

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 41587 of 2016

(Arising out of Order-in-Appeal No. CMB-CEX-000-APP-186-16 dated 10.08.2016 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals-I), No.6/7, A.T.D. Street, Race Course Road, Coimbatore – 641 018)

**M/s. SNQS International Socks Private Limited : Appellant
(Trading Division)**

No. 18, Indira Nagar, 2nd Street, Murungapalayam South,
Tirupur – 641 603

VERSUS

Commissioner of Central Excise and Service Tax : Respondent

No. 6/7, A.T.D. Street, Race Course Road,
Coimbatore – 641 018

APPEARANCE:

Shri J.V. Niranjan, Advocate for the Appellant

Smt. Sridevi Taritla, Additional Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40478 / 2023

DATE OF HEARING: 03.05.2023

DATE OF DECISION: 23.06.2023

Order : [Per Hon'ble Mr. Vasa Seshagiri Rao]

M/s. SNQS International Socks Private Limited (Trading Division), Tirupur, the appellant herein, has challenged the Order-in-Appeal No. CMB-CEX-000-APP-186-16 dated 10.08.2016 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals-I), Coimbatore, who rejected their appeal against Order-in-Original Sl. No. 57/2015-ST dated 30.11.2015 passed by the Assistant Commissioner of Central Excise, Tirupur Division, Tirupur – 641 601 rejecting their refund claim filed for Rs.27,32,953/-.

2.1 Briefly stated the facts in this appeal are that the appellant are engaged in providing design and product development, evaluation and vendor development, quality monitoring and other related services to its foreign client viz. M/s. Primark, P.O. Box No. 644, 47th Mary Street, Dublin, Ireland in procurement of goods and receives remuneration for the above services as a percentage of the value of merchandise exported to the client by the vendors developed.

2.2 The appellant have filed a refund claim for Service Tax amount of Rs.27,32,953/- erroneously paid by them under 'business auxiliary service' during the period from October 2014 to November 2014. During verification of their claim, it was found that they had facilitated procurement and supply of goods to M/s. Primark, Dublin, Ireland from various persons. While facilitating such supply of goods, they had provided their own support services and a fee had been charged by them, which is evident from the service invoice submitted in support of the refund claim.

2.3 The assertion of the Revenue is that the appellant had acted as an intermediary between M/s. Primark, Ireland and various suppliers for a certain consideration and as such, liable to pay Service Tax on the consideration received as in the case of intermediary services and the place of provision of service is the location of the service provider in terms of Rule 9 of the Place of Provision of Services Rules, 2012, as amended. As such, it appeared to the Department that the Service Tax paid by them was proper and the refund claim filed by the appellant appeared to be unsustainable. Consequently, a Show Cause Notice No. 06/2015 dated 06.10.2015 came to be issued to the appellant.

3. After due process of law, the adjudicating authority vide Order-in-Original Sl. No. 57/2015-ST dated 30.11.2015 rejected their refund claim of Rs.27,32,953/- under Section 11B of the Central Excise Act, 1944 made

applicable to Service Tax matters in terms of Section 83 of the Finance Act, 1994.

4. On appeal being filed with the Commissioner of Customs, Central Excise and Service Tax (Appeals-I), Coimbatore, the same was rejected on the ground that the services rendered by the appellant were classifiable as that of an 'intermediary' and in respect of intermediary services, in terms of Rule 9 of the Place of Provision of Services Rules, 2012, the POP i.e., place of provision, shall be the location of the service provider.

5. Feeling aggrieved by the above order, the assessee has come in appeal before this forum.

6.1 The submissions put forth by the appellant are broadly summarized as under: -

- (i) Their services rendered were in relation to the procurement of goods and so, could be called as auxiliary support services.
- (ii) "Procurement" is a business process while "purchase" is a business activity, being one of the elements of the procurement process. Procurement involves preparation and processing of demand, which often involves purchase planning, determination of standards, specifications development, supplier research and selection, value analysis, financing, price negotiation, making purchase, supply contract administration, inventory control and stores, disposals and related functions. The process of procurement is often a part of the strategy of an organization whereas purchase is only one activity covered by the broader process of procurement and as such, the process of procurement cannot be treated as synonymous with "purchase", which is confined to only one activity.

(iii) Some of its activities are covered under business auxiliary service under 'procurement of goods for the client', but not the services of a 'commission agent', which is only limited to transactions relating to purchase or sale of goods and would not cover the broader business process of procurement.

(iv) While the description of business auxiliary service describes certain activities of the appellant, it is submitted that they are also providing some other services that would fit into the description of "support services of business or commerce".

6.2 Thus, the appellant argued that its services are covered under the description of both business auxiliary service and support services of business or commerce, as explained above, but more appropriately, fall under "support services of business or commerce".

6.3.1 Reliance has been placed by the appellant on various judicial pronouncements in support, which are summarized below: -

- *Fifth Avenue v. Commissioner of Service Tax, Chennai*
[2009 (15) S.T.R. 387 (Tri. - Chennai)] :

"4.1 We find that FA and FAWPL had rendered services to the companies in terms of their contracts with them. They assisted processing of purchase orders by the vendors. They monitored progress and timely execution of the export orders placed by the companies. There was no contract between the appellants and their respective vendors. FA and FAWPL admittedly rendered the services described in the Show Cause Notices as evaluation of prospective customers for the companies, processing of purchase orders, customer management, processing of transactions, information and tracking of delivery schedules, operational assistance for marketing, formulation of customer service and pricing policies, managing distribution and logistics. Scope of SSBC as per clause (104c) of Section 65 of the Act is as follows :

"(104c) "support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders

and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.”

....

The services rendered to the vendors and the companies by the appellants conform to the statutory definition of SSBC...

...”

- *Fifth Avenue Sourcing Pvt. Ltd. v. Commissioner of S.T., Chennai [2014 (34) S.T.R. 291 (Tri. – Chennai)]:*

"14.

.....In the case of service rendered by an intermediary both the parties between whom the intermediary works benefits from the service. But the taxable service is the one that is rendered to the person paying for it. If both sides pay for the service, consideration paid by both should be taxable in the hands of the intermediary. In the present case when the service is seen as service provided to the vendors there is room for arguing that it is service for marketing of goods and hence classifiable under Business Auxiliary Service. When the service is seen as one rendered to the buyer the service appears to be more appropriately classified under Business Support Service as already decided by Tribunal in Fifth Avenue v. CCE reported at [2009 \(15\) S.T.R. 387](#) (Tri.-Chennai). So at this stage the decision of the Tribunal in the said case and stay order in appellant's own case reported at [2011 \(22\) S.T.R. 55](#) (T) imply that the service was rendered to the foreign buyer and not to the local vendors.”

- *GECAS Services India Pvt. Ltd. v. Commr. of Service Tax, New Delhi [2014 (36) S.T.R. 556 (Tri. – Del.)]:*

"6.

..... There is no dispute that the services provided by the appellant comprise of evaluation of prospective customers by the way of surveying the prospective customers, collecting information about their profile to enable GECAS, Ireland to design its products and pricing as per the aspiration of the target customer base, advising their holding company about the structuring of various transactions by analyzing data base of the customers, tracking of delivery schedules for supply of leased aircrafts, customer relationship management, customer care services, etc. There is no dispute that these services are business support services covered by Section 65(105)(zzzq) of the Finance Act, 1994 read with Section 65(104c) and payment for these services had been received by the appellant from M/s. GECAS, Ireland inconvertible foreign exchange.

6.3.2 Relying on the decision of the Tribunal in the case of *M/s. Provincial Life Style Retail Services v. Commissioner of Central Excise, Nagpur [2014 (36) S.T.R. 305 (Tri. – Mumbai)]*, the appellant has argued that its services would not be classifiable as that of a commission agent as, in the above decision, the assessee who was involved in undertaking the activities of display and sale of stock, design, maintenance of showrooms, appointing additional agents, bearing expenses of running showrooms and management fee as a percentage of turnover received, was held to be not a commission agent. In view of the above decision, it is also submitted that the mode of quantification of remuneration for the services rendered by them is not relevant for determination of the description of the services, but only the activities performed are relevant for arriving at the appropriate description of service.

6.4 Basing on the above, it is submitted that the services provided by them would only fit into the description of “support services of business or commerce”.

6.5 The appellant has further argued that Rule 3 of the Place of Provision of Services Rules, 2012 would be applicable to his case, which is generally the location of

recipient of services, and inasmuch as the recipient of service of the appellant is located outside India, no Service Tax liability would arise.

6.6 Consequently, it is the appellant's submission that the Service Tax paid by them in respect of the service charges billed during the period from October 2014 to November 2014 are not liable to be paid as Service Tax, but paid under erroneous understanding and so, eligible for refund.

7.1 The learned lower appellate authority has arrived at a finding that the services of commission agents for goods were also covered under the definition of "intermediary" after the amendment of the Place of Provision of Services Rules, 2012 by Notification No. 14/2014-ST dated 11.07.2014. The services rendered by the appellant as a commission agent for sale of goods will be governed by Rule 9 of the Place of Provision of Services Rules, 2012 and the place of provision of service shall be the location of the service provider. She has held that the services of commission agents in assisting foreign companies in supply of goods shall be taxable and the services would not be considered as export of service and the benefit of rebate / refund of CENVAT Credit on input services availed would not be available as one of the conditions of Rule 6A of the Service Tax Rules would not be fulfilled in such cases, i.e., the place of provision of the service should be outside India.

7.2 The findings of the learned lower appellate authority are as under: -

- The services rendered by the appellant are for the procurement of goods and therefore, *prima facie* can be called as services in relation to procurement of goods with auxiliary support services.
- Remuneration is paid to the appellant in the form of a percentage of FOB value of the merchandise

exported by the vendors developed by the appellant and so, *prima facie*, the services of the appellant can be categorised as that of a commission agent.

- The words 'arranges' and 'facilitates', found in the definition of "intermediary", would cover within its ambit a host of marketing and sales promotion activities that are provided in relation to arrangement and/or facilitation of main service / supply of goods. Thus, the scope of work of the appellant will have elements of activities starting from general market research to contract/price negotiations with identified customers. The nature of activities admittedly carried out by the appellant do not fall under the excluded category of "intermediary", i.e., a person who provides the main service or supplies the goods on his own account.
- The services provided by the appellant are falling under the post-amendment definition of 'intermediary' in the Place of Provision of Services Rules, 2012 and thus, the appellant are liable to pay Service Tax on the said intermediary services provided by them.
- Regarding the argument of the appellant that the services provided by them would fall under the category of "support services of business or commerce" as the said services provided to a person located outside the taxable territory would amount to export of services and so exempted from payment of Service Tax and their reliance on the decisions of *M/s. Fifth Avenue Sourcing (P) Ltd. v. Commr. of Service Tax, Chennai [2011 (22) S.T.R. 55 (Tri. - Chennai)]* and *M/s. Fifth Avenue Sourcing Pvt. Ltd. v. Commr. of Service Tax, Chennai [2014 (34) S.T.R. 291 (Tri. - Chennai)]*, it has been held that the period involved is prior to the amendment of Rule 2(f) of the Place of Provision of Services Rules,

2012 with effect from 11.07.2014 whereas the present case deals with the issue which has emanated during the post-amendment definition of "intermediary" under Rule 2(f) of the Place of Provision of Services Rules, 2012 and the appellant's services were held to be taxable under "business auxiliary service" under Section 65(19) of the Finance Act, 1994.

7.3.1 The learned Authorized Representative Smt. Sridevi Taritla (Additional Commissioner) representing the Revenue has put forth as follows in her written submissions: -

- (i) The period involved in the present appeal is post introduction of negative regime with effect from 01.07.2012 and is governed by the Place of Provision of Services Rules, 2012 and the submissions and decisions relied on by the appellant are prior to 01.07.2012 and so, not relevant to the present case.
- (ii) The Place of Provision of Services Rules, 2012 will determine the place wherefrom the service shall be deemed to be provided in terms of Section 66C of the Finance Act, 1994 read with Section 94(hhh) of Chapter V of the Finance Act, 1994.
- (iii) The service rendered by the appellant in relation to procurement of goods clearly indicates that it has acted as an "intermediary" as defined under Rule 2(f) of the Place of Provision of Services Rules, 2012, as given below:

"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;

(iv) In respect of the following services, the place of provision in terms of Rule 9 of the Place of Provision of Services Rules, 2012 shall be the location of the service provider:

- i. Services provided by a banking company, or a financial company, or a non-banking financial company to account holders;
- ii. Telecommunication services provided to subscribers;
- iii. Online information and database access or retrieval services;
- iv. Intermediary services;
- v. Service consisting of hiring of means of transport, up to a period of one month.

(v) The appellant arranges or facilitates supply of goods by its various vendors, the remuneration is paid in the form of a percentage of the FOB value of the merchandise exported by the vendors developed by the appellant and thus, being an intermediary, the appellant is liable to pay Service Tax as the place of provision of service is the location of the service provider.

7.3.2 In view of the above, it is her contention that the appellant has rightly discharged Service Tax and so, not eligible for any refund of the tax paid by it and as such, she has requested for rejection of the appeal.

8. Heard both sides and perused the records, as available in the appeal.

9. The issues that are before us for decision in this appeal relate to: -

(1) Classification of the services rendered by the appellant – whether under “business auxiliary service” as defined under Section 65(19) of the Finance Act, 1994 or “support services of business or commerce” as defined under Section 65(104c) of the Finance Act, 1994?

(2) Whether the services rendered by the appellant 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?

10. From the facts narrated above, we find that the appellant is providing a comprehensive bouquet of services, like designing and product development, including creating new patterns and graphics that are shared with the vendors and arrangement of pre-production samples to the foreign client for approval, evaluation of vendor facilities in terms of its capabilities to provide the merchandise required, quality monitoring and also providing logistics and operational assistance for export of cargo till it reaches the destination. Consideration / remuneration for the above services is computed as a percentage of the value of merchandise exported to the client by the vendors developed by the appellant, which is received in convertible foreign exchange. There is no agreement entered into by the appellant with any of the vendors, either on their behalf or on behalf of the foreign client.

11.1 It is the contention of the appellant that their services are most appropriately classifiable under “support services of business or commerce” under Section 65(104c). The appellant has tried to explain the difference

between the various processes involved in procurement of the goods vis-à-vis purchase of goods as the appellant is rendering a comprehensive list of services relating to procurement of goods on behalf of the foreign client from the time the designs are conceptualized to finishing the manufacture of the goods and their export.

11.2.1 Section 65 (19) of the Finance Act, 1994 defines "business auxiliary service" as under: -

"business auxiliary service" means any service in relation to, —

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

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

*[* * * *]*

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

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

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

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

(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].

[Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) *"commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —*

(i) *deals with goods or services or documents of title to such goods or services; or*

(ii) *collects payment of sale price of such goods or services; or*

(iii) *guarantees for collection or payment for such goods or services; or*

(iv) *undertakes any activities relating to such sale or purchase of such goods or services;*

[(b) "excisable goods" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944 (1 of 1944);

(c) "manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944)]"

11.2.2 The definition of "support services of business or commerce" as per Section 65 (104c) of the Finance Act, 1994, is given below: -

"support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, [Operational or administrative assistance in any manner], formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

Explanation. — For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security;]

Thus, there is no material change in the definitions of both “business auxiliary service” and “support services of business or commerce” having an implication for taking a decision in this appeal on the issue of classification of the services.

11.3 We find that the appropriate classification of these services would be “support services of business or commerce” rather than “business auxiliary service”. Business auxiliary services are general in nature as compared to support services of business or commerce. The appellant’s services are not limited to being a commission agent / buying agent since their services are not limited to only procurement and dispatch, but includes a wide range of services from the stage of designing to testing and quality monitoring and getting the goods manufactured till the final export is made, including assisting in the transportation and dispatch of the goods.

11.4.1 We find that the decision rendered in the case of *M/s. Fifth Avenue v. Commissioner of Service Tax, Chennai [2009 (15) S.T.R. 387 (Tri. – Chennai)]* is applicable wherein the appellant rendering services such as evaluation of prospective customers, processing of purchase orders, customer management, processing of transactions, information and tracking of delivery schedules, operational assistance for marketing, formulation of customer service and pricing policies, managing distribution and logistics, etc., were held to be classifiable under support services of business or commerce and not under business auxiliary service.

11.4.2 We also find the ratio in the case of *GECAS Services India Pvt. Ltd. v. Commr. of Service Tax, New Delhi [2014 (36) S.T.R. 556 (Tri. – Del.)]*, which is referred to in paragraph 6.3.1 above, to be relevant for taking a decision for classifying the services rendered by the appellant as support services of business or commerce.

11.4.3 A similar conclusion has been arrived at by the Tribunal, Chennai in the case of *M/s. Fifth Avenue Sourcing Pvt. Ltd. v. Commissioner of Central Excise and Service Tax, Chennai* in Service Tax Appeal No. 347 of 2011 & ors. [Final Order Nos. 40125 to 41027 of 2023 dated 07.03.2023 – CESTAT, Chennai], wherein it has been held as under: -

"11. We find from a plain reading of clause (104c) of Section 65 that "support services of business or commerce" specifically relates to evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, etc., which were the activities undertaken by the appellant, while the definition of business auxiliary service under clause (19) of Section 65 of the Act is more general in nature. Hence, the services have been correctly classified under the specific heading of 'support services of business or commerce' and does not require us to traverse through section 65A(2) of the Finance Act, 1994. Section 65A(1) states that for the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clause of clause (105) of Section 65. The same having being satisfied the provisions of Section 65A(2) need not be examined. Moreover, none of the Show Cause Notices have taken recourse to section 65A(2) to decide on the classification of the service.

12. This Hon'ble Tribunal's judgment in the case of the appellant in *M/s. Fifth Avenue v. Commissioner of Service Tax Chennai* [Final Order Nos. 768-769/2009 dated 23.03.2009] as reported in 2009 (15) S.T.R. 387 (Tri. – Chennai) and referred to by Revenue above, has at paragraph 4.1, clearly found without ambiguity that the services rendered to the vendors and the companies by the appellants therein conformed to the statutory definition of SSBC and hence, the services rendered to the vendors and companies were classifiable under SSBC and not under BAS. Hence section 65A of the Finance Act, 1994 was not required to be discussed in the order."

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 20.06.2012 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 11.07.2014, 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 20.06.2003). Subsequently, with effect from 16.05.2005, "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. In view of the above detailed analysis, we find that the impugned Order-in-Appeal No. CMB-CEX-000-APP-186-16 dated 10.08.2016 is not sustainable and is accordingly set aside.

15. We allow the appeal with consequential relief, if any, as per the law.

(Order pronounced in the open court on **23.06.2023**)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd