CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 86851 of 2018

(Arising out of Order-in-Appeal No. MKK/526/RGD APP/2017-18 dated 14.02.2018 passed by Commissioner of Central Tax (Appeals), Raigad, Navi Mumbai.)

Western Refrigeration Private Limited **.....Appellants**
7/B, Pannalal Silk Mills Compound,
78, LBS Marg, Bhandup (West)
Mumbai – 400 078.

VERSUS

Commissioner of CGST & Central Excise **.....Respondent**
Navi Mumbai
10th Floor, Satra Plaza, Palm Beach Road,
Sector 19D, Vashi, Navi Mumbai,
Mumbai - 400 075.

Appearance:

Shri Vinay Jain along with Ms Sambhavi Dewalkar, Advocates for the Appellants
Shri Piyush Badhe Barasu, 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/85340/2024

Date of Hearing: 20.11.2023
Date of Decision: 18.03.2024

PER : M.M. PARTHIBAN

This appeal has been filed by M/s Western Refrigeration Private Limited (herein after, referred to as 'the appellants'), assailing Order-in-Appeal No. MKK/526/RGD APP/2017-18 dated 14.02.2018 (herein after, referred to as 'the impugned order') passed by the Commissioner of Central Tax (Appeals), Raigad, Navi Mumbai.

2. Briefly stated, the facts of the case are that the appellants herein is engaged in the manufacture of refrigerated display cabinet/freezers dispensers, voltage stabilizers, coffee vending machine, conveyors, ovens and air-conditioners etc. in their manufacturing unit falling under the jurisdiction of Central Excise and Service Tax Authorities at Vapi. In respect of certain services availed by them as a recipient of service, for which

payment of service tax is required, they had taken centralized registration with the jurisdictional Service Tax Commissionerate. During the course of audit of the records maintained by the appellants, conducted for the period March, 2014 to September, 2015, the Department had identified that in respect of certain sales promotion and marketing services received by the appellants from M/s Hoshizaki Europe BV, as a recipient of service they have not paid the service tax under Reverse Charge Mechanism. Further in respect of certain Works Contract Services, the Department had observed that the value of bought out materials supplied to the service provider was not included in assessable value for the purpose of calculating the service tax liability. On the basis of above objections, the Department had initiated show cause proceedings by issue of Show Cause Notice (SCN) dated 25.07.2016 demanding service tax of Rs.20,28,322/- for the period from October, 2012 to August, 2015 by invoking extended period on the ground of suppression of facts, under Section 73(1) of the Finance Act, 1994 along with interest thereon, besides proposing for imposition of penalties under Section 76, 78 *ibid*. The aforesaid SCN was adjudicated by issue of an Order-in-Original No. AC/32/DN-III/STVII/AC/16-17 dated 28.12.2016 by the Assistant Commissioner, Division-III, Service Tax-VII, Mumbai. Being aggrieved against the above Original order, the appellants had preferred an appeal before the Commissioner of Central Tax (Appeals), Raigad, who had upheld the order passed by the Original authority on merits of the case as well as on limitation by confirming the demand of service tax. However, he had reduced the penalty imposed by the original authority under Section 78 *ibid*, from an amount equal to the duty demanded to 50% of such demand of service tax. Feeling aggrieved with the impugned order, the appellants have preferred this appeal before the Tribunal.

3.1 Learned Advocate for the appellants contends that the appellants had entered into a contract with M/s Hoshizaki Europe BV, for connecting with potential customers in the Middle East and African Nations and for receiving sale orders of the products manufactured by appellants; essentiality the services provided by M/s Hoshizaki Europe BV included locating prospective buyers for the products manufactured by the appellants, Price negotiation with prospecting buyer, procuring sales orders from various buyers abroad etc., for the appellants. Thus he stated that the services are essentially in the nature of sales promotion and marketing. Learned Advocate further stated that the transaction of the appellants with M/s Hoshizaki Europe BV is squarely and more specifically covered by the term 'intermediary services', as it qualifies all the three criteria viz., nature and value of the service is not possible to be altered; value of intermediary service is invariably identifiable from the main supply of service; and services provided by intermediary on behalf of the appellants is separately identifiable and distinguished from the transaction of sale of goods manufactured by the appellant and sold to the overseas customer. Accordingly, he stated that the place of provision of such services by M/s Hoshizaki Europe BV would be determined in terms of Rule 9 of Place of Provision of Services Rules, 2012 (POPS). Thus, learned Advocate claimed that the location of service provider is the place of provision of such intermediary services at Dubai, and hence there is no levy of service tax in this case.

3.2 Learned Advocate submitted that in respect of the demand of service tax on value of free issue materials in works contract services, the issue has been already decided by the Larger bench of the Tribunal in the case of *Bhayana Builders (P) Ltd. Vs. Commissioner of Service Tax* – 2013 (32) S.T.R. 49 (Tri.-LB) which was upheld by the Hon'ble Supreme Court in Civil Appeal Nos. 1335-1358 of 2015, reported in 2018 (10) G.S.T.L. 118 (S.C.). He further stated that by applying the ratio in the above case, the cost of free supplies can be included in the value determined as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, only when the value of free supplies is included in the value of service as per Section 67 *ibid*; in other words, the cost of free supplies can be included in the assessable value, only if the value of service forms part of the consideration flowing from the service recipient to the service provider and such consideration accrues to the benefit of the service provider. He further stated that in their case, the free goods supplied by the appellants do not accrue any benefit to the service provider as these are used in the works contract service and not retained by the service provider.

3.3 Learned Advocate offered his rebuttal on the specific conclusion arrived in the impugned order dated 14.02.2018, wherein the Commissioner (Appeals) had upheld the confirmation of service tax demands on the ground that the services rendered by the appellants under an agreement are in the nature of marketing and sales promotion services, which are specifically covered under the phrase 'Business Auxiliary Services' (BAS) as defined under Section 65 (19) *ibid*. In this regard, learned Advocate claimed that prior to 2012, the scope of BAS services was wide and included a number of activities, such as buying and selling; storage; transportation, processing and other commercial activities; standardization, financing, marketing intelligence etc. However, in their case the services provided was limited to only procurement of sales orders for the appellants and is not other marketing activities as explained above, and as such it is in the nature of commission agent services. In refuting the conclusion of the Commissioner (Appeals) holding that Rule 3 of POPS Rules shall apply in their case and not Rule 9 of POPS Rules, inasmuch as place of provision of service shall be the location of service recipient, the learned Advocate claimed that the services received by the appellants is only a part and sub-set of sales promotion activities and thus are essentially an intermediary services. Accordingly, he submitted that Rule 9 of POPS would apply to their case. He further submitted that the entire exercise is revenue neutral as service tax paid under RCM basis will be available as input credit to the appellants; and the appellants having declared all their transactions in the specified records, there was no intention to evade payment of service tax and thus the extended period of limitation for demand of service tax is not maintainable. He also cited the conclusion arrived by the Commissioner (Appeals) in reducing the penalty to 50% under Section 78 *ibid* for the transactions having been recorded in specified records on the one hand and imposition of penalty is contradictory and therefore penalty is not imposable. Thus, he prayed that the impugned order is liable to be set aside.

3.4 In support of their stand, the learned Advocate has relied upon the following decisions of the Tribunal and the judgements of the Hon'ble Supreme Court, in the respective cases mentioned below:

(i) *Bhayana Builders (P) Ltd. Vs. Commissioner of Service Tax* – 2013 (32) S.T.R. 49 (Tri.-LB)

(ii) *Reliance Industries Ltd. Vs. Commissioner of C. Ex. & S.T., LTU, Mumbai*– 2016 (44) S.T.R. 82 (Tri.-Mumbai)

(iii) *Commissioner of Service Tax Vs. Bhayana Builders (P) Ltd.* - 2018 (10) G.S.T.L. 118 (S.C.).

(iv) *Nirlon Limited Vs. CCE, Mumbai* - 2015 (320) E.L.T. 22 (S.C.)

4. Learned Authorised Representative (AR) reiterated the findings made by the Commissioner (Appeals), in the impugned order dated 14.02.2018 and submitted that the appeal filed by the appellants is liable to be dismissed as the nature of services received by appellants is marketing and

sales promotion of impugned products manufactured by them, which is covered by the definition of BAS service, and is not intermediary services. Further it is not exempt during post negative list period. Hence, he submitted that the impugned order is sustainable.

5. We have heard both sides and perused the case records and the written paper books submitted in this regard.

6.1. The issues for consideration before us are as follows:

(i) (a) whether the services received by appellants from M/s Hoshizaki Europe BV can be considered as taxable services under the definition of 'taxable service' under 65(B)51 *ibid*, post negative list regime, with effect from 01.07.2012;

(b) whether such services can be treated as "Business Auxiliary Service" as per the definition given in Section 65(19) of the Finance Act, 1994 during pre-negative list period for the limited purpose of examining the finding given in the impugned order at para 8; and

(c) whether such services are covered by the term 'intermediary services' for the purposes of Place of Provision of Services Rules, 2012 (POPS);

(d) whether the supply of bought out material as "free supplies" by the appellants to the service provider of construction of their factory building, is subjected to service tax under Rule 2A(ii) of Service Tax (Determination of Value) Rules, 2006.

(ii) whether the demand of service tax invoking extended period of limitation is sustainable; and

(iii) whether penalty under Section 78 of the Finance Act, 1994 can be imposed on the appellants in this case.

6.2. The transactions under present dispute are covered during the period commencing from April, 2014 to September, 2015. Thus, the relevant legal provisions of the Finance Act, 1994, as applicable in the present case are of post negative list regime i.e., after 01.07.2012, and the same are extracted and given below:

"Finance Act, 1994

65. *(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*

(a) an activity which constitutes merely,—
(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or
(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

xx xx xx xx xx

***65.** (51) "taxable service" means any service on which service tax is leviable under section 66B;*

***65.** (54) "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property;*

***65.** (55) words and expressions used but not defined in this Chapter and defined in the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise.*

***66B.** There shall be levied a tax (hereinafter referred to as the service tax) at the rate of fourteen percent. on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.*

***66C.** Determination of place of provision of service.—*
(1) The Central Government may, having regard to the nature and description of various services, by rules made in this regard, determine the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided.

(2) Any rule made under sub-section (1) shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory."

6.3 The following legal provisions of the Finance Act, 1994, are relevant during pre-negative list period and are given only for reference purpose:

"Finance Act, 1994 (prior to 01.07.2022)

***65.** (19) "business auxiliary service" means any service in relation to, —*

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

Explanation.— For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;

(v) production or processing of goods for, or on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, 5[but does not include any activity that amounts to "manufacture" of excisable goods.]

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —
(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person — (i) deals with goods or services or documents of title to such goods or services; or (ii) collects payment of sale price of such goods or services; or (iii) guarantees for collection or payment for such goods or services; or (iv) undertakes any activities relating to such sale or purchase of such goods or services;
(b) "excisable goods" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944(1 of 1944);
(c) "manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944(1 of 1944)

***65.** (105) "taxable service" means any service provided or to be provided,-*

xx xx xx xx xx

(zzb) to a client, by any person in relation to business auxiliary service;"

6.4 The following are the legal provisions of the Rules framed under the Finance Act, 1994, relevant for the present case and the specific provisions of these Rules are extracted and given below:

"Place of Provision of Services Rules, 2012

(Notification No. 28/2012 - Service Tax dated 20.06.2012 as amended)

*2. **Definitions** - In these rules, unless the context otherwise requires,-*
(a) "Act" means the Finance Act, 1994 (32 of 1994);
(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.;

*3. **Place of provision generally**.- The place of provision of a service shall be the location of the recipient of service: Provided that in case "of services other than online information and database access or retrieval services"(Inserted vide Notification 46/2012- Service Tax) where the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.*

*9. **Place of provision of specified services**.- The place of provision of following services shall be the location of the service provider:-*
(a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;
*(b)" ****;" omitted vide Notification 46/2016-Service Tax*
(c) Intermediary services;
(d) Service consisting of hiring of means of transport other than, - (i) aircrafts, and
(ii) vessels except yachts
upto a period of one months.

*14. **Order of application of rules**.- Notwithstanding anything stated in any rule, where the provision of a service is, prima facie, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration."*

"Service Tax (Determination of Value) Rules,2006

(Notification No. 12/2006-S.T., dated 19-04-2006 as amended)

*2. **Definitions**.–In these rules, unless the context otherwise requires,–*
(a) "Act" means the Finance Act, 1994 (32 of 1994);
(b) "section" means the section of the Act;
(c) "value" shall have the meaning assigned to it in section 67;
(d) words and expressions used in these rules and not defined but defined in the Act shall have the meaning respectively assigned to them in the Act.

*2A. **Determination of value of service portion in the execution of a works contract**.-*
Subject to the provisions of section 67, the value of service portion in the execution of a works contract , referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.

Explanation.- For the purposes of this clause,-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;

(b) value of works contract service shall include, -
(i) labour charges for execution of the works;
(ii) amount paid to a sub-contractor for labour and services;
(iii) charges for planning, designing and architect's fees;
(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;
(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;
(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and
(viii) profit earned by the service provider relatable to supply of labour and services;

(c) Where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause.

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-
(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;
(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy percent of the total amount charged for the works contract;
(C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property , service tax shall be payable on sixty per cent. of the total amount charged for the works contract;

Explanation 1. - For the purposes of this rule,-
(a) "original works" means-
(i) all new constructions;
(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;
(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;"

7. From plain reading of the above legal provisions, it transpires that for the period relating to the pre-negative list regime i.e., prior to 01.07.2012, the taxability was determined in terms of coverage of an activity under the service tax net to be defined as 'taxable service' under Section 65(105) *ibid*, which enumerated each of the specified services. For the period post-negative list regime, the category of services hitherto defined under the erstwhile regime were merged under a common phrase i.e., 'service' as defined under Section 65B(44) *ibid*, which was brought into effect from 01.07.2012. In the present case, the disputed transactions have been undertaken during April, 2014 to September, 2015. Hence, there is no legal basis on which the services rendered in marketing and sales promotion could be examined with respect to definition of 'Business Auxiliary Services' that existed in the past i.e., prior to 01.07.2012. Since such a definition does not exist in terms of the legal provisions of the Finance Act, 1994 during the disputed period, and hence the conclusion arrived at by the Commissioner

(Appeals) at para 8 of the impugned order on the finding that '*marketing and sales promotion activities are specifically covered under the Business Auxiliary Services as defined under Section 65 (19) of the Finance Act, 1994'* is not legally sustainable. Further, 65B(55) *ibid* does not provide for the words and expressions used prior to 01.07.2012 to be made applicable in respect of Chapter V of the Finance Act, 1994 for the purpose of service tax. Hence, the findings at para 8 of the impugned order does not have any legal basis, and thus on this basis itself the demand of service tax on marketing and sales promotion service received by the appellants on RCM basis, is liable to be set aside.

8.1 Notwithstanding the above, in order to arrive at a conclusion whether the activities undertaken by the service provider and received by the appellants in marketing and sales promotion of impugned goods manufactured by the appellants, is a taxable service or not, in the post negative list regime, we would like to examine the relevant clauses of agreement dated 25.02.2014 entered into between them.

> *"THIS AGREEMENT is made and entered into as of this 25th day of February 2014 ("Agreement") by and between*
> ***Western Refrigeration Private Limected****....*
> *and*
> ***Hoshizaki Europe BV****....*
> *Hereinafter jointly called the "Parties"*
>
> *WHEREAS:*
>
> *A. Western is carrying on the business of manufacturing of commercial refrigerators and services thereof.*
> *B. Hoshizaki Europe is in the business of manufacturing of commercial kitchen equipment and services thereof.*
> *C. Currently, Western is operating from India and is exporting its products various countries. It is not having any branch offices outside India.*
> *D. Western perceives huge export potential in African and Middle East Countries. In order to explore the same, Western has approached Hoshizaki Europe to provide the required assistance in this regard.*
> *E. Hoshizaki Europe has agreed to provide marketing and sales promotion services to Western through its Dubai office.*
> *F. The parties wish to confirm and formalize the terms and conditions of provision of the services by Hoshizaki Europe to Western.*
>
> *2. Appointment:*
> *Western appoints Hoshizaki to avail the services subject to the terms and conditions of this Agreement.*
> *In order to provide the aforesaid services to Western, Hoshizaki Europe will appoint dedicated personnel of managerial cadre and its Dubai Office to support and enhance Western's export business.*

5. Services:
Service is to be provided by Hoshizaki Europe to Western shall include:

- *Sales promotion*
- *Marketing*

In order to provide the aforesaid services to Western, Hoshizaki Europe we find dedicated personnel of managerial cadre and its Dubai Office to support and enhance Western's export business.

Hoshizaki Europe undertakes to provide the services to Western and further undertakes that any of its personnel used to render the services shall be competent to do so.

The identified personnel appointed by Hoshizaki Europe to render the services to Western, will be an employee of Hoshizaki Europe in the bill work from Hoshizaki Europe's Dubai office to facilitate an increase Western's export business.

6. Service fee:
Hoshizaki Europe shall charge Western the service fee for the supply of services. The service fee shall consist of the actual costs incurred in supplying the services ("service costs") without any mark-up.

The service costs shall cover all direct and indirect operating costs incurred by Hoshizaki Europe to provide the services, including:

(a) Personnel cost agreed to be paid by Hoshizaki Europe to its personnel as per the employment agreement

(b) Out-of-expenses incurred for the purpose of rendering the above services"

The above agreement dated 25.02.2014 clearly brings out the fact that the services provided by Hoshizaki Europe BV to the appellants are governed by the specific clauses of the agreement. On overall reading of the agreement, it also transpires that recognizing the export potential in African and Middle East Countries, the appellants have engaged Hoshizaki Europe to provide the marketing and sales promotion of the products manufactured by them in India. In this regard, we find that Hoshizaki Europe BV operating from its Dubai office is the service provider of 'marketing and sales promotion services' to the appellants in India for an agreed consideration/fees. Thus, the services provided in this case is covered under the scope of definition under Section 65(44) *ibid* as 'service' and is also covered under the definition of 'taxable service' in terms of Section 65(51) *ibid*, as the service in the present case is not covered under any specific exclusion in terms of negative list under 66D *ibid*. However, as the services are rendered from abroad i.e., Dubai office of the service provider, we need to further examine the exigibility to service tax in terms of Section 66C *ibid* and the rules made thereunder. Thus we need to look into the Rules framed in exercise of the powers vested with the Government in terms of Section 94(2)(hhh) *ibid*, i.e., Place of Provision of Services Rules, 2011 (POPS).

8.2 In terms of POPS, under Rule 3, generally the place of provision of service shall be taken as the location of the recipient of service. However, specific rules prescribe the place of provision of service in various circumstances such as performance-based services, services relating to immovable property, services relating to events, services provided from more than one location, service provider and service recipient located in taxable territory, provision of specified services, goods transport services, passenger transport services, services provided on board a conveyance etc. It is claimed by the appellants that the nature of services received from Dubai office of service provider is an intermediary service, for which the applicable rule under POPS is Rule 9; whereas the Department has claimed that the applicable rule under POPS is Rule 3. In order to determine the correct application of the Rule, we have also examined the definition of the phrase 'intermediary services' provided in Rule 2 *ibid*. Inasmuch as, the Dubai office of Hoshizaki Europe BV i.e., the service provider, had arranged for marketing and sales promotion service to the appellants, for supply of goods from their manufacturing facility in India to customers situated abroad, it is clearly proved that these services are covered under the definition 'intermediary services'.

8.3 At the time of introduction of negative list regime of service tax, the Ministry of Finance had issued an Education Guide on 'Taxation of Services". The relevant paragraph dealing with 'intermediary services' the clarification providing on the scope of levy are extracted as follows:

> *"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.

Also excluded from this sub-rule is a person who arranges or facilitates a provision of a service (referred to in the rules 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."*

8.4 Accordingly, by applying the aforesaid three criteria in the present case, we find that firstly, Hoshizaki Europe BV cannot alter the goods for which they are providing this marketing and sales promotion services; secondly, the consideration is received in terms of the contractual arrangements which cannot be altered by Hoshizaki Europe. Thus, the nature and value of the services provided are known to both parties i.e., the service provider and a service receiver. We also find that the consideration charged by Hoshizaki Europe is independent of the consideration received by the appellants in respect of the goods supplied by them to overseas customers. Thus the principle of separation of value, is also fulfilled in the present case. The main transaction between the appellants and the customers situated abroad, is the sale of goods manufactured by the appellants; and this is distinct and is completely different from the services provided by Hoshizaki Europe BV. Thus, we find that all the three criteria laid down by the CBIC's clarification is fulfilled in the present case to categorize the disputed services, as 'intermediary services'.

8.5 Further, we also find that Ministry of Finance vide its notification dated 11.07.2014 had also amended the definition of 'intermediary' in order to include specifically the 'supply of goods', as follows:

"[TO BE PUBLISHED IN THE GAZETTE OF INDIA, EXTRAORDINARY, PART II, SECTION 3, SUB-SECTION (i)]

Government of India
Ministry of Finance
(Department of Revenue)

Notification
No. 14/2014-Service Tax

New Delhi, the 11th July, 2014

G.S.R.....(E).- In exercise of the powers conferred by sub-section (1) of section 66C and clause (hhh) of sub-section (2) of section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules to amend the Place of Provision of Services Rules, 2012, namely:—(1)

(1) These rules may be called the Place of Provision of Services (Amendment) Rules, 2014.

(2) They shall come into force on the 1st day of October, 2014.

(1) In the Place of Provision of Services Rules, 2012,–
(a) in rule 2 for clause (f),the following clause shall be substituted, namely:-_
(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;"*

Thus by harmonious reading of the above clarification issued by CBIC in the Education Guide along with the amendment made in the definition of 'intermediary' it can be clearly concluded that services of marketing and sales promotion for supply of goods is an 'intermediary service'.

8.6 Thus, in terms of specific Rule of the POPS which would more appropriately apply in this case, we find that Rule 9 of POPS is applicable to the 'intermediary service' as it is the more appropriate rule for determination of place of provision of the service. Further, in terms of Rule 14 of POPS in determining the order in which these rules shall be applied, even for argument sake if we consider that both Rule 3 as claimed by the department and Rule 9 as claimed by the appellants are contending Rules in the present case, then notwithstanding the above various Rules, the place of provision of services shall be determined in terms of later Rule among those merit equal consideration. Thus, even in such a case, Rule 9 of POPS would be the appropriate rule to be applied in this case. Accordingly, the place of provision of service in the present case would be the location of the service provider i.e., Dubai. Hence, in respect of 'intermediary services' provided by the service provider from Dubai to the appellants in India, would not be exigible to service tax under Section 66B *ibid*.

9.1 On the issue of service tax levy on free supplies under the works contracts transaction, we find that Larger Bench of this Tribunal in case of *Bhayana Builders Pvt. Ltd.* (supra) having similar set of facts of the case, had concluded that the value of goods and materials supplied free of cost by a service recipient to the provider of taxable construction service, would be outside the taxable value or the gross amount charged in terms of Section 67 *ibid*. The relevant paragraph of the said order is extracted below:

> ***"16.*** *In conclusion we answer the reference as follows :*
>
> *(a) The value of goods and materials supplied free of cost by a service recipient to the provider of the taxable construction service, being neither monetary or non-monetary consideration paid by or flowing from the service recipient, accruing to the benefit of service provider, would be outside the taxable value or the gross amount charged, within the meaning of the later expression in Section 67 of the Finance Act, 1994; and*
>
> *(b) Value of free supplies by service recipient do not comprise the gross amount charged under Notification No. 15/2004-S.T., including the Explanation thereto as introduced by Notification No. 4/2005-S.T."*

9.2 We further find that Hon'ble Supreme Court in the Civil Appeal filed by the department in the above case of *Bhayana Builders Pvt. Ltd.* (supra) had also upheld the Order of the Tribunal by dismissing the Civil Appeal filed by the department. The relevant paragraphs in the above order of the Hon'ble Apex Court is extracted below:

> *"**15.** It was argued that payment received in 'any form' and 'any amount credited or debited, as the case may be...' is to be included for the purposes of arriving at gross amount charges and is leviable to pay service tax. On that basis, it was sought to argue that the value of goods/materials supplied free is a form of payment and, therefore, should be added. We fail to understand the logic behind the aforesaid argument. A plain reading of Explanation (c) which makes the 'gross amount charges' inclusive of certain other payments would make it clear that the purpose is to include other modes of payments, in whatever form received; be it through cheque, credit card, deduction from account etc. It is in that hue, the provisions mentions that any form of payment by issue of credit notes or debit notes and book adjustment is also to be included. Therefore, the words 'in any form of payment' are by means of issue of credit notes or debit notes and book adjustment. With the supply of free goods/materials by the service recipient, no case is made out that any credit notes or debit notes were issued or any book adjustments were made. Likewise, the words, 'any amount credited or debited, as the case may be', to any account whether called 'suspense account or by any other name, in the books of accounts of a person liable to pay service tax' would not include the value of the goods supplied free as no amount was credited or debited in any account. In fact, this last portion is related to the debit or credit of the account of an associate enterprise and, therefore, takes care of those amounts which are received by the associated enterprise for the services rendered by the service provider.*
>
> ***16.*** *In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the*

term "gross amount charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider.

***17.** Faced with the aforesaid situation, the argument of the Learned Counsel for the Revenue was that in case the assessees did not want to include the value of goods/materials supplied free of cost by the service recipient, they were not entitled to the benefit of notification dated September 10, 2004 read with notification dated March 1, 2005. It was argued that since building construction contract is a composite contract of providing services as well as supply of goods, the said notifications were issued for the convenience of the assessees. According to the Revenue, the purpose was to bifurcate the component of goods and services into 67% : 33% and to provide a ready formula for payment of service tax on 33% of the gross amount. It was submitted that this percentage of 33% attributing to service element was prescribed keeping in view that in the entire construction project, roughly 67% comprises the cost of material and 33% is the value of services. However, this figure of 67% was arrived at keeping in mind the totality of goods and materials that are used in a construction project. Therefore, it was incumbent upon the assessees to include the value of goods/material supplied free of cost by the service recipient as well otherwise it would create imbalance and disturb the analogy that is kept in mind while issuing the said notifications and in such a situation, the AO can deny the benefit of aforesaid notifications. This argument may look to be attractive in the first blush but on the reading of the notifications as a whole, to our mind, it is not a valid argument.*

***18.** In the first instance, no material is produced before us to justify that aforesaid basis of the formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the Central Government in issuing these notifications and prescribing the service tax to be calculated on a value which is equivalent to 33% of the gross amount. Secondly, the language itself demolishes the argument of the Learned Counsel for the Revenue as it says '33% of the gross amount 'charged' from any person by such commercial concern for providing the said taxable service'. According to these notifications, service tax is to be calculated on a value which is 33% of the gross amount that is charged from the service recipient. Obviously, no amount is charged (and it could not be) by the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of 'taxable service'. Thirdly, even when the explanation was added vide notification dated March 1, 2005, it only explained that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by* *the service recipient were also to be included in arriving at gross amount 'gross amount charged'.*

19. *Matter can be looked into from another angle as well. In the case of Commissioner, Central Excise and Customs, Kerala v. M/s. Larsen & Toubro Ltd. - (2016) 1 SCC 170 = 2015 (39) S.T.R. 913 (S.C.). This Court was concerned with exemption notifications which were issued in respect of 'taxable services' covered by sub-clause (zzq) of clause (105) read with clause (25b) and sub-clause (zzzh) of clause (105) read with clause (30a) and (91a) of Section 65 of Chapter V of the Act. This Court in the aforesaid judgment in respect of five 'taxable services' [viz. Section 65(105)(g), (zzd), (zzh), (zzq) and (zzzh)] has held as under :*

> *"23. A close look at the Finance Act, 1994 would show that the fixed taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines 'taxable service' as 'any service provided".*
>
> *Further, while referring to exemption notifications, it observed :*
>
> *"42. ...Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise."*

It is clear from the above that the service tax is to be levied in respect of 'taxable services' and for the purpose of arriving at 33% of the gross amount charged, unless value of some goods/materials is specifically included by the Legislature, that cannot be added.

20. *It is to be borne in mind that the notifications in questions are exemption notifications which have been issued under Section 93 of the Act. As per Section 93, the Central Government is empowered to grant exemption from the levy of service tax either wholly or partially, which is leviable on any 'taxable service' defined in any of sub-clauses of clause (105) of Section 65. Thus, exemption under Section 93 can only be granted in respect of those activities which the Parliament is competent to levy service tax and covered by sub-clause (zzq) of clause (105) and sub-clause (zzzh) of clause (105) of Section 65 of Chapter V of the Act under which such notifications were issued.*

21. *For the aforesaid reasons, we find ourselves in agreement with the view taken by the Full Bench of CESTAT in the impugned judgment dated September 6, 2013 and dismiss these appeals of the Revenue."*

9.3 We further find that on the issue of invoking extended period of limitation and the claim of appellants that even if service tax is paid on marketing and sales promotion services, and on the value of free supplies in works contract service, the same is eligible to be taken as input credit by them and thus the entire exercise of demand of service tax is revenue neutral, we find that this Tribunal in the case of *Reliance Industries Limited* (supra) had decided the issue on the basis various judgements given by the Hon'ble High Court of Gujarat and Hon'ble Supreme Court. The relevant paragraph of the said Order is extracted below:

"12. *We also note that the entire dispute being revenue neutral, there could have been no intention to evade payment of duty and consequently the extended period of limitation was per se not invokable. It is settled law laid down in the following amongst other judgments a series of judgment including that of the Apex Court that in a case where credit is available to an assessee itself it cannot be said* *that there is any intention to evade payment of duty, which is a pre-requisite for invoking the extending period of limitation. In the instant case also if any tax was payable it could have been available immediately to the Appellant, thereby rendering the entire dispute being revenue neutral. This being the case the invocation of extended period of limitation is clearly not justified :-*

(a) Reliance Industries Ltd. v. CCE - <u>2009 (244) E.L.T. 254</u> (Tri.)

(b) CCE v. Indeos ABS Ltd. - <u>2010 (254) E.L.T. 628 (Guj.)</u>

(c) Mafatlal Industries Ltd. v. CCE - <u>2009 (241) E.L.T. 153</u> (T); affirmed by the Apex Court by dismissing the Civil Appeal reported in <u>2010 (255) E.L.T. A77 (S.C.)</u>

(d) Nirlon Ltd. v. CCE - <u>2015 (320) E.L.T. 22 (S.C.)</u>

13. *The appeal is accordingly allowed and the impugned order is set aside with consequential relief in accordance with law."*

Thus, we find that the issue of invoking extended period of time for demand of service is answered in favour of the appellants.

10. In view of the foregoing discussions and analysis, and in terms of the judgements of the Hon'ble Supreme Court, we find that there are no strong grounds to hold that the services received by the appellants from Hoshizaki Europe BV from its Dubai office for marketing and sales promotion services are liable for payment of service tax. Further, the value of goods and materials supplied free of cost by the appellants to the service provider of taxable construction service, would be outside the taxable value or the gross amount charged in terms of Section 67 *ibid*. Consequently the demands of service tax and imposition of penalties confirmed in the impugned order is not legally sustainable.

11. In view of the above, we are of the considered view that the adjudged demands confirmed on the appellants in the impugned order dated 14.02.2018 is liable to be set aside. Therefore, by setting aside the impugned order, the appeal is allowed in favour of the appellants.

(Order pronounced in open court on 18.03.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha