

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

COURT NO. I

APPEAL NO. ST/60506/2016

[Arising out of Order-in-Appeal No. 93/ST/Appeal-II/MK/GGN/2016 dated 29.06.2016 passed by the Commissioner of Central Excise (Appeals), Gurgaon]

Date of hearing/decision: 02.07.2018

For approval and signature:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Hon'ble Mr. Devender Singh, Member (Technical)

M/s Evalueserve Sez Gurgaon Pvt. Ltd. : Appellant(s)

VS

C.C.E. & S.T.- Ltu Delhi : Respondent(s)

Appearance:

Present for the Appellant(s): Shri Reeen Khaira (Advocate)

Present for the Respondent(s): Shri Atul Handa (AR)

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Hon'ble Mr. Devender Singh, Member (Technical)

FINAL ORDER NO.

62510/2018

Per : Ashok Jindal

The appellant is in appeal against the impugned order wherein refund claim for the period April 2012 to September 2013 filed under Rule 5 of Cenvat Credit Rules, 2004 read with Notification No. 27/2012 dated 18.06.2012 has been rejected.

2. The brief facts of the case are that the appellant is registered with the Service Tax Department under the category of business Auxiliary Services. The appellant filed Credit Rules, 2004 read with

Notification No. 27/2012 dated 18.06.2012 for unutilized Cenvat credit availed on input services used for providing taxable services under the category of Business Auxiliary Services in respect of Export of Services. The Adjudicating authority sanctioned the refund claim but on appeal the Commissioner (Appeals) held that the appellant is providing intermediary services in terms of Rule 2(f) of Place of Provision of Rules, 2012, therefore, as per Rule 9 of the said Rules, location of service provider is the place of provider of service, hence the appellant was required to pay service tax under reverse charge mechanism. Therefore, the appellant cannot refund of Cenvat credit lying unutilized in their Cenvat account. Against the said order, the appeal is before us.

3. The Ld. Counsel for the appellants submits that for the subsequent period in appellant's own case this Tribunal has already allowed the refund claim by vide final order No. 60151/2018 dated 27.02.2018, therefore, the impugned order is to be set aside and appeal be allowed.

4. Heard the parties, considering the fact that on the identical issue in the appellant's own case of the subsequent period this Tribunal has observed as under:-

"6. Before going through the legal aspect of the case. first we have to see terms of the agreement between the appellant and the Evalueserve Ltd., Bermuda which are reproduced here under:

1.A The Company shall provide the services to the customers of the client in accordance with the requirement as specified by the Client. Client passes the customer requirements and details of the deliverables to the Company. The Company shall directly interact with the customers of the Client, as and when required and hence would provide the Services to such

customers on behalf of Client in close coordination with the Client's team. Client plays a pivotal role in building up the client base. Client's team complements the engagement team of the Company.

1.B The Company shall, on the basis of its research, prepare a report in the format as specified by the Client which has been pre-agreed upon by it with the customers of the Client. The Client would closely supervise the assignments. The Company shall forward such reports directly to the customers of the Client, though internet post a detailed quality assurance of the final deliverable by the Client. The obligations of the Company would come to an end once it forwards the reports to the official e-mail ID of the customers of the Client.

2.A For the Services provided by the Company on behalf of the Client in relation to inter alia, Business Research (including financial services), Market research and intellectual Property activities during the period from April 1st, 2015 till September 30th, 2015, the margin during every month in convertible foreign currency, where the operating expenses are the aggregate of operating, selling distribution, administrative expenses, depreciation, lease rent and amortization, excluding non-recurring expenses, interest and financial charges.

7. Further, as per Rule 2(f) of Place of Provision of Services Rules, 2012 intermediary is defined which is reproduced as under:-

"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. Further Rule 9 of Place of Provision of Services Rules, 2012 is also placed on record. For better appreciation, the same is also reproduced below:-

9. The place of provision of following services shall be the location of the service provider –

- (a) Services provided by a banking company, or a financial institution, or a non- banking financial company, to account holders;*
- (b) Online information and database access or retrieval services;*
- (c) Intermediary services."*

10. As per Rule 2(f) of the Rules 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.

11. On going through the agreement placed before us, the appellants are themselves engaged in providing of services to their client and the facilitating their clients for providing those services by third party. In that circumstance, it is to be seen whether the provider of services is covered as intermediary or not. We have gone through the impugned order also. In the impugned order, the Commissioner (Appeals) has fell in error holding that the appellant provided services on behalf of Evalueserve Ltd., Bermuda. In fact, the appellant has provided the services to customers of their Client and having no direct nexus with the customers of their client has been provided by the appellant to their client and nowhere has facilitated or arranged for the services provided to their client by third party. Furthermore, the appellant has themselves provided the services to their client as the main service provider on principal to principal basis, therefore, the activity undertaken by the appellant do not qualify intermediary as defined in Rule 2(f) of Place of Provision of Services Rules, 2012. Similar view was taken by the Advance Rulings Authority of India in the case of Universal Services India Pvt.Ltd (supra) and Godaddy India Web Services Pvt.Ltd. (supra), wherein the Advance Rulings Authority of India has observed as under:

10. *The definition of "intermediary" as envisaged under Rule 2(f) of POPS does not include a person who provides the main service on his own account. In the present case, applicant is providing main service, i.e., "business support services" to WWD US and on his own account. Therefore, applicant is not an "intermediary" and the service provided by him is not intermediary service. Further, during arguments, applicant drew our attention to one of the illustration given under Paragraph 5.9.6 of the Education Guide, 2012 issued by C.B.E. & C. Relevant portion is extracted as under;*

Similarly, persons such as call centers, who provide services to their clients by dealing with the customers of the client on the client's

behalf, but actually provided these services on their own account', will not be categorized as intermediaries.

Applicant relying on above paragraph submitted that call centers, by dealing with customers of their clients, on client's behalf, are providing service to their client on their own account. Similarly, applicant is providing business support service such as marketing and other allied services like oversight of quality of third party customer care centre operated in India and payment processing services, on behalf of GoDaddy US. Therefore, these services provided by the applicant to GoDaddy US cannot be categorized as intermediary or services, as intermediary service.

11. *Applicant proposes to provide support services in relation to marketing, branding, offline marketing, oversight of quality of third party customer care centre and payment processing, on principal to principal basis. These services are proposed to be provided with the sole intention of promoting the brand GoDaddy US in India and thus augmenting its business in India. Therefore, these services proposed to be provided by the applicant, would support the business interests of GoDaddy US in India.*

12. *It has been submitted by the applicant that services to be provided by the applicant are not peculiar only in applicant's case but are provided by various Indian entities to their overseas customers in India as a single package. Further, supporting the business of GoDaddy US in India is the main service and processing payments and oversight of services of third party Call Centers are ancillary and incidental to the provision of main service, i.e., business support service. Further, applicant would provide said services as a package and the payment for the entire package would be a consolidated lump sum payment. Applicant submits that in view of all these indicators, service provided by them to GoDaddy US is a bundle of services, which is bundled in normal course of business. This point has not been controverted by the Revenue. We agree with the submissions of the applicant that proposed services are a bundle of services, bundled in normal course of business and not intermediary service.*

13. *In view of above, we rule as under;*

In the facts and circumstances, the various support services proposed to be provided by the applicant to GoDaddy US are a "bundle of Services" being naturally bundled in the ordinary course of business and accordingly is a single service, being business support service, in terms of Section 66F of the Finance Act?

Question 2: *If the answer to Question 1 is positive, whether, in the facts and circumstances of the case, the place of provision of business support service by the applicant, is outside India in terms of Rule 3 of the Place of Provision of Service Rules, 2012 (herein after referred to as "POPS"). If the services provided by the applicant are not considered as naturally bundled then in the facts and circumstances enumerated in Annexure I, which of the individual service shall qualify for classification under Rule 3 of the POPS as service provided by a service provider located in India to a service recipient located outside India?*

12. Further, we find that the same Commissioner (Appeals) who has adjudicated these matters has also adjudicated the matter in the case of M/s.LBF Travel India Pvt.Ltd vide OIA No.95/ST/APPEAL-II/MK/GGN/2016 dt.8.7.2016 on an identical issue took contrary view in the appellant's case and observed as under:-

"I have gone through the case records and the submissions made by the appellant as well as by the respondent, the appellant had submitted that M/s.LBF Travel India Pvt.Ltd has been asked to carry out such support on behalf of M/s. LBF Travel India Pvt.Ltd. Inc., effectively. The services are being provided by M/s. LBF Travel India Pvt.Ltd. Inc. Hence, the services are qualified as "Intermediary Services". Rule 9 of POPS Rules, 2012 will apply which states that the place of provision of services provided will be the location of service provider. Since the place of provision of services in the taxable territory, hence services do not qualify as export under Rule 6A of the Service Tax Rules, 1994. In view of the above, it is clear that M/s. LBF is providing intermediary services and are not eligible to claim refund of unutilized Cenvat credit.

The respondent had submitted that LBF India is basically a call centre which provides services to its parent company i.e. LBF Travel company Inc. The parent company M/s.LBF Travel Inc. Is a leading travel company having its head office in USA and engaged in selling domestic & international air tickets to its customer in USA. Further the services provided by LBF are services in an integral manner to assist LBF Travel Inc. To increase its sales and reservations, carry on its operations efficiently and serve its customers, which are as under: Call centre service: (i) Attending Calls; (ii) Processing Reservations; (iii) Processing Payments.

Thus in LBF is not falling under the definition of intermediary and shall not fall under Rule of the Place of Provisions Rules, 2012.

In order to support their contentions, they relied upon the illustrations given on page NO.69 under paragraph 5.9.6 of the "Taxation of Services: An Education Guide" issued by Central Board of Excise & Customs. Relevant portion is extracted as under: "Similarly, persons such as call centres, who provide services to their clients by dealing with the customers of the client on the client's behalf, but actually provided these services on their own account, will not be categorized as intermediaries".

Reliance can also be placed on the ruling of Authority for Advance Ruling (Central Excise, Customs & Service Tax), New Delhi on the application of M/s. GoDaddy India Web Services Pvt. Ltd., vide Ruling No.AAR/ST/08/2016 in Application No.AAR/44/ST/15/2014 dated 04th March, 2016. The ruling of the said application is explained in detail herein below: "..... Section 66F of the Finance Act,1994, read with rules 2(f), 3 and 9 of the Place of Provision of Service Rules, 2012 and Rule 6A of the Service Tax Rules, 1994 Service – Bundled Services – GoDaddy US, was a domain name register and web hosting service provider – Assessee was proposing to provide: (a) Marketing and Promotion services, (b) Supervision of quality of third party customer care center

services and (c) Payment processing services to GoDaddy US – Assessee sought ruling that all three services were a single service, viz. Business support service under Section 66F(3) and its Place of Provision (POP) was outside India as per Rule 3.

In view of the above, I find that on perusal of the service agreement entered between M/s.LBF Travel India Pvt.Ltd,. and M/s. LBF Travel Inc., San Diego, LBF India is basically a call centre which provides services to its parent company.

Central Board of Excise & Customs had issued "Education Guide" wherein it has been clarified that "Similarly, persons such as call centres, who provide services to their clients by dealing with the customers of the client on the client's behalf, but actually provided these services on their own account, will not be categorized as intermediaries".

13. In view of the above analysis, we find that there are various decisions relied upon by the appellant in support of their argument and also had had observed the same. Therefore, we hold that the appellant are not intermediaries in terms of Rule 2(f) of the Place of Provision of Service Rules, 2012. Therefore, the appellants are not liable to pay service tax being provider of service in India in terms of Rule 9 of the Place of Provision of Service Rules, 2012. Therefore, the demands against the appellants are not sustainable. Consequently, refund claim filed by the appellants are admissible."

5. As issue has already been settled in favour of the appellant, therefore, we set aside the impugned order and allow the refund claim filed by the appellant.

With these terms, the appeal is allowed with consequential relief if any.

(Order dictated and pronounced in the open court)

Devender Singh
Member (Technical)

Ashok Jindal
Member (Judicial)