IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CWP-6048-2021 (O&M)
Reserved on:-24.08.2022
Date of Pronouncement:11.11.2022

Genpact India Pvt. Ltd.

.....Petitioner

Versus

Union of India and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA
HON'BLE MR. JUSTICE DEEPAK MANCHANDA

Present:- Mr. Tarun Gulati, Sr. Advocate with
Mr. Rohit Sud, Advocate,
Mr. Sachit Jolly, Advocate,
Ms. Disha Jham, Advocate and
Mr. Kumar Sambhav, Advocate for the petitioner.

Mr. Sharan Sethi, Senior Standing Counsel for respondents.

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TEJINDER SINGH DHINDSA J.

Petitioner is a Business Process Outsourcing (BPO) Service Provider located in India.

Challenge in the instant petition is to the order dated 15.02.2021 (Annexure P-18) passed by the Additional Commissioner CGST (Appeals) Gurugram wherein it has been held that the services provided by the petitioner are in the nature of "Intermediary Services" as per Section 2 (13) of the IGST Act (for short the 'Act') and do not qualify as "export of services" in terms of Section 2 (6) of the Act and thereby rejecting the refund claim of un-utilized Input Tax Credit (ITC) used in making zero rated supplies of services without payment of Integrated Goods and Service Tax.

BRIEF FACTUAL MATRIX

Petitioner is registered with Haryana GST Authorities and is involved in providing a host of services collectively referred as BPO Services to customers located in India as well as outside India. An illustrative list of services stated to be rendered by the petitioner is as under:-

(i) Maintaining vendor/customer master data, scanning and processing vendor invoices, book keeping, preparing/finalizing books of account, generating ledger reconciliations, managing customer receivables etc.

(ii) Developing, licensing and maintaining software as per clients' needs.

(iii) Technical IT support i.e. trouble-shooting services.

(iv) Data analysis and providing solutions to clients in respect of forecasting of demand for their offerings and management of inventory, supporting various business functions like sourcing and supply chain management.

It is asserted that aforesaid services are actually deliverables of the petitioner on its “own account”. Such services are provided by petitioner from India remotely through telecommunication/internet links using its own infrastructure and work force of approximately 50 thousand employees.

Petitioner entered into a Master Services Sub-Contracting Agreement dated 01.01.2013 (hereinafter referred to as MSA) with Genpact International Incorporated (GI) an entity located outside India. It is asserted that as per terms of the MSA various services are to be provided by the petitioner on a principal to principal basis. Further the petitioner is engaged by GI for actual performance of BPO services to the clients of GI located outside India. The arrangement requires the petitioner to complete the assigned processes/scope of work directly to the 3rd parties located outside

India. Copy of the MSA entered between the petitioner and GI stands annexed as Annexure P-1 alongwith the petition.

For the period from July 2017 to March 2018, petitioner filed an application with Haryana GST authorities on 18.10.2018 claiming refund of un-utilized ITC amounting to Rs.27,26,27,276/- on account of zero rated supplies of services without payment of Integrated Goods and Service Tax (IGST) under Letter of Undertaking. The refund claim was filed under Section 16 of the Act read with Section 54 of the Central Goods and Services Act 2017 and Rule 89 of the Central Goods and Services Rules 2017. The Deputy Commissioner Division East-II CGST Gurugram vide Order-in-Original dated 14.03.2019 (Annexure P-3) sanctioned an amount of Rs.26,34,61,625/- towards refund by forming an opinion that the services rendered by the petitioner qualify as “export of services”. The refund claim was, however, partially rejected to the extent of Rs.91,65,651/- on account of ITC availed in respect of certain alleged ineligible inputs and input services. Petitioner being aggrieved by the rejection of the partial amount preferred an appeal dated 13.06.2019 before the Joint Commissioner CGST (Appeals). It would be apposite to take note at this stage that the Central Board of Customs and Indirect Taxes issued a circular dated 18.07.2019 towards clarification whether 'intermediary services' to overseas entities qualify as export of services. On account of numerous representations received expressing apprehensions on the fall out of such circular, the same was *ab initio* withdrawn vide circular dated 04.12.2019. In the meanwhile the Principal Commissioner of Central GST Gurugram exercising the powers conferred under Section 107 (2) of the CGST Act, reviewed the

proceedings and passed an order dated 13.09.2019 reviewing the order in original dated 14.03.2019 and by recording that the services provided by the petitioner are in the nature of intermediary services and do not qualify as export of services in terms of Section 2 (6) of the IGST Act. Accordingly directions were issued for filing of an appeal before the Joint Commissioner (Appeals) GST Gurugram. Pursuant to such development, the department on 13.09.2019 also filed an appeal against the order in original dated 14.03.2019 contesting the entire amount of refund sanctioned to the petitioner amounting to Rs.26,34,61,625/-. In the appeal reliance was placed on circular dated 18.07.2019 which was subsequently withdrawn. The material ground taken in the appeal was that the petitioner was paid by Genpect International (GI) and as such the petitioner fell within the category of intermediary. Thereafter the order in appeal dated 27.05.2020 (Annexure P-9) was passed by the Joint Commissioner, CGST (Appeals) Gurugram holding that the amount of Rs.26,34,61,625/- was erroneously refunded to the petitioner. View taken was that the services provided by the petitioner are in the nature of "intermediary services" as per Section 2 (13) of the Act and do not qualify as "export of services" in terms of Section 2 (6) of the Act.

Petitioner assailed the order dated 27.05.2020 by filing CWP No.10302 of 2020 before this Court. The writ petition was disposed of vide order dated 29.01.2021 (Annexure P-15). The order in appeal dated 27.05.2020 was set aside and the matter remanded back to the appellate authority for a decision afresh.

Thereafter the order dated 15.02.2021 (Annexure P-18) has

been passed by the Appellate Authority, disallowing the appeal filed by the petitioner and allowing the appeal filed by the department against order in original dated 14.03.2019. The appellate authority held that the services performed by the petitioner fall within the category of "intermediary services" and do now qualify as "export of services" under Section 2 (6) of the Act. Consequently, the refund amounting to Rs.26,34,61,625/- previously sanctioned in favour of the petitioner was rejected. Furthermore, refund to the extent of Rs.82,15,102/- which was a subject matter of appeal filed by the petitioner was also denied.

It be noted that apart from the refund in question, two other refund applications for the period starting from April 2018 to September 2018 and October 2018 to March 2019 have been rejected vide orders dated 09.12.2020 and 02.02.2021 (Annexures P-13 and P-14), respectively, on the same very basis.

It is against such brief factual backdrop that the instant petition has been filed assailing the order dated 15.02.2021 at Annexure P-18. A writ of mandamus is also sought for grant of refund for the subsequent period of time as well.

PETITIONER'S CASE

The first contention raised by learned Senior counsel is that the impugned order dated 15.02.2021 (Annexure P-18) passed by the Appellate Authority proceeds not only beyond the grounds in the appeal but also beyond the scope of remand as directed by this court. It is asserted that this Court while disposing of CWP No.10302 of 2020 vide order dated 29.01.2021 (Annexure P-15) had remanded the matter to decide the appeal

afresh. The appeal in turn is stated to have been surmised only on Clause 3.4 and Clause 10 of the MSA. However, the Appellate Authority has undertaken a completely new exercise vis-a-vis the other clauses of the agreement and which apart from being irrelevant to the issue at hand was not permissible in law. Further contended that the conclusion of the appellate authority that the services rendered by the petitioner tantamount to "intermediary" services is patently wrong and perverse. As per definition of "intermediary" under Section 2 (13) of the Act a person who provides services "on his own account" is not an "intermediary". The provider of the main service stands clearly excluded from the definition of "intermediary". No evidence is on record to establish that the petitioner had not provided the main service. There was not even an allegation that there was any 3rd party which the petitioner had "arranged" and who had in turn provided the main services. It is argued that the petitioner is rendering services "on its own account" and is not facilitating any supply of services between GI and its customers. Petitioner is responsible for providing all services, for all the risk related to performance of services and pricing of the services.

Mr. Tarun Gulari, learned Senior counsel has extensively referred to the MSA and the various clauses contained therein to impress upon this Court that the petitioner is rendering services to GI on a "principal to principal" basis and not in the capacity of GI's agent. There is no separate agreement entered between the petitioner and GI's customers and therefore in no manner can the petitioner be equated to an agent or broker. Further contention is that the petitioner is not facilitating supply of services between GI and its customers but is actually providing the services "on its own

account" to the end customers as sub-contracted by GI in terms of the MSA. Since the actual service is being performed by the petitioner under the sub-contract and it does not "arrange" or "facilitate" the service, it cannot be regarded as an "intermediary". It has also been pointed out that the petitioner's turn over is the entire charge for the service which is the main service itself whereas in the case of an "intermediary" the turn over is a mere commission or a facilitation fee which is not the fact in the present case. Learned Senior counsel further submits that the appellate authority in the impugned order has relied on various clauses of the MSA such as Clause 3.1, 3.4, 4.1, 4.2, 5.2, 5.4, 7, 7.1, 7.4, 10.1 and 16.1 to arrive at the conclusion that the petitioner is an "intermediary" but without giving any analysis of the clauses and yet concluding that the petitioner acts as an "intermediary". The Appellate Authority has not assigned any independent reasons to arrive at such a conclusion. Yet another contention raised is that the Appellate Authority has proceeded erroneously to take a view that since petitioner is rendering services "on behalf " of GI and therefore qualifies as an "intermediary". It is asserted that usage of the term "on behalf" of in the impugned order is misleading as using such term, the appellate authority is presuming that there is a relationship of agency between the petitioner and GI and which on the face of it is contrary to the express terms of the MSA. In this regard it is submitted that the findings of the appellate authority in para 13 of the impugned order dated 15.02.2021 that the petitioner is an agent of GI is contrary to the admission of the respondents in the reply filed dated 08.09.2020 in CWP No.10302 of 2020. Learned Senior counsel has also pointed out the contradictory findings recorded in the impugned order

inasmuch as while in paragraph 18, the Appellate Authority clearly observes that the petitioner binds GI by its actions but on the other hand it stands recorded in para 19 of the same that the petitioner cannot bind the principal i.e. GI. The impugned order is stated to the proceeding on mere presumption as in para 17 thereof it has been erroneously stated that there are two supplies involved. In this regard it is argued that in the case of a sub-contract there is only one sale involved and the findings in the impugned order have no factual or legal basis to allege that there was a second contract of agency between the petitioner and GI.

Still further argued that the Appellate Authority has relied on the ruling in the case of ***Infinera India (P.) Ltd., In re [2020] 112 taxmann.com 500 (AAAR- Karnataka Vservglobal (P.) Ltd.., (AAAR-Karnataka Vservglobal (P.) Ltd., In re [2018] 19 GSTL 173 (AAR-Maharashtra)*** and recorded a finding that there has been a material change in the definition of "intermediary" under the GST regime. It is asserted that there is a clear case of misreading inasmuch as in the ruling as of *Infinera (supra)*, the observations are to the contrary that there is no difference in the definition of "intermediary" under the GST and pre-GST regime. It is argued that the decision in *Infinera (supra)* rather clinches the issue in favour of the petitioner.

Learned Senior counsel has also argued that the appellate authority has failed to appreciate that the BPO services rendered by the petitioner have been held to be "export of services" under the erstwhile Service Tax regime and the refund claims were sanctioned on a regular basis by the tax authorities. In support of such contention reliance has been

placed on Order in Original dated 25.01.2018 (Annexure P-2) wherein the nature of services rendered by the petitioner were elaborately gone into and discussed and it was held that the BPO services performed by the petitioner are in the nature of "main service" and not "intermediary services". As a sequel it is submitted that the definition of "intermediary services" under the service tax regime and GST regime being broadly similar and as such there being neither any change in the facts nor any change in the statutory provisions a different view could not have been taken by the authorities pertaining to a different period for the same assessee. Contention is that the principle of consistency would apply to tax proceedings as well.

We may also take note that on a previous date of hearing i.e.27.10.2021, learned Senior counsel had referred to a circular dated 20.09.2021 issued by the Principal Commissioner (GST), Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs, New Delhi, to urge that the claim of the petitioner would be covered under such circular which in turn clarifies that sub-contracting arrangements do not constitute "intermediary Services". On 27.10.2021 statement of counsel for the respondents was recorded to the effect that such circular dated 20.09.2021 would be taken into consideration while preparing reply to the writ petition.

CASE OF DEPARTMENT

Mr. Sharan Sethi, learned Senior Standing for the respondents has justified the passing of the impugned order dated 15.02.2021 (Annexure P-18) rejecting the claim of the petitioner for refund by adverting to the averments made in the written statement. Reference has been made to

different clauses of the MSA to stress that broadly two categories of services are involved. First category comprises of the "main services" being provided by GI to its customers. Second category comprises of ancillary and supportive services (to the main services) being provided by the petitioner. It is urged that both these categories of services are clearly identifiable and distinguishable from each other. Learned counsel has invited our attention to the specific averments made in such regard in correlation to the different clauses contained under the MSA and the same read as under:-

> *(2)* ***Two distinct supplies:*** *There are clearly two categories of supplies in the arrangement, the main supply and the ancillary supply.*
>
> *(i) The main supply between GI and its customers i.e. two principals, comprise of the below:-*
>
> *a. Business Processing Outsourcing and Information Technology services (Recitals of agreement).*
>
> *b. Managing New and existing Customer Relationships by performing all functions to obtain new Customers (Article 3.1of the agreement).*
>
> *c. Appointment of GI Account Representative to deal with GI Customers (Article 3.2 of the agreement).*
>
> *d. Negotiate Customer agreements and statement of work (Article 3.3).*
>
> *e. Customer Invoicing and collection (Article 3.4 of the agreement)*
>
> *(ii) <u>The Ancillary supply provided by applicant</u> to facilitate the provision of main supply between the two principals which is the supply of intermediary services is as below:-*
>
> *a. Maintenance of and expanding GI customer Relationship through regular meetings with GI customers, developing presentations for GI customers, attending industry meetings/conventions, handling public relations and advertising matters etc. (Article 3.1 of the Agreement).*

b. Supply of services to GI Inc, for negotiating Customer Agreements and statement of work.

c. Supply of financial data and other support in order for Gl Inc, to render invoices to GI Inc, customers (Article 3.4 of the agreement);

d. ***Personal data processing:-*** *In performance of this agreement, each Provider (Applicant) may have access to, or otherwise Process, Gl_ Customer Personal Data on GI Customer's behalf Gl Customer personal data will be accessed and otherwise processed by each provider (Applicant) only to the extent strictly necessary to perform this agreement, or upon Gl''s written instructions and in strict compliance thereof.(Article 4.1 of the Agreement);*

e. ***Data Protection:*** *Each provider (Applicant) agrees to keep the Gl Customer Personal Data confidential, and agrees to not disclose any GI Customer Personal Data to third parties without having first received express written approval from the GI Customer and Gl (Article 4.2 of the agreement);*

f. ***Data Recovery Services:*** *Provider (Applicant) shall provide to GI the disaster recovery assistance, cooperation and services, if any, that are relevant. (Article 5.2 of the Agreement) ;*

g. ***Reports****: Each Provider (Applicant) shall provide to Gl, and directly to the GI customer, where so agreed the reports set forth in the Customer Statements of Work in accordance with the frequencies set forth therein (Article 5.3 of the Agreement);*

h. ***Records Retention:*** *Each provider (Applicant) shall retain applicable books and records in accordance with the records retention standards in accordance with Law, or as required by Gl or the GI Customer (Article 5.4 of the Agreement).''*

It is submitted that from a perusal of the services performed by the petitioner, it would be clear that the petitioner is acting on behalf of GI and supplying support services so that GI can supply main services in the

nature of business process outsourcing, information technology services, managing relationship with customers, negotiate customers agreement and statement of work and customer invoicing and collection to its customers. Further, it is contended that under Clause 3.2 of the MSA it is the obligation of GI to appoint dedicated account representatives for each customer who in turn would coordinate with the provider i.e. the petitioner. Such GI representative(s) would have the overall responsibility for managing and coordinating the delivery of the services to GI customers. As such it is argued that such an arrangement where one party-GI possesses the authority to take decisions with regard to actions taken by another party-petitioner, in the course of day-to-day management, can only be referred to as a Principal-agent relationship. The role of the petitioner as such has been described to be supportive in nature and not to act in an autonomous way. Clause 3.4 of the MSA has also been referred to whereby GI is responsible for handling all disputes with customers. It is thus contended that GI is directly responsible to its customers for any fault/lapse on the part of the petitioner in providing services to the customers of GI. The principal i.e.GI is responsible for the lawful acts of its agent i.e. the petitioner. Therefore the petitioner cannot be said to provide "services on its own account". Mr. Sethi, learned counsel has further referred to the Transfer Pricing Report report Annexure P-24 to urge that a similar picture emerges even therefrom and which further crystallizes that the petitioner is only performing supporting functions/services for GI. On the strength of such submissions learned counsel vehemently contends that the petitioner fulfils all the ingredients to be termed as an "intermediary".

Insofar as the issue of the petitioner having been allowed refunds for the previous periods under the pre-GST regime, it is contended that the principle of *res-judicata* does not apply in matters pertaining to tax for different assessment years. Each assessment year is a separate unit and a decision/view in one year is not to be carried forward and held good for a subsequent year. It is submitted that in tax matters each years assessment is final only for that year and does not govern later years.

On the basis of such submissions counsel submits that there is no merit in the writ petition and the same ought to be dismissed.

We have heard counsel for the parties at length and have perused the pleadings on record.

The primary issue that arises for consideration is as to whether the petitioner would be covered under the expression "intermediary" as defined under the provisions of the IGST Act and consequently the BPO services rendered by the petitioner under the MSA (Annexure P-1) be treated as "intermediary services" ?

For adjudication of such issue it would be necessary to advert to certain relevant statutory provisions:-

INTEGRATED GOODS AND SERVICES TAX ACT, 2017

Section 2, Definitions.- In this act, unless the context otherwise requires;-

(1) to (5) xxxxx xxxxx xxxxx xxxxx

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

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

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

(iii) The place of supply of service is outside India;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange;[or in Indian rupees where-ever permitted by the Reserve Bank of India]; and

(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;

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

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

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

(3) The place of supply of the following services shall be the location where the services are actually performed, namely:—

(a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:

Provided *that when such services are provided from a remote*

location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:

***[Provided** further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process;]*

(b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

(4) The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators, shall be the place where the immovable property is located or intended to be located.

(5) The place of supply of services supplied by way of admission to, or organisation of a cultural, artistic, sporting, scientific, educational or entertainment event, or a celebration, conference, fair, exhibition or similar events, and of services ancillary to such admission or organisation, shall be the place where the event

is actually held.

(6) Where any services referred to in sub-section (3) or sub-section (4) or sub-section (5) is supplied at more than one location, including a location in the taxable territory, its place of supply shall be the location in the taxable territory.

(7) Where the services referred to in sub-section (3) or sub-section (4) or sub-section (5) are supplied in more than one State or Union territory, the place of supply of such services shall be taken as being in each of the respective States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

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

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

(b) intermediary services;

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

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

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

resident ordinary account;

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

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

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

(i) a financial institution which is a company;

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

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

(9) The place of supply of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of such goods.

(10) The place of supply in respect of passenger transportation services shall be the place where the passenger embarks on the conveyance for a continuous journey.

(11) The place of supply of services provided on board a conveyance during the course of a passenger transport operation,

including services intended to be wholly or substantially consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey.

(12) The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

***Explanation**.—For the purposes of this sub-section, person receiving such services shall be deemed to be located in the taxable territory, if any two of the following non-contradictory conditions are satisfied, namely:—*

(a) the location of address presented by the recipient of services through internet is in the taxable territory;

(b) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory;

(c) the billing address of the recipient of services is in the taxable territory;

(d) the internet protocol address of the device used by the recipient of services is in the taxable territory;

(e) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;

(f) the country code of the subscriber identity module card used by the recipient of services is of taxable territory;

(g) the location of the fixed land line through which the service is received by the recipient is in the taxable territory.

(13) In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, the Government shall have the power to notify any description of services or circumstances in which the place of supply shall be the place of effective use and enjoyment of a service.

SECTION 16. Zero rated supply. (1) *"zero rated supply" means any of the following supplies of goods or services or both, namely:—*

(a) export of goods or services or both; or

(b) supply of goods or services or both [for authorised operations] to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

[(3) A registered person making zero rated supply shall be eligible to claim refund of unutilised input tax credit on supply of goods or services or both, without payment of integrated tax, under bond or Letter of Undertaking, in accordance with the provisions of Section 54 of the Central Goods and Services Tax Act or the rules made thereunder, subject to such conditions, safeguards and procedure as may be prescribed:

Provided *that the registered person making zero rated supply of goods shall, in case of non-realisation of sale proceeds, be liable to deposit the refund so received under this sub-section alongwith the*

applicable interest under Section 50 of the Central Goods and Services Tax Act within thirty days after the expiry of the time limited prescribed under the Foreign Exchange Management Act, 1999 (42 of 1999) for receipt of foreign exchange remittances, in such manner as may be prescribed.

(4) The Government may, on the recommendation of the Council, and subject to such conditions, safeguards and procedures, by notification, specify____

(i) a class of persons who may make zero rated supply on payment of integrated tax and claim refund of the tax so paid;

(ii) a class of goods or services which may be exported on payment of integrated tax and the supplier of such goods or services may claim the refund of tax so paid.]

CENTRAL GOODS AND SERVICES TAX ACT, 2017

Section 2. Definitions.- In this Act, unless the context otherwise requires,--

(1) to (4) xxxx xxxx xxxx xxxx

(5) "agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;

(6) to (121) xxx xxx xxx xxx

SECTION 54. ***Refund of tax.*** *(1) Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid*

by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:

Provided *that a registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of section 49, may claim such refund in [such form and] manner as may be prescribed.*

(2) A specialised agency of the United Nations Organisation or any Multilateral Financial Institution and Organisation notified under the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), Consulate or Embassy of foreign countries or any other person or class of persons, as notified under section 55, entitled to a refund of tax paid by it on inward supplies of goods or services or both, may make an application for such refund, in such form and manner as may be prescribed, before the expiry of [two years] from the last day of the quarter in which such supply was received.

(3) Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:

Provided *that no refund of unutilised input tax credit shall be allowed in cases other than—*

(i) zero rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on

the recommendations of the Council:

***Provided** further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:*

***Provided** also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies."*

(4) to (14) xxxxx xxxxx xxxx xxxx

Section 2 (6) of the IGST Act lays down the conditions which need to be fulfilled for qualification of a service as "export of services". A conjoint reading of Section 13 (2) and Section 13 (8) clarifies the manner for determining the place of supply of services where location of supplier or location of recipient is outside India. Generally, "place of supply" of services is the location of the recipient, except in case of certain specified services. For "intermediary" services, the place of supply is the location of the supplier. Section 16 (1) (a) *inter alia* provides that the export of services amount to "zero rated supply". Section 16 (2) provides that credit of input tax may be availed for making zero rated supplies. Section 54 of the CGST Act prescribes the manner in relation to claiming refund by tax payers, mainly covering the eligibility and prescribed timelines for filing the refund claim application. A tax payer engaged in export of services without payment of GST is eligible to claim refund of unutilized input tax credit.

By way of passing the impugned order dated 15.02.2021 (Annexure P-18) findings have been recorded that petitioner provides

services on behalf of GI and as such there is a principal agent relationship. Further the petitioner is arranging and facilitating the supply of services between GI and its customers and while doing so petitioner is acting as an "*intermediary".* It has further been held that petitioner is not providing services on "its own account". That apart it has been observed that there has been a material change in the definition of "*intermediary"* under the GST regime and consequently the petitioner cannot benefit from the orders of refund that had earlier been passed under the sales tax regime.

We have examined the MSA (Annexure P-1) in depth and which was imperative to take a view as regards the findings recorded in the impugned order dated 15.02.2021 (Annexure P-18). In para 16 of the impugned order the recitals of the MSA dated 07.01.2013 (Annexure P-1) as also certain clauses have been referred to while concluding the petitioner to be an "intermediary". The relevant extract of the recitals and the clauses in question read as follows:-

Master Services Sub-contracting Agreement
between
Genpact International, Inc.,
and
Genpact India

RECITALS

WHEREAS, GI is in the business of providing business process outsourcing and information technology services to its customers (each a "GI Customer," and, collectively, the "GI Customers") and establishing, maintaining and expanding mutually beneficial relationships with such GI Customers.

WHEREAS, Provider is an Affiliates of GI and has agreed to act as non-exclusive subcontractor for GI, subject to, and in accordance with, the

terms of this Agreement;

WHEREAS, GI intends to appoint the Provider or any of them as its subcontractor(s) to perform certain of these business process outsourcing and information technology services on behalf of GI for the GI Customers, as may be appropriate, from time to time;

WHEREAS, Provider shall have the opportunity to accept or reject any such proposed appointment by GI in its sole discretion, subject to the terms of this Agreement;

WHEREAS, each provider agrees that, in the event it shall have agreed to accept any such appointment by GI, to perform its obligations in a manner and at a level that satisfies in all respects GI's obligations to the relevant GI Customers, as set forth in the agreements and statements of work (each, a "Customer Statement of Work") entered into from time to time between GI and the GI Customers (collectively, the "GI Customer Agreements").

WHEREAS the provider acknowledges that upon such acceptance to perform services for GI, Customer Statement of Work terms on performance standards, indemnities, liabilities and other operating terms, excepting pricing under each Customer Statement of Work will be applicable by reference to all services to be performed by the Provider under this Agreement.

WHEREAS, GI will have continuing responsibility for obtaining new GI Customers and managing and expanding its relationships with existing GI Customers, for the benefit of the Provider and other similarly situated Affiliates of GI (the "Other GI Provider Affiliates") who also provide

services to GI in satisfaction of GI's obligations to the GI Customers under the GI Customer Agreements;

NOW, THEREFORE, in consideration of the foregoing and the mutual promises herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

ARTICLE 3 GI'S OBLIGATIONS AND SERVICES

In addition to any other obligations set forth below in this Agreement, GI shall be obligated to provide the following services:

3.1 Managing New and Existing Customer Relationships, *GI shall be responsible for performing all functions necessary to obtain new GI Customers for whom Services shall be performed by the Provider and by the Other GI Provider Affiliates and for maintaining and expanding all existing GI Customer relationships. Such functions shall include, but not be limited to, scheduling regular meetings with existing and potential GI Customers; developing presentations for GI Customers on existing and new product and service offerings; preparation for, and attendance at, appropriate conventions and industry meetings; handling all public relations and advertising matters etc.*

3.2 GI Account Representatives. *GI shall at all times have one or more specific senior personnel identified and appointed to serve each GI Customer (each, a "GI Account Representative") who shall be responsible for managing the relationship with each GI Customer to whom they are assigned. GI and the applicable GI Account Representatives shall also be responsible for determining which Providers and/or other GI Provider*

Affiliate(s) shall be assigned to perform services for each GI Customer as per GI Customer requirements (in consultation with the relevant Providers and Other GI Provider Affiliates) and for balancing to the extent feasible, the allocation of services among the Providers and other GI Provider Affiliates so that each GI Affiliate is providing Services in accordance with its capacity and capabilities. The GI Account Representatives for each Customer shall also (a) be the primary contact for the Providers in dealing with the respective GI Customer under this Agreement, (b) have overall responsibility for managing and coordinating the receipt of the Services for such GI Customer, (c) interact regularly with the Provider Account Representative (as hereinafter defined) and (d) have the authority to make decisions with respect to actions to be taken by GI in the ordinary course of day-to-day management of GI's receipt of the Services.

3.3 *xxxx xxxx xxxx*

3.4 ***Customer Invoicing and Collection.*** *GI shall be responsible for processing all invoices rendered to GI Customers, in the form required by each GI Customer, as set forth in the relevant Customer Agreement, and for handling all disputes with GI customers. Notwithstanding the foregoing, it shall be the responsibility of each Provider to furnish GI with all financial data and other support as may be necessary in order for GI to render invoices to GI Customers with respect to Services provided by the Provider.*

Article 4 PERSONAL DATA PROCESSING

4.1 ***Personal Data.*** *In performance of this Agreement, each Provider may have access to, or otherwise Process, GI Customer Personal Data on a GI Customer's behalf. GI Customer Personal Data*

will be accessed and otherwise Processed by each Provider only to the extent strictly necessary to perform this Agreement, or upon GI's written instructions and in strict compliance thereof.

4.2 Data Protection

(a) *Notwithstanding anything in Article 11 (Confidentiality) to the contrary, each Provider agrees to keep the GI Customer Personal Data Confidential, and agrees to not disclose any GI Customer Personal Data to third parties without having first received express written approval from the GI Customer and GI and, if required by applicable Law, the applicable Data Subject. All Provider personnel with Process GI Customer Personal Data only on a need-to-know basis in connection with the performance of this Agreement.*

Article 5 Services

5.1 *The Customer Agreement and Customer Statements of Work are by reference incorporated into the terms of this Agreement and Standard Operating Procedures.*

(a) On or before the Service Commencement Date for any Customer Statement of Work, each Provider shall deliver a draft of the standard operating procedures for the services which will be finalized and adopted by the Provider.

(b) Subject to the terms of this Agreement, the Parties shall comply at all times with the standard operating procedures.

(c) Each Provider shall update the standard operating procedures from time to time to reflect changes in the services being delivered.

5.2 ***Disaster Recovery Services.*** *Provider shall provide to GI the disaster recovery assistance, cooperation and services, if any, that are relevant. Each provider shall be responsible for business continuity planning or disaster recovery to the extent set forth in a Customer Statement of Work.*

5.3 ***Reports.*** *Each provider shall provide to GI, and directly to the GI Customer, where so agreed, the reports set forth in the Customer Statements of Work in accordance with the frequencies set forth therein.*

5.4 ***Records Retention.*** *Each provider shall retain applicable books and records in accordance with the records retention standards in accordance with Law, or as required by GI or the GI Customer, Whichever is the longest.*

ARTICLE 7 SERVICE LEVELS

7.1 ***General.*** *The service levels mentioned in each Customer Statement of Work shall be used to measure Provider's performance (the "Service Levels"). For project based Customer Statement of Work all the Deliverables and the Milestones or any other such measurement shall be used to measure the Provider's progress with respect to completion of the applicable services.*

7.2 *and 7.3 xxxx xxxx xxxx xxxx*

7.4 ***Measurement and Monitoring Tools.*** *Provider shall implement its measurement and monitoring tools and procedures to measure and monitor its performance against the Service Levels in any given Customer Statement of Work. Upon GI's reasonable request,*

Provider shall provide GI with information and access to such measurement and monitoring tools and procedures for purposes of verification.

Article 10 Fees and Payment Terms

10.1 Service Charges

(a) The charges for Services provided to GI by a Provider during a particular calendar year with respect to each GI customer (the "Provider Service Fee") shall be invoiced to and paid for by GI to the Provider at an amount equal to the excess of (i) over the sum of (ii), (iii) and (iv) below:

(i) the amount invoiced to the GI Customer for such Services (as denominated in US Dollars), in accordance with such Customer Statements of Work and Customer Agreements including amount invoiced for special projects/migration.

(ii) (a) GI's fully-loaded costs in providing its Services with respect to such GI Customer, calculated in U.S. Dollars, as described in Article 3 hereof and (b) GI's pass through costs including attributable to special projects/migration ((a) and (b) together referred to as "GI Costs")

(iii) Arms' length net margin to be retained by GI pursuant to an economic analysis in accordance with internationally accepted principles as agreed between the Parties from time to time.

(iv) Any adjustments made by GI for compensating the Support Region ((ii), (iii) and (iv) together referred to as "GI Service Fee").

ARTICLE 16 TERMINATION

16.1 <u>Termination for Cause.</u> *If a Provider fails to perform any of its material obligations under this Agreement or a Customer Statement of Work and does not cure such failure within the cure period mentioned in such Customer Statement of Work or where no such cure period is mentioned in a Customer Statement of Work, within 30 days of receipt of a notice of default from GI, then GI may, by giving notice to the Provider within 120 days (or such number of days as mutually agreed) of the last day of such cure period, terminate such Customer Statement of Work as of the date specified in such notice of termination.*

The recitals of the MSA provide that GI has sub-contracted the petitioner for providing the services to its customers. It is clear therefrom that the petitioner is engaged by GI for actual performance of BPO services and information technology services to the customers of GI. Petitioner would be held responsible for all risk related to performance of services which would be akin to services provided on "its own account". Clause 3.1 provides that GI would be responsible for obtaining new customers and maintaining relationship with existing customers, to whom services are provided by the petitioner. Clause 3.3 provides that GI would be responsible for negotiation with all GI customers. Clause 3.4 provides that GI would be responsible to raise invoices as well as handling all disputes of GI customers and the petitioner would be obligated to provide all data in such regard. Afore-said clauses would clarify that the petitioner who is actually performing the services would share the details of the performance/status of

the provision of services, cost incurred etc. which would enable GI to bill or address any dispute arising with the GI's customers. Clause 4.1 provides that the petitioner can access or process the personal date of GI customer to the extent necessary for performance of the services. Clause 4.2 provides for data protection and whereby the petitioner would be responsible for maintaining confidentiality of information pertaining to GI customers. Clause 5.2 obligates the petitioner to provide disaster recovery assistance to GI. Clause 5.3 states that petitioner would provide the report set-forth in the Customer Statement of Work to GI and its customers. Clause 5.4 obligates the petitioner to retain records and books in accordance with records retention standards in accordance with law or as required by GI. Clause 7 provides that the service levels mentioned in the Customer Statement of Work, would be used as criteria to measure the performance of the petitioner. Clause 10 of the MSA lays down the manner in which the petitioner would raise invoices on GI for the services rendered. Clause 16 provides that if the petitioner fails to perform any of the obligations under the MSA or under the Customer Statement of Work, GI may then terminate the contract.

The MSA bears out the arrangement between GI and the petitioner and the same may be summarized as below:-

i) "GI has service agreement for providing BPO services with respective GI customers at global level. GI issues invoices and receives remittence from the GI customers.

ii) GI under the MSA sub-contracted the execution of the BPO services to the petitioner.

iii) Petitioner executes the delivery of BPO services to the customers of GI under the MSA.

iv) Petitioner issues invoices to GI and receives payment from GI in convertible foreign exchange as its service fee."

The MSA dated 01.01.2013 (Annexure P-1) entered between the petitioner and GI is clearly for the purpose of sub-contracting services to the petitioner by GI. These are the very services which GI was contractually supposed to provide to its own customers.

As per definition of "intermediary" under Section 2 (13) of the IGST Act the following three conditions must be satisfied for a person to qualify as an "intermediary";-

First, the relationship between the parties must be that of a principal-agency relationship. Second, the person must be involved in arrangement or facilitation of provisions of the service provided to the principal by a 3rd party. Third, the person must not actually perform the main service intended to be received by the service recipient itself. Scope of an "intermediary" is to mediate between two parties i.e. the principal service provider (the 3rd party) and the beneficiary (the agents principal) who receives the main service and expressly excludes any person who provides such main service "on his own account".

A bare perusal of the recitals and relevant clauses of the MSA reproduced hereinabove do not in any manner indicate that petitioner is acting as an "intermediary" so as to fall within the scope and ambit of the definition of "intermediary" under Section 2 (13) of the IGST Act. Such clauses cannot also be interpreted to conclude that the petitioner has facilitated the services. The said clauses are in relation to the modalities of how the actual work would be carried out and do not in any manner establish that the petitioner was required to arrange/facilitate a 3rd party to render the

main service which has actually been rendered by the petitioner.

It would not be out of place to refer to an order in original dated 25.01.2018 (Annexure P-2) passed by the Assistant Commissioner, Division-East-1, GST, Gurugram, granting refund of Rs.26,34,83,928/- for the period April-June 2016 and July-September 2016 after making a detailed analysis of the MSA and holding that the petitioner cannot be treated as as "intermediary".

The relevant findings recorded by the department are as follows:-

> *The company is involved in provision of various types of IT enabled professional services such as business consulting, back office management, IT helpdesk services, call center services etc. ('BPO services') to overseas entity, Genpact International Inc. As per the terms of Master Services Sub-contracting agreement ('MSA'), the Company provides BPO services of nature mentioned above directly to the customers of Genpact International Inc. ('GI') located outside India. The arrangement requires the Company to complete the assigned processes/scope of work and submit the deliverables directly to the third parties, either on-line or on-call or through e-mail using dedicated electronic networks and voice circuits.*
>
> *Service provided by the Company cannot be classified as services of an 'Intermediary'. The terms 'intermediary' is defined under Rule 2 (f) of the Place of Provision of Service Rules, 2012 ('POPS Rules') as: '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') between two or more persons, but does not include a person who provides the main service on his account".

On a perusal of the above definition, it is evident that the following two conditions must be fulfilled collectively for a service provider to qualify as an 'intermediary':

Involved in arrangement or facilitation in provision of the service provided by the principal;

No role in actual performance of service intended to be received by the receiver.

In view of the above definition, it is clear that the scope of intermediary is to mediate between two parties i.e. the principal service provider and the beneficiary who receives the main service and expressively excludes any person who provides such main service on his own account from its scope.

In the present case, since the company provides BPO services on behalf of GI, it undoubtedly provides the main services on its own account. Accordingly, the services provided by the company under the MSA will get excluded from the purview of 'intermediary services'. It shall be noteworthy to highlight that the agreement with parent entity, GI is on a principal to principal basis and there is no separate agreement of the company with any of the customers of the parent entity. Evidently, the scope of the services performed by the company is completely different from facilitation of service between the GI and customers of GI.

In the light of the above facts, it can be concluded that the services mentioned above rendered by Genpact India is in the nature of it is a main service and not of intermediary."

It has gone uncontroverted that such order has since become final as no appeal has been filed at the instance of the respondents.

In the impugned order the department has chosen to deviate from the view taken in the order in original dated 25.01.2018 (Annexure P-2) on the ostensible basis that there has been a change in law w.e.f. 01.07.2017 i.e.with the onset of the GST regime.

We find such view to be wholly mis-conceived.

In the pre-GST regime the term "intermediary services" was defined under Rule 2 (f) of the Place of Provision of Service Rules 2012. Under the 2012 Rules "intermediary services" were defined to mean a broker/an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service on his account.

A perusal of the definition of "intermediary" under the service tax regime vis-a-vis the GST regime would show that the definition has remained similar. Even as per circular dated 20.09.2021 issued by the Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (GST Policy Wing), the scope of "intermediary" services has been dealt in para 2 thereof. In para 2.2 it stands clarified that the concept of "intermediary" was borrowed in GST from the Service Tax Regime. The circular after making a reference to the definition

of "intermediary" both under Rule 2 (f) of the Place of Provision of Service Rules 2012 and under Section 2 (13) of the IGST Act clearly states that there is broadly no change in the scope of "intermediary" services in the GST regime vis-a-vis the service tax regime except addition of supply of securities in the definition of "intermediary" in the GST law.

We also find that in the impugned order dated 15.02.2021 (Annexure P-18) there has been a clear misreading of the ruling in the case of *Infinera (supra)* while observing that there has been a material change in the definition of "intermediary" under the GST regime. To the contrary a bare perusal of the ruling in the case of *Infinera (Supra)* which stands reproduced by the Appellate Authority in the impugned order itself would show that the definition of the term "intermediary" had been noticed both under the pre-GST regime as also under the GST regime and it had been observed as under:-

> "*From the above definitions, in essence, there does not seem to be any difference between the meaning of the term "intermediary" under the GST regime and pre-GST regime. In the pre-GST regime, an intermediary referred to a person who facilitates the provision of a main service between two or more person but did not include a person who provided the main service on his account. Similarly, in the GST regime, an intermediary refers to a person who facilitates the supply of goods or services or both between two or more persons but excludes a person who supplies such goods or services or both on his own account.*

Accordingly, in the light of such position wherein there is no

change in the legal position i.e. with regard to the scope and ambit of "intermediary" services under the service tax regime vis-a-vis the GST regime and there being no change of facts as it is the MSA of 2013 (Annexure P-1) which continues to operate, the department cannot take a different view for different periods. ***In M/s Radhasoami Satsang Soami Bagh, Agra Versus Commissioner of Income Tax (1992) 1 SCC 659,*** even though it had been observed that *res judicata* dopes not apply to income tax proceedings, yet it was observed as follows:-

> *16. We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.*
>
> *17. On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter – and if there was no change it was in support of the assessee – we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-tax in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income*

*derived by the **Radhasoami Satsang** was entitled to exemption under Sections 11 and 12 of the Income Tax Act of 1961".*

In ***Bharat Sanchar Nigam Ltd. Vs. Union of India (2006) 3 SCC 1,*** the Hon'ble Supreme Court had reiterated that where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view.

Paragraph 20 of the judgment would be relevant to the issue at hand and is reproduced hereunder:-

"20. The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar Courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with

the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction.

The principle of consistency as such ought to apply in the present matter as well and we find merit in the stand taken on behalf of the petitioner that the view taken in the order in original dated 25.01.2018 (Annexure P-2) holding the petitioner to be not an "intermediary" under the MSA, should prevail even under the GST regime.

Furthermore, we find that the finding recorded by the respondents-department to hold the petitioner to be in a principal agent relationship with the GI to be without any basis and to be clearly erroneous. The impugned order proceeds oblivious of Clause 21.6 of the MSA and which is in the following terms:-

21.6 ***Relationship of Parties*** *Nothing in this Agreement shall constitute or be deemed to constitute a relationship of employer and employee, agency, joint venture or partnership between the parties hereto or constitute or be deemed to constitute one Party as agent of the other for any purpose whatsoever, and except as expressly provided herein, neither Party shall have the authority or power to bind the other, or to contract in the name of or create a liability against the other, in any way or for any purpose."*

During the course of arguments, Mr. Sharan Sethi, learned Senior Standing Counsel for the respondents would concede that there is no separate agreement entered between the petitioner and GI's customers. In no manner as such can the petitioner be equated to be an agent or broker. It would also be useful at this stage to advert to the stand taken by the

respondents-department in the written statement that had been filed in the previous round of litigation i.e. CWP No.10302 of 2020 that had been filed by the petitioner. In para 8 of the written statement that stands placed on record and appended as Annexure P-11 it had been stated as follows:-

> *"It is further mentioned that the service is primarily in the nature of various types of backend services which are in the nature of call centre services, back office management, IT helpdesk services etc. ('BPO services') to the overseas entity. The petitioner provides these services to third parties on behalf of its client located outside India.* ***The arrangement requires the company to complete the assigned processes/scope of work and submit the deliverables directly to the third parties, either on-line or on-call or through e-mail using dedicated electronic networks and voice circuits.***

Still further in para 9 of the written statement it was clearly averred to the following effect:-

> "*the test of agency must be satisfied between the principal and the agent i.e. the "intermediary" which is not the case in the present case"*

The findings as regards the petitioner to be an agent is in contradistinction to the clear stand taken by the department in the previous round of litigation.

It is undisputed that the petitioner has an agreement only with the GI.

Pursuant to the sub-contracting arrangement as per MSA (Annexure P-1), the petitioner provides the main service directly to the

overseas clients of GI but does not get any remuneration from such clients. Pursuant to the arrangement, it is GI which gets paid by its customers to whom the services are being provided directly by the petitioner. Nothing has been brought on record to show that the petitioner has a direct contract with the customers of GI. Still further there is nothing on record to show that petitioner is liaisoning or acting as an "intermediary" between GI and its customers. All that is evident from the record is that the petitioner is providing the services which have been sub contracted to it by GI. As a Sub-contractor it is receiving fee/charges from the main contractor i.e. GI for its services. The main contractor i.e. GI in turn is receiving commission/agents from its clients for the main services that are rendered by the petitioner pursuant to the arrangement of sub-contracting. Even as per the afore-noticed circular dated 20.09.2021 and in reference to para 3.5 it stands clarified that sub-contracting for a service is not an "intermediary" service.

In the present case we find that in the written statement reference is made to a Transfer Pricing Report (Annexure P-24) as also to draw a distinction between two categories of supplies as per MSA i.e. main supply and the ancillary supply. The passing of the impugned order is sought to be justified that the main supply takes place between GI and its customers whereas it is the ancillary supply which is provided by the applicant to facilitate the provision of the main supply.

We find that the written statement seeks to justify the impugned order on grounds which are not even part of the impugned order and which is clearly impermissible in law. A reference in this regard may be made to

the judgment of the Apex Court in ***Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others (1978) 1 SCC 405,*** wherein it had been held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of an affidavit or otherwise. It was further observed that an order which was otherwise bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

For the reasons recorded above, we are of the considered view that the impugned order dated 15.02.2021 (Annexure P-18) holding the petitioner to be an "intermediary" under Section 2 (13) of the IGST Act, cannot sustain.

The same as such is quashed and consequently the order in original dated 14.03.2019 (Annexure P-3) granting refund of Rs.26,34,61,625/- in favour of the petitioner is restored.

It is further directed that the benefit of this order shall enure to the petitioner for grant of subsequent refunds as well.

Writ petition is allowed in the aforesaid terms.

(TEJINDER SINGH DHINDSA)
JUDGE

(DEEPAK MANCHANDA)
JUDGE

11.11.2022
shweta

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No