

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

REGIONAL BENCH – COURT NO. III

Service Tax Appeal No. 41459 of 2019

WITH

Service Tax Cross Objection No. 40669 of 2019

(Arising out of Order-in-Original No. 08/2019-COMMR. dated 08.07.2019 passed by the Commissioner of G.S.T. and Central Excise, 6/7, A.T.D. Street, Race Course Road, Coimbatore – 641 018)

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

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

VERSUS

Commissioner of G.S.T. and Central Excise : Respondent

Coimbatore Commissionerate,
6/7, A.T.D. Street, Race Course Road, Coimbatore – 641 018

APPEARANCE:

Shri J.V. Niranjan, Advocate for the Appellant

Shri R. Rajaraman, Authorized Representative for the Respondent

CORAM:

HON'BLE MRS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 41059 / 2023

DATE OF HEARING: 08.11.2023

DATE OF DECISION: 23.11.2023

Order : [Per Mr. Vasa Seshagiri Rao]

Service Tax Appeal No. 41459 of 2019 has been filed by the appellant viz., M/s. SNQS International Socks Private Limited, Tirupur assailing Order-in-Original No. 08/2019-COMMR. dated 08.07.2019 of the Commissioner of G.S.T. and Central Excise, Coimbatore, confirming the demand of Service Tax of Rs.2,88,95,118/-, along with interest, under Section 73(2) of the Finance Act, 1994 read

with Section 174 of the Central Goods and Services Tax Act, 2017 invoking the extended period of limitation and also imposing penalty under Section 78(1) of the Finance Act read with Section 174 of the C.G.S.T. Act, 2017.

2.1 Brief facts that are relevant for this appeal are that on verification of accounts of M/s. SNQS International Socks Pvt. Ltd., Tirupur by the Audit Officers of Coimbatore, it was noticed that the appellant had received commission for procuring export orders from various buyers in foreign countries for the manufacturers who supplied garments. The appellant raised invoices to their foreign buyers for whom the orders were procured and received commission in foreign currency towards the services rendered in relation to procurement of goods for exports. The appellant have raised invoices to their overseas service receiver namely, M/s. Primark, Ireland towards exports sales commission for the support services rendered in relation to procurement of goods for exports and the commission was paid at the rate of 2.5% on the total value.

2.2 The Department is of the view that these services are rightly classifiable under 'intermediary' service as per Rule 2(f) of the Place of Provision of Services Rules, 2012, as amended with effect from 01st October, 2014. The appellant was registered for Service Tax under business auxiliary service which would constitute the services of commission agents and consequently, would fit into the description of 'intermediary' and so, liable to Service Tax as defined under the amended Place of Provision of Services Rules, 2012 with effect from 01.10.2014 read with Rule 9 *ibid*. The appellant has accordingly paid Service Tax for the charges invoiced by them to their foreign clients during the months of October 2014 and November 2014. However, it was noticed that the appellant had not paid Service Tax for the subsequent invoices raised by them for the period from December 2014 up to 31.03.2016.

2.3 M/s. SNQS International Socks Pvt. Ltd. submitted that they were engaged in procuring orders for supply of garments for exports. They directed the seller/manufacturer in India to send the garments to the overseas buyers and commission was received in foreign currency through banks. They stopped procuring orders from April 2016 onwards. During the period from October 2014 to March 2016, the appellant has provided the following: -

- Design and development of products
- Evaluation and development of vendors
- Quality assurance including testing of live production samples
- Logistical and operational support to vendors

to their foreign clients and quantified the service charges as a percentage of the FOB value of export goods for which orders were procured by them and were paid in convertible foreign exchange termed as 'commission', which would be covered by the definition of 'intermediary', for which service the place of provision would be the location of the service provider and accordingly, liable to pay Service Tax.

3. As per Rule 2(f) of the Place of Provision of Services Rules, 2012, as amended vide Notification No. 14/2014 dated 11.07.2014, 'intermediary' means a broker, an agent or any other person, by whatever name called, who arranges or facilitates 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. Thus, according to the Department, the term 'intermediary' would cover a person who arranges or facilitates supply of goods or provision of a service or both without material alteration or further processing and thus involved with the following two supplies at any one time: -

(1) Supply between the principal and the third party

(2) Supply of his own service to his principal for a fee or commission usually charged

4. It is the case of the Department that the effect of the above amendment is that a commission agent for goods is also covered under the definition of 'intermediary', whereas earlier only commission agents for services were covered under the said definition. The new provision which was made applicable with effect from 01.10.2014 would thus cover the services provided by a commission agent for sale of goods and as per Rule 9 *ibid.* and the place of provision of services shall be the location of the service provider. Further, the services rendered by the appellant do not qualify as 'export of service' since one of the conditions of Rule 6A of the Service Tax Rules, 1994 *viz.* "the place of provision of service should be outside India" was not fulfilled; their services are for procurement of goods and therefore *prima facie* called as services in relation to procurement of goods with auxiliary support services and the expression "arranges or facilitates" found in the amended definition of 'intermediary' would cover within its ambit a host of marketing and sales promotion activities that are provided in relation to the arrangement and/or facilitation of a main service/supply of goods. It is also alleged that the nature of the activities admittedly carried out by the appellant do not fall under the excluded categories of intermediary *i.e.*, person who provides the main service or supplies the goods on his account. The appellant had received commission charges for procurement of export orders, but had not paid Service Tax on such charges received from their foreign clients during the period 19.12.2014 to 31.03.2016.

5. As such, a Show Cause Notice No. 18/2018-ST-Commr-CBE I dated 04.12.2018 came to be issued proposing to demand Service Tax of Rs.2,88,95,118/- invoking the extended period of limitation under the

proviso to Section 73(1) of the Finance Act, 1994, along with applicable interest under Section 75 of the Act and for imposition of penalty under the provisions of Sections 76 and 78 of the Act.

6. After due process of law, the Show Cause Notice was adjudicated by the Commissioner of G.S.T. and Central Excise, Coimbatore vide Order-in-Original No. 08/2019-COMMR. dated 08.07.2019 confirming the demand of Service Tax along with interest and also imposed penalty. The adjudicating authority has, however, reduced the penalty imposed under Section 78 to fifty per cent of the Service Tax so determined for the period from 19.12.2014 to 31.03.2015 and 01.04.2015 to 14.05.2015 while holding the appellant liable to pay equal penalty for the period from 15.05.2015 to 31.03.2016, thus quantifying the penalty under Section 78 as Rs.2,21,31,927/-. The proposal to impose penalty under Section 76 of the Act was dropped.

7. Aggrieved by the above Order-in-Original dated 08.07.2019, the appellant came before this forum.

8.1 In the grounds-of-appeal, the appellant has submitted that they have provided the services of: -

- (a) Design and development of products
- (b) Evaluation and development of suitable vendors to manufacture and supply the products
- (c) Quality assurance including testing of live production samples and
- (d) Logistical and operational support to vendors

but erroneously, the lower authority has concluded that their activities would be covered under intermediary services.

8.2 Relying upon the decisions of the Tribunal in: -

- i. *Fifth Avenue v. Commissioner of Service Tax, Chennai [2009 (15) S.T.R. 387 (Tri. - Chennai)]*
- ii. *Fifth Avenue Sourcing Pvt. Ltd. v. Commissioner of Service Tax, Chennai [2014 (34) S.T.R. 291 (Tri. - Chennai)]*
- iii. *GECAS Services India Pvt. Ltd. v. Commissioner of Service Tax, New Delhi [2014 (36) S.T.R. 556 (Tri. - Del.)]*

involving identical facts and circumstances, the appellant has submitted that these services are not of commission agents to fall under "business auxiliary service" but are "support services of business or commerce".

8.2 The appellant has submitted that they are involved in providing a gamut of services to their foreign client and their compliance team would audit the compliance certifications of vendor facilities from time to time, to assure their promise towards the client's compliance requirements; that they have their own SOP (Standard Operating Procedure) for Quality Control to ensure that all merchandise shipped by them meets the client's standards. A pre-production check / pilot run inspection is also claimed to have been carried out, whereafter observations are recorded in the pre-production inspection report and a minimum of three pieces per size / colour are selected and verified for measurements. It is also submitted that the appellant has a sophisticated in-house testing lab wherein testing is conducted on the fabric as well as the finished garments; technology packages are apparently offered by them composing any or all of the following services customised to the client's needs: -

- Colour Fastness Tests, in all varieties
- Fibre Content & Labelling Instructions
- Flammability (Vertical/Inclined)

- Analysis of dues, water, effluents, chemicals and auxiliaries
- Tests based upon customer's specifications

8.3 Relying on the decision of the Tribunal in the case of *M/s. Ideal Road Builders Pvt. Ltd. v. Commissioner of Customs [2012 (27) S.T.R. 57 (Tri. - Mumbai)]*, the appellant has argued that the manner of quantification of remuneration is not relevant to determine the nature of service and the mode of payment for the service rendered does not alter the nature of the service rendered.

8.4 It was submitted that their services would be falling under support services of business or commerce by adverting to the decision rendered in the case of *M/s. Tata Autocomp Systems Ltd. v. Commissioner of Central Excise, Pune [2015 (37) S.T.R. 252 (Tri. - Mumbai)]* wherein payment of service charges as a percentage of total turnover of the service recipients of the service provider, for the services by way of marketing support, arranging for loans from financial institutions, liaising with Government agencies, etc., was involved and such services were held to be support services of business or commerce.

8.5 The appellant has also placed reliance on the decision of the Tribunal in the case of *M/s. Lubrizol Advanced Materials India Pvt. Ltd. v. Commissioner of Central Excise, Belapur [2019 (22) G.S.T.L. 355 (Tri. - Mumbai)]* wherein it was held that the activities of promotion of products and solicitation of orders from prospective customers located in India for overseas group entities are not intermediary services but export of services inasmuch as the transactions between the overseas entities and the assessee were on principal-to-principal basis. It is submitted by the appellant that they only had business arrangements with the business entity for providing support services of design and development of products, identification of suitable vendors for supply of

such goods approved for procurement by the buyers and causing supply of the same by the vendors so identified, apart from various other important support services such as quality monitoring, testing, etc., and thus are providing services only to the overseas entity on principal-to-principal basis which could not be classified as intermediary services.

8.6.1 Shri J.V. Niranjana, Ld. Advocate appearing for the appellant, has argued that the original adjudicating authority had failed to appreciate the contentions of the appellant on the doctrine of principle of equivalence, as propounded by the Hon'ble Supreme Court in the cases of *M/s. All India Federation of Tax Practitioners v. Union of India [2007 (7) S.T.R. 625 (S.C.)]* and *M/s. Association of Leasing & Financial Service Companies v. Union of India [2010 (20) S.T.R. 417 (S.C.)]* by which it has been *inter alia* explained that applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly stands consumed by the service receiver.

8.6.2 He also submitted that in the instant case, there is no difference between production of saleable goods and production of saleable services which stand consumable by the service receiver.

8.7 Reference has also been drawn from the clarification provided by the C.B.E.C. Education Guide in paragraph 5.9.6 to contend that the Business Process Outsourcing (BPO) services rendered by call centres are excluded from the purview of 'intermediary', shall be applicable to Business Process Outsourcing in respect of goods and in the instant case, the appellant has provided procurement services to their overseas client which would thus be excluded from the purview of 'intermediary'; the activities undertaken by the appellant will not fall under intermediary

services to attract operation of Rule 9 of the Place of Provision of Services Rules, but would appropriately fall under "support services of business or commerce", for which the place of provision of service would be the location of the service recipient, in terms of Rule 3 of the Place of Provision of Service Rules, 2012.

8.8.1 On the issue of invocation of extended period of limitation, the Ld. Advocate has submitted that the appellant themselves had brought to the knowledge of the Department about the activities undertaken by them and they had filed refund claim of the erroneously paid Service Tax for the months of October 2014 and November 2014; the appellant had clearly set out the reasons as to why they were not liable to pay Service Tax in the refund claim itself and the same has to be construed as a *bona fide* interpretation of law.

8.8.2 It is further submitted that the Id. adjudicating authority has relied on only one fact for invoking the extended period, that the appellant did not declare the service charges received from their foreign clients in their S.T.-3 returns filed with the Department, which amounted to suppression, ignoring the plethora of decisions of the Hon'ble Apex Court, Hon'ble High Courts and the Tribunal and has thus committed a gross error.

8.9 The appellant has further referred to the order passed by Tribunal, Chennai in the case of *M/s. SNQS International Socks Pvt. Ltd. v. Commissioner of Central Excise and Service Tax, Coimbatore [Final Order No. 40478 of 2023 dated 23.06.2023 in Service Tax Appeal No. 41587 of 2016 - CESTAT, Chennai] = [2023 (6) TMI 1084 - CESTAT, Chennai]* in the appellant's own case wherein it was determined that the services rendered by the appellant do not fall under the ambit of intermediary services and as the issue is no more *res integra*, the appellant has requested for setting aside the impugned order, with consequential relief.

9.1 Shri R. Rajaraman, Ld. Authorized Representative (Assistant Commissioner) appeared for the Department and has extensively relied on the findings of the Id. adjudicating authority. He has referred to paragraph 15.2 of the Order-in-Original dated 08.07.2019 impugned herein to contend that the appellant satisfies the definition of 'intermediary' in view of the following: -

- i. M/s. SNQS International Socks Pvt. Ltd. is facilitating provision of supply of goods (main service) between two persons i.e., Indian suppliers and foreign buyers.
- ii. The appellant cannot alter the value of goods supplied.
- iii. The consideration for the service provided by the appellant i.e., 'commission', is identifiable from the value of exported goods.
- iv. They claimed that there existed an agreement between the buyer and the appellant authorizing the appellant to act on behalf of them.

9.2 He has submitted that the contention of the appellant that they are not an intermediary but providers of support services is not acceptable since for the period from 01.07.1994 to 30.06.2012, Chapter V of the Finance Act, 1994 had not provided any specific definition for the term 'service', but provided for levy of Service tax on specified services only. However, changes were made in the Finance Act, 1994 vide the Finance Act, 2012 providing that Service Tax is payable on all services rendered in taxable territory except for the negative list of services as specified under Section 66D of the Finance Act. The negative list approach largely removes the need for descriptions of services, but such description continue to exist in respect of the following areas: -

- In the negative list of services
- In the declared list of services
- In the exemption notifications
- In the Place of Provision of Services Rules, 2012
- In a few other rules and notifications e.g., the CENVAT Credit Rules, 2004

9.3 It is contended by the Ld. Departmental Representative that Rule 9(c) of the Place of Provision of Services Rules defines that the place of provision of intermediary services shall be the location of the service provider. Intermediary service is the most specific description in the appellant's case.

9.4 He has further contended that in terms of Rule 6A of the Service Tax Rules, 1994, the appellant has not satisfied the condition of "place of provision of the service is outside India" and as such, the services provided by M/s. SNQS International Socks Pvt. Ltd. cannot be treated as export of services.

9.5 Further, he would submit that as M/s. SNQS International Socks Pvt. Ltd./appellant identifies prospective suppliers/exporters of goods for selling to foreign buyers thus arranging or facilitating supply of goods between these two persons and the services have not been provided to foreign buyers by the appellant on a principal-to-principal basis.

9.6 He has argued that the decisions rendered by the Tribunal in the cases of *M/s. Fifth Avenue v. Commissioner of Service Tax, Chennai [2009 (15) S.T.R. 387 (Tri. - Chennai)]*, *M/s. Fifth Avenue Sourcing Pvt. Ltd. v. Commissioner of Service Tax, Chennai [2014 (34) S.T.R. 291 (Tri. - Chennai)]*, *M/s. GECAS Services India Pvt. Ltd. v. Commissioner of Service Tax, New Delhi [2014 (36)*

S.T.R. 556 (Tri. – Del.)] as well as the decision of the AAR in the case of *In Re: M/s. GoDaddy India Web Services Pvt. Ltd. [2016 (46) S.T.R. 806 (AAR)]* relied upon by the appellant are not applicable to the appellant's case.

9.7 The Ld. Departmental Representative has thus prayed for rejection of the appeal.

10. Heard both sides and have gone through the submissions made by the appellant in the grounds-of-appeal and also during the hearing before the Tribunal.

11.1 The issue as to whether the services provided by the appellant are classifiable as 'intermediary' or not has been clearly detailed in the order of this Tribunal vide *Final Order No. 40478 of 2023 dated 23.06.2023 (supra)* in the appellant's own case regarding refund of Service Tax erroneously paid for the period from October 2014 to November 2014, wherein the services provided by the appellant were held to be not intermediary services. In the said case, after examining the comprehensive bouquet of services provided by the appellant in the context of the Place of Provision of Services Rules, 2012, the Tribunal has held that the appropriate classification of these services would be "support services of business or commerce" rather than "business auxiliary service"; business auxiliary services are general in nature as compared to support services of business and commerce and as such, the appellant's services are not limited to that of a commission agent / buying agent inasmuch as the said services were not only limited to procurement and dispatch but includes a wide array of services from the stage of designing to testing and quality monitoring to getting the goods manufactured till the date of final export of the goods, including assisting in the transportation and dispatch of the same.

11.2 The main issue that is to be decided in this appeal is: -

- Whether the services rendered by the appellant can be categorized as that of an 'intermediary' or not and consequently, whether these services would tantamount to 'export of service' or not, for arriving at a decision as to the place of provision of service in terms of the Place of Provision of Services Rules, 2012?

11.3 The relevant portion of the order of the Tribunal vide *Final Order No. 40478 of 2023 dated 23.06.2023 (supra)* in the appellant's own case relating to whether the services rendered by the appellant are 'intermediary' or not and also whether these services can be considered as 'export of service' or not, is extracted below: -

"12.1.1 An intermediary is generally meant to be a person who arranges or facilitates supply of goods or provision of service, or both, between two persons without any material alteration/processing. Paragraph 5.9.6 of the Education Guide issued by the C.B.E.C. dated 20.06.2012 has clarified as to intermediary services, as under: -

"Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time:

i) the supply between the principal and the third party; and

ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition.

Also excluded from this sub-rule is a person who arranges or facilitates a provision of a service (referred to in the rules as "the main service"), but provides the main service on his own account.

In order to determine whether a person is acting as an intermediary or not, the following factors need to be considered: -

Nature and value: An intermediary cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price. Also, the principal must know the exact value at which the service is supplied (or obtained) on his behalf, and any discounts that the intermediary obtains must be passed back to the principal.

Separation of value: The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging. It can be based on an agreed percentage of the sale or purchase price. Generally, the amount charged by an agent from his principal is referred to as "commission".

Identity and title: The service provided by the intermediary on behalf of the principal is clearly identifiable.

In accordance with the above guiding principles, services provided by the following person will qualify as 'intermediary services': -

- i) Travel Agent (any mode of travel)*
- ii) Tour Operator*
- iii) Commission agent for a service [an agent for buying or selling of goods is excluded]*
- iv) Recovery Agent*

Even in other cases, wherever a provider of any service acts as an intermediary for another person, as identified by the guiding principles outlined above, this rule will apply. Normally, it is expected that the intermediary or agent would have documentary evidence authorizing him to act on behalf of the provider of the 'main service'."

12.1.2 However, it has to be noted that by the amendment of the definition of "intermediary" under Rule 2(f) of the Place of Provision of Services, 2012 vide Notification No. 14/2014-ST dated 11.07.2014, a commission agent i.e., a buying or selling agent for supply of goods has also been included to be an intermediary.

12.2.1 "Intermediary", as defined under Rule 2(f) of the Place of Provision of Services Rules, 2012, means "a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a

service or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account". "Commission agent" means "a person who causes sale or purchase of goods, on behalf of another person for a consideration, which is based on the quantum of such sale or purchase" (as defined in exemption Notification No. 13/2003-S.T. dated 20.06.2003). Subsequently, with effect from 16.05.2005, "commission agent" was defined in Section 65 (19) of the Finance Act, 1994 to mean "any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person (i) deals with goods or services or documents of title to such goods or services; or (ii) collects payment of sale price of such goods or services; or (iii) guarantees for collection or payment for such goods or services; or (iv) undertakes any activities relating to such sale or purchase of such goods or services". The words "on behalf of" in the statute connote an agency when one person acts on behalf of the other. The former acts as an agent of the latter. An agency is the relationship of principal and agent in terms of a contract – express or implied.

12.2.2 The broker does not sell the goods on his own account, but merely brings the vendor and the vendee together and settles the price.

12.2.3 In the definition of "intermediary", as in Rule 2(f) of the Place of Provision of Services Rules, 2012, the words – 'broker' and 'agent' are used synonymously though there are fine differences among the intermediary, commission agent and broker, to be analysed depending upon the facts of each case. As given in paragraph 12.1.1 above, there are two supplies in case of an intermediary – (i) supply between the principal and the third party and (ii) the supply of his own service to his principal for which he gets paid. In the instant case, there is only one supply by the appellant to his principal i.e., the foreign client, that too on his account. There is no service provider and service recipient relationship between the appellant and the vendors who were developed by him as there is no consideration received from these and the supply of goods by these vendors is incidental to the service of the appellant. Reportedly, the appellant has not entered into any agreement with the vendors either on their own or on behalf of the overseas client.

12.3 In this case, the appellant is found to be providing services of design and product development essentially for its foreign client to keep track of updates in fashion trends in knitted goods, evaluation and development of

vendors, including quality monitoring and logistics and operational assistance. The appellant has not engaged any other service provider for the process of procuring the specific goods to be exported as per the requirement of his foreign client. All these services are rendered only to M/s. Primark, Dublin, Ireland on his own account and he is receiving the consideration for the services as a percentage of FOB value of the merchandise exported. There is no evidence on record to show that he is receiving any consideration from the vendors developed by him and as such, the services could not be termed as falling under the category of "intermediary".

12.4 We find that the decision in the case of In Re: GoDaddy India Web Services Pvt. Ltd. [2016 (46) S.T.R. 806 (A.A.R.)] is relevant to understand the term 'intermediary' in its correct perspective, wherein it was observed as under: -

"10. The definition of "intermediary" as envisaged under Rule 2(f) of POPS does not include a person who provides the main service on his own account. In the present case, applicant is providing main service, i.e., "business support services" to WWD US and on his own account. Therefore, applicant is not an "intermediary" and the service provided by him is not intermediary service. Further, during arguments, applicant drew our attention to one of the illustration given under Paragraph 5.9.6 of the Education Guide, 2012 issued by C.B.E. & C. Relevant portion is extracted as under;

Similarly, persons such as call centers, who provide services to their clients by dealing with the customers of the client on the client's behalf, but actually provided these services on their own account', will not be categorized as intermediaries.

Applicant relying on above paragraph submitted that call centers, by dealing with customers of their clients, on client's behalf, are providing service to their client on their own account. Similarly, applicant is providing business support service such as marketing and other allied services like oversight of quality of third party customer care centre operated in India and payment processing services, on behalf of GoDaddy US. Therefore, these services provided by the applicant to GoDaddy US cannot be categorized as intermediary or services, as intermediary service."

The above is applicable to decide the issue in this appeal as the facts obtaining in these two cases are similar.

13. The next issue that is required to be decided in this appeal is whether the services provided by the appellant

could be treated as export of service or not. In this regard, the following are required to be gone through for arriving at a decision as to what is the place of provision of service, as applicable to the case of the appellant.

13.1.1 Rule 6A of the Service Tax Rules, 1994 states that:-

(1) The provision of any service provided or agreed to be provided shall be treated as export of service when, -

(a) the provider of service is located in the taxable territory,

(b) the recipient of service is located outside India,

(c) the service is not a service specified in the section 66D of the Act,

(d) the place of provision of the service is outside India,

(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and

(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 2 of clause (44) of section 65B of the Act.

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification."

13.1.2 In the present case, there is no dispute that the provider of service is located in the taxable territory and the recipient is located abroad/outside India. The services rendered are not specified in Section 66D of the Finance Act. The payment for the said services has also been received by the appellant in convertible foreign exchange. Therefore, the only condition that is required to be satisfied is whether the place of provision of service is outside India or not.

13.2.1 In terms of Rule 3 of the Place of Provision of Services Rules, 2012, the place of provision of service shall be the location of the recipient of service. In respect of intermediary service, in terms of Rule 9, the place of provision of service shall be the location of the service

provider. Rules 3 and 9 of the Place of Provision of Services Rules, 2012 are extracted below: -

"Rule 3. Place of provision generally. —

The place of provision of a service shall be the location of the recipient of service :

Provided that in case [of services other than online information and database access or retrieval services, where] the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.

....

Rule 9. Place of provision of specified services.-

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

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

(b) Online information and database access or retrieval services;

(c) Intermediary services;

(d) Service consisting of hiring of means of transport other than, -

(i) aircrafts, and

(ii) vessels except yachts,

upto a period of one month.]”

13.2.2 As we have held that the activities of the appellant will be coming under business support services and also would not be falling under intermediary services, the place of provision of the services applicable to the appellant, is the location of the service recipient, in terms of Rule 3 of the Place of Provision of Services Rules, 2012. Rule 9 is not applicable to the appellant as the services rendered by him in relation to procurement of goods to the foreign client are on his own account. The appellant is not said to be acting as an intermediary i.e., the services were performed by the appellant on a principal-to-principal basis and at arm’s length basis.

13.3 As all the conditions prescribed under Rule 6A of the Service Tax Rules, 1994 are satisfied, the services of the appellant are to be treated as export of services.

14. *In view of the above detailed analysis, we find that the impugned Order-in-Appeal No. CMB-CEX-000-APP-186-16 dated 10.08.2016 is not sustainable and is accordingly set aside.*

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

11.4 The Id. adjudicating authority has held that the services provided by M/s. SNQS International Socks Pvt. Ltd. are not on principal-to-principal basis, which is erroneous in our view, since all these services are rendered by the appellant to its foreign client and as per the direction of the foreign client. Not only procurement of goods, but selection of vendors, monitoring quality of the goods produced, designing of samples, live testing of the samples produced and carrying out various other quality checks on the garments till their final dispatch to the foreign client – the appellant has thus undertaken a bouquet of services which is not mere selling or purchase of goods. It is an admitted fact that remuneration for the services rendered to the foreign client is computed on the basis of FOB value of the garments exported and that itself would not make the appellant an intermediary. All these services were rendered to the foreign client on principal-to-principal basis. Selection of vendors or making of the garments by these vendors are incidental services for procurement goods and as per the direction of the foreign client, who is the recipient of the services provided by the appellant. Thus, the appellant is the service provider and the overseas buyer is the service recipient and there is no oral or written agreement between the appellant and the vendors/exporters of garments. Also, the appellant had not received any consideration for the services provided in relation to export of goods from the vendors in India.

11.5 In view of the above, we find that the appellant does not satisfy the conditions to be an 'intermediary' for his

services and as such, the impugned order 08.07.2019 cannot sustain and is required to be set aside accordingly.

12.1 We find that the Department has filed Service Tax Cross Objection No. 40669 of 2019 wherein they have taken the ground that the adjudicating authority ought to have imposed penalty equal to the Service Tax determined for the entire period. On perusal of the impugned order, we find that the adjudicating authority has imposed a penalty of Rs. 2,21,31,927/- under Section 78(1) of the Finance Act, 1994 read with Section 174 of the C.G.S.T. Act, 2017 whereas the demanded Service Tax confirmed was Rs.2,88,95,118/-.

12.2 In the cross objection filed, the Department is of the view that: -

- The adjudicating authority should have imposed penalty equivalent to the Service Tax demanded. The adjudicating authority has considered the provisions of Section 78 of the Finance Act, 1994, which were substituted vide Section 114 of the Finance Act, 2015, as effective from 14.05.2015, which reads as follows: -

"Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined:"

- In terms of the above provision, penalty imposable is fifty per cent of the Service Tax determined from 08.04.2011 to 14.05.2015, which is valid only till the date of receipt of assent of the Hon'ble President to the Finance Bill, 2015 as the proviso lapses its sanctity on getting the Presidential assent of the Bill.

- The Ld. adjudicating authority should have imposed penalty equal to the Service Tax liability determined.

12.3 However, since we hold that the services of the appellant are not to be categorized as intermediary services, we are of the opinion that there is no need to discuss regarding the invocation of extended period or imposition of penalties.

13. Appreciating the facts and evidence on record and also considering the decision rendered vide *Final Order No. 40478 of 2023 dated 23.06.2023 (supra)* in the appellant's own case wherein an identical issue was involved, the impugned Order-in-Original No. 08/2019-COMMR. dated 08.07.2019 is set aside.

14. Thus, the appeal is allowed with consequential relief, if any, as per the law. The cross objection filed by the Department is disposed of accordingly, as indicated hereinabove.

(Order pronounced in the open court on **23.11.2023**)

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

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Sdd