CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 53892 of 2018

(Arising out of Order-in-Appeal No. 255/Central Tax/Appl-II/Delhi/2018 dated 14.07.2018 passed by the Commissioner of Central Tax, Appeal-II, Bhikaji Cama Place, UG Floor, EIL Building, New Delhi)

Principal Commissioner .....**Appellant**
GST South, 3rd Floor, EIL Annex Building, Bhikaji Cama Place
New Delhi – 110 066

VERSUS

M/s Jindal Poly Films Ltd. .....**Respondent**
Plot No. 12, Local Shopping Complex
Sector B-1, Vasant Kunj
New Delhi – 110 070

AND

Service Tax Appeal No. 53893 of 2018

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VERSUS

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Plot No. 12, Local Shopping Complex
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New Delhi – 110 070

APPEARANCE:
Dr. Radhey Tallo, Authorised Representative of the Appellant
Shri Karan Kanwal, Advocate, for the Respondent

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO. 50135-50136/2023

DATE OF HEARING/DECISION : February 02, 2023

JUSTICE DILIP GUPTA :

Both these appeals have been filed by the Department to assail the order dated July 14, 2018 passed by the Commissioner of Central Tax, Appeals-II, Delhi[1] that upholds the two orders dated January 12, 2018 and January 31, 2018 passed by the Assistant Commissioner. The order dated January 31, 2018 sanctions refund of Rs. 1,73,06,354/- in respect of the refund claim filed by M/s Jindal Poly Films Limited[2] for the months of February 2016, March 2016, May 2016, August 2016, November 2016 and March 2017, while the order dated January 12, 2018 sanctions refund of Rs. 57,13,851/- in respect of the refund claim filed by the respondent for the months of August 2015, October 2015 and December 2015. The Commissioner (Appeals) has held that the respondent would be entitled to the refund for the reason that it is not an 'intermediary' as it had provided services to M/s Jindal Films America LLC[3] on its own account.

2. The issue involved in these two appeals is regarding the refund claimed by the respondent under rule 5 of the CENVAT Credit Rules 2004[4] read with the Place of Provision of Service Rules 2012[5] of the unutilized input service credit of input services used by the respondent to export information technology software service to Jindal LLC located in New York, USA under the contracts. The order passed by the Commissioner (Appeals), while granting the refund, has primarily

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1 the Commissioner (Appeals)
2 the respondent
3 Jindal LLC
4 the 2004 Credit Rules
5 the 2012 Rules

placed reliance upon the judgment of the Delhi High Court in **Verizon Communication India Pvt. Ltd. vs Asstt. Commr. S. T., Delhi-III**[6].

3. As the dispute relates to the refund claims filed by the respondent under rule 5 of the 2004 Credit Rules, the relevant portion of rule 5 is reproduced below:

> **"5. Refund of CENVAT Credit:**
>
> A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette:
>
> Refund amount=(Export turnover of goods+ Export turnover of services) x Net CENVAT credit
> Total turnover
>
> xxxxxx xxxxxx xxxxxx
>
> **Explanation 1:** For the purpose of this rule,-
> (1) "export service" means a service which is provided as per rule 6A of the Service Tax Rules, 1994."

4. Since "export service" means a service which is provided as per rule 6A of the Service Tax Rules 1994[7], the said rule is reproduced:

> **"6A. Export of services.-**
> (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

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6 **2018 (8) G.S.T.L. 32 (Del.)**

7 **the 1994 Rules**

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."

5. As noticed above rule 6A of the 1994 Rules deals with export of services and sub-clause (d) of sub-rule (1) provides that the provision of any service shall be treated as export of service when the place of provision of service is outside India. The place of provision of service is determined under the 2012 Rules. Rule 3 deals with place of provision generally. It is as follows:

"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."

6. It would be seen that in terms of rule 3 of the 2012 Rules, the place of provision of a service shall be the location of the recipient of service.

7. Rule 9, however, deals with place of provision of specified services and is as follows:

> **"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 all means of transport other than, -
> (i) aircrafts, and
> (ii) vessels except yachts,
> upto a period of one month."

8. Under rule 9 (c) of the 2012 Rules, the place of provision for 'intermediary services' would be the location of the service provider.

9. According to the department, since the service provider i.e. the respondent is an intermediary, the place of provision of service by the respondent would be the location of the service provider under rule 9(c) of the 2012 Rules. According to the respondent, the place of provision of service shall be the location of the recipient of service as provided under rule 3 of the 2012 Rules.

10. It is, therefore, necessary to determine whether the respondent provides 'intermediary service'.

11. The concept of "intermediary" was introduced in the 2012 Rules and 'intermediary' has been defined in rule 2(f) as follows:

> "**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, but does not include a person who provides the main service or supplies the

goods on his account."

12. The communication dated 16 March 2012 by the Department of Revenue (Tax Research Unit) dealing with the Union Budget 2012 deals with 'intermediary services' and is as follows:

> **"3.7.7 What are "Intermediary Services"?**
>
> 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 (commission agent i.e a buying or selling agent) is excluded by definition.
>
> 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 are 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) Stockbroker
> (iv) Commission agent [an agent for buying or selling of goods is excluded
> (v) Recovery Agent
>
> Even in other cases, wherever a provider of any service acts as an agent for another person, as identified by the guiding principles outlined above, this rule will apply."

13. Rule 2(f) of the 2012 Rules, as noticed above, defines an "intermediary" to mean a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service to be 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. The communication dated 16 March 2012 referred to above, also clarifies that an intermediary service is involved with two supplies at any one time namely:

> (i) the supply between principal and the third party;
> (ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

14. The said communication also mentions that in order to determine whether a person is acting as an intermediary or not, three factors namely nature and value, separation of value and identity and title have to be examined. In regard to the "nature and value", it states that 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.

Regarding "separation of value", it states that the value of service provided by an intermediary is invariably identifiable from the main supply of service that he is arranging. Generally, the amount charged by an agent from his principal is referred to as "commission". In regard to "identity and title", it provides that the service provided by the intermediary on behalf of the principal are clearly identifiable and example of a travel agent, a tour operator, stock broker, commission agent and a recovery agent have been given.

15. The agreements executed between the respondent and Jindal LLC would, therefore, have to be examined to determine whether the respondent is an 'intermediary'. The relevant clauses of one such agreement dated August 20, 2014 are reproduced below:

> 7.1 JPFL will provide the Services as specified in Exhibit-I this SOW to Jindal Films in accordance with the terms of the SOW either directly or through third party Contractors/Service's Providers.
>
> JPFL shall provide to Jindal Films Services of SAP Implementation Service pursuant to the SOW. The terms and conditions as contained in the Agreement shall apply to the SOW. In case there is any conflict in the provision of SOW and the Agreement, the provision of SOW shall prevail'.
>
> 7.2 JPFL shall provide to Jindal Films Services related to its SAP software. The scope of such services are described in Exhibit 1. It is mutually understood that business requirements, resources and dates as well as the relevant remuneration may be subject to change via the change Request Procedure, including if Jindal Films responsibilities and assumptions are not performed in a timely and appropriate manner and/or if the Project resources are not provided by Jindal Films.
>
> JPFL shall provide the service as per the agreed statement of Work. JPFL is responsible for implementation, scope, costs, resources, and targeted solutions. Jindal Films shall designate a Project Manager to

work with the JPFL Project Manager. It is mutually understood that if business requirements, resources and dated change, Jindal Films shall be entitled for revising the estimated project plans and requesting changes to the requirements for JPFL Services which shall be reasonably considered by JPFL.

Jindal Films agrees to provide appropriate project resources, including but not limited to equipment, data, information, workspace and appropriate and cooperative personnel, to facilitate the performance of the services."

16. The Commissioner (Appeals), in the impugned order, has recorded the following findings :

4.(i) I have carefully gone through the facts of the case and considered the grounds of appeals made by the appellant Revenue. Briefly stated, the respondent are registered under Service Tax as a provider of various taxable services. After the export of output services, they have filed various rebate claims totaling to Rs. 2,30,20,205/- under Notification No. 39/2012-ST dated 20.06.2012. After scrutiny as per the taw, the rebate claims have been sanctioned in full. Being aggrieved, the appellant Revenue has filed present appeals. The only ground taken in these appeals is that "the service provided by the respondent falls under intermediary service. Hence as per Rule 9 of Place of Provision of Services Rules, 2012, the service provided by the respondent to the Service receivers located outside India cannot be said to be export of service. Barring this plea, other facts of case are undisputed. **Hence, I proceed to examine as to whether or not the service provided by the respondent is an 'intermediary service'**.

(iii) From the perusal of impugned orders, I find that the respondent have provided information technology software service to their client located outside India. These services are mainly related to SAP Software. During the provision of this service, the respondent have received some input services from other service providers and after paying applicable Service Tax on these services, the respondent have claimed rebate of such Service Tax. The appellant Revenue has placed reliance on the agreement between the respondent and their Service receiver to bring home the plea that the service provided by the respondent falls within intermediary service. However, on perusal of the portion of the agreement (relied upon by the appellant), I find

> nothing which supports this plea. **On the other hand, the impugned orders clearly show that the service provided by the respondent is information technology software service; that the respondent have provided this service on their own account. For the provision of main service, the respondent have used the input services provided by some of the service providers. However, this fact cannot change the factual position that the respondent have provided the main service on their own account to their foreign based Service receiver**. The judgment in the case of M/s Verizon Communication India Pvt. Ltd. Vs ACST [2018 (8) GSTL 32 (Del)] clearly holds so. With regard to service under dispute, their foreign based Service receiver is Jindal Poly Films LLC situated in USA. The agreement entered into by the respondent with the foreign based service receiver clearly shows that the respondent are the service provider whereas the foreign based entity is the Service receiver. As per one of the impugned orders viz. order no. 17/2017-R, the respondent have used input services valuing more than Rs. 99.64 Crores. These input services have been used for the export of services valuing more than Rs. 139.74 Crores. The whole of the payment against the export of service has been received by the respondent. The full payment against the input services have been made by the respondent, and the full payment of output service has also been received by them from the foreign based service receiver. **Thus, in the facts of the case, I find nothing to show that the service provided by the respondent falls under intermediary service. Accordingly, both the appeals are liable to be dismissed**."
>
> **[emphasis supplied]**

17. As noted above, an intermediary is a person who arranges or facilitates provision of the main service between two or more persons. The respondent is not involved in the arrangement or facilitation of the supply of service. In fact, the respondent had entered into agreement with Jindal LLC for providing telecommunication services and other services on a principal to principal basis. The telecommunication service and other services provided by the respondent qualify for export service since it is providing services to Jindal LLC which is located outside India

and is receiving convertible foreign exchange for such services.

18. The Commissioner (Appeals) relied upon the decision of the Delhi High Court in **Verizon Communication India Pvt. Ltd.** versus **Asstt. Commr., S.T. Delhi-III**[8] to hold that the respondent is not an intermediary. It is seen from a perusal of the aforesaid judgment that Verizon India had entered into a Master Supply Agreement with Verizon US for rendering connectivity services for the purpose of data transfer. Verizon US was engaged in the provision of telecommunication services for which it entered into contracts with the customers located globally. Since Verizon US did not have the capacity to provide such services across the globe, it utilized the services of Verizon India to provide connectivity to its customers. The issue, therefore, that arose before the Delhi High Court was whether the telecommunication services provided by Verizon India during the period April 2011 to September 2014 to Verizon US would qualify as 'export of services'. The department believed that the said services would not qualify as 'export of services'.

19. The Delhi High Court noted that in the process of gathering the data from the entities in India for transmission to Verizon US, Verizon India availed services of Indian telecommunication service providers like Vodafone and Airtel. These service providers raised invoices on Verizon India and Verizon India paid these service providers the requisite charges. Verizon India thereafter raised an invoice on Verizon US for the 'export of services' provided by it to Verizon US. Since the recipient of the service (Verizon US) was outside India, Verizon India treated it as an export of service and understood that it was exempted

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8 2018 (8) G.S.T.L. 32 (Del.)

from service tax under the Export of Service Rules 2005. Verizon US, in turn, raised invoices on its customers in the US. The refund claims of Verizon India pertained to the period January 2011 to September 2014. The Delhi High Court pointed out that the 'recipient' of services is determined by the contract between the parties and this would depend on who has the contractual right to receive the services and who is responsible for the payment for the services provided to the service recipient; there was no privity of contract between Verizon India and the customers of Verizon US; such customers may be the 'users' of the services provided by Verizon India but were not its recipients; Verizon India may have been using the services of a local telecom operator but that would not mean that the services to Verizon US were being rendered in India; and the place of provision of such service to Verizon US remains outside India.

20. In this connection, the Circular dated 24.02.2009 was relied upon which is as follows:

> "For the services that fall under category III [Rule 3(1)(iii)], the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category III service [Rule 3(1)(iii)], it is possible that export of service may take place even when all the relevant activities take place in India so long as the benefits of these services accrue outside India..."

21. The summary of the conclusions noted by the Delhi High Court are as follows:-

> **"54. To summaries the conclusions:**
>
> (i) It made no difference that Verizon India may have provided 'telecommunication service' and not 'business

support services' since to qualify as export of service both had to satisfy the same criteria.

(ii) **The provision of telecommunication services by Verizon India during the period January, 2011 till 1st July, 2012 complied with the two conditions stipulated under Rule 3(1)(iii) of the ESR to be considered as 'export of service'. In other words, the payment for the service was received by Verizon India in convertible foreign exchange and the recipient of the service was Verizon US which was located outside India.**

(iii) **That Verizon India may have utilised the services of Indian telecom service providers in order to fulfil its obligations under the Master Supply Agreement with Verizon US made no difference to the fact that the recipient of service was Verizon US and the place of provision of service was outside India.**

(iv) The subscribers to the services of Verizon US may be 'users' of the services provided by Verizon India but under the Master Supply Agreement it was Verizon US that was the 'recipient' of such service and it was Verizon US that paid for such service. That Verizon India and Verizon US were 'related parties' was not a valid ground, in terms of the ESR or the Rule 6A of the ST Rules, to hold that there was no export of service or to deny the refund.

(v) The Circular dated 3rd January, 2007 of the C.B.E. & C. had no application to the case on hand. It did not pertain to provision of electronic data transfer service. It was wrongly applied by the Department. With its total repeal by the subsequent Circular dated 23rd August, 2007, there was no question of it applying to deny the refund for the period January, 2011 till September, 2014.

(vi) **Even for the period after 1st July, 2012 the provision of telecommunication service by Verizon India to Verizon US satisfied the conditions under Rule 6A(1)(a), (b), (d) and (e) of the ST Rules** and was therefore an 'export of service'. The amount received for the export of service was not

amenable to service tax."

(emphasis supplied)

22. The aforesaid judgment of the Delhi High Court in **Verizon Communication** squarely applies to the facts of the present case. The Commissioner (Appeals) correctly appreciated the position in the impugned order in holding that the respondent was not an intermediary and was involved in export of service to Jindal LLC.

23. It would also be appropriate to refer to the decision of the Tribunal in **Verizon India Pvt. Ltd.** versus **Commissioner of Service Tax, Delhi**[9]. The Tribunal held that as the appellant had provided services under a contract to Verizon US which was located outside India and had raised invoices for such services and received remittance in foreign exchange, the appellant would satisfy the conditions set out in rule 6A of the 1994 Rules. The relevant portion of the decision is reproduced below:

> "30. xxxxxxxxxx Further, we find that the Hon'ble Delhi High Court has held, that its findings applied to post-Negative List also *i.e.* from July, 2012 onwards, as held by the Hon'ble High Court in its aforementioned judgment particularly in para-54 (supra). **Further, admitted facts are that the appellants have provided output services and raised invoices on principal to principal basis. The appellant has not been acting as intermediary between another service provider and Verizon US. This fact is also supported from the fact that the appellant has raised their bills for the services provided on the basis of cost plus 11% mark-up.** As the services have been provided by the appellant under contract with Verizon US, who are located outside India and have raised their invoices, for such services and have received the remittance in convertible foreign exchange,

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9. **2021 (45) G.S.T.L. 275 (Tri.-Del.)**

> the appellant satisfies all the conditions, as specified under Rule 6A of Service Tax Rules, 1994, inserted w.e.f. 1-7-2012. xxxxxxxxxxxx
>
> 31. **From perusal of the aforementioned ruling, it is evident that the services of the appellant to Verizon US do not merit classification under the category of 'intermediary services'.** Further, the Hon'ble High Court has held in the appellant's own case (supra) that the agreement between the related parties does not have any impact on the export of services. Further, the findings of the Commissioner (Appeals) that the service provided by the appellant do not qualify as export, as such services provided to the customers, have been consumed in India, is directly in conflict with the ruling of this Tribunal in the case of *Paul Merchants Ltd.* (supra). **Accordingly, we hold that the appellants have rendered services to Verizon US as principal service provider and not as an intermediary. Accordingly, we hold that the appellants are entitled to refund under Rule 5 of the Cenvat Credit Rules, 2004 read with the notification.** Thus, these appeals are also allowed with consequential benefit and the impugned orders are set aside."
>
> **(emphasis supplied)**

24. Learned counsel for the respondent also placed reliance upon a decision of the Chandigarh Bench of the Tribunal in **Service Tax Appeal No. 61877 of 2018** decided on 08.08.2022[10]. After reproducing the definition of 'intermediary', the Bench observed :

> "5. A plain reading of the aforesaid provision makes it clear that to attract the said definition there should be two or more persons besides the service provider. In other words an "intermediary" is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus necessary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (main supply) and one arranging or facilitating

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10. **M/s. Black Rock Service India Private Limited vs. Commissioner of CGST**

the said main supply. Therefore, an activity between only two parties cannot be considered as an intermediary service. **An intermediary essentially arranges or facilitates the main supply between two or more persons and does not provide the main supply himself. The intermediary does not include the person who supplies such goods or services or both on his own account. Therefore there is no doubt that in cases wherein the person supplies the main supply either fully or partly, on principal to principal basis, the said supply cannot come within the ambit of "intermediary".** Sub-contracting for a service is also not an intermediary service. The supplier of main service may decide to outsource the supply of main service, either fully or partly, to one or more sub- contractors. Such sub-contractor provides the main supply, either fully or a part thereof and does not merely arrange or facilitate the main supply between the principal supplier and his customers and therefore clearly not an intermediary. xxxxxxxxxxx

6. What we have gathered from the perusal of the agreement as well as submission of the learned Counsel is that the Support Services in relation to creation of clients account is limited to the performing of services on HLX systems and that too as a backend process. It is the specific case of the appellants that HLX does not have any clients in India. Maintenance, support or troubleshooting function, if any, the appellant is required to perform on requisition from HLX in order to ensure seamless access of services which means there is no requirement of any interaction, whatsoever with the clients of HLX and for performing all these services on behalf of HLX, the appellant receives a pre-agreed consideration from HLX in convertible foreign exchange. Commission is being paid to an intermediary not the transfer pricing, whereas the appellant herein was getting transfer pricing. **There is nothing on record to show that the appellant is liasioning or acting as intermediary between the HLX and its clients. Therefore, the finding of the lower authorities that the appellant is an "intermediary" is misplaced.** We are astonished to notice that although for earlier periods the then adjudicating authority allowed the refund claim of the appellant, but without looking into those

> orders and without giving any reason for not following the earlier orders, this time the concerned Authorities held otherwise by denying the credit."
>
> **(emphasis supplied)**

25. The aforesaid view also finds support from the decision of the Tribunal in **Principal Commissioner, CGST Delhi South Commissionerate** vs **Comparex India Pvt. Ltd.**[11] and the decision of the Tribunal in **Commissioner of Central Tax, Central Excise & Service Tax** vs **M/s Singtel Global India Private Limited**[12]**.** It needs to be noted that the Department had filed an appeal before the Supreme Court against the decision of the Tribunal rendered in **Comparex India Pvt. Ltd.** and the Civil Appeal was dismissed on February 08, 2021 on the ground of delay.

26. In this connection, it would also be useful to refer to the Circular dated September 20, 2021 issued by the Central Board of Indirect Taxes and Customs regarding the scope of 'intermediary' and the relevant portion is reproduced below :

> "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. **<u>Primary Requirements for intermediary services</u>**
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> 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

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11 MANU/CE/0016/2020

12 Service Tax Appeal No. 52609 of 2019 decided on December 07, 2022

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 Circular No. 159/15/2021-GST 3 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."

27. The aforesaid Circular also emphasizes that 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. It also clarifies that in cases where a 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'.

28. There is, therefore, no illegality in the order dated July 14, 2018 passed by the Commissioner. `

29. Thus, both the Service Tax Appeals, namely Service Tax Appeal No. 53892 of 2018 and Service Tax Appeal No. 53893 of 2018 filed by the department deserve to be dismissed and are dismissed.

(Dictated & pronounced in the open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R PRIYA)
MEMBER (TECHNICAL)

Golay