CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

Service Tax Appeal No. 61877 of 2018

(Arising out of Order-in-Appeal No 124/ST/CGST-APPEAL-GURUGRAM/SG/2018-19 dated 31.08.2018 passed by the Commissioner (Appeals), CGST, Gurugram.)

M/s. BlackRock Services India Private Limited Appellant
14th& 15th Floor, Tower C & D,
DLF Building No. 14, DLF Cyber City,
Phase III, Gurgaon-122002, Haryana.

VERSUS

Commissioner of CGST, Respondent
5th Floor, Mudit Square,
Plot No. 24, Sector 32,
Gurgaon, Haryana-122001.

WITH

SERVICE TAX APPEAL NO. 60111 OF 2019

(Arising out of Order-in-Appeal No 194/ST/CGST-APPEAL-GURUGRAM/SG/2018dated 31.10.2018 passed by the Commissioner (Appeals), CGST, Gurugram.)

M/s. BlackRock Services India Private Limited Appellant
14th& 15th Floor, Tower C & D,
DLF Building No. 14, DLF Cyber City,
Phase III, Gurgaon-122002, Haryana.

VERSUS

Commissioner of Central Excise & Service Tax Respondent
5th Floor, Mudit Square,
Plot No. 24, Sector 32,
Gurgaon, Haryana-122001.

APPEARANCE:

ShriKamal Sahwney, Krishna Rao &Anishka Gupta Advocate for the Appellant
ShriAmandeep Kumar Authorised Representative for the Respondent

CORAM:

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. 60111-60112/2022

Date of Hearing: 25.04.2022
Date of Decision: 08.08.2022

PER: AJAY SHARMA

These appeals have been filed challenging the orders dated 31/08/2018 and 31/10/2018 respectively passed by commissioner CGST (Appeals), Gurugram by which the learned Commissioner rejected appellant's appeal and upheld the order of Adjudicating Authority of rejecting the refund of Cenvat Credit on Input Service used in provision of B*usiness Support Service*(hereinafter referred to as "BSS") exported outside India, on the ground that the service rendered is not BSS but intermediary service and hence the place of provision of service is in India and not outside. Since the issue is common in both the appeals therefore we are deciding these appeals by this common order.

2. The issue to be decided is whether the services provided by the appellant to its overseas client *M/s. HLX Finance Holding*, located in USA falls within the category of BSS, which entitles the appellant to claim a refund of un-utilised Cenvat credit of Service Tax under Rule 5 of Cenvat Credit Rules, 2004 on input services used in provision of those BSS exported outside India or it is an 'intermediary service', having the place of provision of service in India therefore refund not admissible?

3. The facts leading to the filing of instant appeal are stated in brief is follows. The appellant undertakes its business activities through its SEZ unit in Gurugram, Haryana and STPI unit in Mumbai, Maharashtra. Both the units are hundred percent export units. The refund claims of Rs.28,30,015/- for the period April, 2016 to June, 2016 and of Rs.93,61,891/- for the period July, 2016 to March, 2017 were filed by the appellant under Rule 5 of Cenvat Credit Rules, 2004 read with notification No. 27/2012 CE(NT) dated 18/06/2012 for refund of un-utilised Cenvat credit availed on input service used in providing taxable services i.e."*business support services".* The aforesaid refund claims were rejected by the Adjudicating Authority vide Order-in-Original

dated 28/03/2018 and 15/05/2018 respectively on the ground that the service provided by the appellant are "intermediary service" and therefore in terms of Rule 9(c) of Place of Provisions of Services Rules, 2012 the place of provision of service is in India. On appeal filed by the appellant, the learned Commissioner upheld the order passed by the Adjudicating Authority and rejected the Appeals filed by the appellant.

4. Learned Counsel for the appellants submit that the appellants are engaged in providing services to *M/s.HLX,* USA wherein the work inter-alia related to development of interface for Aladdin (an operating system for investment managers to undertake portfolio management) and is maintaining, troubleshooting and providing support on the platform. The appellants also provided support service in relation to creation of client accounts on the platform which is akin to generating customer ERP codes and is a backend process with no client interaction or interfaces and for providing such services the appellant receives a pre-agreed consideration from HLX in convertible foreign exchange. As per the agreement entered into by the appellant with HLX, the appellants are primarily engaged in provision of business support services, IT enabled services, support services with respect to information technology. According to learned Counsel the said services are purely between the appellant and HLX and do not have any 3rd party/consumer involvement whatsoever. It does not require any interaction with any customer of HLX and the terms of agreement nowhere provides for engagement of any other party for execution/arrangement facilitation of the service. The learned Counsel further submits that the services procured by the appellants are well within the ambit of being eligible input services qualifying for refund claims. Learned Counsel also submits that a reading of the agreement makes it clear that the appellants have been providing BSS to HLX, USA on principal to principal basis, for which they receive consideration on cost plus basis and not in the form of commission based on the success of service performed and the agreement clearly mentions that the appellants are "independent contractor" and are not an

employee or agent of HLX and have no authority to enter into or incur any legal obligation on behalf of HLX. According to learned Counsel, the lower authorities have wrongly rejected the refund claim by holding that the appellant is an agent and hence "intermediary", having its place is provision of service in India and not outside India. Per Contra learned Authorised Representative appearing on behalf of the Revenue re-iterated the findings recorded in the impugned order and prayed for dismissal of appeals. Learned Authorised Representative submits that since one of the terms of agreement is that the appellants have to help in setting up new client accounts who purchased Aladdin data base and also to help in resolving client querries, which means there is involvement of three parties viz appellants, HLX and clients of HLX, therefore the appellants are nothing but an intermediary and hence not entitled for any Credit under Cenvat Credit Rules, 2004.

5. We have heard learned Counsel for the appellants and learned Authorised Representative for the Revenue and perused the case records including the compilation filed by the appellant. The term "intermediary" has been defined under Rule 2(f) of Place of Provision of Services Rules, 2012 which is reproduced as under:-

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

services or securities (main supply) and one arranging or facilitating the said main supply. Therefore, an activity between only two parties cannot be considered as an intermediary service. An intermediary essentially arranges or facilitates the main supply between two or more persons and does not provide the main supply himself. The intermediary does not include the person who supplies such goods or services or both on his own account. Therefore there is no doubt that in cases wherein the person supplies the main supply either fully or partly, on principal to principalbasis, the said supply cannot come within the ambit of "intermediary". Sub-contracting for a service is also not an intermediary service. The supplier of main service may decide to outsource the supply of main service, either fully or partly, to one or more sub- contractors. Such sub-contractor provides the main supply, either fully or a part thereof and does not merely arrange or facilitate the main supply between the principal supplier and his customers and therefore clearly not an intermediary. Who is an 'intermediary' and what is 'intermediary service' has been clarified by Central Board of Indirect Taxes and Customs (CBIC) vide Guidance Note dated 20.06.2012 and under GST regime also a clarification has been issued by CBIC on 20.09.2021 both of which are in line with the discussions made hereinabove about 'intermediary'.

6. What we have gathered from the perusal of the agreement as well as submission of the learned Counsel is that the Support Services in relation to creation of clients account is limited to the performing of services on HLX systems and that too as a backend process. It is the specific case of the appellants that HLX does not have any clients in India. Maintenance, support or troubleshooting function, if any, the appellant is required to perform on requisition from HLX in order to ensure seamless access of services which means there is no requirement of any interaction, whatsoever with the clients of HLX and for performing all these services on behalf of HLX, the appellant receives a pre-agreed consideration from HLX in convertible foreign exchange. Commission is being paid to an intermediary not the transfer pricising, whereas the appellant herein was

getting transfer pricising. There is nothing on record to show that the appellant is liasioning or acting as intermediary between the HLX and its clients. Therefore, the finding of the lower authorities that the appellant is an 'intermediary' is misplaced. We are astonished to notice that although for earlier periods the then adjudicating authority allowed the refund claim of the appellant, but without looking into those orders and without giving any reason for not following the earlier orders, this time the concerned Authorities held otherwise by denying the credit. One of the reasons for rejecting the refund claim of the Appellants is that the appellants failed to produce the agreement between HLX, USA and its overseas clients. We agree with the submission of learned Counsel that since the appellant is not a partyto those agreementstherefore they have no access to the same. Although the reasoning of the appellants for not producing those agreement is proper but the authorities below took it otherwise and presumed, without any basis, that the appellants are avoiding disclosure of proper facts, without realising that its settled principle that the burden to prove that the classification claimed by the appellants was incorrect, lies on the department and it has to be substantiated by the department by supporting evidence and not merely on the basis of assumptions and presumptions. We also observe that the learned Commissioner in the impugned order has also places reliance on the website without confronting the appellant with the said material, which is completely in violation of the principle of natural justice and also beyond the show cause notice as the show cause notice did not rely upon any such website.

7. Admittedly the refund claimshave been filed by the appellants under Rule 5 ibid r/w Notification No. 27/2012 dated 18/06/2012. The said rule provides for refund of accumulated Cenvat Credit in respect of goods and services exported under bond or undertaking. This rule is very specific and lays down how to determine the quantum of admissible refund from the accumulated cenvat credit. It cannot be considered to be a proceeding for denial of Cenvat Credit available in the account of the claimant and therefore even if the refund is denied then also

the amount continues to remain in the Cenvat account of the claimant. If the Revenue is not in agreement with the claims of the appellants and if, according to Revenue, the services in issue do not fall within the ambit of export of service then the Revenue ought to have initiated the proceedings against the appellants for demanding the Service Tax in respect of taxable service provided by the appellants. Admittedly no such proceedings have been initiated by the Revenue as borne out from the records of the case and therefore in a way Revenue itself has allowed this taxable service provided by appellantsas export of service. If that is so then in the proceeding under Rule 5 ibid revenue cannot deny refund by treating the service provided not to be export of service. Same principal has been followed by the Tribunal in the matter of *JFE Steel India Pvt. Ltd. v/s Commissioner CGST, Gurugram; 2021 (44) GSTL-292 (Tri-Chan.)* and also in Final Order No. 60959-60960/2021 dated 07/10/2021 in Service Tax appeal Nos. 60024-25 of 2020; *Macquarie Global Service Pvt. Ltd v/s Commissioner C.E. & ST, Gudgaon-1.*On somewhat similar issue whileinterpreting similar terms of agreement the Authority of Advanced Rulings (AAR) in the matters of *Inre Go Daddy IndiaService Pvt Ltd;* 2016-TIOL-08-AAR-ST and *Inre Universal Service India Pvt. Ltd;* 2016 (42) STR 585 (AAR) held that the Place of Provision of Service will be outside India and therefore Rule 3 of Place of Provision of Service Rules are held to be applicable. The Hon'ble High Court of Judicature at Bombay in the matter of *Bombay Flying Club v/s CST;* 2015 (37) STRJ129 has held that the ruling given by Advance Ruling Authority cannot be ignored. We also find force in the submission of learned Counsel about applicability of Rule 3 of Place of Provision of Services Rules, 2012 which provides that generally the place of provision of service is the location of service recipient therefore since in the instant case the location of service receiver M/s. HLX is located outside India i.e. USA therefore the place of provision of service is outside India and hence the service in issue qualify export of services in terms of Rule 6A of Service Tax Rules, 1994.

8. In view of the discussions and findings recorded in the preceding paragraph, we are of the considered view that the orders of lower authorities denying Cenvat credit on impugned services are not sustainable in law and therefore the appeals filed by the appellant deserve to be allowed.The appeals are accordingly allowed subject to calculation of refund of un-utilised Cenvat credit by the adjudication authority on the basis of the documents submitted by the appellants and for this limited purpose these appeals are remanded to the original authority. The said authority is directed to dispose of the refund claim within a period of three months from the date of receipt of this order, after giving proper opportunity to the appellants.

(Pronounced in the open court on 08.08.2022)

(P.V. SUBBA RAO)
Member (Technical)

(AJAY SHARMA)
Member (Judicial)

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