2022/DHC/005541

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 14.12.2022

\+ **W.P.(C) 8876/2021 and CM APPL. 51970/2022**

SINGTEL GLOBAL INDIA PVT. LTD ..... Petitioner

versus

UNION OF INDIA & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Kamal Sawhney with Mr. Krishna Rao and Ms. Aakansha Wadhwani, Advocates.

For the Respondents : Mr. Satish Kumar, Senior Standing Counsel with Mr. Dheeraj Sharma, Assistant Commissioner alongwith Ms. Vaishali Goyal, Advocate for R-2&3.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE PURUSHAINDRA KUMAR KAURAV

JUDGMENT

VIBHU BAKHRU, J

1. Singtel Global India Pvt Ltd. – a company incorporated in India has filed the present petition impugning an order dated 28.08.2020 (hereafter '**the impugned order**'), passed by the Assistant Commissioner, Central Tax, Central Excise & Service Tax (hereafter '**the Assistant Commissioner**') denying the claim for refund of ₹8,69,82,565/- and ₹3,30,37,934/- for unutilized input tax credit. The petitioner had made the said claim for the period of October, 2015 to

December, 2016 and for the period of January, 2017 to June, 2017, respectively.

Factual Context

2. The controversy, in the present petition, relates to the petitioner's claims for unutilised input tax credit relating to three separate periods: July, 2015 to September, 2015; October, 2015 to December, 2016; and January, 2017 to June, 2017.

3. The petitioner is, *inter alia*, engaged in providing telecommunication services and claims that a part of its services are exported. The petitioner claims that export of services are zero rated, and the input tax credit available to it remained unutilised. The petitioner applied for a refund of input tax credit for an amount of ₹1,32,70,532/- for the period July, 2015 to September, 2015.

4. The adjudicating authority (the Assistant Commissioner) examined the said claim and had found that the petitioner was engaged in the export of services and therefore, was entitled to refund of the unutilised input tax credit in relation to the said services. The petitioner's claim was duly verified and the learned Assistant Commissioner held that a refund of a sum of ₹1,32,70,532/- was found due to the petitioner. The said amount was computed by apportioning the available input tax credit in the ratio of export turnover to the total turnover for the given period.

5. The learned Assistant Commissioner had passed an order dated 18.06.2018, directing that the said amount of ₹1,32,70,532/- be transferred to the bank account of the petitioner. The Revenue appealed the said order before the learned Commissioner (Appeals), which was rejected by an order dated 31.01.2019. The principal ground urged by the Revenue was that the petitioner had merely procured services for their overseas clients; thus, the petitioner was an intermediary and not the service provider, providing services on his own account.

6. The learned Commissioner (Appeals) found that the said issue was covered by the decision of this Court in ***Verizon Communication India Pvt. Ltd. v. Assistant. Commissioner Service Tax: 2018 (8) G.S.T.L. 32 (Del.)***, and rejected the appeal.

7. The Revenue appealed the said decision before the Customs, Excise and Services Tax Appellate Tribunal (hereafter '**the CESTAT**').

8. In respect of the second period from October, 2015 to December, 2016, the petitioner claimed refund of an amount of ₹8,69,82,565/-. The petitioner also provided all the necessary details including copies of the input service invoices for the said period. The petitioner's claims were rejected on the ground that the services, rendered by the petitioner, fell within the category of "*intermediary services*". The adjudicating authority (the Assistant Commissioner) found that the conditions specified in Clause (d) of Rule 6(A)(1) of the Service Tax Rules, 1994 were not satisfied and the services, rendered by the petitioner, did not qualify as export of services. On the basis of the said finding, by an

order dated 22.10.2018, the learned Assistant Commissioner rejected the petitioner's claim for the refund of the input tax credit.

9. The petitioner appealed against the said decision to the learned Commissioner (Appeals.) The said appeal was allowed by an order dated 05.07.2019. The learned Commissioner (Appeals), following the decision in ***Verizon Communication India Pvt. Ltd. v. Assistant. Commissioner Service Tax* (*supra*)**, which held that the petitioner was not an intermediary and was engaged in the export of his services on his own account.

10. The Revenue filed an appeal against the order dated 05.07.2019, passed by the learned Commissioner (Appeals), before the learned CESTAT**.**

11. The petitioner's claim for refund of input tax credit against export services for the period January, 2017 to June, 2017 met the same fate as the petitioner's claim for the October, 2015 to December, 2016 period. The adjudicating authority declined the said claim and accordingly, passed an order dated 23.07.2019. By an order dated 01.11.2019, the learned Commissioner (Appeals) allowed petitioner's appeal against the said order.

12. The Revenue appealed the said decision before the learned CESTAT.

13. The learned CESTAT had disposed of the appeals preferred by the Revenue for the aforementioned three periods by a common order

dated 07.12.2022. The learned CESTAT held that the petitioner was not an intermediary and was, *inter alia*, engaged in the export of telecommunications services. The relevant extract of the said order reads as under: -

> '23. In the present case, what transpires from the aforesaid Agreement dated 14.07.2011 is that SingTel is a licensed telecommunication service provider in Singapore. It, on its own or through one or more of its affiliates or suppliers, has the capability to provide services in foreign territories. SGIPI is a licensed provider of certain telecommunication services in India and provides, or can procure, certain telecommunication services in India. SGIPL desired to supply and SingTel had agreed to procure from SGIPL services necessary and ancillary to enable SingTel to provide to its customers seamless global telecommunication services upon the terms set out in the Agreement. The responsibilities of SGIPL are contained in clause 4 of the Agreement. Clause 4.3 provides that SGIPL shall provide, at its own expense, all facilities and resources whatsoever necessary to enable it to provide services to SingTel. In terms of clause 4.7, SGIPL shall bill on SingTel for the services provided by it. The responsibilities of SingTel are contained in clause 5 of the Agreement. Clause 6 of the Agreement deals with charges and payment. It provides that SGIPL will invoice SingTel in US dollars for the services by the end of the month following the month of the provision of services and SingTel will be required to pay such monthly invoices within 30 days of the date of such monthly invoices. Both the parties also agreed on the transfer

pricing adjustments to prices at any time in order to ensure that prices are at acceptable at arm's length. Clause 19 of the Agreement specifically provides that the relationship of the parties to the Agreement shall always and only be that of independent contractors and nothing in the Agreement shall create or be deemed to create a partnership or the relationship of principal and agent or employer and employee between the parties.

24. The Agreement executed between SGIPL and SingTel leaves no manner of doubt that SGIPL is not an intermediary. There is no contract between SingTel and the operators in India like Airtel. SGIPL may have used the services of telecom operators in India but this would not mean that these telecom operators are providing services to SingTel. Such steps have been taken by SGIPL in terms of the Agreement entered with SingTel. What is also important to notice in that SGIPL has to provide, at its own expenses, all facilities and resources necessary to enable SGIPL to provide the services to SingTel. It is SGIPL which bills SingTel for the services provided by it in US dollars and SingTel has to make the payment within 30 days of the date of such monthly invoices. The Agreement also specifically provides that the relationship of the parties to the Agreement shall always and only be that of independent contractors and nothing shall create or be deemed to create a partnership or the relationship of principal and agent or employer and employee between the parties. The terms of the Agreement also perse do not create any relationship of principal and agent or employer and employee. An agent is a person employed to do any act for another or to

represent another in dealing with third persons. The persons for whom such act is done, or who is so represented, is the principal. A broker is a middleman or an agent who, for a commission on the value of the transaction, negotiates for others the purchase or sale of stocks, bonds, commodities, or a property. These two situations do not arise in the present case.

25. An intermediary is a person who arranges or facilitates provision of the main service between two or more persons. SGIPL is not involved in the arrangement or facilitation of the supply of service. In fact, it has entered into two Agreements; one with SingTel and the other with the Indian telecommunication service providers. It needs to be noted that SingTel had entered into Agreements with end customers for providing telecommunication services and it is for the provision of this telecommunication services that SingTel entered into an Agreement with SCIPL on a principal to principal basis. SGIPL entered into agreements with the Indian telecommunication service providers for providing bandwidth so as to enable it to provide the required services to SingTel for its customers. Thus, the two Agreements are distinct and independent from each other. SGIPL provides the main service ie. telecommunication service to SingTel on its own account. The telecommunication service provided by SGIPL qualify for export since it is providing telecommunication services to SingTel which is outside India and is receiving convertible foreign exchange for such services. SGIPL is not a privy to the Agreement entered into between SingTel and its end customers. Merely because SGIPL is charging handling

> fee on SingTel would not mean it is an intermediary."

14. In the meantime, the petitioner sent communications requesting for a refund of the input tax credit that was allowed by virtue of the aforementioned orders passed by the learned Commissioner (Appeals). The said application was rejected by the impugned order. The learned Assistant Commissioner did not process the refund as directed by the orders passed by the learned Commissioner (Appeals), but took upon itself to once again re-examine the question as to whether the petitioner was entitled to refund of input tax credit.

Reasons and Conclusion

15. A plain reading of the impugned order indicates that the learned Assistant Commissioner rejected the petitioner's claim by questioning the decision of the learned Commissioner (Appeals) to allow the petitioner's appeal and reject the Revenue's appeals. The learned Assistant Commissioner held that the learned Commissioner (Appeals) has erred in following the decision of this Court in ***Verizon Communication India Pvt. Ltd. v. Assistant. Commissioner Service Tax* (*supra*)**, on the ground that the Special Leave Petition against the said decision is pending before the Supreme Court. This is evident from the following extract of the impugned order:

> "9.3 The commissioner (Appeals -II) in their OIAs appears to relied on the judgment of Hon'ble Delhi High Court in the case of Verizon Communication India Pvt. Ltd. Vs. ACST [2018(8) GSTL 32 (Del)] and intermediary essentially excludes any person who has provided the service on their own account.

The matter heavily relied upon the above said judgment but they did not appreciated the fact that the said order is pending before the Hon'ble Supreme Court of India and the same has not attained its finality till date. In other words, it is sub- judice and the decision of Hon'ble High Court cannot be considered as conformity of the issue in this scenario, rely on such case could not be framed in the instant case

9.4 Further, I have also peruse the said case of Verizon Communication India Pvt Ltd: and it is observed that the Judgment taken chronically from the previous provision prior to July 2012 but after w.e.f 01.07.2012 there is no specific discussion was made in respect of Rule 6A of the Service Tax Rules, 1994, as amended and Place of Provision of Service Rules, 2012, as amended The chronological point comes to in conclusive stage but when came to w.e.f 01.07 2012 there is only observation noted after perusal of Para 22 Para 30, Para 32 Para 46 to Para 49 as already noted provision of telecommunication services does not have a specific rule and so Rule 3 of the POPS Rules, which is the default option, applies In terms thereof, the place of provision of telecommunication service shall be the location of the recipient of service"

Further, the relied upon judgment was like Paul Merchants Ltd. v CCE. Chandigarh 2012 (12) TMI 424 CESTAT Microsoft Corporation (1) (P) Ltd. v Commissioner of Service Tax, New Delhi 2014-TIOL-1964-CESTAT DEL=2014 (36) STR 766 (T) are still pending before the Hon'ble Supreme Court and till the decision it could not be

> considered as enforced law but under sub-judice law."

16. The Assistant Commissioner has sought to re-adjudicate the question as to whether the services provided by the petitioner are export of services or not. This is clear from paragraph 9.2 of the impugned order which reads as under: -

> "9.2 The instant case is totally depending to ascertain whether the service provided by the assessee is export or not. If it falls under export of service, then there is no criterion for checking of unjust enrichment whereas if it does not fall under the category of export, it should be considered for verification under unjust enrichment. Hence, it is indirectly stipulate to check whether the service provided by the assessee falls under the provisions of Export or not. "

17. The impugned order has been passed in complete disregard of the judicial discipline. It is, *ex facie*, apparent that the learned Assistant Commissioner has attempted to overreach the orders passed by the superior authority.

18. Since the respondent was seeking to defend the impugned order, this Court had called upon Mr. Raghupathy Ramachandran, Senior Standing Counsel, Central Board of Indirect Taxes and Customs (CBIC), to also file written submissions even though he was not appearing in the present petition. He has fairly submitted that the impugned order, which proceeds on the basis that the petitioner is a provider of intermediary services, is incorrect and it is not open for the

Revenue to take this stand. The Revenue would necessarily have to wait for the outcome of the appeals preferred by the learned CESTAT (which have since been dismissed as well).

19. The learned counsel appearing for the respondent fairly states that the impugned order be set aside.

20. In view of the above, the petition is allowed. The impugned order is set aside.

21. The respondent is directed to process the petitioner's application within a period of four weeks from today.

22. The respondent shall also consider the petitioner's entitlement to interest considering the delay in processing its application.

23. The petition is disposed of. The pending application is also disposed of.

VIBHU BAKHRU, J

PURUSHAINDRA KUMAR KAURAV, J

DECEMBER 14, 2022
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