

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

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 61396 of 2018

[Arising out of Order-in-Appeal No. 65-ST-CGST-APPEAL-GURUGRAM-SG-2018-19 dated 2.6.2018 passed by the Commissioner (APPEALS) Gurugram]

M/s Raaga Associates Pvt Ltd

H.No. 233, Ashoka Enclave I, Sector 34
Faridabad 121003 Haryana

.....Appellant

VERSUS

Commissioner of CE & ST, Faridabad-I

Block D, New CGO Complex, NH IV, NIT,
Faridabad 121001 Haryana

.....Respondent

with

Service Tax Appeal No. 60285 of 2018

[Arising out of Order-in-Original No. 02/2020-21/Commr/PP/FBD/ dated 8.6.2020 passed by the Commissioner CE & ST, Faridabad]

M/s Raaga Associates Pvt Ltd

H.No. 233, Ashoka Enclave I, Sector 34
Faridabad 121003 Haryana

.....Appellant

VERSUS

Commissioner of CE & ST, Faridabad-I

Block D, New CGO Complex, NH IV, NIT,
Faridabad 121001 Haryana

.....Respondent

APPEARANCE:

Present for the Appellant: Sh. Monish Panda, Sh. Mrinal Bharat Ram, Adv.

Present for the Respondent: Ms. Shivani, Authorized Representative

CORAM: HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)

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

FINAL ORDER NO. 60026-60027 /2022

DATE OF HEARING: 11.01.2022

DATE OF DECISION: 11.01.2022

PER ASHOK JINDAL:

The appellant is in appeal against the impugned orders wherein demand of service tax has been confirmed against the appellant by holding that the services rendered by the appellant falls under the category of "intermediary services" as per rule 2(f) of Place Of Provision of Service Rules, 2012 (POPSR), 2012.

2. The facts of the case are that appellant entered into a contract with Syntech (HK) Technology Ltd. Hongkong (STLH) in order to short list states for launching Gionee mobile phones and make arrangement for its advertisement for this purpose the appellant undertook to set up (STLH) offices in India, recruit service company, advertisement agency and service staff, and appoint distribution partners for the state short listed for launch of Gionee mobile phones. (STLH) is also entered into separate contracts with the distributors for them to purchase the mobile phones from (STLH) and resale the same in the territory along with marketing and promoting the same (STLH) was to pay to the appellant service charges at the rate of 1% of the value of goods imported in India by these distributors in the first year and the service charges at the rate of 0.8% for the second year, these payments were made to the appellant in convertible foreign exchange. The appellant initially paid service tax for certain period on the amount of commission, they received from STLH classifying their service as "Business Auxiliary Service" but they stopped paying service tax after April, 2014 and sought refund of the service tax already paid by them for the earlier period on the ground that service provided by them to M/s STLH was export of service, therefore, no service tax was payable on such services. Initially, the refund claim was disallowed holding that the services provided by the appellant falls under "Intermediary Service" and the same is taxable in India but on appeal,

the Ld. Commissioner (Appeal) held that during the impugned period the term "Intermediary" as defined in Rule 2(f) of POSPS covers only such person who was facilitating in provision of main service and that the appellant was actually facilitating in sale of goods by STLH, through distributors network in India, therefore, the appellant was not covered within the definition of "intermediary" and he hold that services provided by the appellant was covered by rule 3 of POPSR, 2012, therefore, place of provision of service was location of the recipient of service which is out of India and allowed the refund claim. As a Ld. Commissioner (Appeal) while examining the issue under the law existed applied to 30.09.2014 as concluded that the appellant has facilitated in sale of product through distributor network in India for the overseas customers and that the appellant is not associated in arranging any service for the overseas customer but in fact the service for arranging sale of mobile phones through the distributor network, this finding of the Commissioner (Appeal) is based on submission made by the appellant therefore the appellant is in their own submission before commissioner appeal have claimed that they are facilitating in sale of goods by M/s STLH and not facilitating the provision of service by M/s STLH therefore even by their own submission the appellant has become an intermediary for the period after 01.10.2014. In view of this, two show cause notices were issued to the appellant to demand service tax on the premise that the appellant appears to be covered under intermediary as the scope of intermediary which includes any activity that facilitates supply of goods. The matters were adjudicated, the demand of service tax was confirmed along with interest and penalties were also imposed. Against the said orders, the appellant is before us.

3. The Ld. Counsel appearing on behalf of the appellant submits that the impugned order is based on incorrect facts as it has been held that the appellant has taken a plea before the Ld. Commissioner (Appeal) in earlier

proceedings that they were facilitating sale of product and the only reason that the appellant has received their favorable order was that at that time an intermediary was only a person facilitating main service and not sale of goods. It is a submission that there is no basis to assume that the appellant has made this argument and argument is in teeth of fact of the case. It is the channel distributor partners who is responsible for receipt and sale of goods, import of goods as well as filing bill of entry and the appellant has no role to play in facilitating supply of goods. Further, in the impugned order, it has been assumed that the appellant is marketing and liaison office of STLH in India so the service provided by the appellant could not be export of service under Rule 6A(f) of Service Tax Rules, 1994. This allegation was not raised in the show cause notice. Further, the impugned orders are in contradiction with the order of the Commissioner (Appeal) wherein he has held that the appellant was exporting service as consideration received was in convertible foreign exchange and provider of service and recipient of service were not merely establishment of distinct person. In the impugned order, the lower authority arbitrarily disregarded these findings. There is no reason has been assigned in the impugned orders that service provided by the appellant facilitate in sale of goods. In fact, the authorities below has fell in error holding that the service provided by the appellant facilitates sale of goods, therefore, the appellant is in intermediary but this is not the fact, as the appellant is not an intermediary and does not facilitate any supply of goods it is a submission that the Rule 2(f) of POPSR, 2012 states that intermediary means a broker, agent or any other person by whatever name called. "Any other person" must be construed in view of principle of ejusdem generis which means that where there are general words following any specific words then general words must be confined to the things of the same kind as those specified. The scope of any other person would be limited to the

person like broker and agent and appellant cannot be therefore regarded as broker or agent of STLH. He relied on the decision of the **Verizon Communication India Pvt. Ltd. vs. Commissioner of service Tax, Delhi III -2018 (8) G.S.T.L. 32 (Del.)**. He also relied on the decision of **M/S Sunrise Immigration Consultants Private Limited Vs. CCE & ST, Chandigarh vide Final Order No: 62221/2018 dt. 16.03.2018** in **Appeal No. St/52205/2015** and the decision of **IDB Education India Private Limited Vs. Additional Director General Of Central Excise Intelligence, New Delhi** vide FINAL ORDER NO. 51901/2021 dt. 28.10.2021.

4. On the other hand, Ld. AR opposed the contentions of the Ld. Counsel who submits that the department has not gone beyond the allegation in the show cause notice as in the impugned orders has examined the term intermediary services by taking activity of marketing office and liaising office under intermediary service which was the allegation raised in the show cause notice. In the present case, the activities of appellant certainly constitute "a supply of its own service to overseas company" and the same do qualify as an "intermediary" under the purview of rule 9 of POPS Rules, 2012. She further submitted that as per the agreement between STLH and the appellants, it is the appellant who has to appoint distribution partners for short listed states to establish India office set up, recruitment service company, advertisement company to recruit staff, appoint distribution partners also they were being paid facilitation/service/commission charges equal to 1% of the value of goods imported in India by the appointed distribution channel partners in the first year and 0.8% in the second year onwards. The agreement entered between the appellant and STLH specified that the appellant has to bear all taxes relating to facilitating charges and income generation. This

establish that services rendered by the appellant ultimately led to sale of goods i.e. mobile phones by STLH. It is the submission that the concept of intermediary service as defined under law requires some basic pre-requisites, i.e. there are three parties in this arrangement, the appellant, STLH and distribution partners. There are two distinct supplies in case of intermediary service, one the main supply and the ancillary service. The appellant has the character of an agent, broker or any other similar person which include a person who supplies such as on his account and payment is in form of commission. The nature of service cannot be determined on the basis of method allotted for quantification of service charges. She further submitted that the extended period of limitation is rightly invoked.

5. Heard the parties and considered the submissions.

6. On careful consideration of the submission made by both the sides, we find that the facts which are admitted as under:

The appellant has entered into contact with STLH in order to short list states for launching Gionee mobile phones and make arrangement for advertisement for this. Further, the appellant undertook to set up STLH office in India, to recruit services companies, advertisement agency and service staff and appointed distribution partners for the states short listed for launch of Gionee mobile phones. Thereafter, STLH entered in separate contracts with Distribution partners to purchase phones owned by STLH and resale the same in the Indian territory along with marketing and promoting of the same. The mode of payment of the services rendered by the appellant is 1% of the value of goods imported in India by these distributors in the first year and 0.8% in subsequent years.

The Revenue is of the view that the services rendered by the appellant is an intermediary service. Rule 2(f) of POPS Rules, 2012 defines the term "intermediary" which means a broker, an agent or any other

person, by whatever name called, who arranges or facilitate a provision of a service (herein called the main service) or supply of goods between two or more persons, that does not into a person who provide the main service or supply of goods on his account.

From the facts of case, we find that the appellant nowhere of providing service amongst two or more persons, in fact, the appellant is providing service to set up STLH office in India, recruitment service companies, advertisement agency, service staff and also appoint Distribution partners for states short listed for launch of Gionee mobile phones. These services nowhere include any sale of goods and the appellant is nowhere involved in the providing the service of sale of goods. In fact, for sale of goods, M/s STLH has separately entered into contract with the Distribution partners who import goods in their own names and sell in India. The appellant is neither related to import of goods nor any sale of goods and also nor concern with the payment against those goods, therefore, it cannot be said that the appellant is an "Intermediary" as per Rule 2(f) of POPS Rules, 2012. This issue has been examined by this Tribunal in the case of ***Sunrise Immigration Consultants Private Limited (Supra)*** wherein this Tribunal observed as under:

9. For better appreciation, the definition of intermediary has been defined under Rule 2(f) of POPS Rules, 2012 which is reproduced here as under:

"Intermediary means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provisions 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."

10. We find that the appellant is nowhere providing services between two or more persons. In fact, the appellant is providing services to their clients namely banks/colleges/university who are paying commission/fees to the appellant. The appellant is only facilitating the aspirant student and introduced them to the college and if these students gets admission to the college, the appellant gets certain commission which is in nature of

*promoting the business of the college and for referring investors borrow loan from foreign based bank to the people who wishes settled in Canada on that if the deal matures, the appellant is getting certain commission. So the nature of service provided by the appellant is the promotion of business of their client, in terms, he gets commission which is covered under Business Auxiliary Service which is not the main service provided by the main service providers namely banks/university. As the appellant did not arrange or facilitate main service i.e. education or loan rendered by colleges/banks. In that circumstances, the appellant cannot be called as intermediary in the light of the judgment issued by the **Advanced Ruling Authority in the case of Universal Services India Pvt. Ltd. reported in 2016 (42) STR 585 (AAR) and Godaddy India Web Services Pvt. Ltd. reported in 2016 (46) STR 806 (AAR)** wherein it has been observed as under:*

"10. The definition of "intermediary" as envisaged under Rule 2(f) of POS 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 Service" to WWD US and on his 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 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 centres, 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."

*12. We further take note of the fact that the provisions of Rule 6A of the POPS Rules, 2012 has been declared ultra virus by the **Hon'ble High Court of Delhi in the case of Association of Tour Operators (Supra)**. In that circumstance, also the appellant is not liable to pay services for referral service, therefore, the issue no. 1 is answered in favour of the appellant.*

As discussed herein above, we hold that the appellant do not qualify as “Intermediary” in terms of Rule 2(f) of POPS Rules, 2012, therefore, no demand of service tax sustainable against the appellant.

7. In view of the above observation, we set aside the impugned orders and allow the appeals filed by the appellant with consequential relief.

(Operative part of the order pronounced in the open court)

(ASHOK JINDAL)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)