CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70450 of 2020

(Arising out of Order-in-Original No.08/PR.COMMR./ST/NOIDA/2019-20 dated 30.12.2019 passed by Principal Commissioner Central Tax, Noida)

M/s Indus Valley Partners (India) Pvt. Ltd., ...Appellant
(SDF B-13, 14 & 15 3rd Floor, Noida
Special Economic Zone, Phase-II, Noida)

VERSUS

Principal Commissioner of
Central Tax, Noida ....Respondent
(C-56/42, Renu Tower, Sector-62, Noida)

APPEARANCE:

Shri Abhinav Kalra, Chartered Accountant for the Appellant
Shri Manish Raj, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70025/2024

DATE OF HEARING : 14 December, 2023
DATE OF DECISION : 17 January, 2024

P. K. CHOUDHARY:

This appeal has been directed against Order-in-Original No.08/PR. Commr./ST/Noida/ 2019-20 Dated 30/12/2019 passed by the Ld. Pr. Commissioner, Central Tax, Noida whereby demand of service tax amounting to Rs.35,49,28,587/- was confirmed and penalties amounting to Rs.35,49,28,587/- and Rs.10,000 /- were also imposed under Sections 78 & 77 of the Finance Act, 1994, respectively.

2. Briefly stated, the facts of the case are that the Appellant is a registered SEZ unit under the Special Economic Zone Act, 2005 vide Letter of Approval dated 10/12/2009 for carrying out authorized operations namely 'Software Development'. The Appellant was working at three different places namely, (i) SDF B-13, 14 & 15, 3rd Floor, Noida Special Economic Zone, Dadri

Road, Phase-II, Noida, (ii) Unit No.153 & 154, 1st Floor, SDF-V, Santacruz Electronics Export Processing Zone, SEZ Andheri (E), Mumbai and (iii) 702, 7th Floor Skylark Building, 60, Nehru Place, New Delhi and was holding centralized service tax registration No. AAACI7597RSD002 dated 12/05/2016. The Appellant was engaged in software development activities and was availing CENVAT credit under CENVAT Credit Rules, 2004 in respect of Service Tax paid on input service received by him.

3. The Officers of Central Tax, Audit Commissionerate, Noida had conducted audit of the records of the Appellant for the period from April, 2013 to June, 2017 and observed that Indus Valley Partners US (in short referred to as IVP US) has been engaged by Indus Valley Partners India(in short referred to as IVP India), i.e., the Appellant, to provide & execute Product Delivery Services to IVP India customers in US and such other additional services as may be mutually agreed (hereinafter in consolidation referred to as 'Product Delivery Services') as per Agreement dated 21.03.16. It was agreed upon that IVP US will allocate specific personnel/employees as may be required by IVP India from time to time to provide & execute Product delivery to IVP India clients in US. IVP US would use its best efforts to support IVP India. The price which IVP India would pay to IVP US for the Product Delivery Services at arm's length pricing for previous year. At the end of every financial year settlement of prices would be finalised. The Appellant was also reimbursing expenses, namely rent incurred by IVP US relating to Product Delivery Services. In Balance Sheet for the years from 2013-14 to 2016-17 and ledgers, expenses incurred towards procurement of Product Delivery Services were shown under the head 'Other expenses in Foreign Currency'. It was also observed that the Appellant was showing expenses on account of 'rent' (guest house) to IVP US as part of charges paid by them for product delivery services provided by IVP US.

4. As per the Agreement, it was observed that IVP US had provided services to the clients of the Appellant abroad on Appellant's behalf through their skilled employees against

consideration as agreed upon on monthly basis by way of issuing bill for each month. The nature of activity undertaken by IVP US for the Appellant was elaborated by the Appellant in a Note provided by him.

The same type of Agreement was also made between the Appellant and Indus Valley Partners UK but transaction was negligible.

5. It was further observed that IVP India (the Appellant) had provided software development service to its clients in USA. As per agreement entered into with their clients read with model agreement in the form of Template, IVP India, copy of which was provided by the Appellant, had sold software license for specific fee but installation and implementation of software were not covered within the agreement entered into with its clients. IVP India separately entered into an agreement with its clients through Form-F for rendering services such as installation of software, implementation of software besides maintenance services etc., as and when required. For rendering said services to their clients on his behalf, IVP India engaged IVP US / IVP UK. IVP US provided two types of services (i) installation, implementation of software, maintenance of software and other services to the clients of the Appellant in US, and (ii) Business Auxiliary Service to the Appellant by way of rendering services to the clients of IVP India on behalf of IVP India. Further, as per clause (vi) of the definition 'Business Auxiliary Service' provided under sub-section (19) of section 65 of the Finance Act, 1994, the activity of provisioning of service on behalf of client fell under the category of 'Business Auxiliary Service'.

6. It was found that as per section 68(2) of the Finance Act, 1994 read with notification No.30/2012-ST dated 20/06/2012 and rule 2(d)(i)(G) of the Service Tax Rules, 1994, the Appellant was required to pay service tax on 'Business Auxiliary Service' provided by M/s IVP US to the Appellant under Reverse Charge Mechanism (RCM) for the period from April, 2013 to June, 2017 as service provider was located in foreign territory but it was noticed that no Service Tax was paid by the Appellant.

7. On the basis of above audit observation, Show Cause Notice dated 23.10.18 was issued to the Appellant for demand of Service Tax of Rs.35,49,28,587/- on the services carried out by IVP US for IVP India clients in US on behalf of the Appellant alongwith interest and penalty, treating such services under the category of 'Business Auxiliary Service'. The case was adjudicated and demand was confirmed along with interest and penalty vide the impugned order.

8. Shri Abhinav Kalra C.A. represented the case on behalf the Appellant and contended that IVP US and IVP UK had been working as intermediaries and they had been engaged in arranging the provision of service between the Appellant and his clients located in the USA and the United Kingdom, respectively. Citing the definition of 'Intermediary Service' as provided under rule 2(f) of the Place of Provision of Services Rules, 2012 (in short "the POP Rules"), he contended that an 'intermediary' arranges provision of service for his Principal which would mean 'to plan, organize, and carry out (an event)', 'put (things) in a neat, attractive, or required order'. The main job of intermediary is to get the entrusted work done as per requirement. He further contended that IVP US and IVP UK were providing services like training to the client's employees for use of software, implementation and other regular maintenance of the installed software at client's site, resolution of defects reported by clients and such other services on behalf of IVP India. As per the definition of intermediary the provision of service has to be arranged between two or more persons. In the instant case IVP US / IVP UK arranged the provision of services of installation of software, implementation of software and maintenance of software between IVP India and its clients located in USA or UK. 'Intermediary' excludes a person who provides the main service on his account. The main service provided by the Appellant is 'Software Development'. Installation of software, implementation of software and maintenance of software is also the part of software development but they are after sale services. The payment for services rendered by IVP

US and IVP UK was made by the clients to IVP India only. He went on to say that in terms of rule 9 of the Place of Provision of Services Rules, 2012, the place of provision of service in respect of 'intermediary service' was the location of the intermediary service provider. Since the intermediary services of installation of software, implementation of software and maintenance of software were by IVP US in the United States of America and by IVP UK in the United Kingdom, therefore, the place of provision of service in both the cases would be the United States of America and the United Kingdom, respectively. As the place of provision of service is itself outside the taxable territory of India, demanding service tax on the said services was not legally correct.

9. The Ld. Counsel for the Appellant vehemently refuted the classification of impugned services under 'Business Auxiliary Service'. He pleaded that 'intermediary' means, as per rule 2(f) of the POP Rules, 2012, *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 and services provided by IVP US/UK were intermediary services. In support his contention, he also placed reliance on the clarification issued on intermediary in* 'An Education Guide ('Guidance Note')' on June 20, 2012 issued by the Central Board of Excise and Customs. He emphasized that where a service was capable of being classified under two or more categories, the more specific classification would prevail. It was argued that the definition of "Intermediary" specifically excluded a person who provided the main service or supplies the goods on his account. IVP US and IVP UK were not having any control over the provision of the main service nor can alter any terms between IVP India and their clients. Reliance was placed on the decision of Excel Point Systems (India) Private Limited Vs Commissioner of ST Bangalore, 2018 (10) G.S.T.L. 254 (Tri. - Bang.). He also referred to the decision of the Tribunal in the

matter of Samarth Sevabhavi Trust vs. Commissioner of Central Excise, Aurangabad. In Royal Western India Turf Club Ltd. Vs Commissioner of Service Tax, Mumbai-I, the Tribunal set aside the order in original which confirmed the demand on the basis of wrong classification of service.

10. On the issue of non-inclusion of services (i) installation, implementation of software, maintenance of software and other services to clients, he contended that the Appellant was granted permission by SEZ for carrying out software development services and the said activities include above operations also. He referred the definition of software development given in wikipedia. The ultimate aim of the process of Software development is to bring into existence an operational software and to achieve that ultimate objective, implementation of the software becomes and integral part. Therefore, all the process undertaken by the Appellant for development of software to the installation and giving related ongoing services is duly covered under the term 'Software Development' as authorized by the LOP dated 10/12/2009 under the SEZ Act, 2005.

11. The Ld. Counsel for the Appellant also drew attention towards wrong calculation of demand of service tax. He submitted that the total value of Product Delivery expenses incurred in foreign currency during the financial year 2014-2015 booked in the audited balance sheet of the Appellant Company was Rs.60,12,91,986/- whereas, the value of Product delivery expenses in foreign currency considered by the Ld. Commissioner in the instant show cause notice was Rs.60,27,86,051/-. As such, an excess demand of service tax was computed on the value of Rs.14,94,065/-. He further submitted that the rent was paid as reimbursement of actual rent incurred by the foreign subsidiaries in respect of the guest houses engaged by the Appellant Company in countries outside India. As per Rule 5 of the Service tax (Place of Provision of Services) Rules, 2012, in case of service of accommodation in guest houses etc., the place of supply of such service shall be the place where the immovable property is located which in the

instant matter happens to be a place outside India. Hence, no service tax was chargeable. The Ld. Counsel for the Appellant argued that no penalty was imposable under section 78 & 77 of the Finance Act, 1994 as the Appellant was apprising everything to the department by way of filing of ST-3 returns. He also pleaded the case on time barring issue. Principle of revenue neutrality was also cited. It was contended that the impugned order is not proper and not sustainable.

12. Ld. Departmental Representative contended that services rendered by IVP US/ IVP UK were classifiable under the category of Business Auxiliary Services and were chargeable to service tax under reverse charge mechanism. He reiterated that impugned OIO was proper and legal and maintainable.

13. Heard both sides and perused the appeal records.

14.1. We find that the demand of service tax was raised treating the services namely, installation, implementation and reimbursement of rent services as the Business Auxiliary Service. With effect from 01.07.12, under 'negative list' era when all services were made taxable except those which were enumerated in negative list, there was no definition of 'Business Auxiliary Service'. However, there was definition of 'Business Auxiliary Service' in the Finance Act, 94 during pre-negative list era, under section 65(105)(zzb) of the Finance Act, 1994. It was defined as:-

"Business Auxiliary Service" *means any service in relation to, -*

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

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

Explanation *- For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of change, organised, conducted or promoted by the client, in whatever form or by whatever name*

called, whether or not conducted online, including lottery, lotto, bingo;

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

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

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

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

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

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

In the present case services were treated as in relation to provision of service on behalf of the client and on the basis of said definition, services were proposed to classify under Business Auxiliary Service. In interpretation of statute, the omitted provision cannot be considered. In this context the decision of the Hon'ble Supreme Court in the case of Shiv Shakti Cooperative Society Vs Swaraj Developers & others, date of decision 17.04.2003, can be referred. The Apex Court has held as under:-

"*Section 6 of the General Clauses Act has no application because there is no substantive vested right available to a party seeking revision under Section 115 of the Code. In Kolhapur Canesugar Works Ltd. and another vs. Union of India and others (AIR 2000 SC 811),* ***it was observed that if a provision of statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the***

omission finds them, and if final relief has not been granted before the omission goes into effect, there is no scope for granting it afterwards*."*

In view of the above decision, it is not proper to take assistance of the omitted definition of Business Auxiliary Service for classification of services rendered by IVP US/UK on behalf of IVP India.

14.2. It was contended by the Appellant that the said services were intermediary services. It is found that 'Intermediary' was defined under rule 2(f) of the Place of Provisions of Services Rules,2012 as *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.* Above definition reveals that intermediary involves three or more persons –

i. Provider of service,

ii. Principal on whose behalf service is rendered and

iii. Persons (customers of principal) who actually received services.

It is also important to note that in case provision of service was made by a person is in his own account to his customers, it cannot be termed as an intermediary. The words "arranges or facilitates' the provision of services, between two or more persons, is the crux of the definition of intermediary. Legal meaning of 'facilitate', as per Merriam Webster Dictionary, is i) to make something easier, ii) to help something run more smoothly and effectively. Here in the present case, IVP US/IVP UK help IVP India to run more smoothly and effectively the software sold by IVP India. In 'Taxation of Services: An Education Guide' issued by the CBEC, the 'Intermediary services' were clarified as under:-

"5.9.6 What are "Intermediary Services"?

Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both,

between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time: i) the supply between the principal and the third party; and ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged. For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition. Also excluded from this sub-rule is a person who arranges or facilitates a provision of a service (referred to in the rules as "the main service"), but provides the main service on his own account. 68 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 persons 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.

v) 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'

The above discussion makes it clear as to what kind of services would fall in the category of 'Intermediary Services'. The scope of intermediary services can be summarized as under:-

1. Minimum of Three Parties: Intermediary does not carry out the main supply himself but arranges or facilitates the main supply of goods and services between two or more persons. The arrangement requires a minimum of three parties, two of them transacting in the main supply of goods and services and one arranging or facilitating the main supply. An activity between only two parties can, therefore, NOT be considered as an intermediary service.

2. Two distinct supplies: There are two set of supplies-

a. Main supply, of goods or services, between two principals, which can be a supply of goods or services or securities;

b. Ancillary supply, is the service of facilitating or arranging the main supply of goods or services between the two principals. This supply is identifiable and distinguished from the main supply and is supply of intermediary service.

3. Intermediary service provider to have the character of an agent, broker or any other similar person: The Act itself defines intermediary as a broker, agent or any other person facilitating or arranging the services. The word 'means' in the definition is not inclusive and does not expand the definition to include any other person. The phrase "arranges or facilitates" indicates that intermediary services are only supportive services.

4. Does not include a person who supplies such goods and services or both or securities on his own account: The definition of intermediary services specifically excludes a person who supplies such goods or services, or both or securities on his

own account. The person supplying services, fully or partly, on principal-to-principal basis, cannot be covered under the scope of "intermediary".

5. Sub-contracting for a service is not an intermediary service: The main supplier of goods or services or both can outsource the main service, fully or partly, to sub-contractor. Such sub-contractors are carrying out the main supply of goods or services and provides the main service on his own account to the buyer on behalf of main supplier. Such services are not intermediary and part of main supply only.

14.3 Now we proceed to discuss the nature of services rendered in the present case. To begin with, we consider various clauses of the Agreement dated 21.03.16 entered in to between the Appellant and IVP US/UK.

" a). *IVP US has been engaged by IVP India to provide & execute Product Delivery Services to IVP India customers in US and such other additional services as may be mutually agreed (herein after in consolidation referred to as 'Product Delivery Services').*

b). IVP US has requisite skilled employees who are capable of providing the Product Delivery Services.

c). Subject to the terms and conditions set forth herein, the parties hereto agree that IVP US will allocate specific personnel/employees as may be required by IVP India from time to time to provide & execute Product delivery to IVP India clients in US. IVP US shall use its best efforts to support IVP India.

d). The price which IVP India shall pay to IVP US for the Product Delivery Services at arms length pricing for previous year. Price will be adjusted at the close of financial year to ensure transactions under this agreement are at Arm's Length Prices as per benchmarking provided by global transfer pricing consultants.

c). In addition to above rates, IVP India shall also reimburse expenses (as defined in Para 2.1.2) incurred by IVP US in reference to provision of Product Delivery Services to IVP India on actual basis (Para 2.1.1).

d). 'Expense Reimbursement' in Para 2.1.1 shall include all travel expenses, hotel/guest house expenses, internet & communication expenses, meals or any other expenses which are necessary and directly attributable to the provision of Product Delivery Services (Para 2.1.2).

e). IVP US shall issue a Debit Note/Invoice at the end of each month on IVP India including detailed statements of the costs incurred along with the necessary supporting documents. IVP India shall Pay to IVP US within thirty working days of receipt of invoices from IVP US (Para 2.1.1)."

The nature of activity undertaken by IVP US for the Appellant has been elaborated by the Appellant in a Note provided by him as under:-

> *"The product delivery agreement entered in between IVP India and IVP US is to enable IVP India to provide continuous uninterrupted to its clients abroad. The agreement entered by IVP India with its clients for sale of software licence requires IVP India to provide support services like providing training to the client's employees for use of software implementation and regular maintenance of installed software at client's site, resolution of defects reported by clients and such other services that are required under the agreement to ensure complete delivery of product/software sold by IVP India. IVP India engages IVP US to provide such services on behalf of IVP India when it is not feasible for IVP India to provide such services immediately to ensure uninterrupted product delivery. While performing the services on behalf of IVP India to its clients, IVP US receives performance from IVP India and renders services as agreed between IVP India and its clients abroad. The ultimate responsibility of performance of services to clients remains that of IVP India. Further IVP US can in no way alter the terms of agreement or the price agreed between IVP India and its clients."*
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> A conjoint reading of the Agreement and its Note reveals that –

i. The Appellant was engaged in software development services. He authorised his clients to use software on certain consideration.

ii. The main service of the Appellant was, therefore, authorisation of use of software developed by him.

iii. While selling authorisation of use of software, the Appellant was also agreed upon to provide training to the staff of clients, installation, implementation and rectification defects if any surfaced during use of the software to his clients. The aforesaid services were to be undertaken only after sale of the main service i.e., sale of authorisation of use of software.

iv. It shows that after sale services were also provided by the Appellant to its clients.

v. The Appellant entered into the said agreement with IVP US/UK to provide after sale service to the clients of the Appellant in USA and UK.

vi. Sale of authorisation of use software was main service of the Appellant and training of staff, installation, implementation and rectification of defects services were after sale of main services.

vii. IVP US/UK do not have to change title of main service or alter the main character of such service.

viii. IVPUS/UK were required to work under the control of the Appellant.

ix. Billing was done by IVP US/UK in the name of the Appellant.

The terms and conditions of agreement indicate that IVP US/UK were working as an Agent of the Appellant. All the elements required for qualifying 'intermediary' were present in the above agreement. IVP US/UK could not alter the nature or value of main service, value of intermediary services was clearly identifiable and the services provided by intermediary were clearly identifiable. There were three persons involved in the above deal, i.e., the Appellant, Clients of the Appellant and IVP US/UK. In view of the above discussion we are considered view

that services provided by IVP US /UK to the clients of the Appellant were of the category of 'intermediary services'. Reference is made to the decision of the CESTAT in the case Excel Point Systems (India) Pvt. Ltd. [2018(10) G.S.T.L. 254 (T) where the party was engaged providing project support services, consulting services, marketing on product, technical support services, providing advice, clarification and technical assistance to customers on behalf of the group company located outside India and payment received in convertible foreign exchange. The party in the said matter contested that he was providing services in nature of Business Auxiliary. The Ld. First appellate authority however, held that the services rendered by the appellant fall under the definition of intermediary under Rule 2(f) of the Place of Provisions of Services Rules, 2012 and in terms of Rule 9 of the Place of Provision of Services Rules, 2012 specified vide Notification No. 28/2012, dated 20-6-2012 which is effective from 1-7-2012 in the case of intermediary service, place of provision of services shall be the location of the service provider. The findings of the Ld. Commissioner were subsequently upheld by the Hon'ble CESTAT. The said decision is squarely applicable to the present case also.

15. We find that service tax was also demanded on the amount of 'rent' reimbursed to IVP US for guest houses in USA for the employees deployed for providing services on behalf of the Appellant to its client under Business Auxiliary Service. It is observed that 'renting of immovable property' was a separate service and was not covered under Business Auxiliary service by any stretch of imagination. The definition of 'renting' is provided under section 65B of the Finance Act, 1994 as below:-

"*(41) "renting" means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property;"*

The above facts clearly show that renting of immovable property was a separate service, not covered under Business Auxiliary Service.

16. It is seen that demand was raised and subsequently confirmed under reverse charge mechanism treating the place of provision of services within taxable territory. Under the Place of Provisions of Services Rules, 2012 (POP Rules), place of provisions of services were specified for different services. *Rule 3 of the POP Rules specifies general rule that the place of provision of a service would be place of service recipient. Rule 4 provides place of provision of performance based services. Rule 5 hypothecates place of provisions in relation to an immovable property, including services provided in this regard by experts and estate agents, provision of hotel accommodation by a hotel, inn, guest house, club or campsite, by whatever, name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including architects or interior decorators, shall be the place where the immovable property is located or intended to be located. Rule 6 is in regard to place of provision relating to events. Rule 7 fixes place of provision of services provided at more than one location. Rule 8 provides place of provision of services where provider and recipient are located in taxable territory. Rule 9 provides place of provision of the following services as the location of service provider:-*

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

(b) omitted vide Notification 46/2016-Service Tax

(c) Intermediary services;

(d) Service consisting of hiring of means of transport other than, - (i) aircrafts, and (ii) vessels except yachts upto a period of one months.

Rule 10provides place of provision of goods transportation services. Rule 11 defines place of provision of passenger

transportation service. Rule 12 defines place of provision of services provided on board a conveyance.

In the present case services for which demand was raised were (i) intermediary services and (ii) renting of immovable property services. In accordance with Rule 9 of the POP Rules, place of provision of service of intermediary service was location of service provider. Service providers in the instant case were located in USA and UK. Hence, place of provision of service was USA/UK. As both the service provider and service recipient were located in non-taxable area, service tax demanded in this case is not sustainable. It is also observed that in the case of 'renting' of guest houses located in USA, place of provision of service, as per rule 5 of the POP Rules, was location of immovable property. i.e., guest houses. As the recipient of renting service was IVP US and immovable property was located in USA, i.e., non taxable territory, demand of service tax on renting amount is not sustainable.

17. The Ld. Pr. Commissioner while confirming demand had given his findings as under:-

> *"5.3.7 I find that the services, i.e. installation, implementation, maintenance and other ancillary services performed by IVP US and IVP UK to the clients of IVP India on behalf of IVP India were main services, i.e., the services of installation and maintenance services etc. As such IVP US has performed the sais services (main service) and thus services IVP US are not intermediary services as defined under rule 2(f) of the Place of Provisions of Services Rules,2012 as the definition of intermediary excludes the person who provides main service".*
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> *"5.4.2 I find that the IVP US has provided the installation, implementation of software and on other going services etc to the vendors of the IVP India in USA. I find that IVP India had provided software development service to their clients in USA. As per the agreement entered in to with their clients read with model agreement in the form of Template.*

IVP India had sold software licence for specific fee and installation & implementation of software were no covered within scope of agreement entered into with their clients, however, they separately entered into agreement through Form –F for rendering services such as installation, implementation of software besides maintenance services etc. as and when required instead of providing these services by their own employees. IVP India engaged IVP US /UK to perform said services to their clients on their behalf against agreed upon consideration. In the instant case, IVP US had provided the services of installation, implementation of software and maintenance of software and other services to the clients of IVP India in US.

5.4.3 From the above definition of Business Auxiliary Service and services provided by IVP US, I find that as per clause vi of the definition of Business Auxiliary Service provided under sub-section (19) of section 65 of the Finance Act, 94 the activity of provisioning of service on behalf of client is rightly classified is rightly classified under Business Auxiliary Service."

It is noticed that for classification of impugned services definition of Business Auxiliary Service given in section 65 of the Finance Act, 94 was taken into consideration. Section 65 of the Finance Act, 94 was omitted with effect from 01.07.2012. It shows that the definition was not in existence with effect from 01.07.12. The demand in the instant case pertains to the period from April, 13 to June, 17 when the definition provided under section 65 was not in existence. The classification of service on the basis of a non-existing provision is bad in law. With effect from 01.07.12, all services except services mentioned in negative list were made taxable. Contrary to that, definition of 'intermediary' was available even after 01.07.12 and nature of impugned services were within four corners of intermediary services. We therefore find that observation of the Pr. Commissioner is not sustainable and is liable to be set aside.

18. It is also important to note that the Appellant was an SEZ unit and was availing Cenvat credit of taxes paid on its input services. Services which were provided by IVP US/UK were input services for the Appellant. In this case service tax was payable under reverse charge mechanism under notification No.30/12-ST dated 20.06.12 by the service recipient and the same was available for taking back in the form of Cenvat Credit. Thus, there was no gain to the government exchequer in that case. It is a case of revenue neutrality. We find that the issue of the applicability of revenue neutrality in the circumstances of charging service tax under reverse charge mechanism has been settled in catena of judgments.

In the case of Jet Airways India Ltd. [2016-TIOL-2072-CESTAT-MUM], the Tribunal considered issue of revenue neutrality where service tax was required to be paid under reverse charge mechanism as service provider was a foreign based firm. The Tribunal held that as the Appellant could have availed CENVAT credit of the service tax paid on reverse charge mechanism, hence, a revenue neutral situation arises wherein Appellant pays the tax and takes the credit and accordingly the tax demand, interest thereon and penalties were set aside.

In the case of Jain Irrigation System Ltd. [2015 (40) S.T.R. 572 (T)] the Tribunal holds that revenue neutral situation comes about when credit is available to the assessee.

In the case of Coca-Cola India Pvt. Ltd. [2007 (213) E.L.T. 490 (S.C.)] the Hon'ble Supreme Court accepted the stand that the duty payable in respect of beverage basis/concentrates is modvatable. Since the duty payable is modvatable, there is no revenue implication. By applying the ratio of above decisions, we find that the present case is a revenue neutrality case and as such no demand is sustainable.

19. As regards interest and penalty, we find that the issue is no more *res integra*. Once demand is not sustainable, interest and penalty under section 78 of the Finance Act, 1994 would not be imposable. In support of above, reference is made to the following decisions:-

(1) CCE, Pune Vs. Coca-Cola India Pvt. Ltd., 2007 (213) E.L.T. 490 (S.C.);

(2) CCE & C. Vadodara-II Vs. Indeos Abs Ltd. 2010 (254) E.L.T. 628 (Guj.), affirmed by the Hon'ble Supreme Court in [2011 (267) E.L.T. A155 (S.C)

(3) Hindalco Industries Ltd. v. Commissioner of Central Excise, Bhubaneswar-II – 2023-TIOL-403-CESTAT-KOL.

(4) M/S. Jai Balaji Industries Ltd. v. Commissioner of Central Excise, Bolpur – 2023 (6) TMI 1102 – CESTAT KOLKATA.

In the case of CCL Products (India) Ltd. [2012 (927) S.T.R. 342 (T), the Tribunal has held that in the case of revenue neutrality, no penalty is imposable under section 78 of the Finance Act, 1994.

20. In view of the foregoing discussions, we set aside the impugned order and allow the appeal with consequential relief if any.

(Order pronounced in open court on **17th January, 2024**)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS