues were rightly identified in Para 8 of the impugned order dated 09.01.2023 by the Ld. Commissioner, Appeals:-

(1) Whether Service Tax was payable on the intermediary services provided by the Appellant prior to 01.10.2014.

(2) Whether design and development supplied and Business Auxiliary services provided to overseas buyer (USA) is export of service.

(3) Whether extended period of limitation for demanding service tax is invokable.

7. In relation to point No.1 of Para 3.2 pertaining to intermediary services prior to 01.10.2014, Learned Advocate appearing on behalf of the Appellant submits as follows:-

(i) Intermediary Services in relation to goods became taxable with effect from 01.10.2014 by virtue of amendment in the definition of the term "intermediary" in Rule 2(f) of the Place of Provision of Services Rules, 2012 vide Notification No.14/2014-ST dated 11.07.2014.

(ii) For the period from 1.4.2014 to 30.9.2014, the scope of the term 'intermediary' was confined to 'intermediary of services'; and with effect from 01.10.2014, it was extended to 'intermediary of goods'. Thus, up to 30.09.2014, the place of provision of 'intermediary of goods' was at the place of Recipient of service in terms of Rule 3 of the Place of Provision of Services Rules, 2012; hence such services were considered as export; and were not subject to service tax.

(iii) In view of afore-stated amendment vide Notification No.14/2014-ST dated 11.07.2014, the Appellant took service tax registration, voluntarily, with effect from 01.10.2014 and started paying service tax on intermediary services in relation to goods. These services are not taxable upto 30.09.2014 since its place of provision was outside India and these were categorized as "export of services". It is not disputed that the Appellant has started paying service tax in intermediary services with effect from 01.10.2014.

(iv) Upto 30.09.2014, the scope of the term "intermediary" was confined to "intermediary of services"; and with effect from 01.10.2014, it was extended to "intermediary of goods". Thus, up to 30.09.2014, the place of provision of 'intermediary of goods' was the "place of Recipient of service".

Comparative definition of the term 'intermediary' is as under:-

Up to 30.09.2014	**W.e.f. 01.10.2014**
2(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) between two or more persons, but does not include a person who provides the main service on his account	2(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) **<u>or a supply of goods</u>**, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account

(v) Since the place of provision of intermediary services in relation to goods was the location of the recipient (i.e. outside India in the present case) upto 30.09.2014, hence these services were of the nature of "export of service" in terms of Rule 3 of the Place of Provision of Services Rules, 2012.

(vi) The Appellant placed reliance upon the case of ***Chevron Phillips Chemicals India Pvt. Ltd. vs. Commissioner of CGST & Central Excise, Mumbai***

East - 2019 (12) TMI 1066 (CESTAT-Mumbai), where the Tribunal noted that the definition of 'intermediary' was amended on 01.10.2014 to include 'goods'. For the period before this amendment, the Tribunal held that the Appellant could not be considered intermediary as the definition did not encompass goods. In Para 16 of the Judgment, the Tribunal observed as under: -

> *"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 01.10.2014 in view of the principle law laid down by the Tribunal in* ***Croda India Co. Pvt. Ltd. Vs. CST, Mumbai – 2019 (5) TMI 1139-CESTAT Mumbai****. It is observed as:*
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> *"4.4.12 We 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 Service 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:-*
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> *"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."

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 Service 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." (Emphasis supplied)

8. This judgment was also followed by the Tribunal in the case of ***Viavi Solutions India Pvt. Ltd. vs. Commissioner of CGST, Gurgaon-I - 2024 (6) TMI 187 (CESTAT-Chandigarh)***.

9. In relation to point No.2 of Para 3.2 pertaining to taxability of designing services, the Appellant submits as follows:-

(i) Appellant is also engaged in providing Design and

Development services to the foreign customers. These services are provided by the Appellant and his team; and he is not engaged as agent or intermediary in arranging or facilitating these services. The Appellant also explained the process of provision of design service, as under: -

- *The Appellant used to receive broad description of various sample products from the foreign customers. Based upon that description, the Appellant used to make design of the product on computer software through its own team*
- *On approval of pictures of the designs, the Appellant would make two or three sample products through its own team or its supporting manufacturers. These sample products were subsequently dispatched to the foreign customers.*
- *Role of the Appellant completed once the sample product was delivered to the foreign customers. Further order for supplying goods of the sample products was at the discretion of the foreign customers based upon final quotations from various suppliers, including those referred by the Appellant. Sometimes, these final orders were given even to the manufacturers located outside India directly by the foreign customers.*

(ii) In the "intermediary" services, there are three main parties, where one of the party is a broker, or an agent or other similar person, who arranges or facilitates the supply of goods or services, which does not exist in the present case. Appellant is neither acting as a broker nor as an agent of the recipient of service (i.e. foreign buyer). In fact, there is no third party involved. The Appellant has provided the services on principal to principal basis (P2P), on its own account, to the US Clients. The Appellant is a person who supplies the services on his own account. Only two parties are involved in the transactions.

(iii) In the case of ***Verizon India Pvt. Ltd. vs. commissioner of service tax - 2019 (8) TMI 384 (CESTAT-Delhi)***, the Appellant entered into a "Service Agreement", wherein, the Appellant was rendering Business Services including sales support, advertising, billing, IT support, systems integration, legal, human resources, financial, executive and other administrative services, etc. to the US Client. There was no tripartite agreement wherein the Appellant acting as a facilitator between the US Client and its customers in India. It was held that services of the Appellant to US Client do not merit classification under the category of 'intermediary services'; and the Appellants have rendered services to the US Client as 'principal service provider' and not as an 'intermediary'.

(iv) Reliance has been placed on **Circular No.159/15/2021-GST dated 20 September, 2021** issued by the CBIC which clarifies various doubts related to scope of "Intermediary".

(v) Reliance was also placed on following cases:-

- ***Evalueserve.Com (P.) Ltd. vs. CST (2019) 106 taxmann.com 74 (Chandigarh-CESTAT)***,
- ***Sunrise Immigration Consultants (P.) Ltd. v. CCE&ST [2019] 106taxmann.com 173 (Chandigarh - CESTAT)***,
- ***Valmiki Consultants (P) Ltd. v. Commissioner of Customs - 2018 (11) TMI 1085 (Hyderabad-CESTAT)]***

(vi) The Appellant submitted that as per Rule 3, the place of provision of design and development service is the place of recipient of service; hence, all the conditions specified in Rule 6A of Service Tax Rules, defining the term "export of services", are satisfied.

10. In relation to point No.3 of Para 3.2 pertaining to invoking of extended period of limitation, Learned Advocate appearing on behalf of the Appellant submits as follows:-

(i) The Authorities have **invoked the extended period of limitation** under proviso to Section 73(1) of the Finance Act, 1994, in spite of the fact that Audit of the business affairs of the Appellant was already concluded on 30.01.2020 by the Service Tax Department and the Department had full knowledge of the facts. Reliance was placed on following judgments: -

- ***Anand NishiKawa Co. Ltd. vs. CCE, Appeal, Meerut [2005 (188) E.L.T. 149 (SC)]***
- ***Bharathi Cement Corporation (P) Limited vs. CCT [2019 (3) TMI 1423 (CESTAT-Hyd.)]***
- ***Religare Technova Global Solutions Limited vs. CCE [2020 (11) TMI 753 (CESTAT-Bang.)]***
- ***Khoday Glass Company vs. CCT [2019 (7) TMI 163 (CESTAT-Bang.)]***

(ii) Appellant further stated that the Hon'ble Courts in number of cases have held that extended period of limitation can be invoked only if all the conditions specified in the concerned provision are satisfied and when there is an intention to evade payment of duty; i.e. it is not mere failure to pay duty. Reliance was placed on following judgments: -

- ***CCE Vs. Chemphar Drug and Liniments 1989(40) E.L.T. 276 (SC).***
- ***Cosmic dye chemical vs. collector of central excise, Bombay 1995(75) E.L.T. 721 (SC).***

- ***Tamil Nadu Housing Board - 2004 (74) E.L.T. 9 (SC).***

- ***H. M. Industries vs. CTT (2014) 78 VST 382 (Del)***

- ***Bharathi Cement Corporation (P) Limited vs. CCT [2019 (3) TMI 1423 (CESTAT-Hyd.)].***

11. The Appellant also submitted that since he is maintaining proper records and there was no intention to evade payment of service tax, hence he is not liable to pay penalty under Section 77 and 78 of the Finance Act, 1994. I have considered the impugned order along with the submissions made in appeal and during the course of arguments. In relation to the intermediary services in relation to goods for the period from 01.04.2014 to 30.09.2014, the definition of the term 'Intermediary' under Rule 2(f) of the POPS Rules, 2012 has changed. Going through the amendments in the definition of the term "intermediary" and relying upon the judgments in the cases of ***Chevron Phillips Chemicals India Pvt. Ltd.(Supra) and Viavi Solutions India Pvt. Ltd.(Supra),*** I hold that intermediary services in relation to goods became taxable with effect from 01.10.2014 by virtue of amendment in the definition of the term "intermediary" in Rule 2(f) of the POPS Rules, 2012 vide Notification No.14/2014-ST dated 11.11.2014 with effect from 01.10.2014. Hence, I set aside the imposition of service tax on services provided from 01.04.2014 to 30.09.2014, which were of the nature of "export of services" at the relevant time, and not taxable. In relation to design and development services, looking at the process of providing these services and the fact that no third party is involved, I further hold that the Appellant is not providing "Intermediary Services'', and place of provision shall be the location of recipient of service, which is outside India. Since all the clauses of Rule 6A of the Service Tax Rules are satisfied, design services will be considered as export of service. So far as invoking of extended period of limitation, audit of the Appellant was concluded on 30.01.2020; the Appellant already furnished the details of design and intermediary services provided during

the years 2014-15 to 2016-17; the Appellant voluntary obtained service tax registration with effect from 01.10.2014 and started paying service tax on intermediary services; hence I do not find any ingredient of suppression of facts or any willful misstatement or fraud or collusion or contravention of the provisions of the Act or of the Rules made thereunder with an intent to evade payment of service tax. Relying upon the judgments in the cases of ***Anand NishiKawa Co. Ltd.(Supra); Tamil Nadu Housing Board (Supra); Bharathi Cement Corporation (P) Limited(Supra)*** *and* ***Khoday Glass Company(Supra)****,* I hold that the extended period of limitation cannot be invoked in the present case.

12. Hence, the appeal succeed on all three aspects raised in the impugned order. Since, I also do not find any element of suppression of facts or any willful misstatement with an intent to evade payment of service tax, I find it appropriate to set-aside the penalties imposed under Sections 77 and 78.

13. In the result, the impugned order is set aside and the appeal filed by the Appellant is allowed with consequential relief, if any, as per law.

(Order pronounced in open court on - **20.05.2025**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

LKS