CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH AT CHANDIGARH

COURT NO.I

Appeal No.ST/60579/2018-Cu (DB) with ST/60337/2018

(Arising out of OIA No.261 & 262/ST/CGST-Appeal-Gurugram/SG/2017 dt.02.01.2018 passed by the Commissioner (Appeals), GST, Plot No.24, Mudit Square, Sector 32, Gurgaon-122001)

Commissioner of Goods & Service Tax Gurgaon-II — **Appellant**
(Plot No.36-37, Sector 32, Near Medanta Hospital, Gurgaon)

Vs.

Orange Business Solutions Pvt.Ltd. — **Respondent**
(8th Floor, DLF Infinity Tower, Tower B, DLF Cyber City, Phase-II, Sector 25, Gurgaon, Haryana)

Present for the Appellant: Shri G.M.Sharma, AR
Present for the Respondent: Sh.Sujit Gosh and Ms.Mannat, Advocates

Coram: Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr.C.L.Mahar, Member (Technical)

FINAL ORDER No.60543/2019

Date of hearing: 05.04.2019
Date of decision: 05.04.2019

PER.AHSOK JINDAL

The Revenue is in appeal against the impugned order.

2. The facts of the case are that the respondent filed refund claims for the quarters July, 2012 to September, 2016 in terms of Notification No.27/2012-CE (NT) dt.18.6.2012 for unutilized Cenvat credit availed on input services used in providing taxable service of the nature of "Business Auxiliary Service" exported to its client

located outside India. The refund claims sanctioned by the Assistant Commissioner of Service Tax, Gurgaon. Against the said order, the Revenue has filed appeal before Commissioner (Appeals), who upheld the order of the sanctioning refund claim. Against the said order, the Revenue is in appeal before us.

3. Ld.AR for the Revenue submits that OBSISPL renders the services to other Orange Group companies on the direction of ENSIL. Also, during the personal hearing, the respondent on being asked to submit a sample agreement, submitted master service agreement between Orange Business Netherlands B.V. and its customers. From the agreement, it is evident that role of OBSISPL is to provide outsourced services for Orange Group Entities and has no privy of contact with any customer of orange group entities. It was also submitted that the Orange Group has shared service centers at 4 locations- India, Mauritius, Brazil and Egypt which cater to Orange group entities globally for back office support, these are referred to as 'Global Customer Service Centre (GCSC). In India, respondent is GCSC providing back office support services. The internal arrangement among Orange Group is such that the administration is done trough ENSIL whereby the GCSC execute a contract with ENSIL for provision of services. The consideration of such services is also paid by ENSIL.

4. From, the above it appears that the respondent is providing/arranging the service on behalf of and on the direction of ENSIL as the respondent has no separate contract with the customers of Orange Group Entities. Therefore, services provided by the

respondent appears to fall under the definition of "intermediary services" given under sub-Rule 2 (f) of the Place of Provision of Service Rules,2012. Since the services provided are intermediary services, by virtue of Rule 9 (c) of the rules ibid, the place of provision of service shall be the location of the service provider i.e. India which is in taxable territory. Therefore, the respondent is liable to pay service tax on the said service. In that circumstance, the respondent did not fulfil the condition (d) of Rule 6(A) of Service Tax Rules, 1994 in as much as the place of provision of the service is within India and therefore, the respondent is not entitled for refund of unutilized Cenvat credit under Rule 5 of Cenvat Credit Rules, 2004 read with Notification No.27/2012-CE (NT) dt.18.6.2012.

5. On the other hand, Ld. Counsel for the respondent supported the impugned order and provided the case law in support of his submission.

6. Heard the parties and considered the submissions.

7. We find that the respondent has provided the agreement in question and relevant clauses of the said agreement which is reproduced below:-

"We Orange Business Services India Solution Private Limited (OBSISPL) (Formerly known as Equant Solutions India Private Limited) had attended a personal hearing in relation to the captioned appeal on 28th September, 2017 along with our legal representatives.

During the course of our hearing, we reiterated the submissions filed on 12 July,2017, and explained the services performed by OBSISPL along with a reasoning as to why such services do not qualify as an intermediary. The services under consideration are provided by OBSISPL in accordance with a service agreement dt.18.9.2006 entered with Equant Network Services International Limited (ENSIL) located at Ireland.

Further, during the hearing proceedings, we were asked by your goodself to share the principal agreement with customers pursuant to which the services are being provided by OBSISPL. In relation to the same, we are hereby submitting a sample agreement – Master Services Agreement ("MSA") between Orange Business Netherland B.V. (located in Netherlands) and its customer. The same is attached herewith as Annexure A. In order to provide better understanding, we are hereby providing the facts of the agreement in a point wise manner:

1. Orange Business Netherland B.V. has executed on MSA with Customer for provision of managed network services which entails provision of secure IP networking enabling connectivity between Customer's routes using IP switching. The services are provided for all locations of customer across the globe.

2. To provide the above services, Orange Business Netherland B.V. is required to undertake the following steps:

a. Procurement of networking equipment for customer across the globe which are covered under the scope of the contract. The equipment is sourced from third parties and remains under ownership of Orange Business Netherland B.V.

b. Installation/configuration of equipment of the above sites shall also include software installation.

c. Provide/arrange for telcom services to enable networking. The same may be provided by Orange entity on their own (dependent on the territory where Orange is a telcom service provider), or procured from third party network service provider.

d. Configuration of network equipment is done remotely.

e. Ensure uptime of network services upto an accuracy of an agreed percentage. This shall entail maintenance, troubleshooting, remote upgradation of software etc. The same is either done remotely or physically. The customer is provided with a help where the details of any issue/outage can be uploaded.

f. To perform the above functions, some parts of these activities are outsourced to the shares service centres.

3. The Orange Group has shared service centres at 4 locations – India, Mauritius, Brazil and Egypt which cater to Orange Entities globally for back office support services. These are referred to as Global Customer Service Centre ('GCSC'). In India, the GCSC is OBSISPL which provides the back office support services to Orange entities globally which are typically as under:

a. Remote IT enabled network management and other related back office support services including:

i. Computer Network Implementation Management

ii. Customer Network Management

iii. Equipment order processing

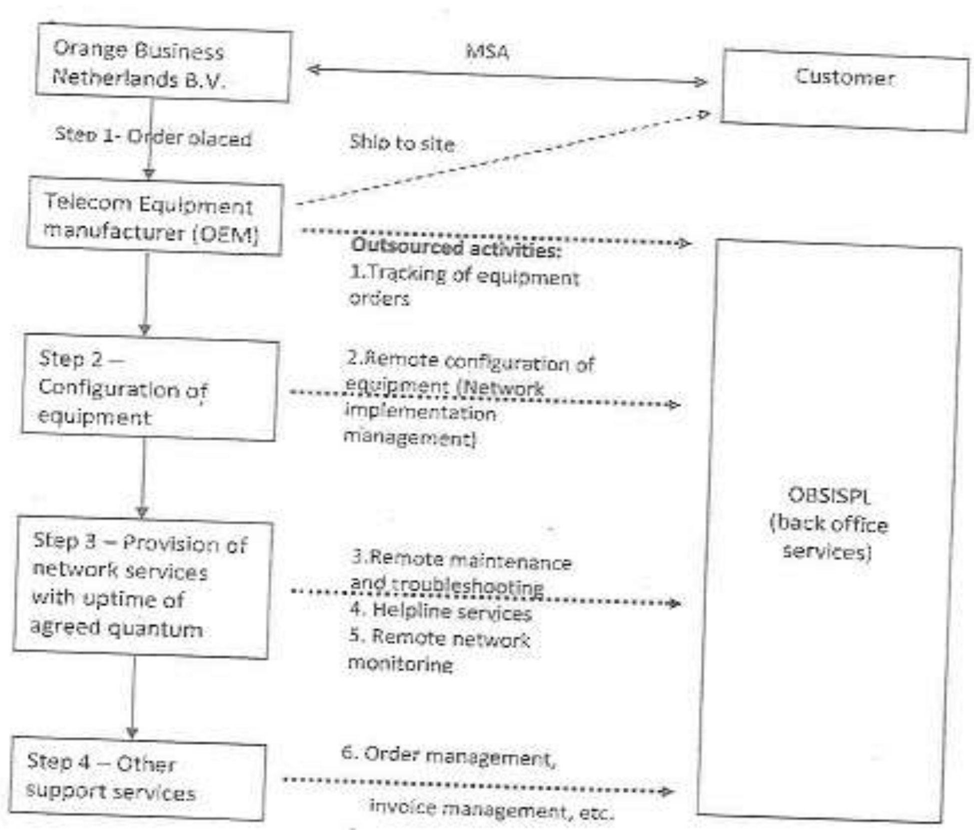
iv. Network Monitoring and Fault Management Services

b. Contract Software development including design, coding and unit testing, system testing and ongoing maintenance of applications.

c. Any other related services as may be mutually agreed between the parties.

4. The internal arrangement among Orange Group is such that the administration is done through ENSIL, whereby the GCSC execute a contract with ENSIL for proviso of services. The consideration for such services is also paid by ENSIL.

5. The above facts are depicted below in a flowchart diagrammatically:



Considering the above facts, it is evident that role of OBSISPL is to provide services for Oranges Group entities and has no privy contract with any customer of Orange Group entities. This is akin to any services provided by a call centre providing the main services of business process outsourcing and by no stretch of imagination can be considered as an intermediary.

"As submitted previously, the Orange Group has shared service centres at 4 locations – India, Mauritius, Brazil and Egypt which cater to Orange Entities globally for back office support services. These are referred to as Global Customer Service Centre ('GCSC'). In India, the

GCSC is OBSISPL which provides Remote IT enabled network management, fault management and other related back office support services. In respect of such services, we here by submit the following:

The troubleshooting services are provided remotely from the location of GCSC, which on first level are addressed telephonically. Thereafter, if the issue is not resolved, the GCSC team detects the outages in the network line by sending commands electronically on such network.

It is also relevant to mention here that at no point of time, OBSISPL has remote access to the equipment of the customers where it can access such equipment from its own location to resolve or repair the fault in the equipment. OBSISPL team only has aces to its internal networks. Further, the commands (as referred to above) are sent by OBSISPL to its network to detect whether there is any connectivity in the networking line or there is an error in the signal.

Pursuant to the checking of network line through sending signals), the issue is diagnosed and communication is sent by GCSC team to the Orange entity catering to client. Such Orange entity thereafter addresses the issue with the client by deputing on-site team, if needed. OBSISPL is no way engaged or connected with such on-site resolution.

It is also important to mention that OBSISPL does not provide any on-site support services in any territory including India. The other entities of Orange Group catering to the client provide such on-site support services, as and when needed.

Therefore, the nature of services provided by OBSISPL are typically akin to call centre/Business Process Outsourcing (BPO) Unit which only undertakes a part of services outsourced by Orange Group entities.

Trust the above explanation clarifies the nature of services provided by OBSISPL."

8. The sole allegation of the Revenue is that the respondent provided intermediary service, therefore the benefit of export services is not available to them.

9. We find that CBEC by Guidance Note on 20.6.2012 has the clarified the meaning of intermediary as under:-

"*Para 5.9.6 what are intermediary services?*

Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between persons, *without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time:*

The supply between the principal and the third party; and

The supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.'

For the purpose of this Rule, an intermediary in respect of goods (such as commission agent i.e. buying or selling agent or a stockholder) is excluded by definition. Also excluded from this sub-Rule is a person who arranges or facilitates a provision of a service (referred to in the Rule as "the main service"), but provides the main service on his own account. In order to determine 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."

10. From the above Guidance Note of CBEC dt.20.6.2012 and definition of intermediary, the following conclusion has drawn:-

(a) An intermediary arranges or facilities a provision of a 'main service' between two more persons;

(b) An intermediary is involved with two supplies at any one time (i) the supply between the principal and the third party; and (ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged;

(c) An intermediary cannot influence the nature or value of service, the supply of which he facilitates on behalf of his principal, although the principal may authorize to negotiate a different price;

(d) The consideration for an intermediary is separately identifiable from the main supply of service that he is arranging and is in the nature of fee or commission charged by him;

(e) The test of agency must be satisfied between the principal and the agent i.e. the intermediary. The Guidance Note states that the intermediary or the agent must have documentary evidence authorizing him to act on behalf of the provider of the main service;

(f) The payment for such services is received by way of commission;

(g) The Principal must know the exact value at which the service is supplied (or obtained) on his behalf.

11. From the agreement placed before us and arguments adduced before us, we find that the activity of computer networking is networking service which is an application running at the network application layer and above, that provides data storage, manipulation, presentation, communication or other capability which is often implemented using a client-server or peer-to-architecture based on application layer network protocols.

12. In view of the above, we do not find any arrangement or facilitation of the main service between two parties by a third person under the category of computer networking services.

13. We further find that the mandate from the group involves various companies more than two. So it is delivered to third entity on the direction of one M/s. Equant Network Services International Limited (ENSIL) and they act as intermediary. The appellant are 'processing equipment supply order's including liaison/coordination', so the liaison/coordination is also equivalent to solicitation and is more near to intermediary nature that the act of solicitation. Each mandate where there are two or more than two companies are involved would not automatically by termed as intermediary merely on the ground of involvement of two or more companies. To be intermediary, the criteria laid down has been discussed hereinabove. We hold that the respondent is not intermediary.

14. We further take note of the fact that the activity of the appellant is routine back office process outsourcings activities and are completely based on instructions/guidelines provided by ENSIL/AEs in this regard. The Revenue has not produced any evidence as to why providing of back office process outsourcing should be treated as intermediary.

15. In view of above discussion, we hold that the responder is not providing any intermediary service, therefore, no service tax is payable by the respondent. The Commissioner (Appeals) has examined the issue and sanctioned the refund claim.

16. We have gone through the impugned order and do not find any infirmity in the impugned and the same is upheld and the appeal filed by the Revenue is dismissed. Therefore, the respondent is entitled to consequential relief as per impugned order.

17. In the result, the appeal filed by the Revenue is dismissed and the cross objections are disposed of in the above terms.

(operative part of order was pronounced in the open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(C.L.MAHAR)
MEMBER (TECHNICAL)

mk