CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 60024 of 2020

[Arising out of Order-in-Appeal No. 142-143-ST-CGST-APPEAL-GURUGRAM-SG2019 dated 11.10.2019 passed by the Commissioner (Appeals) of CGST, Gurugram]

Macquarie Global Services Pvt Ltd **......Appellant**
Level I, Tower B, DLF Building 9B, DLF Phase III,
Gurugram, Haryana - 122002

Vs.

Commissioner of CE & ST, Gurgaon-I **......Respondent**
Plot No. 36-37, Sector 32, Near Medanta Hospital,
Gurgaon, Haryana - 122001

WITH

Service Tax Appeal No. 60025 of 2020

[Arising out of Order-in-Appeal No. 142-143-ST-CGST-APPEAL-GURUGRAM-SG2019 dated 11.10.2019 passed by the Commissioner (Appeals) of CGST, Gurugram]

Macquarie Global Services Pvt Ltd **......Appellant**
Level I, Tower B, DLF Building 9B, DLF Phase III,
Gurugram, Haryana - 122002

Vs.

Commissioner of CE & ST, Gurgaon-I **......Respondent**
Plot No. 36-37, Sector 32, Near Medanta Hospital,
Gurgaon, Haryana - 122001

APPEARANCE:

Present for the Appellant: Mr. Prasad Paranjape, Advocate
Present for the Respondent: Mr. H.S. Brar, Authorized Representative

CORAM:

HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **60959-60960 / 2021**

Date of Hearing: 07.10.2021
Date of Decision: 07.10.2021

PER: SANJIV SRIVASTAVA

These appeals are directed against order in appeal No 142-143/ST/CGST-APPEAL-GURUGRAM/SG/2019 dated 11.10.2019 of Commissioner of Central Goods and Service Tax (Appeals), Gurugram. By the impugned order Commissioner (Appeals) has held as under,-

"6. I find that neither the adjudicating authority in his findings nor the

appellant has in his appeal proposed any new grounds. I also observe that the observations contained in OIA No 302-306/ST/GST-Appeal-Gurugram/SG/2018-19 dated 29th March 2019, have not been examined by the adjudicating authority in the OIO No 1 & OIO No 2. Thus, there are no new grounds to decide the issue at hand. This appeal also therefore needs to be remanded back to the adjudicating authority with direction to examine the issue afresh as per the directions contained in OIA No 302-306/ST/GST-Appeal-Gurugram/SG/2018-19 dated 29th March 2019.

<u>Order</u>

In view of the above discussions the appeal is disposed off in terms of the directions contained in para 6 above."

2.1 The appellant had filed the refund claims for the period as indicated below, in terms of Rule 5 of CENVAT Credit Rules, 2004 read with notification No.27/2012 dated 18.06.2012 for refund of unutilized CENVAT credit availed on input services used in providing taxable services i.e. Business Support Services, Information Technology Services and Management, Maintenance and Repair Services.

Period	Refund Application	SCN	Refund Amount
Jan 2016 to Mar 2016	29.09.2016	24.08.2018	88,65,730/-
Oct 2015 to Dec 2015	29.09.2016	24.08.2018	99,7B,019/-

2.2 The Deputy Commissioner, vide his Order-in-Original No. 141 & 142/Refund/GST/Div.-East-11/2018-19 dated 08.05.2019, rejected the refund by holding that *the services provided are* "Intermediary Services" thus covered under Rule9 of the Place of Provision Rules,2012.Therefore, the place of provision of services would be the location of the service provider, which is within the taxable territory, and hence these services would not qualify as export of services as per Rule 6A of the Service Tax Rules, 1994.

2.3 Against the orders of the original authority rejecting their refund claims appellant filed appeal before the Commissioner (Appeal) which have been decided as per the impugned order referred in para 1, supra.

2.4 Aggrieved by the impugned order, Appellants have preferred this appeal.

3.1 We have heard Shri Prasad Paranjape, Advocate for the Appellant and the Shri H S Brar, Superintendent, Authorized Representative, for the revenue.

3.2 Arguing for the Appellant, learned Counsel submits,-

- The Appellant is, inter alia, engaged in providing various back office support services and IT and ITeS to its various Indian and overseas group entities on its own account. Where the services are rendered to overseas group entities, consideration is received in convertible foreign exchange. These are bi-partite services provided by the Appellant to its group companies on its own and does not involve facilitation or procurement of goods or services for the group entities. The exact nature of activities provided to this overseas group entities, which in any case is not in dispute, but for the sake of completeness, can be found in the sample agreement annexed to the Appeal at Page 32.
- There is no dispute whatsoever with respect to the nature of activities provided by the Appellant to its group entities or its export eligibility. However, based on the Transfer Pricing Documentation of the Appellant for FY 2012-13, FY 2013-14 and FY 2014-15, where certain expenses are reimbursed to the Appellant, which are independent of the main service
- agreement, dispute is raised whether the Appellant can be termed as "Intermediary" in terms of Rule 2(f) of the erstwhile Place of Provisions of Services Rules, 2012 ("POPS Rules").
- A perusal of the findings in the Orders-in-Original and thereafter in the impugned Order-in-Appeal would show that the whole edifice of the findings is based on certain excerpts of Transfer Pricing Documentation.
- Analysis of these excerpts clearly indicate as under:
    a) The Appellant provides certain corporate services, accounts payable, general accounting and financial accounting as required by overseas group entities (referred to as the AEs) in the Transfer Pricing Documentation.
    b) It further provides that ITeS are performed by the Appellant and such services are provided to group entities.
    c) It also records that certain expenses are incurred by group entities and recovered from the Appellant.
    d) Further it records that certain expenses are incurred by the Appellant and recovered at actuals from the group entities.
- With respect to (a) and (b) above, it is submitted that these are business support services or ITeS services provided by the Appellant.

These are provided by the Appellant on its own account to the group entities (referred to as AEs in the Transfer Pricing reports). There is no third party involved and these services do not involve arranging or facilitating or procuring of goods or services for the group entities by the Appellant. Wherever these group entities are located outside India and the consideration for these services is received in foreign exchange, these services would qualify as export and are accordingly disclosed as export of services under Rule 3 of POPS Rules in the ST-3 returns filed by the Appellant.

- With respect to (c) above, it is submitted that certain expenses incurred by group entities on behalf of the Appellant are recovered from the Appellant. Since these are expenses in foreign exchange incurred by the Appellant, this is not claimed as export and therefore this does not have any bearing on the present matter. These expenses are independent of services provided under the service agreements with the group entities.
- With respect to (d) above, it is submitted that the Appellant has incurred certain expenses on behalf of group entities and recovered the same at actual. These expenses are typically towards certain tax reimbursements, meeting expenses or laptop recovery expenses incurred by the Appellant on behalf of AEs and are recovered at actual. These recoveries have no relation with the services provided under the service agreements with the group entities.
- To the extent of above reimbursement, the Appellant has not acted as an facilitator or arranger of provision or supply of services or goods to the group entities. Even assuming without admitting that such recoveries made by the Appellant from the group entities at actual cost would render the Appellant an Intermediary, it is submitted that it should render the Appellant an Intermediary only with respect to such transactions. These expenses are unconnected with the main service agreements with the group entities.
- Further, since these are recovered at cost (as admitted in the Transfer Pricing reports relied upon by the Department), the Appellant would qualify as 'pure agent' of the group entities for these recoveries, thereby no service tax liability would arise on the Appellant for such recoveries.
- It is also important to note that recoveries made under these transactions are not considered by the Appellant as its export turnover

in the service tax returns or for computation of its export turnover for the purpose of refund claims filed.

- It is submitted that for FY 2012-13 to 2015-16, the export turnover as reported in ST-3 Return of the Appellant adds up to approximately Rs. 500 crores as against the total of such recoveries (at cost) for the above period which add upto approximately Rs. 1.18 crores. Thus, in fact the total quantum of these recoveries for the above period is only 0.24% of the total export turnover reported by the Appellant. Please refer to Transfer Pricing documentation relied on by the Department in support of these numbers.
- The services rendered under the main service agreements with the group entities are not disputed with respect to its eligibility as export of service.
- The Appellant's claim of export is also supported by the ratio of the judgement of this Hon'ble Tribunal in the case of Commissioner of Goods and Service Tax, Gurgaon-II v/s. Orange Business Solutions Pvt. Ltd. reported in 2019 (27) GSTL 523 (Tri-Chan.). The nature of activities carried by Orange Business Solutions Pvt Ltd are similar to that carried out by the Appellant in the present case. Further the impugned order of the Ld. Commissioner Appeals which stood upheld by the Hon'ble Tribunal in the Orange Business case was passed within the same Commissionerate as that of the Appellant.
- Further, in the Appellant's own case by earlier Orders-in-Original dated 29.02.16 (Page 85 of Appeal) (Apr 12 to Mar 15) and dated 08.09.16 (Page 113 of Appeal) (Apr 15 to Sep 15) the Department has provided categorical finding with respect to the main service provided by the Appellant that it does not qualify as intermediary and that it qualifies as export. The Department even in the GST era has granted refunds to the Appellant in its Mumbai location for the period FY 2018-19 and FY 2019-20.
- In the absence of any contrary judgement or stay to the judgement of the Orange Business case or in Appellant's own case, it is submitted that the same will be binding and on this ground itself, the present appeal may please be allowed.
- In para 7 of the impugned Order-in-Appeal it is stated that the Appellant has only provided copy of one agreement. It is submitted that this is incorrect finding. The Appellant has indeed submitted all the agreements along with sample invoices to the Ld. Commissioner

(Appeals) during the hearing (refer Page 232 para 4 of Appeal). Further, the rejection of refund claims of the Appellant in the Order-in-Original was not because the Appellant has not provided copies of all agreements. Undisputedly, all the agreements are similar in nature.

- The impugned Order-in-Appeal also holds that the adjudication authority shall examine the nature of services provided by the Appellant in the nature of IT/ITeS. It is submitted that there is no dispute about nature of services being provided by the Appellant. In the absence of any appeal by the Revenue, the Ld. Commissioner (Appeals) ought not to have given directions for re-examination of facts which are not in dispute by either parties and enhance the scope of the appeal before him.

- It is submitted that when it was a matter of fact and undisputed before the Ld. Commissioner (Appeals) that the values of reimbursed expenses have not been considered for the purpose of export turnover of the Appellant, the remand by the Ld. Commissioner (Appeals) to enable the adjudicating authority to spell out as to how Transfer Pricing Report supports the case of the Revenue is absolutely irrelevant. In any case, the Ld Commissioner (Appeals) ought to have held that the main service of the Appellant qualifies as export. At best the Ld. Commissioner (Appeals) could have remanded the matter only to verify whether the export turnover declared by the Appellant is inclusive of expenses incurred by the Appellant on behalf of their group entities. In any case, Revenue has not issued any service tax demand with respect to these expenses if they want to deny the export status of these expense reimbursements.

- In view of the above even assuming without admitting that remand is warranted, the Appellant submits that in the present case the manner in which the remand powers are exercised is unlawful and seeks to enhance the scope of adjudication which may cause unwarranted delay in disposal of the case.

- 34. The Appellant prays that the order of the Ld. Commissioner (Appeals) be set aside and the appeals filed by the Appellant may please be allowed. Alternatively, the remand may be restricted only to verify the contention of the Appellant that they have not claimed the expenses as their export turnover and render the findings accordingly and not to examine any other issues which are not in dispute.

3.3 Arguing for the revenue learned authorized representative while reiterating the findings recorded in the impugned order submits that-

- The Appellant has claimed to be engaged in providing Business Support Services, Information Technology Software Services and Maintenance & Repair Services to various Macquarie Group entities worldwide, i.e., for providing data processing, back office and IT enabled support services which counted as exports and sought refund of Cenvat credit of input services used in rendering the same under Rule 5 of the Cenvat Credit Rules, 2004.
- The adjudicating authority rejected the refund claim holding that based on the facts in Softex form and Transfer Pricing documents it was observed that certain expenses were incurred by the party on behalf of its associate entities, for which reimbursements were provided by associated entities and the functions performed by the party related to facilitating the payment on behalf of associated entities. Since, the Appellant had merely facilitated the provision of such services, therefore, the services provided by the party appeared to fall under the category of "Intermediary Services" and would be covered under Rule 9 of the Place of Provision Rules, 2012 and taxable at the hands of Appellant and cannot count as exports.
- The Commissioner (A) vide the impugned order while remanding the case back observed :
    - The adjudicating authority had not examined the agreement(s) between the parties.
    - The Appellant had provided copy of scope of work entered with only one entity to him(Commissioner(Appeals)), whereas they had provided services to around 30 associate entities as mentioned in the Analysis of Transactions for the year 2016-17.
    - That there were other Indian Associated Entities of the same group which were providing financial services to customers in India whose relationship with the Appellant have not been explained.
    - The adjudicating authority has not specified whether the expenses incurred by Appellant were as an agent or as a broker or merely as an expense reimbursement.
- Commissioner (A) vide impugned orders has not decided the case on merits, rather, remanded back the case to adjudicating authority to examine the agreements and remittances, give findings on

classification of services and pass a speaking order.

- Earlier also refund cases of same party were remanded back by the Commissioner (A) vide OIA no. 302-306/ST/CGST-APPEAL-GURUGRAM/ SG/2019 dated 29.03.2019 on the same grounds which has not been appealed against by the Appellant.
- Any decision on merits by Commissioner (Appeals) In impugned proceedings would have made the OIA dated 29.03.2019 null and void. The Appellant had sought to bypass the adjudicating authority, and instead of supplying the relevant documents before the latter in remand proceedings arising out of OIA no. 302-306/ST/CGST-APPEAL-GURUGRAM/SG/2019 dated 29.03.2019, escalated the matter with the Commissioner(Appeal) in the impugned proceedings despite personal hearing almost 5 months after remand of the above order.
- Reliance is placed on the following case laws wherein it has been specifically held that the matter cannot be decided on merits where the impugned order has not discussed the matter on merits:
  - Smithkline Beecham Co. Health C. Ltd. [2003 (157) ELT 497 (SC)]
  - Aashirwad Construction Co. [2017 (352) ELT 347 (All)]
  - Madhusudan Texturisers Pvt Ltd [2017 (345) ELT3(Guj)]
  - Shanti Exports Ltd. [2017 (345) ELT 65 (Guj)]
  - Wintac Ltd [2021-TIOL-1730-HC-KAR-IT]
  - Kasturba Health Society [2021-TIOL-1794-HC-MUM-GST]
  - Cipla Ltd [2017 (348) E.L.T. 579 (Tri. - Del.)]
  - Krishna Petrochemicals [2021-TIOL-542-CESTAT-MUM]
  - Virmati Software and Telecommunications Ltd [2021 TIOL-520-CESTAT-AHM]
  - M/s Agrasha Alloys Trading Pvt Ltd [2021-TIOL-571-CESTAT-MUM]
  - The Standard Chartered Bank [2021-TIOL-579CESTAT-MUM]
  - M/s Anantara Solutions Pvt Ltd [2021-TIOL-592-CESTAT-MAD]
- The above judgements/decisions lay down the following principles :

  "An impugned order, not passed on merits, ought not to be taken up for adjudication on merits An issue not decided in the impugned order ought not to be taken up for adjudication by the appellate authority A non-speaking order ought not to be adjudicated upon by the appellate authority Documents not produced before the lower authority ought

not to be taken cognizance of by the higher authority directly and same ought to be produced before the former and decided thereupon."

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 In the present case we are concerned with the refund claim filed by the Appellant, in terms of the Rule 5 of the CENVAT Credit Rules, 2004 as amended. These refund claims were examined by the Deputy Commissioner, who after referring to certain report on transfer pricing (Softex Form, Transfer Pricing Documents, Form 3 CB, and other related documents and information) and records following findings for rejecting the refund claims filed.

"11. From the above, it is clear that certain expenses were incurred by the party on behalf of its associated entities, for which reimbursements were provided by associated entities. It is also mentioned that the function performed by the party relates to facilitating the payment on behalf of associated entities. Further, details of similar expenses were also provided in the transfer pricing document for the FY 2014-15.

12. In view of the above, it has been observed that the party has facilitated provision of certain services to its Associated Entities. Since, the part6y has not provided the services directly and has merely facilitated the provisions of such services, therefore, the services provided by the assessee appear to fall under the category of "Intermediary Services" and would be covered under Rule 9 of the Place of Provision Rules, 2012. Accordingly, the place of provision of services provided will be the location of service provider, i.e. the location of the party, which is within the taxable territory. Since the place of provision of services is in taxable territory, it may be construed that the services do not qualify as Export under Rule 6A of the Service Tax Rules, 1994."

4.3 Commissioner (Appeal) has while remanding the matter observed as follows:

"The main ground of the appeal by the appellant is that they are not intermediary as has been held by the adjudicating authority and the benefit of export of services is therefore available to them. To understand the issue it would be relevant to properly abbreviate the term intermediary. Sub-rule (f) of Rule 2 of the place of Provisions of Services Rules, 2012, defines 'Intermediary' as "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) between two or more persons, but does not include a person who provides the main service on his account;"

6. The Central Board of Excise and Customs in Service Tax: An Education Guide ("Guidance Note') on June 20, 2012 has clarified the meaning of intermediary as under:

"Para 5.9.6 what are intermediary services?

…..

Even in other cases, wherever a provider of any service acts as an intermediary for another person, as identified by the guiding principles outlined above, this rule will apply. Normally, it is expected that the intermediary or agent would have documentary evidence authorizing him to act on behalf of the provider of the main service.

- *Thus, from the definition of 'intermediary' along with the Guidance Note, it can be surmised that:*
- *An intermediary arranges or facilitates a provision of a 'main service' between two more persons;*
- *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; 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;*
- *The consideration for an intermediary's service 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;*
- *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';*
- *The payment for such services is received by way of commission;*
- *The principal must know the exact value at which the service is supplied (or obtained) on his behalf.*

7. Thus, in the Service Tax regime, the agreement between the parties is of paramount importance and any interpretation that is to be made has to be *made on the basis of the agreement undertaken. It would be therefore appropriate to examine the agreement entered by the respondent with the entity situated outside the country i.e. Associated entities is to be looked into. The respondent has provided copy of the Minor Service agreement effective from 1st October 2013 executed with Macquarie Group Services Australia Pvt Ltd wherein the scope of work has been laid down under statement of work No. 1 (for EOU) and No.2 (for SEZ) which is reproduced as under*

1. Service Location

The Service in the Statement of Work Will be provided by the Service Recipients from Level 1, DLF Building 9B, DLF Phase III, Cyber City, Gurugaon, Haryana 122002, India.

2. Services

a) The Services in the nature of data processing, back office and IT enabled support

services may include the following:

(i) Accounts payable and procurement services including:

1) Voucher preparation;
2) Order placement;
3) Delivery receipts;
4) Maintenance of vendor data;
5) Expenses review;
6) Invoice review;
7) Invoice and expense payments;
8) Accounts reconciliation;
9) Query resolution; and
10) Any other account payable procurement related services;

(ii) General accounting including

1) Journals
2) Reconciliation;
3) Query resolution;
4) Cash management;
5) Budgeting and forecasting;
6) Statutory and regulatory reporting;
7) Management reporting;
8) Risk management reporting
9) Tax reporting; and
10) Any other related general accounting services;

(iii) Information technology services including:

1) Operation of ITG Gurgaon which includes the following services:

a. Database administration and support not involving any maintenance activity. Database administration and support to include monitoring of server, security monitoring and ensuring *effective functioning of systems, migration of data and administration of storage maintenance of database;*

b. *IT Infrastructure support services involving Level 2 and Level 3. IT infrastructure management and support and technical assistance in relation to IT Infrastructure;*

c. *Software maintenance including Network maintenance, storage maintenance and unix and wintel maintenance. Maintenance services to performed in respect of IT infrastructure and software located outside India. Maintenance to specifically not cove on-site maintenance but to be in the form of remote maintenance performed through server located outside of India;*

d. *Software support not involving any maintenance activity;*

e. *Software development, provision of updates and enhancements and independent testing of Software (Not involving any maintenance activity);*

2) *Software quality assurance, application development, application support and infrastructure support and management; and*

3) *Any other related information technology services;*

(b) *Data processing, Back-office activities and IT enabled support services related to;*

i. *Other financial operations including (without limitation) according, business process reengineering, corporate reporting, financial planning, budgeting, regulatory reporting, non-functional currency exposure mitigation and accounts payable services;*

ii. *Fixed Income, Discount Security and Equities Securities instrument set up;*

iii. *Custody Fee reconciliation;*

iv. *Broker Fee reconciliation;*

v. *Stock Borrow and Lending Billings; S*

vi. *Special Payment Order (SPO) charge reconciliation;*

vii. *Customer static data verification and maintenance;*

viii. *AML/CTF customer on-boarding and AML related services;*

ix. *Administrative and reporting tasks relating to credit risk management;*

x. *Preparation of response of Customer Audit Requests;*

xi. *Cash, Stock, trade and Inter-system control reconciliations;*

xii. *Administrative tasks relating to compliance, including;*

1. *General compliance administration and planning tasks;*
2. *Planning and coordination;*
3. *Compliance training and personnel management, including development of content, follow-up of training tasks allocated to personal; and*
4. *Data processing and communication to staff on compliance matters*

This includes, by way of example but without limitation,

a. *E-learning Development;*

b. *b. Administration of External Directorships;*

c. *My Compliance Level 1 Support;*

d. *Compliance Training Administration; and* *e. Australian Continuing Professional Development (CPD) Training*

xlii. Tracking; General tasks including;

1) *Answers requires relating to payment compliance*
2) *Provide guidance on message formatting*
3) *Provide training and user support for Romulus*

xiv. Real Time payment screening;

1) *Screen outgoing and incoming SWIFT message type 103, 202 & 202 cover messages against sanctions lists*
2) *Investigate alerts*
3) *Request more information from originating MGL division where applicable*
4) *Review and approve alerts for release*
5) *Escalate potential matches to regional RMG AML Compliance*

XV. International Fund Transfer Instruction (IFTI) reporting

1) *Send IFTI report files to regulator*
2) *Reconciliation of IFTI report files*
3) *Confirm IFTI'S (FICC & MSG) for reporting*
4) *Escalation of discrepancies back to regional AML and On boarding teams*

Xvi. Transaction Monitoring

1) *Triage and investigate transaction monitoring alerts that arise from detection scenarios or rules developed by RMG AML Compliance*
2) *Perform primary investigation*
3) *Escalate potentially suspicious transactions or transaction behaviour to RMG AML Compliance*

xvii. Bank requests for complete payer or sanctions clearance

1) *Request incomplete payer or sanctions clearance information from originating MGL division*
2) *Provide complete or sanctions clearance information to remitting bank*
3) *Report incomplete payer and sanctions requests to RGM AML Compliance*

xviii. Third party payment processing

1) *Review third party payment requests*
2) *Request more information from originating FICC/MSG division where applicable*
3) *Approve third party payment requests*
4) *Escalate potentially suspicious third party payment requests to regional RMG AML Compliance*

xix. Human resources services, including:

1) *General administration and planning;*
2) *Data processing and communications, and*
3) *Training and personal management;*

xx. Such other services as the Service Recipient may require from time to time but excluding:

1) *Application operation such as operating a trading/booking system on behalf of a front/back office user;*

2) Client interaction and client management; and

3) Servicing companies that are not a Related Body Corporate (as defined in the Corporations Act 2001 (6th) of the Service Recipient; and

Xxi Agreed services, including any additional or amended services as agreed from time to time;

Each as detailed in the relevant Group Methodologies, as amended from time to time, and where such services as are provided by the Service Provider are distributed to subsidiaries of Macquarie Group Limited (being the non operating holding company parent of the group) through direct agreements between such subsidiaries and the Service Provider or through direct agreements between such subsidiaries and the service recipient; those agreements themselves having been created under a outsourcing Master Services Agreement,

On perusal of the above and the Analysis of Transaction for the year 2016-17 by EY as provided by the appellant it is observed that the appellant has provided services to around 30 Associated Entities whereas the appellant has only provided copy of scope of work entered with Macquarie Group Services Australia Pvt Ltd. The appellant has not disclosed the relationship and the agreement that it has with the various Associated Entities mentioned in the Analysis of Transaction for the year 2016-17 by EY. I also observe that there are other Indian Associated Entities of the same group which are providing various financial services to its Customers in India and I observe that their relationship with the appellant has also not been disclosed. It is incumbent upon the appellant to disclose all facts and the full nature of the relationship that it has with various group entities. As the same has not been done here it would be in accordance with the law if the same is examined by the adjudicating authority. The appellant shall disclose all the service agreements that it has entered with its associated entities abroad or in India from whom it has received remittances during the refund period to the adjudicating authority who shall examine the same in light of the law with respect to intermediary and give a detailed finding. I also observe that the services provided by the appellant has been termed to be in the nature of ITeS under Analysis of Transaction for the year 2016-17 by EY. The adjudicating authority shall also examine the nature of services being provided by the appellant and may like to peruse the ***FAQ released by the Government w.r.t IT/ITeS issued under the GST regime as the nature of classification of services under the erstwhile Service Tax law and the present GST regime is more or less the same.***

8. It is pertinent to note that the adjudicating authority has stated in the old after considering the submissions of the appellant and the report of transfer pricing that "From the above. It is clear that certain expenses were incurred by the party on behalf of its associated entities, for which reimbursements *were provided by associated entities. It is also mentioned that the entities, for which reimbursements were provided by associated entities. Further, details of similar expenses were also been provided in the Transfer Pricing Documentation for the FY-2014-15."*

In view of the above, it has been observed that the party has facilitated provision of certain services to its Associated Entities. Since, the party has not provided the services directly and has merely facilitated the provision of such services, therefore, the services provided by the assessee appear to fall under the category of Intermediary Service and would be covered under Rule 9 of The Place of Provision Rules, 2012". The adjudicating authority speaks of certain expenses which have been incurred by the appellant on behalf of its associated entities but has not specified whether these expenses have been incurred as an agent or as a broker or merely as an expense reimbursement. Further, the adjudicating authority has not spelled out the provisions of law under which incurring of certain expenses on behalf of the associated enterprises would entail the complete rejection of the refund.

I agree that transfer pricing is sometimes a means adopted by companies to reduce its tax liability. OECD in its report on Developing Capacity in BEPS and Transfer Pricing - TASK FORCE ON TAX & DEVELOPMENT WORK ON BEPS AND TRANSFER PRICING has stated that In Transfer pricing rules raise the question as to whether an "arm's length" price has been set between the producing, intermediary and selling companies. If not, the governments of either or both of the producing and selling companies may lose out on significant potential revenues. Most OECD and many non-OECD countries have introduced and are introducing transfer pricing and BEPS rules into their tax legislation. They have done this in order to ensure that the profits reported by MNEs in their jurisdictions are computed in line with internationally accepted principles, to counter only inappropriate or abusive transfer pricing by MNEs, and to avoid BEPS practices done by taxpayers. In most countries that have transfer pricing rules, the benchmark adopted is the "arm's length principle". The arm's length principle requires that transfer pricing between associated enterprises should be the same as if the two companies involved in the transaction were two unrelated parties negotiating in the market, rather than part of the same corporate structure.

9. I observe that the adjudicating authority has relied upon the transfer pricing and has quoted part of the report but what has been relied from the report of transfer pricing has not been specified. I also observe that the

Transfer pricing report for the year 2012-13, 2013-14, 2014 15 and 2015-16 as quoted by the adjudicating authority has concluded that the operating margin on the operating cost of the appellant can be considered to be at arm's length from an Indian Transfer Pricing perspective. So how does the same help the case of the respondent has not been spelled out in the O10. The adjudicating authority has highlighted para 7.36 of the OECD Guidelines but how does the same come to the help of the respondent has also not been spelled out."

4.4 The issue for consideration before both the authorities were the refund claims filed under Rule 5 of CENVAT Credit Rules, 2004, and not whether the services provided by them were the "intermediary services" or else. However the original authority misdirected himself, by considering the nature of the output services, to determine the eligibility of the refund claim. In the case of Evonik Energy Services [2016 (43) STR 137 (T-Mum)] held that

"11. *We agree with the contention raised by the ld. Counsel that the reclassification of the services as sought by the Adjudicating Authority in a refund claim filed by the assessee seems to be incorrect appreciation of the law. In our view if the Revenue authorities were holding a view that the services rendered by the respondent assessee would be correctly classified under "Management Maintenance and Repair Services" they should have issued a show cause notice for doing it so. Revenue authorities cannot reclassify the services rendered by the respondent assessee in a refund claim filed by the respondent."*

4.5 Be that as it may be issue of "intermediary services" was considered by CESTAT, in case of Orange Business Solutions Pvt Ltd. [2019 (27) GSTL 523 (T-Chand)] and Chandigarh Bench held as follows:

"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 C.B.E. & C. 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 C.B.E. & C. dated 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."*

4.6 Similar view has been affirmed vide the Circular No 159/15/2021-GST dated 20th September, 2021, issued by the Board though in relation to similar provisions under GST, stating as follow:

"Subject: Clarification on doubts related to scope of "Intermediary"–reg.

Representations have been received citing ambiguity caused in interpretation of the scope of "Intermediary services" in the GST Law. The matter has been examined. In view of the difficulties being faced by the trade and industry and *to ensure uniformity in the implementation of the provisions of the law across field formations, the Board, in exercise of its powers conferred by section 168 (1) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "CGST Act"), hereby clarifies the issues in succeeding paragraphs.*

2. Scope of Intermediary services

2.1 'Intermediary' has been defined in the sub-section (13) of section 2 of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "IGST" Act) as under–

"Intermediary means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account."

2.2 The concept of 'intermediary' was borrowed in GST from the Service Tax Regime. The definition of 'intermediary' in the Service Tax law as given in Rule 2(f) of Place of Provision of Services Rules, 2012 issued vide notification No. 28/2012-ST, dated 20-6-2012 was 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;"

2.3 From the perusal of the definition of "intermediary" under IGST Act as well as under Service Tax law, it is evident that there is broadly no change in the scope of intermediary services in the GST regime vis-à-vis the Service Tax regime, except addition of supply of securities in the definition of intermediary in the GST Law.

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' subcontracts 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', i.e. 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, i.e. 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."

4.6 In the decision of CESTAT in Orange Business Solutions Pvt Ltd, supra and also the Circular issued by the Board, the basic characteristics, of the intermediary has been clearly spelt out. Also in the case of JFE Steel India Pvt Ltd [2021 (44) G.S.T.L. 292 (Tri. – Chan)], same has been held stating as follows:

7...*……. 'Intermediary Service' has been defined under Rule 2(f) of the Place of Provision of Service Rules, 2012 reads as follows :-*

"(f)"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;"

A simple reading of the aforesaid provisions makes it clear that to attract the said definition there should be two or more persons besides the service provider. In the present case, the appellants are providing services to their parent company at Japan and they did not involve in any manner in the activity of negotiation for sale and purchase of goods in India or collection of sale proceeds from customers on behalf of the parent company, hence cannot be called as an 'intermediary' and, accordingly, do not fall under Rule 9(c) of the Place of Provisions of Service Rules, 2012.

Thus law on the issue as laid down is that for a person to be said to be intermediary, there should be two distinct services and three persons involved. The intermediary should be the person who is facilitating the provision between the other two persons. While considering the issue on the ground of "intermediary services" both the authorities have at no stage identified the three persons, and have solely relied upon certain analysis, transfer pricing document prepared by EY, in respect of appellants. Interestingly Commissioner (Appeal) observes "*I agree that transfer pricing is sometimes a means adopted by companies to reduce its tax liability. OECD in its report on Developing Capacity in BEPS and Transfer Pricing - TASK FORCE ON TAX & DEVELOPMENT WORK ON BEPS AND TRANSFER PRICING has stated that In Transfer pricing rules raise the question as to whether an "arm's length" price has been set between the producing, intermediary and selling companies ….",* however he too do not speaks of the relevance of this document for determination of the issue of "intermediary services" under consideration.

4.7 Issue under consideration is in respect of refund claim is in respect of refund claim under Rule 5 of CENVAT Credit Rules, in the decision of JFE steel India Ovt Ltd, supra, following was further held,-

"10.*The present issue is in respect of the refund claims filed in terms of Rule 5 of the Cenvat Credit Rules, 2004 as amended from time to time. The said rule provides for the refund of accumulated credit in the Cenvat account 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 credit. It is not a proceeding for the denial of credit available in the Cenvat account of the claimant. Thus even if the refund is denied then also the amount continues to be in the Cenvat account of the claimant.*

11.*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."*

4.8 Since we find the issue under consideration to be squarely covered by the decision of tribunal in the case of Orange Business Solutions Pvt Ltd, supra, we do not see any merits in the impugned order. The authorized representative has vehemently argued stating that Commissioner (Appeal) has not considered the refund claim and issue on merits and have remanded back the matter to be decided by the original authority for consideration of issue. From the perusal of the decisions which have been referred by the authorized representative, we find that the decisions, were in the case where the appeals have been dismissed by the Commissioner (Appeal) on the ground of limitation or for failure to comply with the requirements of pre-deposit. However from the observations reproduced from the order of Adjudicating Authority and Commissioner (Appeal), it is quite evident that the only issue under consideration by both the authorities was in respect of the "intermediary services". Appellant has filed this appeal challenging the impugned order claiming that the services provided by them do not qualify as "intermediary services". Section 35 C (1) of the Central Excise Act, 1944, read with Section 86 of Finance Act, 1994, provides as under,-

"(1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary."

In our view the said section does not put any such restriction on the orders that may be passed by us.

4.9 Further we also take note of provisions of Section 11 B (2) and 11 B (3) the Central Excise Act, 1944 and the decision of Hon'ble Apex Court in case of Mafatlal Industries [1997 (89) ELT 247 (SC)] stating as follows:

82…………..That is the plain meaning of sub-rule (3) of Rule 11 and sub-sections (3) and (4) of Section 11B (prior to 1991 Amendment). There is no departure from that position under the amended Section 11B. All claims for refund, arising in whatever situations (except where the provision under which the duty is levied is declared as unconstitutional), has necessarily to be filed, considered and disposed of only under and in accordance with the relevant provisions relating to refund, as they obtained from time to time. We see no unreasonableness in saying so."

To dispel the fears expressed by the learned Authorized Representative, we make it clear we are in the present case setting aside the impugned order and allowing the appeal vis a vis the issue in respect of the "intermediary services" only. Our order should not be construed as allowing the refund claims made by the appellant, which are completely in the jurisdiction of the jurisdictional Assistant/ Deputy Commissioner and need to be examined and decided by him.

5.1 In view of the discussions as above we do not find any merits in the impugned order and set aside the same allowing the appeals.

(Pronounced in the open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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