

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 88545 & 88547 of 2018

(Arising out of Order-in-Appeal No. PVNS/48-52/APPLS/THANE/ME/ 2018-19/3485 dated 14.05.2018 passed by the Commissioner of CGST & Central Excise (Appeals-Thane), Mumbai)

M/s Chevron Phillips Chemicals India Pvt. Ltd. **Appellant**

Alfa Building, 2nd Floor, Unit No. 201, Hiranandani Gardens,
Powai, Mumbai - 400076

Versus

Commissioner of CGST & Central Excise. Mumbai East **Respondent**

5th Floor, CGO Complex, CBD Belapur, Navi Mumbai

WITH

Service Tax Appeal No. 88552, 88554, 88557 of 2018

(Arising out of Order-in-Appeal No. PVNS/48-52/APPLS/THANE/ME/ 2018-19/3485 dated 14.05.2018 passed by the Commissioner of CGST & Central Excise (Appeals-Thane), Mumbai)

M/s Chevron Phillips Chemicals India Pvt. Ltd. **Appellant**

Alfa Building, 2nd Floor, Unit No. 201, Hiranandani Gardens,
Powai, Mumbai - 400076

Versus

Commissioner of CGST & Central Excise. Mumbai East **Respondent**

5th Floor, CGO Complex, CBD Belapur, Navi Mumbai

AND

Service Tax Appeal No. 88913 of 2018

(Arising out of Order-in-Appeal No. PVNS/82/APPLS/THANE/ME/ 2018-19/3664 dated 01.06.2018 passed by the Commissioner of CGST & Central Excise (Appeals-Thane), Mumbai)

M/s Chevron Phillips Chemicals India Pvt. Ltd. **Appellant**

Alfa Building, 2nd Floor, Unit No. 201, Hiranandani Gardens,
Powai, Mumbai - 400076

Versus

Commissioner of CGST & Central Excise. Mumbai East **Respondent**

5th Floor, CGO Complex, CBD Belapur, Navi Mumbai

Appearance:

Shri S. Thirumalai, Advocate for the Appellant

Shri D.M. Shine, AC, Authorized Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/87373-87378/2019

Date of Hearing: 28.06.2019

Date of Decision: 20.12.2019

Per: Dr. D.M. Misra

These appeals are filed against Order-in-Appeal No. PVNS/48-52/APPLS/THANE/ME/ 2018-19/3485 dated 14.05.2018 and PVNS/82/APPLS/THANE/ME/2018-19/3664 dated 01.06.2018 passed by the Commissioner of CGST & Central Excise (Appeals-Thane), Mumbai.

2. The facts in brief (Appeal Nos. 88545, 88547, 88552, 88554, 88557 of 2018) are that the appellants are engaged in providing taxable output services namely, Business Auxiliary Service viz. marketing and sale promotion of chemicals to their overseas counterpart M/s Chevron Philips Chemicals Global FZE (CPC Global) under an agreement dt.14.9.2009. The appellants received consideration/commission from the CPC Global in convertible foreign exchange in rendering the said service. On various input services used in providing the said output service, the Appellant has availed CENVAT Credit. Since the said services are exported, they have filed cash refund of

accumulated CENVAT Credit under Rule 5 of the CENVAT Credit Rules, 2004. Alleging that the service provided by the appellant is not an 'export service' since they acted as an 'intermediary' defined under Rule 2(f) of the Place of Provision of Services Rules, 2012 (POPS Rules in short), consequently as per Rule 9 of the said Rule the service provider is deemed to be situated in India, hence there cannot be export of service and accordingly cash refund of the credit is inadmissible; also (in Appeal No. 88913 of 2018) it is alleged that the input services are having no nexus with the output services exported, hence refund claim also not admissible. Aggrieved by the said order, they filed appeals before the learned Commissioner (Appeals), who in turn, rejected their appeals. Hence, the present appeals.

3. Learned Advocate for the appellant has submitted that under Sales Promotion and Agency Agreement dated 14.09.2009, the appellant had provided sale promotion services to the overseas entity i.e. CPC Global in respect of various chemical products. The details of sale promotions services required to be provided by the Appellant through out the territory are mentioned at clause 3 of the said Agreement. For rendering the said services, the appellants were paid agent's commission in accordance with clause (5) of the said agreement. Referring to clause (10) of the said agreement, the learned Advocate has submitted that even though the appellant was appointed as agent, however render the service on non exclusive basis and an independent contractor and not an employee of the CPC Global. The Appellant are no way connected with the

manufacturer clients of CPC Global. All the sales promotion activities are carried as per the Agreement dt.14.9.2009 to CPC Global only.

4. The Learned Advocate has submitted that the Commissioner (Appeals) in the impugned order referred to the definition of 'intermediary' prescribed under amended definition i.e. Rule 2(f) of POPS Rules, 2012 and applied it to the entire period in question. It is his contention that amendment became effective only from 1.10.2014 by which "goods" were included in the said definition. However, the Commissioner (Appeals) has confirmed the demand for the entire period from July, 2012 to Sept, 2015 applying the amended definition. It is his plea that therefore confirmation of demand from July 2012 to Sept, 2014 is contrary to the principles of law laid down by the Tribunal in the case of Croda India Co. Pvt. Ltd. Vs. CST, Mumbai – 2019 (5) TMI 1139-CESTAT MUMBAI.

5. He has submitted that the Department has accepted the services rendered by the appellant as export service with regard to the refund filed for the period October 2013 to March, 2014 and refund was not disallowed on this ground. The said Order was not challenged by the Department.

6. For the period after 1.10.2014, the services rendered by the appellant would qualify as export service and definition of 'intermediary' could not apply. He has submitted that in the agreement, it is clearly mentioned that the dealing between the

appellant and the foreign counterpart is on principal to principal basis and they have no control to conclude the deals between CPC Global and its clients nor to negotiate the price. Under such circumstances, merely because the measure of remuneration /compensation of the service rendered is with respect to formula based on the invoice price, it cannot be a reason to describe the role of appellant as intermediary. In support, he has referred to the judgment of this Tribunal in the case of Sunrise Immigration Consultants Pvt. Ltd. Vs. CCE&ST, Chandigarh – 2018 (5) TMI 1417-CESTAT CHANDIGARH.

7. It is his contention that therefore the appellants are not rendering intermediary services within the meaning of Rule 2 (f) of the Place of Provision of Services Rules, 2012 and hence do not fall under Rule 9 of POPS Rules, 2012. In support, he has referred to the judgment of this Tribunal in the case of Lubrizol Advanced Materials India Pvt. Ltd. Vs. Commissioner of Central Excise – 2019 (1) TIM 720-CESTAT MUMBAI and M/s R.S. Granite Machine Tools Pvt. Ltd. Vs. CGST&CE – 2019 (1) TMI 1179-CESTAT CHENNAI.

8. The learned Advocate further submitted that in the impugned order, the learned Commissioner (Appeals) also had concluded that the services namely, Management and Business Consultant services, Business Auxiliary Service, Business Support Service, Membership of Club or Association, Convention Services, Renting of Immovable Property & Telecommunication services, do not satisfy the definition of 'input service' as

prescribed under rule 2(I) of CCR,2004, as having no nexus with the output services provided, hence not eligible to cash refund under Rule 5 of the CENVAT Credit Rules, 2004. It is his contention that the Management and Business Consultant service relates to professional fees paid towards advice, consultancy and assistance in relation to the conduct the operation in efficient manner. The said service is an input service as held in the case of Electronic Arts Games India Pvt. Ltd. Vs. Commissioner of Central Excise, Hyderabad – 2017-TIOL-1275-CESTAT-HYD. Similarly, the Business Support Service received by the appellant in the nature of activities relating to legal, market and product research, administrative, finance & accounts etc., hence is input service as held in the case of OSI Systems Pvt. Ltd. Vs. Commissioner of Central Excise, Hyderabad – 2017-TIOL-1684-CESTAT-HYD. He has further contended that membership of club or association service relates to their business as they are required to obtain membership in various trades, association and thus it is also an input service as held in the case of Electronic Arts Games India Pvt. Ltd. Vs. Commissioner of Central Excise, Hyderabad – 2017-TIOL-1275-CESTAT-HYD. With regard to Convention services, the appellants are required to avail such services for organizing business event in conducting product and sales promotion activities, therefore, it is also an input service as held by the Tribunal in the case of Virchow laboratories Ltd. Vs. Commissioner of Central Excise, Hyderabad – 2017 (1) TMI 1176-CESTAT-HYD. The services availed in respect of Renting of Immovable Property & Telecommunication services relates to rent of office premises and other facilities like electricity, water

supply used for conducting their business. Therefore, credit is admissible on the Service Tax paid on such services as held in the case of Renting of Immovable Property & Telecommunication services. Similarly, telecommunication services used in the communication with client, vendors for sending reports etc and credit is admissible as held in the case of OSI Systems Pvt. Ltd. Vs. Commissioner of Central Excise, Hyderabad – 2017-TIOL-1684-CESTAT-HYD.

9. Further, the learned Advocate has submitted that in any case denial of cash refund of accumulated CENVAT Credit under Rule 5 of CCR,2004 on the ground that the services rendered is not the export service under POPS Rules,2012 is contrary to the principles of law laid down by the Tribunal in the case of Holtek Asia Pvt. Ltd. – 2018-TIOL-1888-CESTAT-MUM and also Softek India Pvt. Ltd. Vs. CST, Bangalore – 2018-TIOL-816-CESTAT-BANG.

10. Per contra, the learned AR for the Revenue has submitted that the appellant is subsidiary of Chevron Phillips Chemical International Holdings LLC, USA. Chevron Phillips Chemical Group, manufactures and markets chemicals including olefins and polyolefins, specially chemicals and plastics. Olefins and polyolefins include products of Ethylene, Polyethylene, Normal Alpha Olefins etc. The appellant is providing marketing and promotion services in relation to petrochemical products manufactured by its group entities under the Sales Promotion Agreement dated 14.09.2009. Referring to the clarification

issued by the Board on the scope of intermediary services, the learned AR has submitted that –

- (a) An intermediary arranges or facilitates a provision of a 'main service' between two or 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 alter 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'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;
- (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';

11. In view of the above and the agreement between the appellant and CPC Global, it is clear that the appellant and CPC Global are group companies of Chevron Phillips Chemical Group. CPC Global is a marketing arm of the "Selling companies", who in turn, appointed the appellant as their agent for sell of chemicals and other products in India. The appellant arranges or facilitates provisions of main service i.e. supply of goods between selling company of its group and buyers in India. Thus, they are involved with two supplies at one time, (i) the supply between the seller and the buyer, and (ii) the supply of his own service (agent service) for which commission is charged. Thus, they fall squarely under the scope of intermediary. Consequently, the

service rendered by them to CPC Global cannot be considered as export service and hence they are not eligible to cash refund of accumulated credit under Rule 5 of CCR,2004.

12. Heard both sides and perused the records.

13. The issues involved in the present appeals for determination are whether- (i) the appellants are an 'intermediary' and hence the services rendered by them fall outside the scope of export service as the service provider is deemed to be located in India in view of Rule 9 of the POPS Rules, 2012 and consequently the appellants are not eligible to cash refund of accumulated credit under Rule 5 of the CENVAT Credit Rules, 2004; (ii) some services received since having no nexus with the outputs services, hence, not an input service, consequently no cash refund under the said rule is admissible even though credit is allowed and not disputed.

14. The appellant by an agreement with overseas company CPC Global agreed to provide service of sales promotion of the chemicals in the territory specified in the said agreement. The detailed of services required to be rendered in connection with sales promotion in defined territory are stated under the clause (3) of the said agreement. A plain reading of the same reveals that it is an agreement between the Appellant and the CPC Global and no mention of rendering of service to the clients of CPC Global or any other third party. For rendering such services, the appellants are entitled to commission stipulated under clause

(5) of the agreement. For the purpose of measure of the remuneration/consideration for rendering the service the measure is certain percentage of the sale price of the chemicals which is paid to the Appellant by CPC Global. It is the contention of the appellant that they did not act as an intermediary between the CPC Global and any other person while rendering the service of promotion of sale of the goods in the defined territory. The Appellant are neither concerned the fixation of selling price of the goods and their role is an independent contracting as stipulated under clause (10) of the said agreement.

15. The Ld Advocate for the Appellant has vehemently argued that while confirming the demand, the learned Commissioner (Appeals) has referred to the amended definition of intermediary prescribed under Rule 2(f) of POPS Rules, 2012 for the entire period i.e. July, 2012 to Sept, 2015 when the said definition got amended w.e.f. 1.10.2014 to include 'goods' within the scope of said definition. Secondly, it is contended that even after 1.10.2014, also the appellant never acted as an 'intermediary' as is clear from the agreement between the appellant and the overseas company. The definition of 'Intermediary' under Rule 2(f) of the POPS Rules, 2012 reads as under:

Before amendment

"(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 on his account."

After amendment w.e.f.1.10.2014

*"(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."*

16. There is merit in the contention of the appellant that since 'goods' was not covered under the scope of definition of 'intermediary', therefore, for the period prior to 1.10.2014 confirmation of demand is bad in law. I find that the definition of intermediary cannot be made applicable to sale of goods for the period prior to 01.10.2014 in view of the principle law laid down by the Tribunal in Croda India Co. Pvt. Ltd. Vs. CST, Mumbai – 2019 (5) TMI 1139-CESTAT MUMBAI. It is observed as :

"4.4.12 We cannot agree with the conclusion of the Commissioner, holding the services provided by the Noticee as "intermediary service". From the Rule 2(f) of Place of Provision of Service Rules, 2012, it is quite evident that service provided in relation to sale of goods by a commission agent cannot be classified as intermediary service. We are further supported in our view because para 5.9.6 of The Education Guide issued by the CBEC clearly states:-

"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 two persons, without material alteration or further processing. Thus, 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.

For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition."

Thus while it is true that intermediary includes intermediary in respect of sale of goods, but legislature has while framing these rules deemed it fit to exclude the intermediaries in respect of sale of goods from the definition of intermediary. Hence we cannot sustain the view expressed by the Commissioner, contrary to the express definition of intermediary provided by the Place of Provision of Service Rules, 2012. Hence in our view the services provided by the appellant in respect of the sale of goods of associated group companies cannot be said to be services provided by intermediary as defined by said Rules *ibid*. Since Rule 9 is applicable to specified services and the services provided in this case being not the intermediary services, this Rule will not be applicable for determination of place of provision of service."

17. For the period after 1.10.2014, on merit also, the appellant cannot be called as an 'intermediary'. On a simple reading of the agreement analyzed as above, it is clear that the appellants are appointed by their overseas counterpart CPC Global for sales promotion of the goods for their client in the defined territory. The appellant has no role in fixation of price nor they negotiate in any manner between CPC Global and their clients relating to sales promotion of the goods sold. Therefore, in my view, the appellant cannot be called as an intermediary. consequently, fall outside the amended definition of 'intermediary' under Rule 2(f) and Rule 9 of the POPS Rules, 2012. Similar view has been expressed by the Tribunal in the case of *Lubrizol Advance Materials (supra)* and *R.S. Granite Machine (supra)*. This Tribunal in the case of *Lubrizol Advance Materials* has held as under: -

"6. I find that the learned Commissioner (Appeals) has denied the benefit of export with effect from 1.10.2014 under the Place of Provision of Services Rules, 2012, holding that the appellant had facilitated supply of goods between its foreign counterpart and processing of goods and thus, it should be considered as an intermediary. On perusal of the contracts, I find that the service fee charged by the appellant to its overseas group entities for provision of service has no direct nexus with the supply of goods by the overseas group entities to its customers in India. Further, the appellant had provided the service to the overseas entities on principal to principal basis. Thus, the appellant cannot be termed as an intermediary between the overseas entity and the Indian customers. It is an admitted fact on record that the consideration received by the appellant for providing the services was based upon cost plus markup and is nowhere connected with the main supply of goods. In other words, the main supply may or may not happen and thus, cannot be directly correlated with the service provided by the appellant. Thus, the appellant is not acting as a bridge between the overseas group entities and supplies made to their customers in India and accordingly, it cannot be said that the appellant has provided intermediary service and should be governed under the provisions of Rule 9 of the rules."

Also, in the case of *R.S. Granite Machine (supra)*, this Tribunal has held as under: -

5. The facts of the case as analysed elsewhere in this order, make it clear that obtaining/procuring order for its foreign Principals is the main service rendered by the appellant and consequently, rigors Rule 9 vis-à-vis Rule 2 (f) are not applicable. In view of the above, I am of the considered opinion that Rule 3 of POPS Rules would only apply and therefore the appellant cannot be fastened with tax liability. For the above reasons, demand as well as the impugned order are not sustainable and consequently, the same are set aside and the appeal stands allowed with consequential benefits if any, as per law.”

18. As far as denial of credit on various input services namely, Management and Business Consultant services, Business Auxiliary Service, Business Support Service, Membership of Club or Association, Convention Services, Renting of Immovable Property & Telecommunication services, the finding of the learned Commissioner (Appeals) that it is not an ‘input service’ is contrary to the principles of law laid down by this Tribunal in various judgments stated above as submitted by the Advocate for the Appellant. No contrary decision has placed by the Revenue. Therefore, on this count also the order of the learned Commissioner (Appeals) is unsustainable.

19. In the result, the impugned orders are set aside and appeals are allowed with consequential relief, if any, as per law.

(Pronounced in court on 20.12.2019)

(Dr. D.M. Misra)
Member (Judicial)