

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

REGIONAL BENCH - COURT NO.II

Service Tax Appeal No.70214 of 2021

(Arising out of Order-in-Appeal No. NOI-EXCUS-001-APP-498-20-21, dated - 20/08/2020 passed by Commissioner (Appeals), CGST & Central Excise, Noida)

M/s Gopsons Papers Ltd,
(A-2 & 3, Sector-64,
Noida, Uttar Pradesh 201301)

.....Appellant

VERSUS

Commissioner, CGST & Central Excise, Noida

....Respondent

(Noida)

APPEARANCE:

Shri Atul Gupta, Advocate for the Appellant

Shri A. K. Choudhary, Authorised Representative for the Respondent

**CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. ANGAD PRASAD, MEMBER (JUDICIAL)**

FINAL ORDER NO.70612/2025

DATE OF HEARING : 15.07.2025
DATE OF DECISION : 15.07.2025

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No. NOI-EXCUS-001-APP-498-20-21, dated -20/08/2020 passed by Commissioner (Appeals), CGST & Central Excise, Noida. By the impugned order Commissioner (Appeals) has upheld the Order-In-Original No.01/ADC/CGST/Audit Noida/2018-19 Dated 03.10.2018 by which following was held:-

"ORDER

- (i) I confirm the demand of the Service Tax (including Education Cess and Secondary Higher Education Cess) amounting to Rs.88,70,256/-(Rupees Eighty Eight Lacs Seventy thousand Two Hundred Fifty Six only) for the period 2011-12 & 2012-13, upon the party, in terms of the Section 73 (1) of the Finance Act, 1994.*
- (ii) I confirm the demand of Interest on the Service Tax liability of Rs.88,70,256/- (Rupees Eighty Eight Lacs Seventy thousand Two Hundred Fifty Six only) under the provisions of Section 75 of the Finance Act, 1994.*
- (iii) I also Impose a penalty amounting to Rs.88,70,256/- (Rupees Eighty Eight Lacs Seventy thousand Two Hundred Fifty Six only) under Section 78 of the Finance Act, 1994 upon the party.*
- (iv) I also impose a penalty of Rs. 10,000/- under the provisions of Section 77 of the Finance Act, 1994."*

2.1 The Appellant is having Service Tax Registration for services falling under the category of GTA & Business Support Services provided to their customers as defined in Section 65 (105) (zzp) and Section 65 (105) (zzzq) of the Finance Act, 1994.

2.2 During the course of audit it was observed that Appellant had provided commission to foreign party during the period from 2009-10 to 2012-13. On inquiry and investigation it was observed that services provided by the foreign companies to the Appellant were covered under the category of 'Business Auxiliary Services' and Appellant was required to pay service tax in respect of these services received on reverse charge basis. Details of service tax payable is in the table below:-

Year	Total amount of Commission paid	Commission related India	Commission paid outside India	Service Tax Liability (including Ed. Cess & S.H. Ed. Cess) @ 10.30% for period upto FY 2011- 12 &
------	---------------------------------	--------------------------	-------------------------------	---

				@12.36% for FY2012-13
2010-11	2082921	2082921	NIL	NIL
2011-12	8824383	2942515	5881868	605832
2012-13	69371010	2506737	66864273	8264424
Total			72746141	8870256

2.3 A Show Cause Notice dated 19.09.2016 was issued to the Appellant asking them to show cause as to why:-

(i) Services Tax amounting to Rs.88,70,256/- (including Ed. Cess & S&H Ed. Cess) (Rupees Eighty Eight Lakhs Seventy Thousand Two Hundred Fifty Six only) not paid during the period from financial year 2011-12 to 2012-13 should not be demanded and recovered from them under the proviso to Section 73(1) of the Finance Act, 1994.

(ii) Interest on the above amount should not be demanded and recovered from them under Section 75 of the Finance Act, 1994;

(iii) Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 for contraventions of various statutory provisions with intent to evade service tax, as mentioned supra and

(iv) Penalty should not be imposed upon them under Section 77 of the Finance Act 1994 in view of aforementioned contravention of the statutory provision of Finance Act'1994 and Service Tax Rules, 1994 as mentioned supra.

2.4 Show Cause Notice has been adjudicated as per Order-In-Original referred in Para 1 above.

2.5 Aggrieved Appellant filed appeal before the Commissioner (Appeals) which has been dismissed.

3.1 We have heard Shri Atul Gupta, Advocate for the Appellant and Shri A. K. Choudhary, Departmental Representative for the Revenue.

3.2 Arguing for the Appellant learned Advocate submits that:-

- The impugned order have been passed in gross violation of principle of natural justice without consideration of the submissions made before the Lower Authorities.
- The Appellant is not liable to pay Service Tax under the category of 'Business Auxiliary Service' for the period from April 2011 to June 2012. The demand under this category has been made without identifying specific sub-clause of Section 65(19) of the Finance Act, 1994. Not only the Show Cause Notice but even the order of the Lower Authority does not point to a specific sub-clause. It is a settled law that for making a demand under this category specific clause is to be pointed out. Reliance is placed on following case laws:-
 - United Telecom Ltd., 2011 (22) STR 571 (Tri-Bang);
 - Hindalco Industries Ltd., 2009 (248) ELT 391 (Tri-Del);
 - Balaji Enterprises [2019 SCC OnLine CESTAT 6251];
 - Syniverse Mobile Solutions Pvt Ltd. [2023 (6) TMI 463 - CESTAT HYDERABAD].
 - National Organic & Chemical Industries Limited [1999 (113) ELT 912 (Tri-Del)]
 - CMA CGM Global (India) Private Limited [2016 (41) STR 292 (Tri-Mum)]
- The services provided by the Appellant Company to the Appellant were in nature of transportation and distribution of the printed books supplied by them under a contract with the Government of Ethiopia. This service work could not have been classified under the category of 'Business Auxiliary Service' as the foreign company did not act as a commission agent for the sale of goods for services provided by them. Reliance is placed on the following decisions:-
 - Pandurang Tukaram Dalal, [AIR 1957 Nagpur 61]

- Fulchand Tikamchand [2016 (42) STR 1063 (Tri-Mum)]
 - Arun Electrics Bombay [1966 (17) STC 576]
 - Maa Sharda Wine Traders [2009 (15) STR 3 (MP)]
 - Continental Airlines PLC [2016 (45) STR (Tri-Del)]
 - LMJ Services Limited [2017 (3) GSTL 263 (Tri-Del)]
 - Indsil Electrosmelts Limited [2017 (48) STR 64 (Tri-Bang)]
 - Kulcip Medicines (P) Limited [2009 (14) STR 608 (P&H)]
- Since the foreign company was engaged by the Appellant for clearance of goods from Customs Port in Ethiopia and for distribution to specific locations, these parties were carrying out the work of clearing and forwarding agency as defined under Section 65(25) of the Finance Act, 1994. Reliance is also placed on Board Circular No. 59/8/2003-ST, dated 20.06.2003 wherein difference between the Commission Agent and clearing and forwarding agent service has been explained.
- The activities post 01st July, 2012 are covered under negative list of service as per Section 66(D)(p) of the Finance Act.
- The foreign parties were only transporting and delivering the printed books to various locations and were performing services of transportation of goods not amounting to goods transportation agency service or courier services.
- The place of provision of subject service is outside the taxable territory and thus no service tax was payable. Therefore, as per Rule 4 of the Place of Provision of Services Rules no Service Tax can be levied on the subject activities as the same are performed outside India. Reliance is placed of following decisions:-

- Indian association of Tour Operators 2017-TIOL-1715-HC-DEL-ST]
 - Medway Educational Consultant (P) Ltd. [(2025) 141 GSTR 155]
- Demand is also barred by limitation as there was no reason for invocation of extended period of limitation in the present case. Reliance is placed on following decisions:-
- Gowri Computers (P) Limited, [2012 (25) STR (Tri-Bang)].
 - Sunshine Steel Industries [2023(385) E.L.T. 826 (S.C.)]
 - Anand Nishikawa Co Ltd [2005 (188) ELT 149 (SC)]
 - Continental Foundation Jt. Venture [2007 (216) ELT 177 (SC)]
 - Reliance Industries Ltd. in Civil Appeal No. 6033 of 2009 & 5714 of 2011 -Supreme Court dated 04.07.2023.
 - Cosmic Dye Chemical [1995 (75) ELT 721 (SC)]
 - HMM Limited [1995 (76) ELT 497 (SC)]
 - Chemicals & Fibres of India Limited [1988 (33) ELT 551(Tri-Del)]
 - Ispat Industries Limited [2006 (199) ELT 509 (Tri-Mum)]
 - NIRC Limited [2007 (209) ELT 22 (Tri-Del)]

3.3 Authorized Representative reiterates the finding recorded in the impugned order.

4.1 We have considered the impugned order alongwith the submissions made in the appeal and during the course of argument.

4.2 The impugned order records as follows:-

"5.....The core issue to be decided before me is whether the appellant is liable to pay service tax of Rs.

88,70,256/- during the impugned period under the proviso to section 73(1) of the Finance Act, 1994 on the alleged service category "Business Auxilliary Service",

5.1 From the facts of the case, I observe that the appellant was engaged in the business of manufacturing/printing books and registered for "Business Support Services" and "Goods Transport Agency Services". Appellant was awarded an export order by the Ethiopian government for supply and delivery of printed books to various locations in Ethiopia. To execute the export order, the appellant entered into agreements with two foreign companies i.e. M/s FKIE, Ethiopia and M/s City Corner, Dubai, to undertake all related jobs of receiving communications, supervising coordinating and paying for all necessary activities along with timely, efficient and proper distribution and delivery of the exported books to be done by co-ordinating with the Govt of Ethiopia. The scope of services was specified in details in the MOUS signed with the said overseas parties. The payments made to the two foreign companies have been entered into the financial records/ ledgers of the party as Foreign Commission paid during different periods of time. The statutory financial records duly audited by the statutory auditors are to be believed and relied upon for understanding the nature of payment and the services rendered. But the appellant has argued that the subject activities are not classifiable as BAS and there is no liability to pay tax thereon under RCM. They further argued that the subject activities are in nature of transportation of goods covered under negative list of services and that, in any case, the place of provision thereof is outside the taxable territory.

5.2 I think, to understand the nature of the service, the definition of "Business Auxiliary Services" as defined in Section 65(19) of the Finance Act, 1994, has to be gone through, which provides that:

(19) *"business auxiliary service" means any service in relation to,*

- (i) *promotion or marketing or sale of goods produced or provided by or belonging to the client, or*
- (ii) *promotion or marketing of service provided by the client: or*
- (iii) *any customer care service provided on behalf of the client, or*
- (iv) *procurement of goods or services, which are inputs for the client, or*

Explanation. For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client.

- (v) *production or processing of goods for, or on behalf of, the client:*
- (vi) *provision of service on behalf of the client, or*
- (vii) *a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and*

includes services as a commission agent.

but does not include any activity that amounts to manufacture of excisable goods.

Explanation. For the removal of doubts, it is hereby declared that for the purposes of this clause,

- (a) *"commission agent" means any person who acts on behalf of another person and causes sale or purchase of*

goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person-

- (i) deals with goods or services or documents of title to such goods or services, or*
- (ii) collects payment of sale price of such goods or services; or*
- (iii) guarantees for collection or payment for such goods or services; or*
- (iv) undertakes any activities relating to such sale or purchase of such goods or services:*

In view of the above definition and the nature of services rendered as recorded in the statutory audited records it is ample clear that all the activities in respect of the exported books by the foreign companies for a consideration in the form of a Commission is rightly covered under the definition of "Business Auxiliary Services".

5.3 I further find that as per the provisions of Section 66A and 66C (w.e.f. 01.07.2012) of the Finance Act, 1994, the liability to pay tax falls upon the appellant as a recipient of the said service:

SECTION 66A. Charge of service tax on services received from outside India.

(1) Where any service specified in clause (105) of section 65 is,

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed

establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that.....”

SECTION 66C. Determination of place of provision of service.- (1) *The Central Government may, having regard to the nature and description of various services, by rules made in this regard, determine the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided.*

(2) Any rule made under sub-section (1) shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory |

Further, Rule 3 of the Place of Provisions of Service Rules, 2012 provided that

RULE 3. Place of provision generally.-*The place of provision of a service shall be the location of the recipient of service*

Provided *that in case [of services other than online information and database access or retrieval services, where the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.*

In the light of the above discussion, in the instant case, it gets established that the appellant is the service receiver and location of the service receiver is well within the taxable territory of India by way of its place of business fixed establishment and permanent address. Hence

appellant is liable to pay the service tax during the impugned period.

5.4 The appellant further argued that the issuance of SCN was improper, for being merely based on internal audit report as no further investigation was carried out so as to first see the veracity of the audit observations and then to make out a prima-facie case against the appellant. I find that the plea taken by the appellant is not sustainable on the ground when the audit of records is conducted by the audit team in the premises of any unit, necessary investigation is automatically involved on the basis of which the audited unit either pays/debits the disputed amount or disagrees with the audit for which necessary proceedings to recover the government dues, are carried out and SCNs are issued. Moreover, Audit is the investigative wing of the department which unearths modus operandi of the unit leading towards sometimes big scandal.

Hence, saying that SCN is improper as the same has been issued merely on the basis of internal audit is not sustainable.

5.5. The appellant further argued that they are not liable to pay service tax under the category of BAS for the period from April-2011 to June-2012 as there has been no allegation in the SCN as well as OIO as to the subject activities carried out by the foreign parties fit into a particular limb of the definition of BAS since the BAS under 65(19) consists of numerous clauses referring to different and mutually exclusive activities. They added that their subject activities are covered under clearing and forwarding agency service which are performed abroad and not taxable being under Negative List of Services for the period From July-2012 to March-2013. I find that there is no denying the fact that Appellant had exported the printed books against an order awarded by the

Ethiopian government for supply and delivery of the same to various locations in Ethiopia. The appellant entered into agreements with two foreign companies to undertake all related jobs for which scope of services was specified in details in the MOUs signed with the said overseas parties. The appellant made payments to the both foreign companies which were entered into their financial records as Foreign Commission paid to the foreign companies against their services rendered by them. The said financial records have been duly audited by the statutory auditors and are to be relied upon for understanding the nature of payment and the services rendered. In view of the nomenclature of the consideration paid & MOUs signed with the foreign companies, I come to the conclusion that the said rendered service falls under the category "Business Auxiliary Service" and service tax is liable to recovered from the appellant under RCM as per Section 66A & 66C of Finance Act, 1994, and Rule 3 of Place of Provision of Service Rules, 2012.

5.6 As regards invocation of extended period of limitation, interest applicable under Section 75 of the Finance Act, 1994, and penalty under Section 77 & 78 of the Finance Act, 1994, the adjudicating authority has suitably discussed the reasons in details, hence I do not find any worth discussing them again."

4.3 Undisputedly, the Appellant entered into an agreement/contract with the Federal Democratic Republic of Ethiopia for supply of printed books. In term of this contract, Appellant was required to provide and deliver printed books at the location specified by the Government of Ethiopia in number and quantity specified. For the purpose of executing the above Appellant hired services of a foreign company for the clearance of the goods from the Port at Ethiopia and thereafter delivered them to the specified locations by the Government of Ethiopia. From the above it is quite evident that the foreign company was

not engaged in the activity of purchase or sale of any goods or services provided by the Appellant in foreign territory. The payments made by the Appellant though indicated in their books of accounts to be commission paid to the foreign company was for the purpose of clearance of the goods from the Customs Port in Ethiopia and thereafter transporting them to the desired location. In our view the appellant had outsourced certain activities in relation to the agreement entered by them with the Government of Ethiopia, and were making payment to the said foreign company in respect of these out-sourced activities. The impugned order summarily dismissed the above without going into the details of the transactions made for the reason that these have been reflected as commission in the books of account. It is a settled proposition in law that for levy of tax its nature of the transaction which is material rather than the nomenclature adopted in the books of account.

4.4 Similar view has been taken in the case of Dwaraka Constructions [2021 (54) G.S.T.L. 159 (Tri. - Hyd.)] Hyderabad Bench observed as follows:-

"11. The next question is whether the commission so received is chargeable to service tax under the Head 'Business Auxiliary Services' as per the definition indicated in para 8 above. Learned A.R. argues that the appellant is "promoting and marketing the services" of the sub-contractor and therefore the sub-contractor is the client and the appellant is the service provider and is providing business auxiliary services. Therefore, the service tax is chargeable on the commission amount. From the nature of transactions discussed above, we do not find that the appellant is in the business of or is engaged in promoting or marketing the service of the sub-contractor. He is merely outsourcing some of the work which they have received to their sub-contractors because the appellant cannot handle the entire work on his own. They are also receiving commission of 2% which they are deducting from

the amounts paid to the sub-contractors. In our considered view, this is not a promotion or marketing of the services of the sub-contractors but actually outsourcing some of their work to the sub-contractors. Although their assertion is that the contract is on back to back basis with no commission whatsoever, they were, in fact, deducting 2% as their own commission. Regardless of how much commission they deduct or whether they sub-contract for the same amount as they receive or for a much lower amount, this outsourcing arrangement does not amount to promoting or marketing the service of the sub-contractors to whom the work is outsourced. In view of the above, we find that no service tax can be charged from the appellant under the head business auxiliary services."

4.5 Thus going by the crux of the transaction, we find that services received by the Appellant cannot be called as commission agent service to be taxed under the category of 'Business Auxiliary Service' prior to 01.07.2012.

4.6 We also observe that neither the Show Cause Notice nor any of the orders of the Lower Authorities specify the specific the sub-clause of Sub-Section 65 (19) of the Finance Act, 1994 for making demand under the category of 'Business Auxiliary Services'.

4.7 In view of the various decisions referred by the Appellant at the time of the hearing, we observe that without specifying the specific sub-clause classification of services under the category of 'Business Auxiliary Service' cannot be justified.

4.8 In the case of CMA CGM Global (India) Pvt. Ltd. [2016 (41) S.T.R. 292 (Tri.-Mumbai)] following has been held:-

"5. *We have carefully considered the submissions of both sides. We note that the show cause notice in the present case does not refer to any specific clause of the BAS Service which is reproduced below as it stood for the period upto 15-6-2005 -*

"business auxiliary service" means any service in relation to, —

- (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*
- (ii) promotion or marketing of service provided by the client, or*
- (iii) any customer care service provided on behalf of the client; or*
- (iv) procurement of goods or services, which are inputs for the client; or*
- (v) production of goods on behalf of the client; or*
- (vi) provision of service on behalf of the client; or*
- (vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and*

includes services as a commission agent,

but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of Central Excise Act, 1944 (1 of 1944).

During arguments the Id. AR fairly conceded that it can only be covered under Clause (iii) namely, any customer care service provided on behalf of the client. The show cause notice does not refer to this clause at all. Even the adjudication order makes no mention of this clause. The only hint which surfaces from these documents is that the activities on which tax is demanded amount to customer management services. To this extent the proceedings are flawed."

4.9 Further we also note that the services provided by foreign company which are in the nature of clearance and transportation of the goods to the specified destinations would be in nature of clearing and forwarding agent services and CBEC vide Circular No.59/08/2003-ST dated 20.06.2003 clarified as follows:-

*"It may be noticed that the exemption under this notification is for a commission agent while the services of a consignment agent remain taxable under the category of Clearing and Forwarding services. **It may be appreciated that the nature of service provided by a Consignment agent is different than that provided by a commission agent. A consignment agent's job is to receive the goods from the principal and dispatch them on the directions of the principal, whereas a commission agent's job is to cause sale/purchase on behalf of another person.** Thus, the essential difference is that a commission agent sells or purchases on behalf of the principal while consignment agent receives and dispatches the goods on behalf of a principal. It is possible that a person may be a consignment agent as well as a commission agent. Such a person would already be covered in the category of Clearing and Forwarding agent and would be liable to pay service tax in that category."*

4.10 In the case of Kulcip Medicines [2009 (14) S.T.R. 608 (P&H)] following has been observed:-

"10. *A perusal of the aforesaid Section shows that taxable service has been defined to mean any service provided or to be provided to a client by a 'clearing and forwarding agent in relation to clearing and forwarding operations in any manner'. If the clearing operation are separated from forwarding operations, the levy of tax would not be attracted if it only involves one of the two activities.*

11. *The question which falls for consideration is whether word 'and' used after the word 'clearing' but before the word 'forwarding' at two places in clause (j) be considered in a conjunctive sense or dis-injunctive sense. It appears to be fairly well settled that the*

context and intention of legislature are the guiding principles. In that regard reliance may be placed on the judgment of Hon'ble the Supreme Court in the case of Mazagaon Dock Ltd. v. CIT (1958) 34 ITR 368. By necessary intendment the expression 'a clearing and forwarding agent in relation to clearing and forwarding operations, in any manner' contemplates only one person rendering service as 'clearing and forwarding agent' in relation to 'clearing and forwarding operations'. To say that if, one person has rendered service as 'forwarding agent' without rendering any service as 'clearing agent' and he be deemed to have rendered both services would amount to replacing the conjunctive 'and' by a disjunctive which is not possible. The counsel for the revenue has not been able to bring on record any material to show the word 'and' should be construed as disjunctive. He has not shown any 'trade practice' which may lead to a necessary inference that service of one kind rendered by one is invariably considered to comprise both. No argument has been advanced before us by him to canvass that the legislature intention is discernible from the scheme of the statute or from any other relevant material. Therefore the word 'and' should be understood in a conjunctive sense. (See Maharaja Sir Pateshwari Prasad Singh v. State of U.P. (1963) 50 ITR 731. In these circumstances if we read the word 'and' as 'or' then it would amount to doing violence to the simple language used by Legislature which cannot be imputed ignorance of English language. In that regard we place reliance on the judgment of Hon'ble the Supreme Court rendered in the case of Inayat Ali Khan v. State of U.P., (1971) 2 SCC 31 (Para 5) and para 6 of the judgment of Hon'ble the Supreme Court rendered in the case of APE Belliss India Ltd v. Union of India, (2001) 132 E.L.T. 8. The observations of their Lordship reads thus :

"6..... A plain reading of the Section (sic Tariff Public Notice) clearly shows, as contended by Mr. Bhatt, that for an alloy steel to be considered as stainless steel, it will have to satisfy two conditions i.e. The alloy steel should be known in the trade as stainless steel and further, it should contain 11% chromium as a component of the alloy steel. This is clear from the use of the word "and". If the intention of the trade notice was to treat the two types of alloy steels as stainless steel, then it would have been made clear by using the word "of instead of the word "and"."

4.11 As these services were provided by the foreign company to the Appellant outside the taxable territory in respect of the goods already delivered at the port in Ethiopia, the demand of service tax on reverse charge basis treating them to be import of services cannot be upheld. These services being performance based services as per the Rule 4 of Place of Provisions of Services Rules, 2012 are treated to be performed at the location where they are actually performed. Rule 4 is reproduced as under:-

"RULE4. Place of provision of performance based services. – The place of provision of following services shall be the location where the services are actually performed, namely:-

*(a) **Services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service:***

Provided that when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service:

Provided further that this clause shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after the repairs without being put to any use in the taxable territory, other than that which is required for such repair.

(b) Services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for the provision of the service." [Emphasis supplied]

4.12 In case of WANBURY LTD [2019 (21) G.S.T.L. 154 (Tri. - Mumbai)] following was held:

"8.*It is clear that the impugned order has determined tax liability on the commission that was paid by the appellant to agents situated outside the country. It is also not in doubt that their services were utilised in connection with the promotion of their products which involved exports out of India and, consequent to such exports, the issue stands settled by the decision of the Tribunal in re Genom Biotech Pvt. Ltd. in near identical circumstances. Accordingly, the levy of service tax on an activity rendered by an entity located abroad and in relation to the goods after their arrival in those countries is not liable to tax."*

4.13 In case of Enbee Education Centre Pvt. Ltd [(2024) 15 Centax 54 (Tri.-Ahmd)] following has been held:

14. *We notice that in the present matter the demand for Service Tax under the category of "Business Auxiliary Services" has been made on the ground that Appellant is acting as commission agent. The revenue alleges that service tax ought to be paid on such expenses under the Business Auxiliary Service under reverse charge mechanism. However, we observe that definition of*

'Business Auxiliary Services' contained numerous sub-heads and it was necessary for Revenue to point out under which head of the said definition the demand was raised. It is important to classify the activity under the specific sub-clause before confirming the demand. We find that the same has not been done in the present matter. In the absence of the specification of the exact sub-clause under which the demand was raised the said demand cannot be sustained. In this regard judgment in the case of United Telecoms Ltd. v. Commissioner of Service Tax - 2011 (22) S.T.R. 571 (supra), Sharma Travels - 2017 (52) S.T.R. 272 (supra) and Balaji Enterprises v. C.Cx. & S.T. - 2020 (33) G.S.T.L. 97 (Tri. - Del.) (supra) support their case. The said decisions are squarely applicable to the facts of the present case.

15. *We find that department alleged that appellant are receiving the services of 'Commission Agent' from subsidiary Company. Whereas as per the appellant subsidiary company is acting as consignment cum clearing and forwarding agent. However there is difference between the terms 'consignment agent' and 'commission agent'. This distinction is also clarified in Board Circular No. 59/8/2003-ST dated 20-6-2003. The relevant portion is reproduced as below:*

"It may be appreciated that the nature of service provided by a Consignment agent is different than that provided by a commission agent. A consignment agent's job is to receive the goods from the principal and dispatch them on the directions of the principal, whereas a commission agent's job is to cause sale/purchase on behalf of another person. Thus, the essential difference is that a commission agent sells or purchases on behalf of the principal while consignment agent receives and dispatches the goods on behalf of a principal. It is possible that a person may be a consignment agent as well as a commission agent. Such a

person would already be covered in the category of Clearing and Forwarding agent and would be liable to pay service tax in that category. In other words, the present exemption is available only to such commission agent who is not a consignment agent."

As it is clear from above, there is difference between commission agent and consignment agent. Consignment agent actually deals with the goods, when he receives the same from the principal and dispatches them on the direction of the principal, to the ultimate customer. Consignment agent may not be even associated with the procurement of orders or does not directly deal with the sale purchase. He is acting on behalf of the principal and deals with the movement of the goods as per the direction of the principal. On the other hand commission agent is only concerned with the procurement of orders for which he may receive the fixed amount along with some percentage amount.

16. *As per the agreement entered between the appellant and subsidiary company, we also find that subsidiary company is merely clearing the goods in USA and forwarding the same to the Customers of the Appellant. This fact also evident from the clause 2 of the agreement between appellant and subsidiary company in which it is mentioned that the books sold/shipped to subsidiary company is on 'consignment basis'. Clause 6 of the said agreement provides that all import expenses on cargo at the port of destination, are sole responsibility of the buyer and he is responsible for cargo discharge, including all charges incurred in supervision of the discharge. Clause 7 also provides that the buyer bears the sole responsibility of securing all permits, licenses or any other documents required by the government of the importing nation. Thus the Subsidiary company is also undertaking the activity of clearing and forwarding agent. No clause of the agreement*

provides that subsidiary company also undertaking any marketing or promotion activity for the sale of the books exported by the appellant. In such a scenario, the subsidiary company who is the service provider had to be held as consignment agent rather than commission agent.

4.14 Thus for the period prior to 01.07.2012 we do not find any merits in the demand under the category of "Business Auxiliary Services". From 01.07.2012 the services provided are specific in nature on transportation of goods from the port to the specified location. These services fall under the category of transportation of goods by road which are covered by the negative list as per Section 66(D)(p). Further we also find that for the period post 01.07.2012, these services being provided to the appellant in respect of the goods subsequent to delivery of the exported goods at foreign port, cannot be termed as import of service for levy of service tax on reverse charge basis by the appellant.

4.15 Thus we do not find any merits in the demand.

4.16 As we are deciding the issue on the merits of the demand itself, we are not rendering any findings on the issue of limitation etc. raised in the appeal.

5.1 Demand is set aside alongwith the penalties imposed.

5.2 Appeal is allowed.

(Operative part of the order is pronounced in open court)

**Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)**

**Sd/-
(ANGAD PRASAD)
MEMBER (JUDICIAL)**