

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

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 86879 of 2021

(Arising out of Order-in-Original No. 03/CGST-NM/Commr/KV/2021-22 dated 23.07.2021 passed by the Commissioner, Central Tax & Central Excise, Navi Mumbai)

Executive Ship Management Pvt. Limited Appellants

2nd Floor, Sai Commercial Annexee, BKS Devashi Marg
Govani Station Road, Govandi East
Mumbai-400 088.

Versus

**Commissioner of CGST & Central ExciseRespondent
Navi Mumbai**

16th Floor, Satra Plaza, Palm Beach Road
Sector 19D, Vashi, Navi Mumbai - 400 705.

Appearance:

Shri Gopal Mundra, Advocate for the Appellant

Shri Priyesh Bheda, 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/85492/2024

Date of Hearing: 15.01.2024

Date of Decision: 14.05.2024

Per: M.M. PARTHIBAN

This appeal has been filed by M/s Executive Ship Management Private Limited, Mumbai (herein after, referred to, for short as 'the appellants') against Order-in-Original No. 03/CGST-NM/Commr/KV/2021-22 dated 23.07.2021 (referred to as 'impugned order') passed by the Commissioner, Central Tax (CGST) & Central Excise, Navi Mumbai.

2.1. Briefly stated, the facts of the case are that the appellants herein *inter-alia*, are engaged in rendering “ship crew management services” and are registered with jurisdictional Commissionerate under service tax registration No. AAACE3158JST002. On the basis of investigation conducted by Directorate General of GST Intelligence, Chennai Zonal Unit (DGGI), it was found that the appellants were rendering the services of ship crew management services to their associated enterprise Executive Ship Management Pte Ltd., Singapore (ESM) by claiming the same as export of services. In turn, ESM were providing ship crew recruitment and ship management services to various vessel owners based in Singapore and Malaysia, through one another entity Executive Shipping Services Pte Ltd., Singapore (ESS). The services provided by the appellants included selecting, contracting and managing the crew, ensuring medical screening of selected crew and providing them additional training etc. The appellants were being paid fees, on a monthly basis, for an amount equal to costs incurred by them in connection with providing the services agreed upon with ESM, plus 6.50% along with applicable taxes, if any. The appellants assessee were not paying service tax on the fees received for services rendered to ESM situated in Singapore, where payment is received in foreign currency, claiming it as export of service.

2.2 On Completion of the investigation, DGGI concluded that ESS has been appointed as ‘Manager’ for ship management and crew management services by various vessel owners or ship charters and ESS have in turn have appointed ESM as ‘sub-manager’ for rendering such services. As the services provided by the appellants to ESM is in the nature of ‘intermediary services’ as per Rule 2(f) of the place of Provision of Service Rules, 2012, the DGGI investigation concluded that as per Rule 9(C) *ibid*, the place of provision of services is the location of service provider, and thus the appellants are liable to pay service tax on the above transactions. Accordingly, on the entire fees received by the appellants during 01.10.2014 to 30.06.2017, service tax liability was worked out by initiating show cause proceedings by issue of show cause notice dated 16.06.2020 for demand of service tax short paid during 01.10.2014 to 30.06.2017 along with interest by invoking extended period under proviso to Section 73(1) of the Finance Act, 1994 and for imposition of penalties under Sections 77, 78 *ibid* on the appellants. In adjudication of the above SCN, learned Commissioner, Central Tax (CGST) & Central Excise, Navi Mumbai vide impugned order dated 23.07.2021 had confirmed the adjudged demands besides imposition of penalty under

Sections 77 and 78 *ibid.* The appellants having been aggrieved by the impugned order passed by the learned Commissioner, have filed this appeal before the Tribunal.

3.1. Learned Advocate appearing for appellants submits that they have entered into an agreement dated 01.04.2013 for the period up to 31.03.2016 and thereafter by another agreement dated 01.04.2016 for providing services of recruitment of seafarers on their own account to ESM Pte., Singapore. These services are used by ESM to provide services of technical management and crew management to ESS Pte., Singapore. Thus he claimed that the appellants have correctly classified the services of recruitment of seafarers as export of services on which no service tax is payable. For the services provided by the appellants to ESM Pte., Singapore, they have received fees in foreign currency and therefore the question of service tax liability does not arise. Further, the pre-requisites for considering a service as 'intermediary service' has been clarified By the Board in Circular No. 159/15/2021-GST dated 20.09.2021, which have not been fulfilled in their case, and thus they are not liable to pay service tax in terms of Rule 2(f) of the Place of Provision of Service Rules, 2012 (POPS) read with Sections 65B(44) and 66B of the Finance Act, 1994.

3.2 Further, Learned Advocate also stated that the appellants have regularly filed periodical ST-3 returns and they have given proper disclosure of the turnover and other declarations to the Department. Thus, he claimed that in the absence of any wilful mis-statement or suppression of facts on the part of the appellants and as the issue involved herein is of interpretation of legal provisions, extended period of limitation cannot be invoked for demanding service tax. Thus, he claimed that the impugned order cannot be sustained on the grounds of limitation.

3.3. Learned Advocate also submitted that the issue involved in the present case is no longer under dispute, as the Tribunal have held that the services of providing manpower to overseas client under an agreement are not intermediary services and there is no liability to pay of service tax, in the case of *Seaspan Crew Management India Pvt. Ltd. Vs. Commissioner of CGST, Mumbai East*– 2019 (5) TMI 1813 CESTAT MUMBAI, having similar set of facts.

3.4 In support of their stand, learned Advocate had also relied upon the following decisions of the Tribunal and the judgement of the Hon'ble High Court of Delhi, in the respective cases mentioned below:

(i) *Eastern Pacific Shipping (India) Pvt. Ltd. Vs. Commissioner of CGST, Mumbai East* – 2020 (37)G.S.T.L.182 (Tri. Mum.)

(ii) *Torm Shipping India Pvt. Limited Vs. Commissioner of CGST, Mumbai East* – 2021 (44) G.S.T.L. 195 (Tri. Mum.)

(iii) *Anglo Eastern Maritime Services Pvt. Ltd. Vs. Commissioner of CGST, Mumbai East* – MANU/CM/0129/2022

(iv) *Ernst and Young Limited Vs. Additional Commissioner, CGST Appeals-II, Delhi and Anr.* – 2023 (3) TMI 1117 (Delhi High Court)

4.1. Learned Authorised Representative for Revenue submits that the services of ship crew recruitment are being provided by the appellants to ESM Pte. who in turn provide such services to various ship/vessel owners, through ESS Pte., Singapore. Thus, learned Commissioner has come to conclusion that the appellants are acting as 'intermediary' between ESM and vessel/ship owners in the impugned order. By reiterating the findings made by the learned Commissioner, he stated that the appellants are covered under scope of Section 2(f) read with Rule 9(c) of POPS and therefore the confirmation of adjudged demands is sustainable and the appeal filed by the appellants are liable to be rejected.

5. The submissions advanced by the learned Advocate appearing for the appellants and the learned Authorized Representative of the Department have been considered by us. Further, we have also perused the records of the case and additional written submissions in the form of paper books.

6. On perusal of the impugned order dated 23.07.2021, it is seen that the learned Commissioner had recorded that the issue for decision before him to decide whether the services provided by the appellants are 'intermediary services' as per the provisions of Rule 2(f) and Rule 9(c) of the Place of Provision of Service Rules, 2012. In this regard, he had given the following findings in confirmation of the adjudged demands. The relevant paragraphs of the impugned order are extracted and given below:

"4.3.5 From the particulars mentioned in the invoices, I find that the invoices issued by the noticee to ESM Pte. Singapore clearly show the services provided by them as 'manning services provided to ESM PTE managed vessels'. Thus, the noticee's claim that ESM India was only rendering services to ESM Pte. Singapore and there was no third party

involved in the agreement is not correct. Further, upon going through the Appendix-I of the service agreement dated 01.04.2016, between the noticee and the ESM Pte. Singapore, I find that the clause 12 of the said agreement states as under:....

From the above, it is clear that as per the agreement, the scope of duty/responsibility of the noticee spanned not only upto the provision of recruitment/mining services to ESM Pte. Singapore, but to the level of keeping ESM Pte. informed about any demands, claims of legal actions brought by the records (hired under the agreement) against the clients of ESM Pte. or the Vessels. This again shows that the noticee's claim that ESM India was only rendering services to ESM Pte. Singapore and there was no third party involved in the agreement is not correct, since the services provided by the noticee are clearly involved in this vessels/clients of ESM Pte./ third parties.

4.3.6 ... In view of the factual position discussed above, I find that the noticee facilitated the provision of services of ESM Pte. Singapore to the clients/vessels. Accordingly, in view of the discussion above, I find that the first condition of facilitating a service between two persons is satisfied in the instant case.

4.3.8 I find that though the noticee were facilitating crew recruitment services of ESM Pte. to the clients of ESM Pte./vessels managed by ESM Pte., but they could not alter the nature of the value of the main services provided to the clients of ESM Pte./vessels managed by ESM Pte., I find that the services rendered to the vessels/clients of ESM Pte., were not at noticee's risk and reward. Accordingly, in view of the factual position discussed above, I find that the main services i.e., crew recruitment services provided by ESM Pte. to their clients/vessels managed by them, were not provided on noticee's own account. Thus, in view of the discussion above, I find that both the criteria to be an intermediary, as discussed above in terms of the rule 3 of the place of provision of service rules, 2012 and fulfilled in the present case.

Learned Commissioner, in justifying that why he did not follow the orders of the Tribunal in the cases of Seaspan Management India Private Limited (supra) had given his findings as below:

4.3.10...Whereas, in the present case, as discussed above in the foregoing paras, it has been clearly found that the noticee were facilitating the provision of crew recruitment/manning services provided by ESM Pte. Singapore to the ESM Pte. managed vessels. Thus, I find that the facts and circumstances of the above case referred by the noticee are also different from the instant case and therefore the same is not applicable to the present case."

7. We find that the dispute in this case lies in the narrow compass of deciding the following two issues, viz.,

(i) Whether service tax is liable to be paid or not, in respect of ship crew recruitment provided by the appellants to ESM Pte. Singapore, who were providing such services in turn to the ship/vessel owners through ESS Pte. Singapore, and for which the appellants are being paid as reimbursement charges, of applicable cost plus 8.7% (01.04.2013 to 31.03.2016) and 6.5% (from 01.04.2016), under the Finance Act, 1994 and the Rules made thereunder? and

(ii) Whether the services rendered by the appellants can be categorized as that of an 'intermediary' or not and consequently, whether these services would tantamount to 'export of service' or not, for arriving at a decision as to the place of provision of service in terms of the Place of Provision of Services Rules, 2012?

8. Revenue has claimed that the service tax is liable to be paid by the appellants, treating the service as 'intermediary service' for which a specific provision has been made to treat the place of service provider as the place of supply of service, through it was provided to ESM Pte. Singapore, in terms of specific Rule 9(c) Place of Provision of Service Rules, 2012. On the other hand, the appellants have claimed that they are not required to pay service tax on 'ship crew recruitment fees', since all the services have been exported to ESM Pte. Singapore and the payment have been received in convertible foreign exchange, treating this as export of services on which no service tax is liable to be paid. The disputed period of the transactions is from 01.10.2014 to 30.06.2017.

9.1 In order to address the above issue, we would like to refer the relevant legal provisions contained in Chapter V of the Finance Act, 1994, Service Tax Rules, 1994 and the Place of Provision of Service Rules, 2012, as it existed during the disputed period in respect of the taxable service under dispute.

Chapter V of the Finance Act, 1994:

"SECTION 65B. Interpretations.—

In this Chapter, unless the context otherwise requires,—

65B(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.

Explanation 1.— For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section...

...

Explanation 3.— For the purposes of this Chapter,—

- (a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;*
- (b) an establishment of a person in the taxable territory and any of his other establishment in anon-taxable territory shall be treated as establishments of distinct persons.*

65B(52)"taxable territory" means the territory to which the provisions of this Chapter apply;

SECTION 66B. Charge of service tax on and after Finance Act, 2012.—

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, providedor agreed to be provided in the taxable territory by one person to another and collected in suchmanner as may be prescribed.

SECTION 66C. Determination of place of provision of service.—

(1) The Central Government may, having regard to the nature and description of variousservices, by rules made in this regard, determine the place where such services are provided ordeemed to have been provided or agreed to be provided or deemed to have been agreed to beprovided.

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

78. Penalty for suppressing, etc., of value of taxable services.— (1)

Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of—

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax,

the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him,

which shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded:...."

PLACE OF PROVISION OF SERVICES RULES, 2012

"Definitions.

2. In these rules, unless the context otherwise requires,—

(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;

Place of provision generally.

3 . *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, 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.*

Place of provision of services where provider and recipient are located in taxable territory.

8. *Place of provision of a service, where the location of the provider of service as well as that of the recipient of service is in the taxable territory, shall be the location of the recipient of service.*

Place of provision of specified services.

9. *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;*
- (c) Intermediary services;*

Order of application of rules.

14. *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 RULES, 1994

"Export of services.

Rule 6A. (1) The provision of any service provided or agreed to be provided shall be treated as export of service when,—

- (a) the provider of service is located in the taxable territory,
- (b) the recipient of service is located outside India,
- (c) the service is not a service specified in section 66D of the Act,
- (d) the place of provision of the service is outside India,
- (e) the payment for such service has been received by the provider of service in convertible foreign exchange, and
- (f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b)

of *Explanation 3* of clause (44) of section 65B of the Act.

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification."

9.2 From plain reading of above legal provisions, it transpires that any service provided or agreed to be provided in the taxable territory by one person to another, to the extent it is covered by the definition of 'service' under Section 65B(44) of the Finance Act, 1994 and that the same not being covered under the negative list specified under Section 66D *ibid*, are chargeable to service tax at the prescribed rate under Section 66B *ibid*. It may be of importance to note that earlier, prior to the disputed period, in order to categorize a particular activity as a 'service' and to charge service tax thereon, it should be covered under the specific category of taxable services as per defined scope of coverage under tax net, inasmuch as each of the taxable services are defined separately under clause (105) of Section 65 of the Finance Act, 1994. The definition of taxable services under the category of 'Ship Management Service' defined under Section 65(96a) *ibid* included various activities including engagement or providing of ship crew. Further, such ship management service was covered specifically under the taxable clause (zzzt) of Section 65(105) *ibid*. Thus, it clearly flows from the above legal provision that the service of ship crew recruitment provided by the appellants to any person in the taxable territory are subjected to levy of service tax. Inasmuch as the Chapter V of the Finance Act, 1994 extends to the whole of India except the State of Jammu and Kashmir, it transpires as a corollary that services provided outside India are not liable for payment of service tax. In view of the above, we are of the *prima facie* view that the activities undertaken by the appellants in provision of ship crew management/ship management service to ESM Pte., Singapore as explained above does not get covered under the tax net of service tax.

10.1 Further, in order to decide the issue referred at paragraph 7(ii) above, and as the legal provisions under Section 66C *ibid* provide for determination of the place where such services have been considered to have been provided, there is a need to look into such Rules framed under Section 66C *ibid*. From plain reading of the legal provisions relating to 'Place of Provision of Services Rules, 2012' framed in exercise of the powers under Section 66C *ibid*, it transpires that the place of provision of

service in general has been specified under Rule 3 *ibid* as the place of recipient of service; and in specific situations such as place of provision of performance-based services, provision of services relating to immovable property, provision of services relating to events, services provided at more than one location, services where provider and recipient are located in the taxable territory, provision of certain specified services have been specifically categorized and the place of provision in such cases have been given in the respective Rules 4, 5, 6, 7, 8 and 9 *ibid* respectively. As regards the place of provision for goods transportation services, other than by way of mail or courier, it is specifically stated as the 'place of destination of the goods' under Rule 10 *ibid*. Considering the above legal provisions, in the present case, we find that since the services are provided in respect of ship crew management by the appellants situated in India, and that the service receiver is situated at Singapore, which is out of 'taxable territory', the services provided by the appellant cannot be covered under the service tax net. However, since the Department has claimed that the nature of services is of 'intermediary services', we also need to examine this aspect. 'Intermediary' has been defined under Rule 2(f) *ibid*, so as to indicate a broker, an agent or any person who arranges provision of service between two or more persons. However, person who provides the main service on his own account cannot be considered as 'intermediary' in terms of this definition. In order to determine the relationship between the appellants as service provider and ESM Pte. Singapore, as a service receiver, and whether it amounts to 'intermediary', we would like to examine the contract entered between them and the documents on record evidence in the nature of transactions in providing service amongst them.

10.2 On perusal of the records of the case, it transpires the appellants had entered into a 'Services Agreement' dated 01.04.2013 with ESM Pte. Singapore for providing certain agreed services, as detailed in Appendix-I of this agreement. This contract covered the period from 01.04.2013 to 31.03.2016. Further, contract dated 01.04.2016 entered between the appellants and ESM Pte. Singapore, was of similarly worded but covered the period from 01.04.2016. For providing such services, the appellants are being paid an amount equal to 'applicable costs' i.e., direct and indirect operating expenses of the appellants incurred in connection with providing the services, plus 8.70% (upto 31.03.2016) and 6.50% (from 01.04.2016) along with applicable taxes, if any. The above agreement contains various clauses which *inter-alia* include scope of work, duties of the appellants as service provider,

duties of service receiver, period of agreement, fees and payment for services provided, reimbursement of expenses, use of software, confidentiality clause, legal rights, indemnification, dispute resolution and other general clauses. The nature of services provided as enumerated in the appendix are the following:

"Duties of ESM (i.e., appellants) as service provider:

1. *To screen and engage only competent, medically sound and technically qualified and experienced officers and the seamen in accordance with the equipment instructions and policies of ESM Pte.*
2. *To exercise best efforts to recruit the most suitable candidates having regard to relevant experience, this case, attitude, proficiency in English and Presentation.*
3. *To ensure that every Recruit holds valid, genuine certificates in accordance with the requirements of STCW '95, the Vessel's flag state regulations, USCG special requirements and ESM Pte's special requirements for the relevant rank and appointment, as applicable from time to time, and to correct or arrange for correction of any deficiencies.*
4. *To engage, for employment as officers, only persons approved by ESM Pte.*
5. *To ensure that all Recruits enter into the employment contracts (ESM Pte.'s standard form from time to time) with ESM Pte.*
6. *To arrange for pre-employment physical and medical examinations of the Recruits in accordance with the World Health Organisation/Flag/ ESM Pte's requirements including drug and alcohol tests.*
7. *To arrange full pre-departure briefing seminars for Recruits of their terms and conditions of employment, duties, and of ESM Pte's policies, and to keep a written record of this.*
8. *To instruct Recruits to obey all lawful orders of ESM Pte. or any other nominated by ESM Pte. including orders in connection with safety and navigation, avoidance of pollution and protection of the environment, and to keep a written record of the same.*
9. *To provide necessary assistance and coordination to enable the Recruits to visit ESM Pte. (if required by ESM Pte.) and to board the Vessels to which they have been assigned at the ports and on the date specified by ESM Pte.*
10. *To keep ESM Pte. informed of any amendments, revisions or a new rules that apply to the employment of Indian ratings are officers on foreign flagged ships.*
11. *To arrange and effect the transfer, replacement or dismissal of any Recruit in accordance with ESM Pte.'s decision.*
12. *To keep ESM Pte. informed at all times of any demand, claim or legal action brought against the ESM Pte. and/or clients of ESM Pte. or any agent or manager or the Vessels by any Recruit hired under this Agreement.*
13. *To provide ESM Pte., if requested, with information about conditions of payment, rates of pay, personal data of the Recruits, deductions and/or contribution that may be payable and other such information as may be reasonably required by ESM Pte.*
14. *To be responsible to maintain full personnel files of all seafarers employed, in accordance with STCW Code requirements and have details made available to ESM Pte. as and when required."*

10.3 In order to understand any contract or agreement, all the clauses and the entire agreement has to be examined comprehensively so as to bring out

the true nature and purpose of such agreement/contract. In the international Maritime trade, provision of services with regard to ship crew management and ship management etc. is governed as per standard contract of Baltic and International Maritime Council (BIMCO). The BIMCO agreement provides for various management services such as technical management, commercial management, crew management and crew insurance etc., for which the parties to contract have to enter into agreement. On the subject of ship crew management services, we find that ship owners, ship crew managers/sub-managers, and various other service providers operate in a myriad of different laws and customs. At the level of international maritime law, there are four basic acts/conventions regulating shipping trade. United Nations Convention on the Law of the Sea (UNCLOS), signed on 10th December 1982, effective as of 16th November 1994, to which India is a signatory, provides the core element of international legislation for maritime industry. The other important international conventions that are required to be complied with by the shipping industry are International Convention for the Prevention of Pollution (MARPOL) covering prevention of pollution of the marine environment by ships due to either operational or accidental causes; International Convention and Code on Standards of Training, Certification and Watch keeping for Seafarers (STCW), International Management Code for the Safe Operation of Ships and for Pollution prevention (ISM Code). For the purpose of the present case, the relevant international convention is International Convention and Code on Standards of Training, Certification and Watch keeping for Seafarers (STCW), which enables ensuring compliance with various legal requirements of international maritime law, by adopting the standard agreements. BIMCO in their efforts to complement the global regulatory regime developed by the International Maritime Organization (IMO) have created standard contracts and clauses that address the commercial and practical implications of global regulations that allocate obligations, responsibilities and liabilities of various parties to the contract fairly. SHIPMAN is one such model agreement covering various aspects such as crew, technical, commercial management as well as insurance arrangements. Considering the complexity of crew management and the need for proper management by ship owners, BIMCO has also brought out separate agreement CREWMAN designated for larger crew administration services. From the above contractual arrangements, it can be inferred that in order to enable the crew engaged or to be engaged by providing the services, the appellants have to ensure that they comply with various legal compliance requirements over various countries in the voyage of the ship, and for the

upkeep of the ship commercial and technical management, and thus in the 'services agreement/contract' various terms and conditions have been entered into contractual arrangement. However, learned Commissioner, based on certain clauses of the agreement, had come to the conclusion that the requirement of providing information to the service receiver ESM Pte., Singapore and to any other persons such as ESS Pte., Singapore or ship/vessel owners, for compliance with various legal requirements, as though it is a part of service. It is also a fact seen from the records that such SHIPMAN contracts have been entered by ESS Pte., Singapore with vessel/ship owners and the appellants do not have any role to do in such contracts or provision of services amongst them. From the detailed analysis of the various terms of the 'services agreement' and the international conventions/treaties, we are of the considered view that these terms and clauses do not alter the nature of services that has been provided by the appellants being 'ship crew management services' provided to ESM Pte., Singapore. Further, mentioning of the other parties for compliance with regulatory requirement in the contract, does not in any way change the services being provided only to the service receiver i.e., ESM Pte., Singapore.

10.4 Further in India, while consolidating the laws and generally amending the laws relating to merchant shipping, the Merchant Shipping Act, 1958 had been enacted to foster the development and ensure the efficient maintenance of an Indian mercantile marine in a manner best suited to serve the national interests and for that purpose to establish a National Shipping Board who will provide for the registration, certification, safety, security of Indian ships and also for the engagement and discharge of seamen, their wages and welfare, working conditions etc. Further, we find that in order to consolidate the laws relating to admiralty jurisdiction, legal proceedings in connection with vessels, their arrest, detention, sale and other matters connected therewith or incidental thereon the Government had brought out the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017. Section 96 of the Merchant Shipping Act, 1958 provide for engagement of seamen only by a ship owner or his agent. In the present case, ESS Pte., Singapore is the agent of ship owners or manager for providing various ship management services and ESM Pte., Singapore, is the sub-manager for providing ship crew management services. Thus, the appellants are only providing the services of recruitment and enabling the service receiver for supply of such ship crew to the ESS Pte., Singapore or other Ship/ Vessel owners.

11.1 From plain reading of the legal provisions relating to 'Place of Provision of Services Rules, 2012' it clearly transpires that the place of provision of service in general has been specified under Rule 3 *ibid*, and in specific situations such as place of provision of performance-based services, provision of services relating to immovable property, provision of services relating to events, services provided at more than one location, services where provider and recipient are located in the taxable territory, provision of certain specified services have been specifically categorized and the place of provision in such cases have been given in the respective Rules 4, 5, 6, 7, 8 and 9 *ibid* respectively. As regards the place of provision for goods transportation services, other than by way of mail or courier, it is specifically stated as the 'place of destination of the goods' under Rule 10 *ibid*. Considering the above legal provisions, in the present case, we find that since the services are provided in recruitment of ship crew and enabling them for the ocean voyage to be performed as per the directions of the service receiver ESM Pte., Singapore, which is situated out of 'taxable territory', the services provided by the appellant cannot be covered under the service tax net in terms of Section 66B *ibid*.

11.2 In this case, the appellants are found to be providing services of ship crew recruitment essentially for its foreign entity, who in turn were providing ship crew management and other related services to ESS Pte., Singapore and other Vessel/Ship owners. The appellants have not engaged any other service provider for the process of procuring the services to be exported as per the requirement of his foreign entity ESM Pte., Singapore. All these services are rendered only to ESM Pte., Singapore on their own account and they are receiving the consideration for the services provided as a percentage of agreed costs of the services exported. There is no evidence on record to show that the appellants are receiving any consideration from the Ship/Vessel owners or any other person and as such, the services could not be termed as falling under the category of "intermediary".

11.3 In such a situation, the next issue to be addressed is to decide whether the services provided by the appellants could be treated as export of service or not. In this regard, the relevant legal provisions under the Finance Act, 1994 and the relevant rules framed therein viz., Service Tax Rules, 1994 and Place of Provision of Service Rules, 2012, are required to

be gone through for arriving at a decision as to what is the place of provision of service, as applicable to the present case of the appellants.

11.4 Rule 6A of the Service Tax Rules, 1994 states that provision of any service provided or agreed to be provided shall be treated as export of service, when the following six conditions are satisfied. These are that (a) the provider of service is located in the taxable territory, (b) the recipient of service is located outside India, (c) the service is not a service specified in the section 66D of the Act, (d) the place of provision of the service is outside India, (e) the payment for such service has been received by the provider of service in convertible foreign exchange, and (f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act. In the present case, there is no dispute that the provider of service is located in the taxable territory in India and the recipient is located abroad/outside India i.e., in Singapore. The services rendered are not specified in Section 66D of the Finance Act, 1994. The payment for the said services has also been received by the appellant in convertible foreign exchange. The service provider and service receiver are merely establishments of distinct persons, but are governed by the 'services contract' on principal-to-principal basis. Therefore, the only condition that is required to be satisfied is whether the place of provision of service is outside India or not. In terms of Rule 3 of the Place of Provision of Services Rules, 2012, the place of provision of service shall be the location of the recipient of service. In respect of intermediary service, in terms of Rule 9, the place of provision of service shall be the location of the service provider. As we have examined this issue and have come to a considered view that the activities of the appellants will be coming under ship crew management services, which was covered under pre-negative list regime by the definition of ship management services under Section 65(96a) *ibid* and during the disputed period, i.e., post negative list regime as a taxable service under Section 65B(44) *ibid* and also would not be falling under intermediary services, the place of provision of the services applicable to the appellants, is the location of the service recipient, in terms of Rule 3 of the Place of Provision of Services Rules, 2012. Further, Rule 9 *ibid* is not applicable to the appellants, as the services rendered by him are in relation to supply of services to the foreign client on his own account. The appellants cannot not be said to be acting as an intermediary i.e., the services were performed by the appellants on a principal-to-principal basis

and at arm's length basis. Inasmuch as all the conditions prescribed under Rule 6A of the Service Tax Rules, 1994 are satisfied, the services of the appellants are to be treated as export of services. Thus, we are of the considered view that the findings given by the learned Commissioner in the impugned order on this ground is also not sustainable.

12. We also note that the Department had clarified the doubts raised by the trade and industry on the scope of the term 'intermediary' and had stated that broadly there is no change in the scope of intermediary services in the GST regime *vis-à-vis* the Service Tax regime, except addition of securities and offered necessary clarification to the field formations. The extract of the relevant paragraphs of the said instructions are as follows:

**CLARIFICATION ON DOUBTS RELATED TO SCOPE OF
"INTERMEDIARY"**

**"CIRCULAR NO. 159/15/2021-GST
[F.NO. CBIC-20001/8/2021-GST], DATED 20-9-2021**

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

2. Scope of Intermediary services

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

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

2.2 *The concept of 'intermediary' was borrowed in GST from the Service Tax Regime. The definition of 'intermediary' in the Service Tax law as given in Rule 2(f) of Place of Provision of Services Rules, 2012 issued vide notification No. 28/2012-ST, dated 20-6-2012 was as follows: "Intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account;"*

2.3 *From the perusal of the definition of "Intermediary" under IGST Act as well as under Service Tax law, it is evident that there is broadly no*

change in the scope of intermediary services in the GST regime vis-à-vis the Service Tax regime, except addition of supply of securities in the definition of intermediary in the GST Law.

3. Primary Requirements for intermediary services

The concept of intermediary services, as defined above, requires some basic pre-requisites, which are discussed below:

3.1 Minimum of Three Parties: *By definition, an intermediary is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus a natural corollary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply. An activity between only two parties can, therefore, NOT be considered as an intermediary service. An intermediary essentially "arranges or facilitates" another supply (the "main supply") between two or more other persons and, does not himself provide the main supply.*

3.2 Two distinct supplies: *As discussed above, there are two distinct supplies in case of provision of intermediary services;*

- (1) Main supply, between the two principals, which can be a supply of goods or services or securities;*
- (2) Ancillary supply, which is the service of facilitating or arranging the main supply between the two principals. This ancillary supply is supply of intermediary service and is clearly identifiable and distinguished from the main supply.*

A person involved in supply of main supply on principal to principal basis to another person cannot be considered as supplier of intermediary service.

3.3 Intermediary service provider to have the character of an agent, broker or any other similar person: *The definition of "intermediary" itself provides that intermediary service provider means a broker, an agent or any other person, by whatever name called....". This part of the definition is not inclusive but uses the expression "means" and does not expand the definition by any known expression of expansion such as "and includes". The use of the expression "arranges or facilitates" in the definition of "Intermediary" suggests a subsidiary role for the intermediary. It must arrange or facilitate some other supply, which is the main supply, and does not himself provides the main supply. Thus, the role of intermediary is only supportive.*

3.4 Does not include a person who supplies such goods or services or both or securities on his own account: *The definition of intermediary services specifically mentions that intermediary "does not include a person who supplies such goods or services or both or securities on his own account". Use of word "such" in the definition with reference to supply of goods or services refers to the main supply of goods or services or both, or securities, between two or more persons, which are arranged or facilitated by the intermediary. It implies that in cases wherein the person supplies the main supply, either fully or partly, on principal to principal basis, the said supply cannot be covered under the scope of "Intermediary".*

3.5 Sub-contracting for a service is not an intermediary service: An important exclusion from intermediary is sub-contracting. The supplier of main service may decide to outsource the supply of the main service, either fully or partly, to one or more sub-contractors. Such sub-contractor provides the main supply, either fully or a part thereof, and does not merely arrange or facilitate the main supply between the principal supplier and his customers, and therefore, clearly is not an intermediary. For instance, 'A' and 'B' have entered into a contract as per which 'A' needs to provide a service of, say, Annual Maintenance of tools and machinery to 'B'. 'A' subcontracts a part or whole of it to 'C'. Accordingly, 'C' provides the service of annual maintenance to 'A' as part of such sub-contract, by providing annual maintenance of tools and machinery to the customer of 'A', i.e. to 'B' on behalf of 'A'. Though 'C' is dealing with the customer of 'A', but 'C' is providing main supply of Annual Maintenance Service to 'A' on his own account, i.e. on principal to principal basis. In this case, 'A' is providing supply of Annual Maintenance Service to 'B', whereas 'C' is supplying the same service to 'A'. Thus, supply of service by 'C' in this case will not be considered as an intermediary.

3.6 The specific provision of place of supply of 'intermediary services' under section 13 of the IGST Act shall be invoked only when either the location of supplier of intermediary services or location of the recipient of intermediary services is outside India.

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5. The illustrations given in para 4 above are only indicative and not exhaustive. The illustrations are also generic in nature and should not be interpreted to mean that the service categories mentioned therein are inherently either intermediary services or otherwise. Whether or not, a specific service would fall under intermediary services within the meaning of sub-section (13) of section 2 of the IGST Act, would depend upon the facts of the specific case. While examining the facts of the case and the terms of contract, the basic characteristics of intermediary services, as discussed in para 3 above, should be kept in consideration."

In terms of the above instructions, when applied to the present case, it transpires that the services provided by the service provider to the service receiver ESM Pte., Singapore is on principal-to-principal basis and executed through a service contract; in providing the services that are only two persons involved viz., appellants and ESM Pte., Singapore; there is no principal-agent relationship among the parties to the contract; there is no main and ancillary supply, as there is only one supply of services which is the main supply; and the services are provided by the appellants on their own account. Thus, we find that the essential pre-requisites for considering the transaction as 'intermediary' services are not fulfilled in the present case, in terms of the aforesaid instructions issued by the CBIC.

13.1 Learned Advocate for the appellants had submitted that the adjudged demands cannot be sustained on the point of limitation, as the SCN has not made out any case for invocation of extended period. In this regard, we find that the SCN nowhere had given any specific ground for invoking the extended period for demand of service tax, except mentioning in paragraph 13.1 of SCN that the "*assessee have erroneously claimed that they have exported the said services though they have not fulfilled Rules 6A (1)(f) of the Service Tax Rules, 1994.*" We find that the issue with respect to invocation of extended period in respect of fraud, collusion, willful misstatement or suppression of facts under tax demands is no more open to dispute, as the Hon'ble Supreme Court in the case of *Uniworth Textiles Ltd., Vs. Commissioner of Central Excise, Raipur* – 2013 (288) E.L.T. 161 (S.C.) had held that the onus is on the Revenue to prove the presence of such specific grounds. The relevant paragraph of the above judgements is extracted below:

"24. *Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of bona fide conduct, by observing that "the appellants had not brought anything on record" to prove their claim of bona fide conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. This Court observed in Union of India v. Ashok Kumar & Ors. - (2005) 8 SCC 760 that "it cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility."*

25. *Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the fides of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In Aban Loyd Chiles Offshore Limited and Ors. (supra), this Court made the following observations :*

'21. This Court while interpreting Section 11-A of the Central Excise Act in Collector of Central Excise v. H.M.M. Ltd. (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement or suppression of fact with intent to evade the payment of duty. It has been observed :

'...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.'

It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held :

'...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso....'

(Emphasis supplied)

26. *Hence, on account of the fact that the burden of proof of proving mala fide conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a wilful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant."*

13.2 On the basis of above judgement of the Hon'ble Supreme Court and on the facts of the case, we find that there are no specific grounds invoked for suppression of facts or willful mis-statement on the part of the appellants, particularly when the entire records of the appellants including periodical returns filed were available with the department. Thus, we are of the considered view, that no effective case was made out in the SCN for invocation of extended period and for sustaining the same in the impugned order. Therefore, such order confirming the adjudged demands for extended period is patently illegal and therefore not sustainable, on the grounds of limitation.

14.1 We also find that the issue of service tax liability in respect of ship management and crew management services rendered in relation to vessel /ship owners has already been dealt in elaborately by the Tribunal in the case of *Seaspan Crew Management India Pvt. Ltd.* (supra) holding that the service tax is not applicable on such services. The relevant paragraphs of the said order are extracted and given below:

"5. *Heard both sides and perused the records. The facts are not in dispute are that the appellant are engaged in providing 'man power recruitment/supply agency' services to their overseas client Seaspan Canada under an agreement with them. Article 2 of the said agreement reads as follows:*

Aspects of the employment of the crew.

The service shall include but will not be limited to:

- 1. Providing assistance in recruiting, selecting and hiring crew for SCML.*
- 2. Ensuring that all members of the crew have passed a medical examination with a qualified doctor certifying that they are fit for performing services as crew members. This shall include getting the approved candidates go through a medical examination and clearance from doctors in accordance with the pre-determined standards.*

3. *Fulfilling the requisite documentation requirements and paper works in respect of the crew selected.*
 4. *Keeping full records of all the candidates.*
 5. *Ensuring that each candidate has all the appropriate travel visas and any related documentation as may be prescribed.*
 6. *Ensuring that the crew shall have command of the English language of a sufficient standard to enable them to perform their duties effectively and safely*
 7. *Training, supervising discipline, discharge and other terms and conditions of employment of the crew. This shall include making necessary arrangements in respect of crew training which can be done in house as well as external seminars.*
 8. *Arranging for all transportation (including repatriation), visa and travel arrangement including boarding and lodging through approved travel agents for the crew as and when the same may be required.*
 9. *Performing such other functions relating to crew recruitment services as may be required from time to time.*
- 6.** *There is no stipulation either under Article 2 or under any clauses of the agreement, whereby it could be inferred that the finding of the Ld. Commissioner (Appeals) at para 6 of the impugned order that they were supplying man power on behalf of their overseas client is factually incorrect and not supported by any evidence. This is the only reasoning advanced by the Ld. Commissioner (Appeals) in setting aside the refund order where under the original authority after verification of all other conditions prescribed under the said notification 27/2012 CE(NT) dated 19/06/2012 issued under Rule 5 of the Cenvat Credit Rules, 2004 sanctioned the refund. In the subsequent order, however, the adjudicating authority considering the appellant as an intermediary, rejected the refund claim. The allegation of the department as observed above that the appellant is an 'intermediary' is without any basis, hence, cannot be sustained. There is no other finding in the impugned orders about ineligibility of the appellant to the cash refund claim of the accumulated credit filed under notification 27/2012 dated 19.06.2010 read with Rule 5 of Cenvat Credit, 2004. In the result, the impugned orders are set aside, the appeals are allowed, with consequential relief, if any, as per law."*

However, instead of properly appreciating the facts of the above case and the relevance of the above order by the Tribunal in examining the contract/agreements carefully, the learned Commissioner in the impugned order has recorded that the appellants were facilitating the provision of crew recruitment/manning services provided by ESM Pte. Singapore to the ESM Pte. managed vessels, with out explaining the basis. As can be seen from the detailed discussion of various clauses to the service agreement and the safeguards incorporated in the agreement for compliance with international maritime standards and legal requirements in paragraphs 10.2 to 10.4 above, the learned Commissioner had not examined these aspects and the basis for not following the decision of the Tribunal in the above case, and thus the impugned order on this ground is not found on sound legal basis. Thus, we find that the learned Commissioner has not properly brought out the facts for ignoring the decision of the Tribunal and thus such findings is not sustainable.

14.2 We also find that the Tribunal in the case of *Eastern Pacific Shipping (India) Pvt. Ltd.* (supra) has held that appellant, a duly licensed Seafarer Recruitment service provider, as per agreement is not an intermediary particularly when entire process of selection, medical test, insurance, transportation etc. are carried out by him, for which he received payment in convertible foreign exchange from first party having its office in Singapore. It was held that services provided by him are to be considered as export of service. The relevant paragraphs of the said order are extracted and given below:

"4. Heard from both the sides at the length and perused the case record. The ground of rejection cited by the Commissioner (Appeals) is that the content of agreement reveals that appellant was an agent of employer (intermediary) engaged for the purpose of providing Seafarer recruitment service to third parties for which as per Rule 6(a) of Export of Services that stipulates under sub-rule (1)(d) that the Place of Provision of Service is to be outside India to bring the activities into the purview of Export but Rule 9 of the Place of Provision of Services Rules, 2012 stipulates under sub-clause (c) that in case of intermediary service, the location of service provider since been in India, such service rendered by agent to the principal cannot be treated as export of services for which refund was not admissible. However, going by the Seafarer recruitment agreement executed between the parties concerning status/standing/capacity of the parties at page 1 under sub-clause (c), it has been described as below.

"The employer desires to employ seafarers or crew on behalf of its principals and for vessels owned by the principals through the Agent and desires to enter into this Agreement".

*The above sentence makes it abundantly clear that first party to the agreement i.e. employer is an intermediary between the principal (third party but not a signatory to the agreement) and the appellant who is, as per sub-clause (a) is in the business of Seafarer recruitment service duly licensed to provide Seafarer recruitment service to third party. This being the status of the appellant as referred in the agreement, the findings of the Commissioner (Appeals) that the first party i.e. employer is the principal under whom the appellant had worked as an agent is erroneous. Admittedly payments were received from the first party i.e./employer who has its office in Singapore and such payment has been made in convertible foreign exchange, which remains undisputed. Therefore, appellant cannot be treated as an intermediary of the first party when the agreement indicates that it is the vice versa. Further, as has been held by Hon'ble Delhi High Court in the case of *Indian Association of Tour Operators v. Union of India* [W.P. (C) No. 5267 of 2013] [2017 (5) G.S.T.L. 4 (Del.)], Export is different from non-taxable event and unrelated to POPS which deals clearly with taxable events of service. Therefore, I have got no hesitation to hold that the services carried out by the appellant are in the nature of manpower recruitments/supply agency services which were being exported from India.*

5. In view of Circular No. 120/01/2010-S.T., dated 19th January, 2010 issued by the Board which clarified that no correlation or nexus is required to be established between input service and export and since credits were validly taken by the appellant, refund cannot be rejected on the ground that there was no nexus between input and output services without any findings on its adverse impact on the quality and efficiency of the provision of services exported."

14.3 We further find that the Tribunal in the case of *Torm Shipping India Pvt. Ltd.* (supra) by relying earlier order of the Tribunal has held that the appellant, engaged in providing ship management and crew management services to its group company fall under the scope of export service. The relevant paragraphs of the said order are extracted and given below:

"7. *The short question involved in the present appeals for determination is whether the services viz. Ship Management Service which includes crew Management service provided by the appellant to their associate overseas company at Bermuda should be called as 'export service' under POPS Rules, 2012 and consequently they are entitled to cash refund of accumulated Cenvat credit under Rule 5 of Cenvat Credit Rules, 2004 read with Notification No. 27/2012, dated 18-6-2012.*

8. *The undisputed facts are that by an agreement dated 1-4-2013 between the appellant (described as 'Ship Manager') and the overseas associate company TORM Bermuda (called as 'Primary Manager'), various services were agreed to be provided by the appellant to their overseas associate company. The services mentioned in the said agreement are broadly relate to Technical and Operation Services, Agency Services, SQE Services, Vetting Services, Crew Management Services etc.. The scope of each said services are narrated under various clauses of the agreement which as whole described as Ship Management service. Interpreting one of the said services particularly 'Agency Services', the Learned Commissioner (Appeals) has concluded that the relation between the appellant service provider and the overseas service recipient are not on principal to principal basis but as a principal and agent which falls within the scope of 'intermediary' as defined under Rule 2(f) of POPS Rules, 2012, hence not an export service. In his finding, the Learned Commissioner (Appeals) had observed that the appellants, as per the agreements, are required to appoint agent on behalf of their principal, hence covered under the definition of intermediary. It is the observation that in respect of the Ship Management service rendered by appellant, the main components are provided by the agent and the appellant did not provide the said service on their own account, therefore, both the parts of the definition of 'intermediary' are satisfied. To scrutinize the said finding and to analyse the scope of 'Intermediary' defined under Rule 2(f) of POPS Rules, 2012, the same is reproduced below :-*

"(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."

9. *Since the Commissioner (Appeals) mainly focused on the Agency Service as mentioned in clause 3.2 of the agreement dated 1-4-2003 the same is placed below which reads as follows :-*

"When required, Ship Manager will provide the agency services which shall include the following services;

- (i) Appointment of agents;*
- (ii) Recording the expenses incurred (disbursement account) by the agents appointed for the particular vessel;*
- (iii) Making the payment of disbursement accounts of agents; and*
- (iv) Providing such other services as may be necessary to the effective operation of the Vessel."*

10. *From scope of the said agency services rendered by the appellant to their overseas associate company, it is clear that they were required to appoint agent, the recording of expenses incurred by the agents*

appointed for a particular vessel, making payment to disbursement account of the agent and providing such services as may be necessary to the effective operation of the vessels cannot make them ipso facto an intermediary. In their submission, the Learned Advocate for the appellant has submitted that the appellants are only appointing agents for providing various services and ultimately the services are provided by agent to their associate company at Bermuda and payments are also directly made by the associate company to such agent. Therefore, they did not act in any manner as an intermediary between the overseas company and the agents. This is a part of the main service i.e. Ship Management Services provided on their own behalf and not a facilitator of said service as held by the Learned Commissioner (Appeals). I find force in the contention of the Learned Advocate inasmuch as the appellants are providing ship management services, which is the main service, on their own behalf to their overseas client, which includes varieties of services including appointment of agent, recruitment of crew under the Crew Management Service and they had never acted as facilitator between the overseas associate company as service recipient and the agents or crew appointed for smooth functioning of the vessel, which is the main service agreed to be provided by the appellant. In other words, the service of appointing Crew or Agent had been provided on their account, hence, falls under the exclusion clause of the definition of 'intermediary'.

11. *This issue has been considered by the Tribunal in the case of Seaspan Crew Management India Pvt. Ltd. v. Commissioner of CGST vide Order Nos. A/86004-86007/2019, dated 16-5-2019 where M/s. Seaspan Crew Management Pvt. Ltd. were supplying the manpower to their overseas associate company Seaspan Canada. The allegation of the Department was that the services provided by Seaspan India to Seaspan Canada as an intermediary, hence the services rendered cannot qualify as export services, consequently, refund under Rule 5 of the Cenvat Credit Rules, 2004 is not admissible to them. This Tribunal in more or less similar circumstances held that the service provided by the assessee in the said case was not an 'intermediary service' but on principal to principal basis, hence, eligible to refund under Rule 5 of the Cenvat Credit Rules. I do not find much difference in the types of services provided by the appellant in the present case in contrast to above case, hence, applying the principles laid down in the said judgment, I am of the view that the service provided by the appellant fall under the scope of export service, consequently, the impugned orders are set aside and the appeals are allowed with consequential relief, if any, as per law."*

14.4 Furthermore, we also find that the issue of service tax liability in respect of the appellant providing Ship Management service involving Crew Management to its foreign associated company based in Hong Kong was examined by the Tribunal in the case of *Anglo Eastern Maritime Services Pvt. Ltd.* (supra) and it was held that it is not intermediary services. The relevant paragraphs of the said order of the Tribunal is extracted below:

"5. *I have gone through the case record, written submissions and the relied upon judgments submitted in this case and referred in the orders passed by the authorities below. At the outset, it is required to be scrutinised the status of the exporter. It is an independent agency or agent or intermediary? Can it be ascertained from the terms of the contract between the service provider and its overseas service recipient? If the nature of service provided by the service provider is that of an intermediary as contained in Rule 2(f) of the POPS Rules, 2012? Going by*

its Bare texts, which is reproduced below would bring more clarity to the issue. Rule 2(f) of the POPS Rule, 2012 reads:

"Rule 2(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 and does not include a person who provides the main service on his account."

The simple meaning that can be inferred from the above provision is that anyone who arranges or facilitates provision of service between two or more persons, other than providing the main service, is an intermediary and it is immaterial if he is called a broker or an agent or in any other name. Agreement copy at Annexure-2 clearly reveals that Appellant selects and trains crew members as an independent agency and provides the trained personnel to its overseas client namely M/s. Anglo-Eastern Tanker Management (Hong Kong) Ltd. The said service recipient provides entire ship management service to ship owners and in the process it recruits the crew members selected and trained by the Appellant. In the process, Appellant gets 15% as its remuneration over and above the amount spent in completing the recruitment process, training and making provision for Visas and travels for the crew members. This being facts on record, it can be said that only trained manpower supply work is done by the Appellant and the service recipient recruits those manpower after taking them into its fold and control and even pays salary to them directly. Additionally Annexure-2 i.e. agreement copy clearly contains provision that it is an agreement on principal to principal basis and during subsistence of the agreement, it is the Appellant who shall indemnify overseas client against any claim or demand, cost, action that may be incurred or suffered by the Manager mainly the overseas clients. Section 2 definition on intermediary classifies them as agent, broker, etc. etc. whose action as per Indian Contract Act are supposed to be ratified/indemnified by the Principal and therefore, as per terms of the agreement, I have got no hesitation to say that Appellant is not an intermediary since it provided trained manpower to its overseas customer who recruited them and engaged them in the ship owned by others through a separate Ship Management agreement. Further, Ship Management in its entirety is not confined to requirement of crews by the ship owners as individual.

6. *As could be inferred from the order passed by the learned Commissioner (Appeals) at para 7.1 of his order, Appellant's role is restricted to provision of crew management services and not any other services of ship management activities that was being managed by AETM (Hang Kong) Ltd. who outsourced crew management service to the Appellant. This is not factually correct in its entirety in view of the fact of para 9(a) of the Agreement and its sub-para:*

"9(a) This Agreement is on a "Principal to Principal" basis. It is hereby clearly agreed and understood that the Manager is an independent employer and all personnel, employees engaged by them shall be employees of the Manager and not of the Service Provider.

At no point of time the Service Provider shall be considered as Principal Employer relating to the personnel engaged/employed by the Manager and the Manager shall alone be responsible for payment of salaries, wages and other legal dues of the employees, for rendering services as contemplated herein."

(emphasis supplied)

Para 9(b) is also more categorical on the nature of relationship between the Appellant and its overseas services, which can never be equated with any kind of intermediary relationship. Sub-para (b) of para 9 of Exhibit-B namely the agreement dated 01.04.2013 is also reproduced below for a better clarity:

"9(b) The Manager and Service Provider acknowledge and agree that their relationship arising from this Agreement does not constitute or create a general agency, joint venture, partnership, employee relationship or franchise between them."

It is, therefore, erroneous to hold that AETM (Hang Kong) Ltd. had outsourced crew management service to the Appellant whereas in its actuality it picked up trained crew members from the Appellant selected at its instance and recruited them in its own company for providing crew management service to ship owners.

7. In para 8 of his order learned Commissioner (Appeals) also had made some observations concerning the Appellant after going through the Director General of Shipping Control Website. But I prefer not to go into its detail as the same relates to grant of licence to the Appellant from 05.11.2017, which is beyond the period of dispute required to be settled in this appeal. On the contrary, I fully concur with the stand taken by the Appellant that in view of the judgments referred in the preceding paragraph namely Eastern Pacific shipping India Pvt. Ltd. Vs. Commissioner of CGST, Mumbai East. 2020 (37) GSTL 182 (Tri. Mumbai) that had set the ratio on the issue that seafarer's recruitment service provider, who processes the entire selection, medical test, insurance, transportation, training etc. to the overseas client and received convertible foreign exchange, is not an intermediary..."

14.5 In the case of Ernst and Young Limited (supra), the Hon'ble High Court of Delhi had examined the scope of the term 'intermediary' and held that the services provided by the appellants cannot be considered as intermediary services and it would fall within the scope of the definition of 'export of service'. The relevant paragraphs of the said judgement is extracted and given below:

"28. *The circular dated 20-9-2021 (Circular No. 159/15/2021-GST) issued by the Central Board of Indirect Taxes and Customs also acknowledges that there is broadly no change in the scope of intermediary services in the GST regime vis-à-vis the service tax regime. The relevant extract of the said circular is set out below:-*

"2. Scope of Intermediary services

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

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

2.2 The concept of 'intermediary' was borrowed in GST from the Service Tax Regime. The definition of 'intermediary' in the Service Tax law as given in Rule 2(f) of Place of Provision of Service Rules, 2012 issued vide Notification No. 28/2012-S.T., 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 own account."

3. Primary Requirements for Intermediary services

The concept of intermediary services, as defined above, requires some basic prerequisites, which are discussed below:

3.1 Minimum of Three Parties: By definition, an intermediary is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus a natural corollary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply. An activity between only two parties can, therefore, NOT be considered as an intermediary service. An intermediary essentially "arranges or facilitates" another supply (the "main supply") between two or more other persons and, does not himself provide the main supply.

3.2 Two distinct supplies: As discussed above, there are two distinct supplies in case of provision of intermediary services:

(1) Main supply, between the two principals, which can be a supply of services or securities:

(2) Ancillary supply, which is the service of facilitating or arranging the main supply between the two principals. This ancillary supply is supply of intermediary service and is clearly identifiable and distinguished from the main supply.

A person involved in supply of main supply on principal to principal basis to another person cannot be considered as supplier of intermediary service.

3.3 Intermediary service provider to have the character of an agent, broker or any other similar person: The definition of "intermediary" itself provides that intermediary service providers-means a broker, an agent or any other person, by whatever name called... " This part of the definition is not inclusive but uses the expression "means" and does not expand the definition by any known expression of expansion such as "and includes". The use of the expression "arranges or facilitates" in the definition of "intermediary" suggests a subsidiary role for the intermediary. It must arrange or facilitate some other supply, which is the main supply, and does not himself provides the main supply. Thus, the role of intermediary is only supportive.

3.4 Does not include a person who supplies such goods or services or both or securities on his own account:

The definition of intermediary services specifically mentions that intermediary "does not include a person who supplies such goods or services or both or securities on his own account". Use of word "such" in the definition with reference to supply of goods or services refers to the main supply of goods or services or both, or securities, between two or more persons, which are arranged or facilitated by the intermediary. It implies that in cases wherein the person supplies the main supply, either fully or partly, on principal to principal basis, the said supply cannot be covered under the scope of intermediary".

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29. *Concededly, the services rendered by the petitioner to EY Entities, prior to roll out of the GST regime, was considered as 'export of services'. The petitioner prevailed before the concerned service tax authorities in establishing that the professional services rendered by it cannot be considered as services as an 'intermediary'. It is also material to note that the petitioner's application for refund of ITC for the period after March 2020 has also been accepted by the Adjudicating Authority. Thus, the petitioner has been denied ITC only for the period from December 2017 to March 2020; it has been allowed CENVAT credit for the period covered under the service tax regime as well as ITC for the period after March 2020.*

30. It is also relevant to refer to section 2(6) of the IGST Act, which defines the expression 'export of services'. Section 2(6) of the IGST Act is set out below:

"export of services" means the supply of any service when,-

(i) the supplier of service is located in India;

(ii) the recipient of service is located outside India;

(iii) the place of supply of service is outside India.

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange [or in Indian rupees wherever permitted by the Reserve Bank of India]; and (v) the supplier of service and the recipient of service are not merely establishment of a distinct person in accordance with Explanation 1 in section 8;"

31. Section 13 of the IGST Act contains provisions for determining the place of services where the location of supplier or location of the recipient is outside India. Thus, the question whether the supply of service by the petitioner is outside India is required to be determined with reference to section 13 of the IGST Act.

32. In terms of section 13(2) of the IGST Act, the place of supply of services except the services specified in Sub-sections (3) to (13) is the location of the recipient of the services. In the present case, there is no dispute that the provisions of Sub-sections (3) to (13) except Sub-section (8) of Section 13 are not attracted. The relevant extract of section 13 of the IGST Act is set out below:

"13. (1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

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(8) The place of supply of the following services shall be the location of the supplier of services, namely:—

(a) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) intermediary services;

(c) services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month.

Explanation.—For the purposes of this sub-section, the expression,—

(a) "account" means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account;

(b) "banking company" shall have the same meaning as assigned to it under clause (a) of section 45A of the Reserve Bank of India Act, 1934 (2 of 1934);

(c) "financial institution" shall have the same meaning as assigned to it in clause (c) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(d) "non-banking financial company" means,—

(i) a financial institution which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or

(iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette, specify."

33. *In terms of Sub-section (8) of section 13 of the IGST Act, the place of supply of certain services would be the location of the supplier of the services. In terms of clause (b) of sub-section (8) of section 13 of the IGST Act, the place of supply of intermediary services is the location of the supplier of services. In the present case, the place of supply of services has been held to be in India on the basis that the petitioner is providing intermediary services. As discussed above, the Services rendered by the petitioner are not as an intermediary and therefore, the place of supply of the Services rendered by the petitioner to overseas entities is required to be determined on basis of the location of the recipient of the Services. Since the recipient of the Services is outside India, the professional services rendered by the petitioner would fall within the scope of definition of 'export of services' as defined under section 2(6) of the IGST Act.*

34. *There is no dispute that the recipient of Services - that is EY Entities - are located outside India. Thus, indisputably, the Services provided by the petitioner would fall within the scope of the definition of the term 'export of service' under section 2(6) of the IGST Act."*

14.6 In another case relating to supply of services to foreign vendors in the case of *SNQS International Socks Private Limited (Trading Division) Vs. Commissioner of Central Excise and Service Tax*, the Tribunal has held in the Final Order No. 40478/2023 dated 23.06.2023 in disposal of the Service Tax Appeal No. 41587 of 2016, that the services provided are in the nature of specified taxable services and not 'intermediary service' and the place of provision in such export of services is the location of the service provider abroad. The relevant paragraphs of the said judgement are extracted and given below:

"12. *The next issue that has to be analysed now is whether the appellant can be treated as an 'intermediary'.*

12.1.1 *An intermediary is generally meant to be a person who arranges or facilitates supply of goods or provision of service, or both, between two persons without any material alteration/processing. Paragraph 5.9.6 of the Education Guide issued by the C.B.E.C. dated 20-6-2012 has clarified as to intermediary services, as under: -*

"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.

In accordance with the above guiding principles, services provided by the following person will qualify as 'intermediary services': -

- (i) Travel Agent (any mode of travel)*
- (ii) Tour Operator*
- (iii) Commission agent for a service [an agent for buying or selling of goods is excluded]*
- (iv) Recovery Agent*

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

12.1.2 *However, it has to be noted that by the amendment of the definition of "intermediary" under Rule 2(f) of the Place of Provision of Services, 2012 vide Notification No. 14/2014-ST dated 11-7-2014, a commission agent i.e., a buying or selling agent for supply of goods has also been included to be an intermediary.*

12.2.1 *"Intermediary", as defined under Rule 2(f) of the Place of Provision of Services Rules, 2012, means "a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a 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". "Commission agent" means "a person who causes sale or purchase of goods, on behalf of another person for a consideration, which is based on the quantum of such sale or purchase" (as defined in exemption Notification No. 13/2003-S.T. dated 20-6-2003). Subsequently, with effect from 16-5-2005, "commission agent" was defined in Section 65 (19) of the Finance Act, 1994 to mean "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". The words "on behalf of" in the statute connote an agency when one person acts on behalf of the other. The former acts as an agent of the latter. An agency is the relationship of principal and agent in terms of a contract - express or implied.*

12.2.2 *The broker does not sell the goods on his own account, but merely brings the vendor and the vendee together and settles the price.*

12.2.3 *In the definition of "intermediary", as in Rule 2(f) of the Place of*

Provision of Services Rules, 2012, the words - 'broker' and 'agent' are used synonymously though there are fine differences among the intermediary, commission agent and broker, to be analysed depending upon the facts of each case. As given in paragraph 12.1.1 above, there are two supplies in case of an intermediary - (i) supply between the principal and the third party and (ii) the supply of his own service to his principal for which he gets paid. In the instant case, there is only one supply by the appellant to his principal i.e., the foreign client, that too on his account. There is no service provider and service recipient relationship between the appellant and the vendors who were developed by him as there is no consideration received from these and the supply of goods by these vendors is incidental to the service of the appellant. Reportedly, the appellant has not entered into any agreement with the vendors either on their own or on behalf of the overseas client.

12.3 *In this case, the appellant is found to be providing services of design and product development essentially for its foreign client to keep track of updates in fashion trends in knitted goods, evaluation and development of vendors, including quality monitoring and logistics and operational assistance. The appellant has not engaged any other service provider for the process of procuring the specific goods to be exported as per the requirement of his foreign client. All these services are rendered only to M/s. Primark, Dublin, Ireland on his own account and he is receiving the consideration for the services as a percentage of FOB value of the merchandise exported. There is no evidence on record to show that he is receiving any consideration from the vendors developed by him and as such, the services could not be termed as falling under the category of "intermediary".*

12.4 *We find that the decision in the case of In Re: GoDaddy India Web Services Pvt. Ltd. [2016 (46) S.T.R. 806 (A.A.R.)] is relevant to understand the term 'intermediary' in its correct perspective, wherein it was observed as under: -*

"10. The definition of "intermediary" as envisaged under Rule 2(f) of POPS 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 services" to WWD US and on his own 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 portion 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 centers, 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."

The above is applicable to decide the issue in this appeal as the facts obtaining in these two cases are similar.

13. *The next issue that is required to be decided in this appeal is whether the services provided by the appellant could be treated as export of service or not. In this regard, the following are required to be gone through for arriving at a decision as to what is the place of provision of service, as applicable to the case of the appellant.*

13.1.1 *Rule 6A of the Service Tax Rules, 1994 states that:-*

(1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-

- (a) the provider of service is located in the taxable territory,
- (b) the recipient of service is located outside India,
- (c) the service is not a service specified in the section 66D of the Act,
- (d) the place of provision of the service is outside India,
- (e) the payment for such service has been received by the provider of service in convertible foreign exchange, and
- (f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 2 of clause (44) of section 65B of the Act.

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification."

13.1.2 In the present case, there is no dispute that the provider of service is located in the taxable territory and the recipient is located abroad/outside India. The services rendered are not specified in Section 66D of the Finance Act. The payment for the said services has also been received by the appellant in convertible foreign exchange. Therefore, the only condition that is required to be satisfied is whether the place of provision of service is outside India or not.

13.2.1 In terms of Rule 3 of the Place of Provision of Services Rules, 2012, the place of provision of service shall be the location of the recipient of service. In respect of intermediary service, in terms of Rule 9, the place of provision of service shall be the location of the service provider. Rules 3 and 9 of the Place of Provision of Services Rules, 2012 are extracted below: -

"Rule 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, 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.

....

Rule 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) Online information and database access or retrieval services;
- (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 month."

13.2.2 As we have held that the activities of the appellant will be coming under business support services and also would not be falling under intermediary services, the place of provision of the services applicable to the appellant, is the location of the service recipient, in terms of Rule 3 of the Place of Provision of Services Rules, 2012. Rule 9 is not applicable to the appellant as the services rendered by him in relation to procurement of goods to the foreign client are on his own account. The appellant is not said to be acting as an intermediary i.e., the services were performed by the appellant on a principal-to-principal basis and at arm's length basis.

13.3 *As all the conditions prescribed under Rule 6A of the Service Tax Rules, 1994 are satisfied, the services of the appellant are to be treated as export of services.”*

14.7 Furthermore, we also find that the issue of service tax liability in respect of the activity of supply of services to foreign vendors having been decided that it amount to export of services, and no service tax is payable in the case of *SNQS International Socks Private Limited*(supra) was upheld by the Hon’ble Supreme Court in Civil Appeal Diary No.8343 of 2024 by dismissing the appeal filed by the department. The said order of the Hon’ble Apex Court is extracted below:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). /2024
(CIVIL APPEAL DY. NO(S). 8343/2024)

COMMISSIONER OF G.S.T. AND CENTRAL EXCISE
VERSUS
M/S SNQS INTERNATIONAL SOCKS PRIVATE LIMITED

APPELLANT(s)
RESPONDENT(s)

O R D E R

Delay condoned.

We have heard learned senior counsel for the appellant and we have also perused the definitions of ‘Business Auxiliary Service’, ‘Business Support Service’ as well as ‘Intermediary’.

The respondent-Company does not fall within the scope and ambit of any of the aforesaid definitions. This is having regard to the scope of its mandate to act on behalf of the principal namely primark.

Hence, the appeals are dismissed.

Pending application(s), if any, shall stand disposed of.

.....J
[B.V. NAGARATHNA]

.....J
[AUGUSTINE GEORGE MASIH]

NEW DELHI;
MARCH 19, 2024



15. In view of the above analysis of the legal provisions and on the basis of the orders passed by the Tribunal, the judgement of the Hon'ble Delhi High Court, and the judgement of the Hon'ble Supreme Court, we find that the impugned order dated 23.07.2021 with regard to confirmation of adjudged service tax demands along with interest and penalties are not sustainable.

16. In the result, by setting aside the impugned order dated 23.07.2021, the appeal is allowed in favour of the appellants.

(Order pronounced in open court on 14.05.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha