CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Service Tax Appeal No. 89802 of 2018

(Arising out of Order-in-Appeal No.PK/810/ME/20018 dated 31.08.2018 passed by Commissioner of GST & Central Excise (Appeals-II), Mumbai)

M/s Integreon Managed Solutions Pvt. Ltd. .....**Appellant**
602, 6th Floor, IT Building 3, Nesco IT Park, NESCO Complex, Western Express Highway, Goregaon,
Mumbai-400063.

VERSUS

Commissioner of Central Goods And Service Tax- Mumbai East .....**Respondent**
9th Floor, Lotus Infocentre, Near Parel Station,
Parel, Mumbai-400012.

Appearance:

Shri Ramnath Prabhu, Advocate for the Appellant
Shri Anand Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M. M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85579/2023

Date of Hearing: 13.04.2023
Date of Decision: 13.04.2023

PER : S.K. MOHANTY

Briefly stated the facts of the case are that, the appellant is engaged, *inter alia*, in providing various services under the category of Business Support Service, Software Service, Legal Service and Discovery Support Service to its clients both based in India as well as outside India. In the present case, the appellant had entered in to service agreement with M/s. Integrated Managed Solutions Inc. ('IMS-US') and Integreon

Managed Solutions Limited (‘IMS-UK’), both located outside the country. The rendition of service as per the agreement related to Administrative Support Service like document review, preparation of presentation and business information services. Since, substantial part of the output services provided by the appellant were exported, there was no scope or occasion to utilize the accumulated Cenvat credit available in their books of account. Thus, the appellant had filed a refund application for the period of July 2016 to June 2017, claiming refund of service tax paid on the input services. The subject refund applications were filed by the appellant under Rule 5 of the CENVAT Credit Rules, 2004 read with notification No. 27/2012-C.E. (N.T.) dated 18.06.2012. The refund applications filed by the appellant were not considered favourably and the deficiency memo dated 15.01.2018 was issued by the Jurisdictional Refund Sanctioning Authority, seeking the rejection of the said applications. The issue pertaining to the grant of the refund benefit was adjudicated by the Original Authority vide order dated 05.02.2018 in rejecting the refund claim applications filed by the appellant. On appeal against said adjudication order, the learned Commissioner (Appeals), CGST & Central Excise, Mumbai vide impugned order dated 31.08.2018 has upheld the original order and rejected the appeal filed by the appellant. In support of rejection of appeal, the learned Commissioner (Appeals) has held that the appellant performs the role of intermediary for the overseas service receiver and since the location of the appellant is in India, the disputed service cannot be termed as exports and should appropriately fall under Rule 9(c) of Place of Provision of Services(POPS) Rules, 2012. Feeling aggrieved with the impugned order, the appellant has filed this appeal before the Tribunal.

2. Learned Advocate appearing for the appellant submitted that the agreements entered into between the overseas entities and the appellant clearly provide that the appellant is not an agent acting on behalf of the overseas entities and thus, the conditions of Rule 6A (1) of the Service Tax Rules, 1994 have been duly satisfied, in order to claim that the transaction made between both the sides should be construed as export and the benefit of export of service should be available to the appellant. To strengthen such stand, the appellant has relied upon the Circular No.159/15/2021-GST dated 20.09.2021 issued by the CBIC, clarifying the phrase 'intermediary' for the purpose of the POPS Rules, 2012. He has also relied upon the decision of this Tribunal in the case of Blackrock Services India Pvt. Ltd. Vs. Commissioner of CGST, Gurgaon [2022 (67) GSTL 447 (Tri.-Chan)] to state that in identical set of facts, by considering the contractual norms, the Tribunal has held that the appellant therein cannot be considered as an intermediary and accordingly, allowed the benefit of refund provided under Rule 5 *ibid*.

3. On the other hand learned Authorized Representative appearing for the Revenue reiterated the findings recorded in the impugned order.

4. Heard both sides and examined the case records.

5. For ascertaining the issue whether the transaction made between the appellant and the overseas entities involve export of services or otherwise, the relevant contents in the agreement are required to be examined, which are extracted herein below:-

> "Extract of CLAUSES 4; 5; 6; 8 AND 14 OF SUB-CONTRACTING AGREEMENT entered between Integreon

Managed Solutions Inc. a New York Corporation (IMS NY) and Integreon Managed Solutions (India) Pvt. Ltd. (IMSIPL)

4. PROVISION OF SERVICES

On and from the Appointment Date, IMS NY will sub-contract to IMSIPL such administrative support services like document review, presentation services and business information services as are contracted by IMS NY with its Clients, which are agreed with Clients and/or its affiliates to be provided from India by IMSIPL.

5. APPROACH WITH CLIENT

IMS NY shall market to potential clients situated in the United States of America, United Kingdom, Canada or such other country and/or it affiliates, as may deem fit that it has capability to deliver certain services. Where such services are to be provided by IMSIPL, IMS NY shall first check whether IMSIPL will be capable of providing such services prior to subcontracting the work to IMSIPL.

6. OBLIGATIONS OF IMS NY

IMS NY hereby agrees to fulfil the following obligations during the term of this Agreement:

a) Carry out marketing/promotion activities on its own account, enter into contracts with its Client and subcontract such procured contracts for execution to IMSIPL.

b) Assist IMSIPL with such information and assistance as may be require by IMSIPL to perform the necessary services to IMS NY.

c) The terms for performing services will be mutually agreed between IMS NY & IMSIPL.

d) Maintain necessary approvals, permits, registrations and licenses as are necessary for the purpose of complying with applicable law during the term of this Agreement.

8. CHARGES AND PAYMENT

8.1 IMSIPL shall raise monthly invoice on IMS NY for the services mentioned in Clause 4 above alongwith applicable taxes. The service fees payable by IMS NY to IMSIPL would be determined by adding mark-up of 15 percent on the costs incurred by IMSIPL in providing such services.

> *"Costs" for the purposes of applying the markup include all direct and indirect expenses incurred by IMSIPL in connection with performance of the services sub-contracted by IMS NY, including, but not limited to personnel costs, travel expenses, rent, foreign exchange fluctuation gain/loss resulting due to this transaction and other administrative and overhead expenses. Such cost will exclude any interest expense and income tax liability of IMSIPL. Further, no markup will be applicable to any cost recharge in the nature of reimbursement or recovery as these items will be paid/received based on actual.*

8.2 The invoices shall be raised by IMSIPL in USD (US Dollar) or such other currency as may be mutually agreed between the Parties.

14. RELATIONSHIP

All dealings between the Parties shall be in accordance with the arms' length standard and nothing contained herein shall be construed as constituting any relationship of joint venture or partnership or agency between the Parties or management of any operation of IMSIPL in Territory, relating to this Agreement or otherwise, by IMS NY. Each party hereto shall remain exclusively responsible for performance of its obligations on their own account, payment of their own tax obligations in accordance with applicable law and for the payment of any benefits, compensation and/or dues as may be payable to their respective employees."

6. On careful examination of the contents of the agreement, it reveals that the relationship between the appellant and the overseas entities are

that of Principal to Principal, and there is no otherwise relationship namely joint venture, partnership or agencies. It is not the case of revenue that the appellant had failed to export the taxable output service or failed to receive the payment for such services in convertible foreign exchange. Thus, in our considered view the condition of Rule 6A (1) *ibid* have been fulfilled by the appellant for consideration of the disputed services as export of service for the purpose of grant of benefit of refund provided under the Rule 5 ibid read with notification issued thereunder. Further, we also find that the concept of 'intermediary' appearing in the Rule 2(f) of the POPS Rules, 2012 has been dealt with by the CBIC under the GST regime. The relevant paragraph in the Circular No. 159/15/2021-GST dated 20.09.2021 is extracted herein below:-

> *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 20-06-2012 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-a-vis the Service Tax regime, except addition of supply of securities in the definition of intermediary in the GST Law.*

> *"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."*

7. We have also noted that though the said circular was issued under the GST regime but for the purpose of consideration of such phrase under the service tax regime, it should apply *mutatis mutandis*. We find that the said circular has been issued on the basis of representations received, citing ambiguity caused in interpretation of the term 'Intermediary services', and after examination of the difficulties faced by the trade and industry, the said circular was issued, with a view to ensure uniformity in the implementation of the provision of the law across field formations. We also find that in an identical case, this Tribunal in the case of Blackrock Services India Pvt. Ltd. (supra) has defined the true meaning and purpose

of the phrase intermediary. The relevant paragraph in the said order is quoted below:-

> *“A plain reading of the aforesaid provision makes it clear that to attract the said definition there should be two or more persons besides the service provider. In other words an "intermediary" is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus necessary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (main supply) and one arranging or facilitating the said main supply. Therefore, an activity between only two parties cannot be considered as an intermediary service. An intermediary essentially arranges or facilitates the main supply between two or more persons and does not provide the main supply himself. The intermediary does not include the person who supplies such goods or services or both on his own account. Therefore there is no doubt that in cases wherein the person supplies the main supply either fully or partly, on principal to principal basis, the said supply cannot come within the ambit of "intermediary”. Sub-contracting for a service is also not an intermediary service. The supplier of main service may decide to outsource the supply of 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 not an intermediary. Who is an 'intermediary' and what is 'intermediary service' has been clarified by Central Board of Indirect Taxes and Customs (C.B.I. & C.) vide Guidance Note dated 20-6-2012 and under GST regime also a clarification has been issued by C.B.I. & C. on 20-9-2021 both of which are in line with the discussions made hereinabove about 'intermediary'.*

8. Rather, the contract referred in the above case is the sub-contracting agreement for the services being provided by the appellant to overseas entity as the main contractor and thus, under no stretch of imagination, it can be held that the appellant is an agent or intermediary, engaged for facilitating business of overseas entity.

9. In view of forgoing discussion, we do not find any merit in the impugned order, in so far as it has upheld the rejection of refund benefit

to the appellant. Therefore, by setting aside impugned order, the appeal is allowed in favour of the appellant, with consequential benefit of refund, if any, as per law.

(Dictated and pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha