

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No.60579 of 2019

[Arising out of Order-in-Appeal No. 272/ST/CGST-APPEAL-GURUGRAM/SG/2019 dated 31.01.2019 passed by the Commissioner (Appeals), CGST, Gurugram, Haryana]

M/s Saxo India Private Limited

1st Floor B-39, Near PVR Plaza, Metro Gate No.2
Middle Circle Connaught Place, Central Delhi
New Delhi-110001

.....Appellant

VERSUS

**Commissioner of Central Excise and
Service Tax, Gurugram**

Plot No.3 & 37, Sector 32, Near Medanta Hospital,
Gurgaon, Haryana-122001

.....Respondent

APPEARANCE:

Shri Deepak Thackur, Advocate for the Appellant

Shri Shivam Syal and Shri Aniram Meena, Authorized Representative for the
Respondent

WITH

Service Tax Appeal No.60652 of 2019

[Arising out of Order-in-Appeal No. 272/ST/CGST-APPEAL-GURUGRAM/SG/2019 dated 31.01.2019 passed by the Commissioner (Appeals), CGST, Gurugram, Haryana]

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Service Tax, Gurugram**

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APPEARANCE:

Shri Shivam Syal and Shri Aniram Meena, Authorized Representative for the Appellant

Shri Shri Deepak Thackur, Advocate for the Respondent

CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.60661-60662/2024

DATE OF HEARING: 22.08.2024

DATE OF DECISION: 12.12.2024

P. ANJANI KUMAR:

The appellants, M/s Saxo India Pvt. Ltd., are registered with the Service Tax Department for providing services like Information Technology Software Services (ITSS) and Business Support Services (BSS) to their foreign clients; during the period April 2015 to March 2016, the appellant claimed refund of unutilized CENVAT credit of Rs.1,14,55,997/-under Notification No.27/2012; the lower authorities allowed a refund of Rs.1,08,06,910/- on ITSS and rejected refund of Rs.6,49,068/- on BSS; on an appeal filed by the appellants, learned Commissioner (Appeals) vide impugned order dated 31.01.2019 remanded the cases back to the Adjudicating Authority while holding that:

- The Adjudicating Authority has wrongly rejected the refund claims by classifying the ITSS as Intermediary Services that the appellants are eligible for the refund of the same;

- The Adjudicating Authority has rightly rejected the claim of the appellants for refund of CENVAT credit on export of BSS holding that the appellants were intermediary.
- The appellants are not eligible for refund where Foreign Inward Remittances Certificates were not provided.

2. Against the impugned order, Department is in appeal (ST/60652/2019) against the grant of refund on ITSS while the appellants are in appeal (ST/60579/2019) against the refund rejected in respect of BSS.

3. Shri Deepak Thackur, learned Counsel for the appellant, submits that the appellant satisfies each of the conditions mentioned in the CENVAT Credit Rules and the services rendered qualify to be export of service as defined under Rule 6A of Service Tax Rules, 1994. He takes us through the relevant provisions regarding the definition of ITSS, BSS, Intermediary Services and the Education Guide issued in this regard and submits that in terms of the CBIC Circular No.159/15/2021 dated 20.09.2021, any back-end services provided by an assessee in India will not qualify as an Intermediary Services; even though the Circular is issued under the GST Regime, it is applicable to the service tax. He further submits that the appellant's agreement with the foreign recipients shows that the activities carried out by the appellant are not in the nature of Intermediary.

4. Learned Counsel further submits that the impugned order wrongly holds that the appellants are providing BSS as an intermediary relying on one clause of the Service Agreement which provides for the escalation procedure and in holding that appellant is dealing with both foreign clients and their customers. He submits that the reading of the agreement by the learned Commissioner (Appeals) is wrong and is contrary to the clauses of the agreement; the "Customer" referred to in the escalation procedure is not the "Customer" of the foreign client but M/s Saxo Netherland themselves; intermediary is a person who facilitates the provision of service between the provider of the service and recipient of the service and in the present case, the appellant is not interacting with the customers of their foreign affiliate; they are only engaged in providing accounting related service to their affiliates. He submits that the service provided by the appellants is Back-End Office Service/ Business Support Service and not the resolution provided by the appellant during any operational excuse; it is very clear from the agreement that M/s Saxo Bank, Netherland has approached the appellant for providing accounting related services. He relies on the following cases:

- M/s Blackrock Services India Pvt. Ltd. – (ST/61877/2018)
- Genpact India (P) Ltd. – 2023 (68) GSTL 3 (P&H)
- Singtel Global India Pvt. Ltd. – [SERTA 10/2023]
- Verizon Communications India Ltd. – 2018 (8) GSTL 32 (Del.)
- Ernst & Young Ltd. – 2023 (73) GSTL 161 (Del.)

5. Learned Counsel for the appellants submits in respect of ITSS that the functions carried out by the appellants as per the agreement are clearly ITSS; Revenue simply states that the appellant is arranging and facilitating the service between M/s Saxo Bank, its branches and customers without any basis; Revenue fails in showing as to how development of software can be treated arranging and facilitating services between M/s Saxo Netherland and their customers.

6. Shri Shivam Syal, learned Authorized Representative for the Department, reiterates the findings of the impugned order in respect of the appeal filed by M/s Saxo India Pvt. Ltd. and grounds of appeal in respect of Revenue's appeal. He submits that vide Deficiency Memo cum Show Cause Notice dated 25.07.2018, appellants have been informed very clearly the deficiencies in the refund applications. He takes us through the Education Guide and presents the Department's case.

7. Heard both sides and perused the records the case. Brief issue that requires to be addressed in the case is as to whether the appellants have rendered intermediary services in respect of services provided by them and as to whether the non-submission of FIRC certificates would dis-entitle them to the claim of refund. We find that it is beneficial to have a look at the legal position in this matter. Section 2(f) of Place of Provision Rules, 2012 defines an Intermediary as follows:

“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”

8. We find that CBIC vide Circular No.159/15/2021-GST dated 20.09.2021 clarified “Intermediary Services” while making it clear that there is broadly no change in the scope of intermediary services in the GST Regime vis-à-vis Service Tax Regime, except addition of supply of securities in the definition of “Intermediary” in the GST Law. The Circular highlights the primary requirements for intermediary services to be as follows:

3. Primary Requirements for intermediary services, The concept of intermediary services, as defined above, requires some basic prerequisites, which are discussed below:

3.1 Minimum of Three Parties: By definition, an intermediary is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus a natural corollary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply. An activity between only two parties can, therefore, NOT be considered as an intermediary service. An intermediary essentially arranges or facilitates" another supply (the "main supply") between two or more other persons and, does not himself provide the main supply.

3.2 Two distinct supplies: As discussed above, there are two distinct supplies in case of provision of intermediary services;

- (1) Main supply, between the two principals, which can be a supply of goods or services or securities;
- (2) Ancillary supply, which is the service of facilitating or arranging the main supply between

the two principals. This ancillary supply is supply of intermediary service and is clearly identifiable and distinguished from the main supply.

A person involved in supply of main supply on principal-to-principal basis to another person cannot be considered as supplier of intermediary service.

3.3 Intermediary service provider to have the character of an agent, broker or any other similar person:

The definition of "intermediary" itself provides that intermediary service provider-means a broker, an agent or any other person, by whatever name called...". This part of the definition is not inclusive but uses the expression "means" and does not expand the definition by any known expression of expansion such as "and includes". The use of the expression "arranges or facilitates" in the definition of "intermediary" suggests a subsidiary role for the intermediary. It must arrange or facilitate some other supply, which is the main supply, and does not himself provides the main supply. Thus, the role of intermediary is only supportive

3.4 Does not include a person who supplies such goods or services or both or securities on his own account: The definition of intermediary services specifically mentions that intermediary "does not include a person who supplies such goods or services or both or securities on his own account". Use of word "such" in the definition with reference to supply of goods or services refers to the main supply of goods or services or both, or securities, between two or more persons, which are arranged or facilitated by the intermediary. It implies that in cases wherein the person supplies the main supply, either fully or partly, on principal to principal basis, the said supply cannot be covered under the scope of "intermediary".

3.5 Sub-contracting for a service is not an intermediary service: An important exclusion from intermediary is sub-contracting. The supplier of main service may decide to outsource the supply of the main service, either fully or partly, to one or more sub-contractors. Such sub-contractor provides the main supply, either fully or a part thereof, and does not merely arrange or facilitate the main supply between the principal supplier and his customers, and therefore, clearly is not an

intermediary. For instance, 'A' and 'B' have entered into a contract as per which 'A' needs to provide a service of, say, Annual Maintenance of tools and machinery to 'B'. 'A' sub-contracts a part or whole of it to 'C'. Accordingly, 'C' provides the service of annual maintenance to 'A' as part of such sub-contract, by providing annual maintenance of tools and machinery to the customer of 'A', ie, to 'B' on behalf of 'A'. Though 'C' is dealing with the customer of 'A', but 'C' is providing main supply of Annual Maintenance Service to 'A' on his own account, ie. on principal-to-principal basis. In this case, 'A' is providing supply of Annual Maintenance Service to 'B', whereas 'C' is supplying the same service to 'A'. Thus, supply of service by 'C' in this case will not be considered as an intermediary.

3.6 The specific provision of place of supply of 'Intermediary services' under section 13 of the IGST Act shall be invoked only when either the location of supplier of intermediary services or location of the recipient of intermediary services is outside India.

9. We find that the Original Authority vide his order held that the services rendered by the appellants are Intermediary Services in terms of Rule 9 of Place of Provision of Service Rules, 2012. The Original Authority held as follows:

In case of the assessee, I find that the assessee is engaged in the provision of ITSS services and Business Support Services to its overseas clients. Under IT Services they are engaged for upgrading software applications, providing software support and other related services. Their services are confined to developing certain components of the main software. Their work mainly involves coding, testing, handling queries etc. Under BSS Service, the assessee is engaged in performing corporate treasury, accounting, market data management, reconciliations and similar services as per the Service Level Agreements with its associates through its shared service centre.

As per Rule 6A mentioned above, I find that in case of the assessee, the provider of service is located in the taxable territory, the recipient of

service is located outside India and that the service provided by the services not covered under negative list of services. Therefore, the place of provision of the service, receipt of convertible foreign exchange and the point of separate entity in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act needs to be discussed.

In order to determine the place of provision of service and whether a person is acting as an intermediary or not, the following factors need to be considered: -

Nature and value: An intermediary cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price. Also, the principal must know the exact value at which the service is supplied (or obtained) on his behalf, and any discounts that the intermediary obtains must be passed back to the principal.

Separation of value: The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging. It can be based on an agreed percentage of the sale or purchase price. Generally, the amount charged by an agent from his principal is referred to as "commission".

Identity and title: The service provided by the intermediary on behalf of the principal is clearly identifiable.

Based on above, it appears that the company is provisioning services on behalf of its parent company and on a limited mandate. I find that the assessee cannot alter the nature and value of the main service and the entire transaction between the principal and its clients is not within the purview of the assessee. Further, the value of service provided by the assessee is clearly distinguished from that of the value of main service provided by the principal to its clients. Also, the service provided by the assessee is clearly identifiable from the main services as the assessee is providing only a delegated portion of the overall ITSS service/main services.

Similarly in case of BSS, services are provided through the shared services team under Master Service level Agreements globally and that

independent provisioning of the services does not take place. The assessee appears to merely act as a facilitator in provision of the main service. The assessee appears to be an intermediary and I hold accordingly.

10. We find that neither the Show Cause Notice nor the Original Order refers to any clauses of the agreement. Whereas the Commissioner (Appeals) vide impugned order, for the first time, refers to the agreement and finds that in respect of ITSS that the appellants are not intermediary. He finds that:

The appellant is providing ITSS services only to M/s. Saxo Bank A/s, Denmark and not to any other overseas group entity. These services mainly related to upgrading of various software applications/components, besides providing other services like software support, software project management service as per the instructions of Saxo Bank A/s, Denmark. Their work mainly involves coding, testing, handling queries etc. I find that the above said service of ITSS provided by the appellant to its overseas client is mainly as per the requirement of the Client and there does not appear to be involvement of any third party to this extent. The ITSS services undertaken by the appellant are strictly in accordance with the instructions/requirement of their overseas client M/s. Saxo Bank A/s, Denmark only and hence do not appear to have any intermediary which would make it come under the preview of intermediary services. Thus, I find that the adjudicating authority has wrongly rejected the refund claims by classifying the said ITSS services as an intermediary and the appellant's refund claim is allowable to this extent.

10.1. In respect of BSS, he finds that they are intermediary service observing that:

On perusal of above Service level agreement, it appears that the appellant is dealing with both the

Saxo Bank Netherlands and its customers and thus acting as an intermediary. The appellant is providing multitasking services to its global entities including query support and other facilitations to their customers/clients as well. The appellant appears to merely act as a facilitator in provision of the main service. As Rule 9 of the Place of Provision of Services Rules, 2012 as amended, the place of provision of the following services shall be the Services Rules, 2012 as amended, the place of provision of the intermediary services shall be the location of the service provider, hence all the services provided by the appellants, as evident from aforesaid terms of agreement and are naturally bundled as a single service i.e. BSS by an 'intermediary' under the 'place of provision of Services Rules 2012'. Further, the facts and circumstances of the advance ruling and judicial pronouncements quoted by the appellant are not applicable to the instant appeal as the services provided by the appellant are broad enough to affect the principal activity i.e. Business Support services by the appellant to their overseas clients and hence are clearly classified as services provided by an intermediary. Hence, in accordance with the statutory provisions of Finance Act, 1994 and rules made thereunder, the activity undertaken by the Appellant cannot be treated as export and the adjudicating authority has correctly rejected the refund claim of the appellant to this extent.

11. The appellant submits that the above finding of the Appellate Authority is contrary to the clauses of the agreement. It appears that learned Commissioner has read the word "Customer" appearing in the clauses to be the customers of M/s Saxo Bank Netherlands. However, on going through the clauses of the agreement, it is clear that the word "Customer" refers to M/s Saxo Bank Netherlands themselves and not to their customers. It is made very clear in the service level agreement that it is between the customer (M/s Saxo Bank

Netherlands) and the provider. To that extent, we find that the findings of the learned Appellate Commissioner are beyond the Show Cause Notice and the Original Order. We also find that the Show Cause Notice just refers to the definition of "Intermediary" and assumes that the services rendered by the appellants are in the nature of intermediary, without going into the various clauses of the agreements.

12. We find that as per the clauses of the agreement what is mentioned as customer is none other than the foreign principal i.e. Saxo Bank, Netherlands as made clear under Service Level Agreement:

Between (Customer) - Saxo Bank Netherlands
Strawinskylaan 1527, Tower B, Level 15, grid TB-
15090/111, 1077XX Amsterdam, Netherlands

AND (Provider) - SAXO Accounting Center Saxo IT
India Pvt. Ltd. 20th. Floor, Tower 10C Cyber City,
DLF Phase II Gurgaon-122 002 Haryana India.

This being the position, it is not correct for the appellate authority to hold that the appellants are rendering services to the customer of their foreign principal.

13. We find that Hon'ble Punjab & Haryana High Court in the case of Genpact (P) Ltd. (supra) has gone into the issue of Intermediary and has enunciated the principle as follows:

28. As per definition of "intermediary" under Section 2(13) of the IGST Act the following three conditions must be satisfied for a person to qualify as an "intermediary"; -

29. First, the relationship between the parties must be that of a principal-agency relationship. Second, the person must be involved in arrangement or facilitation of provisions of the service provided to the principal by a 3rd party. Third, the person must not actually perform the main service intended to be received by the service recipient itself. Scope of an "intermediary" is to mediate between two parties *i.e.* the principal service provider (the 3rd party) and the beneficiary (the agents principal) who receives the main service and expressly excludes any person who provides such main service "on his own account".

14. We find that, though, the judgment is rendered in the context of GST, the principles are not very much different. We find on going through the different clauses of the agreement that there is nothing to indicate that the appellants are working as Intermediary as there is no mention of any service to be rendered by the appellants to any third party. Thus, we are of the considered opinion that either in respect of ITSS Services or BSS Services, the appellants acted as Intermediary.

15. We further find that Tribunal in the case of Ernst & Young Ltd. (*supra*) held that:

23. It is apparent that the Adjudicating Authority has interpreted the last limb of the definition of 'intermediary' under Section 2(13) of the IGST Act as controlling the definition of the term. We are unable to agree with this interpretation. The limb of Section 2(13) of the IGST Act reads as "but does not include a person who supplies such goods or services or both or securities on his own account" but this does not control the definition of the term 'intermediary'; it merely restricts the main definition. The opening lines of Section 2(13) of the IGST Act expressly provides that an

intermediary means a broker, agent or any other person who “arranges or facilitates supply of goods or services or both or securities between two or more persons”. The last line of the definition merely clarifies that the definition is not to be read in an expansive manner and would not include a person who supplies goods, services or securities on his own account. There may be services, which may entail outsourcing some constituent part to a third party. But that would not be construed as intermediary services, if the service provider provides services to the recipient on his own account as opposed to merely putting the third party directly in touch with the service recipient and arranging for the supply of goods or services.

24. Thus, even if it is accepted that the petitioner has rendered services on behalf of a third party, the same would not result in the petitioner falling within the definition of ‘intermediary’ under Section 2(13) of the IGST Act as it is the actual supplier of the professional services and has not arranged or facilitated the supply from any third party.

16. We find that the impugned order mistakenly categorizes the services rendered by the appellants on the basis of Place of Provision Rules. We find that Tribunal in the case of M/s Blackrock Services (India) Pvt. Ltd. (supra) observed that:

7. Admittedly the refund claims have been filed by the appellants under Rule 5 *ibid* r/w Notification No. 27/2012, dated 18-6-2012. The said rule provides for refund of accumulated Cenvat credit in respect of goods and services exported under bond or undertaking. This rule is very specific and lays down how to determine the quantum of admissible refund from the accumulated Cenvat credit. It cannot be considered to be a proceeding for denial of Cenvat credit available in the account of the claimant and therefore even if the refund is denied then also the amount continues to remain in the Cenvat account of the claimant. If the Revenue is not in agreement with the claims of the appellants and if, according to Revenue, the services in issue do not fall within the ambit of export of service then the Revenue ought to have initiated the

proceedings against the appellants for demanding the Service Tax in respect of taxable service provided by the appellants. Admittedly no such proceedings have been initiated by the Revenue as borne out from the records of the case and therefore in a way Revenue itself has allowed this taxable service provided by appellants as export of service. If that is so then in the proceeding under Rule 5 *ibid* Revenue cannot deny refund by treating the service provided not to be export of service. Same principle has been followed by the Tribunal in the matter of JFE Steel India Pvt. Ltd. v. Commissioner CGST, Gurugram, 2021 (44) G.S.T.L. 292 (Tri. - Chan.) and also in Final Order No. 60959-60960/2021, dated 7-10-2021 in Service Tax Appeal Nos. 60024-25 of 2020; Macquarie Global Service Pvt. Ltd. v. Commissioner C.E. & ST, Gudgaon-1. On somewhat similar issue while interpreting similar terms of agreement the Authority of Advanced Rulings (AAR) in the matters of In re : Go Daddy India Service Pvt. Ltd. - 2016-TIOL-08-AAR-ST = 2016 (46) S.T.R. 806 (A.A.R.) and In re : Universal Services India Pvt. Ltd., 2016 (42) S.T.R. 585 (A.A.R.) held that the Place of Provision of Services will be outside India and therefore Rule 3 of Place of Provision of Services Rules are held to be applicable. The Hon'ble High Court of Judicature at Bombay in the matter of Bombay Flying Club v. CST, 2015 (37) S.T.R. J129 has held that the ruling given by Advance Ruling Authority cannot be ignored. We also find force in the submission of Learned Counsel about applicability of Rule 3 of Place of Provision of Services Rules, 2012 which provides that generally the place of provision of service is the location of service recipient therefore since in the instant case the location of service receiver M/s. HLX is located outside India i.e. USA therefore the place of provision of service is outside India and hence the service in issue qualify export of services in terms of Rule 6A of Service Tax Rules, 1994.

17. We further find that the impugned order holds that the appellants have not submitted some of the FIRC's though the appellant has calculated the entire receipt of foreign exchange as

service exports on the basis of auditor's certificate while holding that the appellant is eligible for refund of unutilized credit in proportion to the remittances received by the appellant during the respective quarters. Learned Commissioner further finds that the appellant has not produced any proof of missing remittances/ FIRC's before him which were also not produced before the adjudicating authority and that auditor's certificate cannot be evidence of receipt of remittance. In view of this, we find that as far as the rejection of refund of Rs.6,49,068/- is concerned, the issue must travel back to the original authority in order to calculate eligible refund amount in accordance with the actual remittances received during respective quarters on the basis of the evidence that may be submitted by the appellants.

18. In view of the above, we hold that the appellants have not rendered the services of ITSS or BSS as an Intermediary and as such, the services rendered by the appellant can be classified as export of services. The appellant shall be eligible for the refund of the same. The Revenue's Appeal No.ST/60652/2019 is liable to be dismissed and Appeal No. ST/60579/2019 filed by the appellant is liable to be partly allowed by way of remand to the original authority with a direction to calculate eligible refund amount in accordance with the actual remittances received during respective quarters on the basis of the evidence that may be submitted by the appellants.

19. In the result, Revenue's Appeal No.ST/60652/2019 is dismissed and Appeal No. ST/60579/2019 filed by the appellant is partially allowed by way of remand in above terms.

(Order pronounced in the open court on 12/12/2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

PK