CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD
REGIONAL BENCH - COURT NO. – I

Service Tax Appeal No. 30136 of 2017
(Arising out of **Order-in-Original** No.HYD-EXCUS-004-COM-041-16-17 dated 19.10.2016 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV)

HSBC Electronic Data Processing India Private Limited .. **APPELLANT**
H S B C House, Plot No. 8,
Survey No. 64, Hi-tech City,
Madhapur, Hyderabad,
Telangana – 500 081.

VERSUS

Commissioner of Central Tax Rangareddy – GST .. **RESPONDENT**
GST Commissionerate,
Posnett Bhavan, Tilak Road,
Ramkoti, Hyderabad,
Telangana – 500 001.

AND
Service Tax Appeal No. 30257 of 2019
(Arising out of **Order-in-Original** No. HYD-EXCUS-004-COM-015-18-19 dated 31.10.2018 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV)

HSBC Electronic Data Processing India Private Limited .. **APPELLANT**
H S B C House, Plot No. 8,
Survey No. 64, Hi-tech City,
Madhapur, Hyderabad,
Telangana – 500 081.

VERSUS

Commissioner of Central Tax Rangareddy – GST .. **RESPONDENT**
GST Commissionerate,
Posnett Bhavan, Tilak Road,
Ramkoti, Hyderabad,
Telangana – 500 001.

APPEARANCE:
Shri S. Thirumalai, Advocate for the Appellant.
Shri Wagh Chittanranjan Prakash, Authorised Representative for the Respondent.

CORAM: HON'BLE Mr. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30020-30021/2024

Date of Hearing:04.10.2023
Date of Decision:17.01.2024

[ORDER PER: ANIL CHOUDHARY]

1. These appeals (on common issue) arise out of i) Order-in-Original No. HYD-EXCUS-004-COM-041-16-17 dated 19.10.2016 (First Order, for the

period October 2010 to March 2015) and ii) Order-in-Original No. HYD-EXCUS-004-COM-015-18-19 dated 31.10.2018 (Second Order, for the period and April 2015 to June 2017), ('impugned Orders'). The issue that arises is with respect to export of services by the appellants to the overseas customer and consequent demand towards certain elements of the export activity and also reimbursement of costs incurred by the appellant. Both the appeals are disposed of by this common order.

2. In the First Order, the Learned Commissioner has confirmed the proposals in the show cause notice with respect to appellant providing accommodation and travel services to the personnel of their customers, after dropping the demand in respect of accommodation service for the period upto 30.06.2012, holding that 'short-term accommodation service can be taxed only when it is provided by hotels, etc. or entities engaged in provision of such services'.

The following demands were confirmed in the First Order –

(I) Rs. 1,03,95,608/- being the Service Tax payable on Accommodation service by M/s HSBC Electronic Data Processing India Pvt. Ltd., in terms of Section 73(2) of the Finance Act,1994;

(II) Rs. 18,29,072/- being the Service Tax payable on Rent a cab service by M/s HSBC Electronic Data Processing India Pvt. Ltd., in terms of Section 73(2) of the Finance Act, 1994;

(III) Rs. 6,36,38,134/- being the Service Tax payable on Intermediary services by M/s HSBC Electronic Data Processing India Pvt. Ltd., in terms of Section 73(2) of the Finance Act,1994;

(IV) Payment of interest, at applicable rates, on the Service Tax demanded and confirmed at (I) to (III) above, in terms of Section 75 of the Finance Act, 1994;

(V) Penalty of Rs.200/- per day on M/s. HSBC Electronic Data Processing India Pvt. Ltd., for the period calculated from the date on which they ought to have obtained the registration for the impugned services upto 30.06.2012, in terms of Section 77(1) of the Finance Act, 1994.

(VI) Penalty of Rs.10,000/- for failure to properly assess their service tax liability on the impugned services, in terms of Section 77(2) of the Finance Act, 1994.

(VII) Rs. 7,58,62,814/- as penalty on M/s HSBC Electronic Data Processing India Pvt. Ltd., under Section 78 of the Finance Act, 1994;

3. In the Second Order, wherein the only question was with respect to service tax payable on intermediary services, the learned Commissioner has

passed the following Order –

(I) Rs.5,43,00,759/- being the service tax payable on the 'Intermediary Services' rendered during the period from 04/2015 to 06/2017;

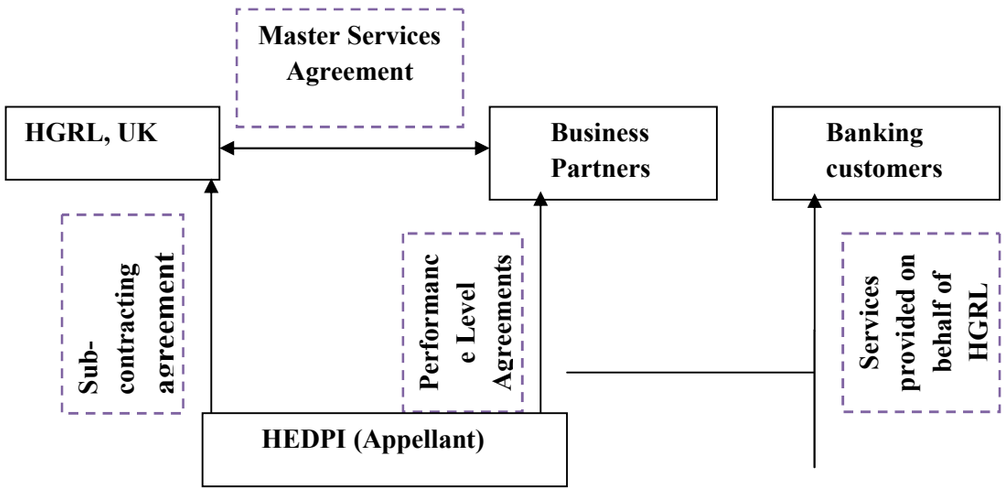
(II) Payment of interest, at applicable rates, on the Service Tax demanded and confirmed above, in terms of Section 75 of the Finance Act, 1994;

(III) Penalty of Rs. 5,00,000/- in terms of Section 76 of the Finance Act,1994'.

4. The Learned Counsel appearing for the appellant assailing the impugned orders made the following submissions –

4.1 With regard to the demand in respect of some elements of the export activities, namely collections for credit/debit card operations and contact center (outbound calls) among the activities listed in the nature of services mentioned at Para 27 of the First Order, it is not permissible in law to segregate these elements from the bundle of services and to subject these as services provided by intermediary in terms of Rule 2(h) of the Place of Provision of Service Rules, 2012 ('POPS') read with Rule 9(c) of the said Rules.

4.2 The Learned Counsel has sought to explain the business arrangement with the help of the following diagrammatic representation –



4.3 HEDPI (HSBC Electronic Data Processing India Pvt Ltd.,), the appellant has entered into a sub-contracting agreement with a Group entity, HGRL (HSBC Global Resourcing (UK) Ltd), UK. The services to be rendered by the appellant in terms of the said agreement are those which HGRL UK have agreed to provide to Business Partners in terms of 'Master Services Agreement (Intra-Group Services Agreement). The appellant has performance level agreements with the Business Partners and provides the

services directly to the ultimate customers, called banking customers of the Business Partners.

4.4 It is submitted that the appellants are answerable in terms of the sub-contracting agreement only to HGRL, UK and the compensation provided is on cost-plus basis. There is no principal-agent relationship since it is provided in the sub-contracting agreement that the appellants render services to HGRL as independent contractors i.e. on principal-to-principal basis. Therefore, there is no service provided as intermediary and the export of services even for these elements of services will also be determined under Rule 3 of the POPS and not under Rule 9(c) as claimed by the department.

4.5 In support of his contentions he has relied upon the following Orders/Judgments–

- Commissioner of Goods and Services Tax, Gurgaon – II Vs. Orange Business Solutions Private Limited [2019-VIL-332-CESTAT-CHD-ST]
- Macquarie Global Services Private Limited Vs. CCE & ST, Gurgaon – I [2021- VIL-704-CESTAT-CHD-ST]
- Genpact India Private Limited Vs. UOI &Ors [2022-VIL-751-P&H]
- Verizon Communication India Private Limited Vs. Assistant Commissioner, Service Tax, Delhi – III &Anr. [2017-VIL-469-DEL-ST]
- Commissioner of Central Tax Vs. M/s Singtel Global India Private Limited [2023-VIL-606-DEL-ST]

4.6 With regard to the demand for accommodation and rent-a-cab services, claimed as reimbursements, he has submitted that in terms of the sub-contracting agreement, these are part of the original service and therefore qualify as export of services.

4.7 Therefore, it was submitted that the invoices raised for reimbursement of costs incurred towards accommodation and rent-a-cab for visiting customers would be very much part of export turnover and qualify in terms of Export of Service Rules and Rule 6A of the Service Tax Rules, 1994 for export, without payment of service tax.

4.8 Further, there is no allegation in the show cause notice as observed in the First Order that the addition of profit margin to the cost indicates that the appellants are acting as principal service provider, but sub-contracted the services provided by them.

4.9 He also submits that for the service to be classified as rent-a-cab in terms of Section 65(91), upto 30.06.2012 and with reference to Rule 11 of the POPS for the period from 01.07.2012, is also not sustainable as these are part of the original service.

4.10 With regard to accommodation services, the same is identically worded in terms of Rule 5 of the POPS as in the case of short-term accommodation for the period prior to 01.07.2012 and therefore the demand in respect of the same, post 01-07-2012 ought to have been dropped.

4.11 He has also relied upon the judgment in the case of **Ness Technologies (India) Private Limited Vs CST, Division – IV Mumbai [2015-VIL-3821-CESTAT-MUM-ST]**.

4.12 With respect to the demand pursuant to the extended period of limitation at Para 54 of the First Order, it is claimed that evidence of the current issues, indicating knowledge of the audit team, has not been mentioned. However, it is to be seen that specific mention of the Master Service Agreement has been made in the Draft Audit Report of 27.05.2014. The First Order also makes reference to the refund claims filed by the appellant in Para 32, and a perusal of the show cause notice will show that these agreements are verified by the department. Therefore, the extended period in any case cannot be invoked. He has relied upon the following judgments –

- GD Goenka Private Limited Vs. COGST, Delhi South [2023-VIL-798-CESTAT-DEL-ST]
- Tata Steel Limited Vs. CCE & ST, Jamshedpur [2019-VIL-1303-CESTAT-KOL-ST]
- Advance Steel Tubes V COC ST [2019-TIOL-3353-CESTAT-All]
- Emami Paper Mills Limited Vs. COCGST, Bhubaneshwar [2022-VIL-835-CESTAT-KOL-CE]

4.13 He prayed that the extended period of limitation cannot be invoked and finally prayed that the appeals be allowed.

5. On the other hand learned Authorized Representative appearing for the Revenue stated that, as per the show cause and the Order-in-original,

the elements of service namely, expenses for providing accommodation and rent-a-cab for foreign customers during their visit to India, should be taxed under the respective categories and not treated as export of services. The outbound call and debit/credit card collections have been rightly held as intermediary services. In this regard, he has reiterated the findings in the impugned Orders based on the show cause notices

6. Heard both sides at length and examined the case records.

7. The following issues arise for determination –

- Whether the services provided by the appellant in connection with sales and services and collection services can be classified under the category of intermediary services?

- Whether the services provided by the appellant to the personnel of foreign customers on their visit to India are taxable?

8. In order to appreciate the rival contentions it will be useful to extract the relevant portions of the sub-contracting agreement referred to herein above and the performance level agreement –

'SUB-CONTRACTING AGREEMENT

DATED 1st January 2006

(1) HSBC Electronic Data Processing India Private Limited
(2) HSBC GLOBAL RESOURCING (UK) LIMITED
CONTENTS

Parties

Recitals

12 Force Majeure
13 Miscellaneous
14 Juridical Provisions
Schedule A – Standard Security Measures

Schedule B – Charges

…

THIS AGREEMENT is made the 1st day of January 2006

BETWEEN:

(1) HSBC Electronic Data Processing India Private Limited of (HSBC House, Plot No 81 Survey No. 64 (Part), Hitec City Layout, Madhapur, Hyderabad - 500 081 (the ''GSC''); and

(2) HSBC GLOBAL RESOURCING (UK) LIMITED of 8 Canada Square, London E14 SHQ (''HGRL'')

WHEREAS:

(A) That GSC carries on the business of providing certain services, including electronic data processing and the handling of volume telephone calls

(B) HGRL carries on the business of providing certain services, including electronic data processing and the handling of volume telephone calls, to Business Partners (as defined below)

(C) Each of the GSC and the HGRL is an HSBC Group Member (as defined below)

(D) HGRL wishes to sub-contract to the GSC the provision of certain services that HGRL provides to its Business Partners (as defined below), and the GSC has agreed to undertake the provision of such services, on the terms set out herein.

…

1 INTERPRETATION

(a) In this Agreement:

(i) ''Additional Country Specific Terms'' means any additional terms that have been agreed between the HGRL and certain of its Business Partners set out in Schedule D to the Master Services Agreement, comprising additional terms relevant to the provision of services generally to the Business Partner to which

the Schedule D relates, including such terms as are necessary to ensure that such services are provided in accordance with such Business Partner's Legislative and Regulatory Requirements;

(ii) ''Agreement'' means this agreement together with its schedules (as may be amended by the parties from time to time);

(iii) ''Business Partner'' means each of the HSBC Group Members to which HGRL has agreed to provide services and in respect of which (i) HGRL has entered into a Master Services Agreement; and(ii) HGRL wishes to sub-contract such services to the GSC;

(iv) ''Business Partner Representative'' means in the case of each Business Unit of a Business Partner, the officer or person specified in paragraph 2 of the relevant Schedule B (or such other officer or person as the Business Partner may designate in writing from time to time) who is responsible for the day-to-day liaison with the HGRL Representative and the GSC Representative(s) and for monitoring the performance of the relevant Services by HGRL and the GSC;

(v) ''Business Unit'' means any of the business or operating units of a Business Partner to whom HGRL provides services from time to time, and in respect of which (i) a Schedule Band Schedule(s) C have been completed; and (ii) HGRL wishes to sub-contract such services to the GSC;

…

(x) ''GSC Representative'' means the officer or person specified in paragraph 4 of a relevant Schedule B (or such other officers or persons as the GSC may notify to HGRL in writing from time to time), being an individual who the GSC has appointed to be responsible for day-to-day liaison with the HGRL Representative and the Business Partner Representative;

…

(xv) ''Master Services Agreement'' means each of the master services agreements that have been entered into between HGRL

and a Business Partner setting out the terms and conditions upon which HGRL will provide services to such Business Partner;

…

(xvii) ''Performance Level Agreement means the performance level agreement(s) that the GSC has agreed to put in place from time to time directly between it and each of the Business Units setting out, inter alia, the levels of service and performance which the GSC has undertaken to HGRL will be achieved with respect to the provision of the Services, and which the GSC acknowledges that HGRL has undertaken to the Business Partner will be achieved with respect to the provision of the Services;

…

(xxvi) "Services'' means in the case of each Business Unit the services that HGRL has agreed to provide to such Business Unit as specified in a Schedule C, the provision of which HGRL has sub-contracted to the GSC pursuant to the terms of this Agreement;

2 SERVICES

(a) The GSC shall provide the Services in accordance with:

(i) the provisions of this Agreement;

(ii) the provisions of the relevant Schedules A, B, C and any Additional Country Specific Terms provided by HGRL to the GSC pursuant to the provisions of Clause 2(b);

(iii) the provisions of any relevant Performance Level Agreement;and

(iv) HSBC Group standards.

…

(c)The GSC shall ensure that the Services are performed with due diligence and skill at all times during the Term and that the Designated Employees and/or Contractors have the qualifications and expertise necessary to perform the Services.

…

(m) The GSC shall enter into Performance Level Agreements directly with each Business Partner or designated Business Unit with respect to the provision of the Services as agreed between the GSC and the Business Partner (or its designated Business Unit). The Performance Level Agreement(s) will reflect the levels of service and performance that HGRL has undertaken to the Business Partner that it will meet with respect to the provision of the Services, and in turn, the levels of service and performance that the GSC undertakes to HGRL to meet with respect to the provision of the Services. Upon execution of each Performance Level Agreement, its terms are deemed acceptable by HGRL. Accordingly, the GSC shall provide the Services in accordance with the levels of service and performance set out in such Performance Level Agreement(s) and shall be directly liable to HGRL for any failure to meet such performance levels in accordance with the provisions of Clause 8 of this Agreement, as if references to the Business Partner or its designated Business Unit in such Performance Level Agreement(s) were references to HGRL. The GSC shall have no direct liability to a Business Partner or its designated Business Unit with respect to any failure to meet such performance levels. In the event of any inconsistency between Such Performance Level Agreements and the provisions of this Agreement, then the provisions of this Agreement shall prevail.

6 COMPENSATION

(a)In consideration of the provision of the relevant Services the GSC shall be entitled to receive from HGRL. arm's length charges for the Services, together with recoverable expense..> For the purposes of this Clause6(a), the term ''arm's length'' shall mean on terms and under circumstances that are substantially the same as those prevailing at the time for comparable services with non-affiliated parties, or where comparable third- party services do not exist, on terms and under circumstances that in good faith would apply to such third parties.

(b) The charges and the basis upon which expenses are recoverable shall be set out in Schedule F to this Agreement and may be amended by the GSC from time to time on not less than 30 calendar days prior written notice to HGRL and will be recorded in a revised Schedule F specifying the date that the new charges become effective. HGRL may reasonably reject a material

amendment to the charges. If the parties are unable to agree on any such material amendment, HGRL shall as soon as reasonably practicable discontinue

its use of the relevant Services. Prior to such discontinuance, the charges applicable prior to the notification of any such amendment shall apply.

(c) The charges shall be exclusive of any applicable value added tax or any other fiscal imposition on the charges payable by HGRL for the supply of the Services, which taxes (if any) shall be for the account of HGRL.

(d) The GSC shall ensure that the charges invoiced to HGRL in accordance with Clause 6(e) are adjusted to reflect the provisions of Clause 8(b). This clause shall only apply in relation to the provision of Services from the date that the parties have agreed that such Services are being provided on a ''business as usual'' basis (as recorded in writing) or such other date as the parties may agree.

(e) The GSC will send an invoice to HGRL at during the second week of each calendar month (or at such other time each month as may. be agreed from time to time)in respect of the charges payable and expenses recoverable for the previous month in such currency /currencies as the parties may agree from time to time. HGRL shall arrange for payment of the amount specified in each invoice within 35 calendar days of receipt of the invoice by crediting the amount, or arranging for the amount to be credited, to such account as the GSC may specify from time to time. Payment of the charges may also be effected, in any other manner as may be agreed between the GSC and HGRL from time to time.

(f) Save as expressly provided under the terms of this Agreement, payment by HGRL to the GSC hereunder shall be made without any deduction or withholding and free from any set off or counterclaim. Should any applicable law at any time require any deduction or withholding to be made from a payment then (i) HGRL's liability in respect of the payment shall be for a revised amount such that after the making of such deduction or withholding the net payment shall be equal to the amount which the GSC would have received had no such deduction or withholding been made, (ii) HGRL shall make such deduction or withholding, and iii) HGRL shall pay the full amount deducted or withheld to the relevant taxation authority or other authority in accordance with applicable law.

7. INSPECTION AND AUDIT

(b) Without prejudice to Clause 7(a) above whenever GHRL and/or the Business Partner shall so request by written notice to the GSC then HGRL and/or the relevant Business Partner (through the appropriate HSBC Group internal audit function or external auditors engaged for the purpose) may undertake an

independent and objective review (at the requesting party's expense) in respect of the Services.

13 MISCELLANEOUS

…

(f) Nothing herein contained shall be deemed to create or constitute a legal partnership or joint venture between the parties hereto, and the GSC shall be considered for all purposes to be an independent contractor.

…

SCHEDULE B

CHARGES

HGRL will pay the Approved GSC fees in respect of the Services summarised in the relevant Schedules C provided by HGRL to the Approved GSC from time to time.

The fees charged by the Approved GSC will be calculated on the basis of the costs of the Approved GSC in performing its obligations under this Agreement for each charging period. A premium will be added to the costs to arrive at the total compensation due.

Incidental third party costs necessarily incurred by the Approved GSC in performing and delivering the Services will be charged without a mark-up."

9. It is necessary to examine the following provisions of the Place of Provision of Service Rules, 2012–

- ***Rule 2(f)*** *-* ***"intermediary"*** *means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account;*

- ***Rule 3*** *- Place of provision generally*
  The place of provision of a service shall be the location of the recipient of service:
- ***Rule 5*** *- Place of provision of services relating to immovable property*
  The place of provision of services provided directly in relation to an immovable property, including services provided in this regard by experts and

estate agents, provision of hotel accommodation by a hotel, inn, guest house, club or campsite, by whatever, name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including architects or interior decorators, shall be the place where the immovable property is located or intended to be located.

- ***Rule 9*** *- Place of provision of specified services*

  The place of provision of following services shall be the location of the service provider:-

  …

  (c) Intermediary services;

- ***Rule 11*** *- Place of provision of passenger transportation service*

  The place of provision in respect of a passenger transportation service shall be the place where the passenger embarks on the conveyance for a continuous journey.

10. It is also necessary to take into account some of the Orders/ Judgments relied upon by the learned Counsel for the Appellants.

- In **Commissioner of Goods and Services Tax, Gurgaon – II Vs. Orange Business Solutions Private Limited [2019-VIL-332-CESTAT-CHD-ST]**, the facts were that the Respondents in that case had rendered services to the Orange Group of Companies on direction of Group entity. The role of the Respondent was to provide outsourced services and there was no privity of contract with any customer of Orange Group entities. In that case, the Orange group had shared service centers which catered to the global entities for back office support. The consideration was provided by ENSIL. After noting the Guidance Note of the CBIC dated 20.06.2012, and the terms of the agreement it was held as follows –

"10. From the above Guidance Note of CBEC dt.20.6.2012 and definition of intermediary, the following conclusion has drawn:-

(a) An intermediary arranges or facilities a provision of a 'main service' between two more persons;

(b) 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;

(c) An intermediary cannot influence the nature or value of service, the supply of which he facilitates on behalf of his principal, although the principal may authorize to negotiate a different price;

(d) The consideration for an intermediary is separately identifiable from the main supply of service that he is arranging and is in the nature of fee or commission charged by him;

(e) The test of agency must be satisfied between the principal and the agent i.e. the intermediary. The Guidance Note states that the intermediary or the agent must have documentary evidence authorizing him to act on behalf of the provider of the main service;

(f) The payment for such services is received by way of commission;

(g) The Principal must know the exact value at which the service is supplied (or obtained) on his behalf.

…

14. We further take note of the fact that the activity of the appellant is routine back office process outsourcings activities and are completely based on instructions/guidelines provided by ENSIL/AEs in this regard. The Revenue has not produced any evidence as to why providing of back office process outsourcing should be treated as intermediary."

- The next Order is of the coordinate bench of **Macquarie Global Services Private Limited Vs. CCE & ST, Gurgaon – I [2021- VIL-704-CESTAT-CHD-ST]**, where in the context of similar arrangement of back office support services and IT/ITES services to overseas group companies, after taking note of the Circular No 159/15/2021-GST dated 20th September, 2021 it was observed as follows –

"4.6 Similar view has been affirmed vide the Circular No 159/15/2021-GST dated 20th September, 2021, issued by the Board though in relation to similar provisions under GST, stating as follow:

"Subject: Clarification on doubts related to scope of "Intermediary"–reg.

Representations have been received citing ambiguity caused in interpretation of the scope of "Intermediary services" in the GST Law. The matter has been examined. In view of the difficulties being faced by the trade and industry and to ensure uniformity in the implementation of the provisions of the law across field formations, the Board, in exercise of its powers conferred by section 168 (1) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "CGST Act"), hereby clarifies the issues in succeeding paragraphs.

2. Scope of Intermediary services

2.1 'Intermediary' has been defined in the sub-section (13) of section 2 of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "IGST" Act) as under–

"Intermediary means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account."

2.2 The concept of 'intermediary' was borrowed in GST from the Service Tax Regime. The definition of 'intermediary' in the Service Tax law as given in Rule 2(f) of Place of Provision of Services Rules, 2012 issued vide notification No. 28/2012-ST, dated 20-6-2012 was as follows: "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;"

2.3 From the perusal of the definition of "intermediary" under IGST Act as well as under Service Tax law, it is evident that there is broadly no change in the scope of intermediary services in the GST regime vis-à-vis the Service Tax regime, except addition of supply of securities in the definition of intermediary in the GST Law.

3. Primary Requirements for intermediary services The concept of intermediary services, as defined above, requires some basic prerequisites, which are discussed below:

3.1 Minimum of Three Parties: By definition, an intermediary is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus a natural corollary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply. An activity between only two parties can, therefore, NOT be considered as an intermediary service. An intermediary essentially "arranges or facilitates" another supply (the "main supply") between two or more other <u>persons and, does not himself provide the main supply</u>.

3.2 Two distinct supplies: As discussed above, there are two distinct supplies in case of provision of intermediary services;

(1) <u>Main supply</u>, between the two principals, which can be a supply of goods or services or securities;

(2) <u>Ancillary supply, which is the service of facilitating or arranging the main supply between the two principals</u>. This ancillary supply is supply of intermediary service and is clearly identifiable and distinguished from the main supply. A person involved in supply of main supply on principal to principal basis to another person cannot be considered as supplier of intermediary service.

3.3 Intermediary service provider to have the character of an agent, broker or any other similar person: The definition of "intermediary" itself provides that intermediary service provider means a broker, an agent or any other person, by whatever name called….". This part of the definition is not inclusive but uses the expression "means" and does not expand the definition by any known expression of expansion such as "and includes". The use of the expression "arranges or facilitates" in the definition of "intermediary" suggests a subsidiary role for the intermediary. It must arrange or facilitate some other supply, which is the main supply, and does not himself provides the main supply. Thus, the role of intermediary is only supportive.

3.4 Does not include a person who supplies such goods or services or both or securities on his own account: The definition of intermediary services specifically mentions that intermediary "does not include a person who supplies such goods or services or both or securities on his own account". Use of word "such" in the definition with reference to supply of goods or services refers to the main supply of goods or services or both, or securities, between two or more persons, which are arranged or facilitated by the intermediary. It implies that in cases wherein the person supplies the main supply, either fully or partly, on principal to principal basis, the said supply cannot be covered under the scope of "intermediary".

3.5 Sub-contracting for a service is not an intermediary service: An important exclusion from intermediary is sub-contracting. The supplier of main service may decide to outsource the supply of the main service, either fully or partly, to one or more sub-contractors. Such sub-contractor provides the main supply, either fully or a part thereof, and does not merely arrange or facilitate the main supply between the principal supplier and his customers, and therefore, clearly is not an intermediary. For instance, 'A' and 'B' have entered into a contract as per which 'A' needs to provide a service of, say, Annual Maintenance of tools and machinery to 'B'. 'A' subcontracts a part or whole of it to 'C'. Accordingly, 'C' provides the service of annual maintenance to 'A' as part of such sub-contract, by providing annual maintenance of tools and machinery to the customer of 'A', i.e. to 'B' on behalf of 'A'. Though 'C' is dealing with the customer of 'A', but 'C' is providing main supply of Annual Maintenance Service to 'A' on his own account, i.e. on principal to principal basis. In this case, 'A' is providing supply of Annual Maintenance Service to 'B', whereas 'C' is supplying the same service to 'A'. Thus, supply of service by 'C' in this case will not be considered as an intermediary.

3.6 The specific provision of place of supply of 'intermediary services' under section 13 of the IGST Act shall be invoked only when either the location of supplier

of intermediary services or location of the recipient of intermediary services is outside India."

4.6 In the decision of CESTAT in Orange Business Solutions Pvt Ltd, supra and also the Circular issued by the Board, the basic characteristics, of the intermediary has been clearly spelt out. Also in the case of JFE Steel India Pvt Ltd [2021 (44) G.S.T.L. 292 (Tri. – Chan)], same has been held stating as follows:

7……. 'Intermediary Service' has been defined under Rule 2(f) of the Place of Provision of Service Rules, 2012 reads as follows :-

"(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account;"

A simple reading of the aforesaid provisions makes it clear that to attract the said definition there should be two or more persons besides the service provider. In the present case, the appellants are providing services to their parent company at Japan and they did not involve in any manner in the activity of negotiation for sale and purchase of goods in India or collection of sale proceeds from customers on behalf of the parent company, hence cannot be called as an 'intermediary' and, accordingly, do not fall under Rule 9(c) of the Place of Provisions of Service Rules, 2012".

It was therefore held that there is no intermediary in this case.

- The next decision referred to is in the case of **Genpact India Private Limited Vs. UOI &Ors [2022-VIL-751-P&H]** where also the petitioners were providing support services on behalf of the overseas entity (GI). After examining the terms of the services sub-contracting agreement in that case, the Hon'ble High Court held as follows –

  "The recitals of the MSA provide that GI has sub-contracted the petitioner for providing the services to its customers. It is clear there from 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 data 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 remittance 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

…

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"

- Further in **Verizon Communication India Private Limited Vs. Assistant Commissioner, Service Tax, Delhi – III & Anr. [2017-VIL-469-DEL-ST]**, where the issue was with respect to business support services provided to Verizon US, it was observed as follows –

  "46. The position does not change merely because the subscribers to the telephone services of Verizon US or its US based customers 'use' the services provided by Verizon India. Indeed in the telecom sector, operators have network sharing and roaming arrangements with other telecom service providers whose services they engage to provide service to the former's subscribers. Yet, the 'recipient' of the service is determined by the contract between the parties and by reference to (a) who has the contractual right to receive the services; and (b) who is responsible for the payment for the services provided (i.e., the service recipient). This essential difference has been lost sight of by the Department. In the present case there is no privity of contract between Verizon India and the customers of Verizon US. Such customers may be the 'users' of the services provided by Verizon India but are not its recipients

  ..

  49. The position becomes even clearer in the post July 2012 period during which the POPS Rules 2012 apply. As already noted provision of telecommunication services does not have a specific rule and so Rule 3 of the POPS Rules, which is the default option, applies. In terms thereof, the place of provision of telecommunication service shall be the location of the recipient of service.

  51. In the considered view of the Court, the judgment of the CESTAT in Paul Merchants Ltd v. CCE, Chandigarh (supra) is right in holding that "The service recipient is the person on whose instructions/orders the service is provided who is obliged to make the payment from the same and whose need is satisfied by the provision of the service." The Court further affirms the following passage in the said

judgment in Paul Merchants Ltd v. CCE, Chandigarh (supra) which correctly explains the legal position:

"It is the person who requested for the service is liable to make payment for the same and whose need is satisfied by the provision of service who has to be treated as recipient of the service, not the person or persons affected by the performance of the service. Thus, when the person on whose instructions the services in question had been provided by the agents/sub-agents in India, who Is liable to make payment for these services and who used the service for his business, is located abroad, the destination of the services in question has to be treated abroad. The destination has to be decided on the basis of the place of consumption, not the place of performance of Service."

52. In Vodafone Essar Cellular Ltd. v. CCE (supra), the CESTAT explained the arrangement lucidly in the following words:

"Your customer's customer is not your customer. When a service is rendered to a third party at the behest of your customer, the service recipient is your customer and not the third party. For example, when a florist delivers a bouquet on your request to your friend for which you make the payment, as far as the florist is concerned you are the customer and not your friend."

…

Summary of conclusions

54. To summarise the conclusions:

(i) It made no difference that Verizon India may have provided 'telecommunication service' and not 'business support services' since to qualify as export of service both had to satisfy the same criteria.

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

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

(iv) The subscribers to the services of Verizon US may be 'users' of the services provided by Verizon India but under the Master Supply Agreement it was Verizon US that was the 'recipient' of such service and it was Verizon US that paid for such

service. That Verizon India and Verizon US were 'related parties' was not a valid ground, in terms of the ESR or the Rule 6A of the ST Rules, to hold that there was no export of service or to deny the refund.

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

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

- In **Commissioner of Central Tax Vs. M/s Singtel Global India Private Limited [2023-VIL-606-DEL-ST]**, where the Respondents were providing global telecommunication and ancillary support services to Singapore based entity, the question was whether such services would qualify as intermediary services. After consideration of Rule 6A of the Service Tax Rules and Rule 2(f) of the Place of Provision of Service Rules, the Hon'ble High Court held as follows –

  "18. On a careful perusal of the terms and conditions of the aforesaid Agreement dated 14 July 2011 between SingTel and SGIPL, we find no legal infirmity or irrational approach adopted by the learned CESTAT when it comes to conclude that SGIPL is not providing 'intermediary services'. The plea that SGIPL is not providing any services on its own account is misplaced. It is manifest that there is no contract between SingTel and service providers in India like Airtel, Vodafone, Reliance etc., and the agreement between SGIPL and SingTel is on principal-to-principal basis. Indeed, SGIPL has entered into separate contracts with the telecom operators in India but on its own account and not as in the nature of a broker or agent for SingTel. The above-referred communication dated 16 March 2012 also supports such a disposition. The agreement envisages that SGIPL has to provide, at its own expenses, all necessary infrastructure in order to provide the services to SingTel and its customers. It further envisages that SGIPL shall raise invoices upon SingTel in US dollars for the services rendered on a monthly basis and on such transfer prices as may be agreed upon from time to time. Clause 19 of the Agreement specifically stipulates that the relationship of the parties to the Agreement shall always and only be that of independent contractors and nothing in the Agreement shall create or be deemed to create a partnership or the relationship of principal and agent or employer and employee between the parties. Incidentally, the appellant has not

even alleged that the aforesaid agreement is a camouflage, fraudulent or designed to get over the service tax dragnet"

11. From the perusal of the definition of intermediary extracted herein above and the CBIC Circular of 20.09.2021 (supra.), show that the sub contracting arrangement would not fall within the purview of intermediary. In the instant case, from the perusal of the sub-contracting agreement referred to hereinabove it is seen that the services undertaken by the group entity HGRL, UK have been sub-contracted to the appellants. There is no privity of contract between the appellants and the Business Partners. Service level monitoring takes place in terms of the Performance Level agreement (PLA). Even here, as provided in the PLA, the terms of the sub-contracting agreement shall always prevail in case of any conflict. The responsibility and liability is only between the appellant and the group entity - HGRL from whom compensation is received on cost-plus basis in convertible foreign exchange. It is well settled in terms of the decisions cited by the learned Counsel in Genpact (supra) and Singtel (supra) that where the relationship between the parties is on principal to principal basis, such an arrangement cannot come within the purview of intermediary services.

12. Also, the sub contracting agreement shows that the compensation is on cost-plus basis In similar case, such an arrangement, it was held in **Lubrizol Advanced Materials India Private Limited Vs. CCEx., Belapur [2019-VIL-38-CESTAT-MUM-ST (SM)]** also referred to in **Chevron Philips Chemicals India Private Limited Vs. Commissioner of Central Tax and Central Excise, Navi Mumbai [Order No. A/86318/2022 (DB)] that there is no intermediary service.** In Lubrizol (supra) it was observed as follows:

"6. I find that the learned Commissioner (Appeals) has denied the benefit of export with effect from 1.10.2014 under the Place of Provision of Services Rules, 2012, holding that the appellant had facilitated supply of goods between its foreign counterpart and processing of goods and thus, it should be considered as an intermediary. On perusal of the contracts, I find that the service fee charged by the appellant to its overseas group entities for provision of service has no direct nexus with the supply of goods by the overseas group entities to its customers in India. Further, the appellant had provided the service to the overseas entities on principal to principal basis. Thus, the appellant cannot be termed as an intermediary between the overseas entity and the Indian customers. It is an admitted fact on record that the consideration received by the appellant for providing the services was based upon cost plus markup and is nowhere connected with the main supply of goods. In other words, the main supply may or may not happen and thus, cannot be directly correlated with the

service provided by the appellant. Thus, the appellant is not acting as a bridge between the overseas group entities and supplies made to their customers in India and accordingly, it cannot be said that the appellant has provided intermediary service and should be governed under the provisions of Rule 9 of the rules." *(emphasis added)*

13. In view of the Board Circular (supra.) and the precedent decisions it is not possible to accept the view expressed by the Commissioner in Para 31 of the First Order and Para 16 of Second Order on the interpretation of Rule 2(f) of the POPS. The finding that principal-agency relationship is not essential for terming a service provider as intermediary, is clearly contrary to law. Similarly, the interpretation of 'independent contractor' in Para 32 of the First Order and Para 17 of Second Order, is also unsustainable. Further, we find that the Commissioner having found that the main service is handled by the appellants and provided on their own account, cannot at the same time hold that it would also qualify as provision of intermediary services, as observed by him in Para 33 of the First Order and Para 18 of Second Order. Also, the elements of service, namely collections and contact center services for credit/debit card operations, are essentially part of the bundled services and in terms of Section 66F(3)(a), will qualify as part of main service.

14. For all these reasons, we hold that the elements of service, namely collection services and contact center services for credit/debit card operations, cannot be held to be intermediary services and we set-aside the findings in this regard in Para 47 of the First Order and Para 32 of the Second Order.

15. With regard to the issue of reimbursement claimed by the appellant for accommodation and cab charges, incurred by the appellant on behalf of HGRL/Business Partners, we find that the show cause notice issued vide O. R. No. 15/2016-ADJN (COMMR) ST dated 28.01.2016, at Para 3.2 stated that 'the services in question namely accommodation and rent-a-cab are separately discernible from the main service i.e. back office services **and has no connection or relation** with such main service' (emphasis supplied). However, the Learned Commissioner at Para 15 of the First Order held that the purpose of the visits is connected with the original service. Again at Para 16 of the First Order, the learned Commissioner has recorded the finding that 'these agreements require certain level of contact and coordination or liaison between the parties concerned'.

16. As long as there is a connection with the terms of the sub-contracting agreement, these expenses are to be recovered in terms of Schedule B of the sub-contracting agreement. Ultimately, it is for the HGRL, UK to agree for payment and we find that there is no dispute that these invoices have been recovered in convertible foreign exchange. It is also seen from the sample invoices shown to us for reimbursement of expenses, that these have been submitted to the Software Technology Parks of India (STPI) authorities and the Software Export Declaration is furnished at Page 325 to 330 of the Appeal Paper Book and have been treated as part of the same contract.

17. At any rate, for the service to be classified as rent-a-cab in terms of Section 65(91), upto 30.06.2012, the service is to be provided by a person engaged in the business of renting of cabs, which is not the case in the context of the present appellants. Also, with respect to the period after 01.07.2012, the transportation services cannot fall under Rule 11 of POPS, for determining the place of provision as taxable territory, as in the facts of this case it does not satisfy the definition of 'continuous journey' as per Rule 2(d) of the said Rules.

18. With regard to accommodation services, which is sought to be roped in post 01.07.2012, under Rule 5 of POPS, the same is identically worded as in the case of short-term accommodation for the period prior to 01.07.2012, where the Commissioner vide First Order (Para 23) for the previous period upto 30-6-2012 has dropped the demand. On the same basis, the demand for the subsequent period also ought to have been dropped.

19. In view of the fact that, it is clearly established that there is connection between the visits of the foreign customers and the back-office support services provided by the appellant, in terms of the sub-contracting arrangement, these expenses should qualify as export turnover and be allowed the benefit of export without payment of taxes since the same would be covered in terms of Rule 3 of the POPS, which says that the place of provision of service, would be the location of the recipient, in this case, HGRL, UK.

20. We also find that, in **Ness Technologies (India) Private Limited Vs. CST, Division – IV Mumbai [2015-VIL-3821-CESTAT-MUM-ST]**, in the context of rechargeable expenses it has been held as follows –

"From the above clause it is very clear that seller i.e. appellant shall charge, rechargeable expenses to the buyer i.e. recipient of the service. Under this clause, service recipient in addition to the IT Software, under obligation to also pay rechargeable expenses which is nothing but reimbursement expenses. On this, I am of the view that it is like export value divided into, parts one - value of the software and part two - on account of reimbursement; however there is no dispute that both the amounts have been realized in convertible foreign exchange. The reimbursement cannot be treated in isolation but is very much in connection with the export of services. Therefore in my view refund of the service tax on reimbursement which has been realized by the appellant from Foreign Service recipient in convertible foreign is admissible".

21. In view of the above, we have no hesitation in holding that the costs towards rent-a-cab claimed from HGRL, UK which is remitted by the HGRL UK to the appellants in convertible foreign exchange cannot be taxed for the period from 01.10.2010 to 30.06.2012 under Rule 3(1)(ii) of the Export of Service Rules, 2005 and Rule 11 of the POPS post 01.07.2012. Similarly, the costs towards accommodation claimed from HGRL, UK cannot be taxed for the period from 01.07.2012, in terms of Rule 5 of the POPS.

22. Accordingly, we set-aside the finding on the levy of service tax in the First Order on accommodation services and rent-a-cab services. This ground is not in 2nd Order.

23. As the appeal(s) are allowed on merits, we leave the ground of limitation open.

24. In view of our aforementioned, we allow the appeals and set-aside the First Order and Second Order ('impugned Orders') with consequential relief, if any.

(Order Pronounced in open court on 17.01.2024)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER(TECHNICAL)

jaya