CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
<u>CHANDIGARH</u>

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No.60171 of 2020

[Arising out of Order-in-Appeal No.216/ST/CGST-APPEAL-GURUGRAM/SG/2019 dated 28.02.2020 passed by the Commissioner (Appeals), CGST, Gurugram, Haryana]

M/s Airbnb India Pvt. Ltd. ......**Appellant**
Plot No.241, Phase-I, Udyog Vihar,
Gurgaon, Haryana-122001

VERSUS

Commissioner of Central Goods and Service Tax, Gurugram ......**Respondent**
Plot No.36-37, Sector-32, Gurugram,
Haryana-122001

<u>APPEARANCE:</u>

Shri Kamal Sawhney and Ms. Aakansha Wadhwani, Advocates
for the Appellant
Shri Aneesh Dewan and Shri Narinder Singh, Authorized Representatives
for the Respondent

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

FINAL ORDER NO.60352/2025

DATE OF HEARING: 24.01.2025
DATE OF DECISION: 04.03.2025

<u>PER: P. ANJANI KUMAR</u>

The appellants, M/s Airbnb India Pvt. Ltd., assail the Order-in-Appeal dated 28.02.2020.

2. Brief facts of the case are that the appellants are engaged in the provision of Promotional and Marketing Support Services to M/s Airbnb, Ireland under an Agreement; appellants filed a refund claim

for Rs. 3,25,50,445/-, for the period April 2017 to June 2017, of the unutilized CENVAT credit. The Adjudicating Authority rejected the refund claim on the grounds that the services rendered by the appellants are Intermediary Services in nature and therefore, cannot be treated as Export of Services. Commissioner (Appeals), on an appeal filed by the appellants, upheld the Order of the lower authority. Hence, this appeal.

3. Learned Counsel for the appellants submits that brief question involved in the case is whether the Promotional and Marketing Support Services to their overseas entity qualify as exports or whether they are Intermediary Services. Learned Counsel takes us through various Paras of the Agreement and submits that the Appellate Authority confirmed the demand only on the basis that the appellant interacts with the clients of M/s Airbnb, Ireland in setting up new client accounts on M/s Airbnb online market place & in resolution of client queries and the appellant promotes and markets the M/s Airbnb online market place to prospective users, hosts, guests and associated hospitality providers. Learned Counsel submits that the Master Service Agreement clearly shows that there are only two parties to the Contract and the appellant is providing services to its overseas entity on its own account; it is clearly mentioned in the Agreement that the Agreement is on principal-to-principal basis and the appellant (the service provider) is not an agent of M/s Airbnb, Ireland; therefore, the nature of services provided are not intermediary in nature.

4. Learned Counsel submits that CBIC vide Circular No.230/24/2024-GST dated 10.09.2024 clarified that the services

provided by an advertising agency/ company to a foreign company do not amount to Intermediary Services; the activities of the appellant are similar to that of an advertising agency inasmuch as the scope of the activity, as per the Agreement, is to perform business development and marketing activities to help, promote and market the M/s Airbnb Online Market Place; therefore, in view of the Circular, the activity carried out by the appellant qualifies as an Export of Service. Learned Counsel further submits that the issue in the present appeal is covered in favour of the appellant by the Final Order dated 04.09.2024 passed by this Bench wherein it was held that M/s Airbnb Payments India Pvt. Ltd. (another entity of the appellant's group) is not an intermediary as the remuneration is in the form of mark-up and the Agreement only between two parties and there is not tripartite agreement; there is no contract with the customers of foreign entity.

5. Learned Counsel further submits that the learned Commissioner wrongly finds that:

- The appellant procures the entire services from others on behalf of the parent company;
- The appellant does not work in an independent manner and works only as per the directions of the overseas entity;
- The appellant is only facilitating the services;
- The FIRCs are not certified by the Auditor;

6. Learned Counsel counters the argument, of the Appellate Authority, as follows:

- The fact that the services are outsourced/ sub-contracted do not alter the status of the appellant; he relies on CBIC Circular dated 20.09.2021 and on the decision in the cases of Singtel Global India Pvt. Ltd. [SERTA 10/2023] and Verizon Communications India Ltd. – 2018 (8) GSTL 32 (Del.);
- The overseas entity has outsourced the work of Promotion and Marketing Services to the appellant; the appellant has to follow certain guidelines laid down by the overseas entity; guidelines issued by the overseas entity in itself do not make the appellant an intermediary;
- The appellant is responsible for provision of services and it is the appellant who raises the bills on the overseas entity on a principal-to-principal basis;
- Rule 6A of Service Tax Rules, 1994 lays down the only condition that the payment should be received in convertible foreign exchange, the proof of which is submitted by the appellant in the form of FIRCs; there is no requirement that the same should be certified by an Auditor;

7. The learned Counsel relies on the following to supplement his argument that the appellants are not an Intermediary:

- Genpact India (P) Ltd. – 2023 (68) GSTL 3 (P&H)
- Black Rock Services India Pvt. Ltd. – Appeal No. 61877 of 2018.
- SNQS International Sock Private Limited – (Service Tax Appeal No.41459 of 2019] [Civil Appeal No.1431 of 2024]
- Infodesk India Pvt. Ltd. – 2025-VIL-28-GUJ

- Chevron Philips Chemicals India Pvt. Ltd. – 2019 (12) TMI 1066- CESTAT Mumbai [Civil Appeal No.4370 of 2024]

8. Learned Counsel further submits that the appellant filed a refund claim under Rule 5 of the CENVAT Credit Rules, 1994 read with Notification No.27/2012 dated 18.06.2012; Revenue cannot raise the question of applicability of CENVAT credit while deciding the refund. In case the Revenue was of the opinion that some credit was taken wrongly, proceedings under Rule 14 could have been initiated. He relies on Black Rock Services India Pvt. Ltd. (supra) and JFE Steel India Pvt. Ltd. – 2021 (44) GSTL 299 (Tri. Chan.). He further submits that for the financial year 2020-21 and 2021-22, Revenue has sanctioned the refunds filed in the GST Regime. Therefore, Revenue cannot raise the issue in the instant case. He relies on Marsons Fan Industries – 2008 (225) ELT 334.

9. Learned Authorized Representative reiterates the findings of the impugned order.

10. Heard rival contentions and perused the records of the case. Brief issue involved in the case is to decide as to whether the appellants are intermediaries as far as the services rendered by them to M/s Air BNB Ireland are concerned. The Original Authority finds as follows:

> …….I found that the assessee is providing market support service to Airbnb Ireland. It is noticed that the company in India has only 14 full time employees as per Transfer Pricing study Report 17-18 for overall management and representation and that the entire marketing and support services has been procured from other service

> providers in India on behalf of the parent company. Therefore, the services have not been provided on its own account. The entity incorporated in India is only for overall facilitation and not discharge of core work. The Airbnb platform connects the hosts and the users and Airbnb India promotes the same.
> The assessees facilitated market research, promotion and support service to its parent company. I find that as per TP study report, market risks, credit risk, utilisation risks, manpower risk and other material decision making power vests with the Holding Company only and that entity incorporated in India works only as per the directions of the parent company and not in an independent manner. The investment and servers etc. flow from the parent entity only and that it has no role in the entire process of service provision except for facilitation. Even the remuneration is on cost plus basis highlighting that the company in India has no relevance except for arrangement of service for its parent company. It has no other operations. The marketing services has even not been provided on their own account but procured from other entities.

11. We find that the Learned Commissioner (Appeals) goes through the definition of intermediary services and the CBIC circular and finds as follows.

> 7. From perusal of the Master Service Agreement, I observe that there is an interaction of this appellant with the third-party i.e. the clients of Airbnb Ireland as the agreement clearly specifies that one of the services offered by the appellant would be to help in setting up new client accounts on Airbnb Online Marketplace and helps in resolving client queries. Further the appellant evidently promotes and markets the Airbnb Online Marketplace to prospective users, hosts, guests and associated hospitality providers in the Territory, with the objectives of (1) having such users, hosts, guests and associated hospitality providers register with Airbnb Ireland online and use their online accounts efficiently, and (2) expanding the scope of offerings available through the Airbnb Online Marketplace The appellant has claimed before me that they do not interact with any client of Airbnb Ireland, does not appear to be true. The appellant interface as

well as resolves the queries of third parties/prospective clients/hosts/guests in order to get their bookings through online marketplace portal of their overseas holding company.

8. I also observe that during the personal hearing held on 05.12.2019, the appellant was also asked to produce the original of the Master Service Agreement, but appellant failed to produce the same. The appellant was given further time to get and arrange the original master service agreement and produce the same in next hearing on 15.01.2020. The appellant attended the hearing on 15.01.2020, but on being asked to produce the original service agreement, appellant failed to produce the original service agreement, and submitted only a copy of agreement on plain paper having a stamp affixed as 'certified true copy' signed by one Sh. Tushar Mehrishi, said to be authorised signatory. The appellant was again requested to provide a copy of the agreement that has been executed between Airbnb Ireland and its clients in India in order to ascertain the nature of relationship between the clients of Airbnb Ireland and the appellant, but the appellant submitted that Airbnb Ireland do not have any agreement with the customers located in India and further as the agreements are entered into by the overseas entity with the overseas customers, Airbnb India does not have any access to these agreements. I observe that the appellant is hiding behind the clause of confidentiality in order to avoid disclosures of proper facts as well as the true nature of relationship that exists between the clients of Airbnb Ireland and the appellant. Further, I observe that under clause 1.5 of the agreement dated 14.04.2014 pertaining to 'Data Protection' it has been stated "to provide the Services, the Service Provider may need to access certain data provided by Airbnb Ireland. Airbnb Ireland certifies that it has full legal right to make such data available to the Service Provider. The Service Provider and Airbnb Ireland acknowledge and agree that this data may include information relating to an identified or identifiable natural person ("Personal Data')" which flies against the contention that there are no clients whereas the appellant also has clients whose data is to be managed by them on behalf of Airbnb Ireland.

9. Further, I have also gone through Transfer Pricing Document of the appellant, and it is observed that Airbnb Group (Airbnb Inc., and its subsidiaries either individually or collectively) operates the Airbnb Platform, which enables people to list, discover, and book accommodations around the world on both desktops and mobiles devices. The Airbnb Platform

> allows Guests to connect with Hosts. The ingredients of an intermediary are visibly present in the master service agreement as the appellant interface as well as resolves the queries of third parties/ prospective clients/hosts/guests in order to get their bookings through online marketplace portal of their overseas holding company. I am therefore entirely in agreement with the views of the adjudicating authority that the services offered under the service agreement certainly fall under the definition of intermediary as there are three entities involved in the whole process, the clients, the appellant and their overseas entity i.e. Airbnb Ireland.

12. It appears that the original authority and the appellate authority base their conclusions on the point that find that the appellant has a bare minimum number of employees; the appellant has merely arranged for services to their masters procuring from others; Airbnb platform connects the hosts and the users and Airbnb India promotes the same; the appellants have no say in the policy or investment etc. and are just facilitators; they have not produced the original agreement etc. we find that it is required to have a look at the definition of 'Intermediary' .

12.1 Section 2(f) of POPS Rules, 2012 defines "Intermediary" as below:

> "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".

12.2. We find that Hon'ble Punjab & Haryana High Court has held in the case of Genpact India Pvt. Ltd. (supra) that the following three conditions must be satisfied primarily for a person to qualify as an Intermediary:

- the relationship between the parties must be that of a principal-agency relationship.
- the person must be involved in arrangement or facilitation of provisions of the service provided to the principal by a 3rd party.
- 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 who receives the main service and expressly excludes any person who provides such main service "on his own account"

12.3. CBIC Circular No.159/15/2021 dated 20.09.2021 explains the concept of Intermediary Services.

13. We shall now proceed to analyse the facts of the impugned case vis a vis the definition. We find that it will be beneficial to have a look at the agreement in doing so. Some clauses of the agreement as follows

> ……….
>
> - Airbnb Ireland desires to have Service Provider perform services for Airbnb Ireland and Service Provider, having the capacity, facilities, expertise and personnel to provide such services, desires to perform such services for Airbnb Ireland, subject to and in accordance with the terms and conditions of this Agreement.
> - 1.3. (a) The Services will be provided to at a charge equal to (i) the direct and indirect costs and expenses incurred by Service Provider to provide the Services to Airbnb Ireland (including, without limitation, pre-operative costs, salary costs and travel expenses of the personnel and

any subcontractors engaged in the performance of the Services, charges for depreciation and amortization of equipment and other capital assets used in performing the Services), plus (ii) a mark-up where deemed appropriate by the parties. Costs and markup will be determined in accordance with applicable transfer pricing regulations and be computed with reference to Service Provider's financial statements, prepared in accordance with U.S. generally accepted accounting principles. It is the intent of the parties to provide Service Provider with an arm's length return for providing the Services to Airbnb Ireland. Accordingly, the parties may adjust the mark-up(s) from time to time, as they deem appropriate.

- **1.4 Limitations on Appointment.**

  (a) Airbnb Ireland has sole authority to agree to prices in relation to the Airbnb Online Marketplace, to amend specifications for the Airbnb Online Marketplace, to agree and finalise service terms and conditions and credit terms, and to conclude, accept or reject any online registrations.

  (b) Service Provider **<u>may not accept any orders in its own name or on behalf of Airbnb Ireland or User.</u>**

  (c) Service Provider has no authority to make any agreement on behalf of or in any way to bind Airbnb Ireland or User to any third party.

  <u>(d) Nothing in this Agreement or in the arrangements hereby contemplated shall constitute or be taken to mean that Service Provider acts as the agent of Airbnb Ireland or User for any purpose whatsoever and Service Provider shall not hold itself out or make any warranty, representation or do any act on behalf of the Airbnb Ireland or User</u> except in accordance with this Agreement.

  (e) If Service Provider receives any enquiry or order from inside or outside the Territory Service Provider shall immediately pass each such enquiry or order to Airbnb Ireland.

- **RELATIONSHIP OF PARTIES.**

  2.1 Independent Contractor and Arms Length Relationship. **<u>The relationship of Airbnb Ireland and Service Provider established by this Agreement is that of independent</u>**

contractors, and **nothing in this Agreement shall be construed**: (a) to give either party the right or power to direct or control the daily activities of the other party; **(b) to constitute the parties as principal and agent,** employer and employee, partners, joint ventures, co-owners or otherwise as participants in a joint undertaking; or (c) to allow either party (i) to create or assume any obligation on behalf of the other party for any purpose whatever or (ii) to represent to any person, firm, or entity that such party has any right or power to enter into any binding obligation on the other party's behalf, provided that Service Provider will at all times comply with applicable Law

- **5.4 Performance of Services.**
  Service Provider represents and warrants to Airbnb Ireland that (i) Service Provider possesses the business, professional and technical expertise and the resources, including without limitation equipment, facilities and employees to perform the Services and (ii) to the best its knowledge Service Provider has been issued, as of the Effective Date of this Agreement, and shall use its best efforts to maintain in effect for the term of this Agreement, all permits, licenses, certificates or approvals required by applicable laws to perform the Services; and Service Provider shall notify Airbnb Ireland in the event its permits, licenses, certificates or approvals to perform the Services are modified, revoked, suspended, transferred or otherwise changes such that there is a material adverse effect upon the Services.
- **Clause 9.3 Subcontracting.**
  Service Provider shall not subcontract or otherwise delegate any of its obligations under this Agreement without Airbnb Ireland's express prior written consent on a case- by-case basis. Upon receipt of such consent, Service Provider may subcontract the Services or any portion of the Services to any person or entity which has all of the necessary technical expertise and qualifications to provide the Services contemplated herein. Upon request by Airbnb Ireland, Service Provider shall provide verification of said technical expertise and qualifications. Before allowing any subcontractor to begin performing services, Service Provider shall enter into a binding written agreement with such subcontractor that protects Airbnb Ireland's rights and interests to at least the same degree as this Agreement. Service Provider shall be responsible

> for the direction and coordination of the services of each subcontractor. Airbnb Ireland shall have no obligation to pay any subcontractor. Airbnb Ireland's consent to a subcontractor shall not in any way relieve Service Provider of any duty or responsibility under this Agreement and Service Provider shall remain primarily obligated for the performance of the Services.
>
> - **4.1.2.5 Assistance in attracting customers and support services**
>
> The role of Airbnb India is limited to performing promotional activities to attract prospective customers. Airbnb India plays no role in the acceptance of customers and price negotiation, nor does it enter into contract with customers.

14. On going through various clauses of the contract, we find that the authorities below have not interpreted the clauses of the agreements and the facts of the case correctly. The terms of the agreements give an unmissable understanding that Only the main service i.e. promotional and marketing services is being provided by the Appellant and there is no auxiliary service is involved; the compensation to the appellant is on cost plus markup basis; appellant is an independent contractor of Airbnb Ireland; there is no agent-principal relationship; appellant may have entered in to subcontracts for the provision of service, agreement will be between subcontractor and the Appellant and the responsibility will be on the Appellant; the Appellant raises bills on Air BNB Ireland and not on their Customers. The appellant has no contract with the customers of Airbnb Ireland. The fact that the appellant has subcontracted does not make them an intermediary as per CBIC Circular dated 20.09.2021; this Bench final order in the case of M/s Airbnb Payments vide Final Order No.60505-60506/2024 dated 04/09/24 by

this Bench and Singtel Global India Pvt Ltd and Verizon Communications India Ltd. (supra)

15. We find that though the overseas entity has outsourced the work of promotion and marketing services to the Appellant, the Appellant has to follow certain guidelines laid down by Air BNB Ireland. There is no infirmity in the same and that in itself does not make the appellant an intermediary. It was held in Genpact India (P.) Ltd. vs. Union of India [2023 (68) GS.T.L. 3 (P&H)] that the assessee was responsible for provision of BPO services directly to the clients of the overseas entity does not qualify as an intermediary. We find that CBIC clarified vide Circular No. 230/24/2024-GST dated 10.09.2024, though in respect of advertisement agency in the GST regime that the services provided by an advertising agency/ company to a foreign company do not amount to intermediary services even though they are engaged in providing services such as media planning, investment planning, creating and designing content, identification of media owners, dealing with media owners, procuring media space, etc. and basically acts like a one stop solution to the client.

16. One of the reasons given by the impugned order for denying refund was that the Appellant has not provided the original agreement and have also not provided the agreement between client and Airbnb Ireland. We find that it is unfair on the part of the Revenue to make an allegation and expect the appellant to disprove the same. The onus to prove the allegation is on the department who is making the allegations. We find that Tribunal held in the case

of M/s Blackrock Services India Pvt Ltd. (supra) wherein also the appellant did not have any contract with the customers of overseas client, that it has to be substantiated by the Department.

17. Learned Counsel for the appellants submits that for the Financial Years 2020-21 and 2021-22, the refund with respect to export of services has been sanctioned in the GST regime; the said orders have not been challenged by the GST Department and have thus, attained finality; the Revenue cannot take a different stand for the year 2017-18. He relies on the judgment of Marsons Fan Industries vs. Commissioner of C. Ex., Calcutta (supra). We find that there is considerable force in the argument of the appellant. We find that Hon'ble Punjab and Haryana High Court held in the case of M/s Genpact India (supra) that there is no material change in the definition of Intermediary in the Service Tax Regime and the GST Regime. We find that though the principal of estoppel is not applicable to the matters of taxation, it is not open to the Revenue to hold on to the stand taken by them in the past, once they have revised their stand at a later date.

18. We find further that the department seeks to deny the refund claimed under Rule 5 of the CENVAT Credit Rules. The appellant submits that Revenue cannot take recourse to recovery without initiating proceedings under Rule 14 read with Section 73 of the Finance Act. We find that the appellant the Appellant had filed refund claim under Rule 5 of the CENVAT Credit Rules read with Notification 27/2012 dated 18.06.2012. which provide for safeguards, conditions and limitations along with the procedure to claim refund of CENVAT credit and the same does not provide for

denial of credit. We are in agreement with the contention of the appellant. It was held in M/s Blackrock Services India Pvt Ltd (supra) following the decision in JFE Steel India Pvt Ltd (supra) that if the case of Revenue is that the activities undertaken by the appellants in present case is not amounting to Export of Service then the proceedings need to be initiated against the appellant for demanding the service tax in respect of the taxable services provided by the appellant. In the present case no such proceedings demanding the Service Tax on these taxable services provided by the appellant have been initiated in terms of Section 73 of the Finance Act, 1994. By not initiating any such proceedings Revenue itself has allowed these taxable services provided as Export of Services. Having done so they cannot in a proceeding under Rule 5 for refund of accumulated credit take the contrary stand and deny refund treating the services provided not to be export of services.

19. In view of the above, the appeal is allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on 04/03/2025)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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