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Marketing/promotional services, engineering support services and accounting and management reporting services provided on own account to the overseas holding company would not qualify as intermediary services

CESTAT Mumbai

23 February 2023

Summary

The Customs, Excise and Service Tax Appellate Tribunal (CESTAT) Mumbai has held that if the appellant is engaged in providing marketing and promotional services, engineering support services to the distributors/customers and accounting and management reporting services to its overseas holding company, then it cannot be regarded as an intermediary under the erstwhile service tax law. The CESTAT further observed that there is no tripartite agreement, and such services are provided on a principal-to-principal basis, and consideration is also decided on the cost-plus markup basis. Therefore, the CESTAT held that the appellant is an independent contractor and not an agent or representative, or intermediary. Accordingly, it has held that the services provided by the appellant to its overseas holding company qualify as an export of services and are eligible for a refund.

Facts of the case

- M/s Idex India Pvt. Ltd. (the appellant) provides business support services to its overseas holding company, M/s Idex Corporation, USA, and its subsidiaries, such as Idex Japan, etc.
- The appellant aids the selling activities of various business units of the overseas holding company by rendering the services such as marketing and promotional services, engineering support services to the distributors/customers and accounting and management reporting services.
- The appellant had filed five refund claims under Notification no. 27/2012-CE(NT) dated 18 June 2012 read with Rule 5 of the Central Value Added Tax (CENVAT) Credit Rules, 2004, for unutilized accumulated CENVAT Credit.
- The Adjudicating Authority rejected all five refund claims filed by the appellant on the ground that the services provided by the appellant to its clients cannot be treated as an export of services as provided under Rule 6A of the Service Tax Rules and, therefore, they are not eligible for a refund of the CENVAT Credit that comes under Rule 5. The authority stated that the services provided by the appellant are covered under Rule 4(a) of Place of Provision of Service Rules, 2012 (hereinafter referred to as POPS Rules), and the Place of Provision of services is the location of the service provider, i.e., India.
- The learned Commissioner (Appeals) upheld the orders passed by the adjudicating authority.

CESTAT Mumbai observations and ruling (Service Tax Appeal No. 86812 of 2019 order dated 9 February 2023):

- **Appellant cannot be termed as an intermediary:** An activity between two parties cannot be considered as an intermediary. The intermediary does not include the person who supplies such goods or services or both on their own account. Therefore, there is no doubt that in cases wherein the person takes care of the main supply either fully or partly, on a principal-to-principal basis, the said person cannot come within the ambit of an 'intermediary.' Therefore, in view of the facts involved herein, the appellant cannot be termed as an intermediary.
- **No proceedings initiated for recovering service tax:** If the Revenue is not in agreement with the claims of the appellant 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 appellant for demanding the service tax in respect of taxable service provided by the appellant.

However, no such proceedings have been initiated by the Revenue; therefore, in a way, the Revenue itself has allowed this taxable service provided by the appellant as an 'export of service.' Thus, the Revenue cannot deny a refund by treating the service provided as not an 'export of service.'

- **No proceeding for denial of CENVAT credit available:** Rule 5 is very specific and lays down how to determine the quantum of admissible refund from the accumulated CENVAT Credit. It cannot be a proceeding for denial of CENVAT Credit available in the account of the claimant, and therefore even if the refund is denied, the amount will remain in the CENVAT account of the claimant.
- **Appellant is an independent contractor:** Based on the agreement, the CESTAT observed that the appellant is providing the services of marketing and market research to the overseas recipient of these services. The services are provided on a principal-to-principal basis, and consideration is also decided as the cost-plus markup. Therefore, there is no doubt that the appellant is an independent contractor and not an agent or representative or, more precisely, an intermediary.
- **Services provided by the appellant qualify as export:** The CESTAT stated that the services provided by the appellant, namely accounting and management reporting, after-sales support and marketing and promotion, do not require the physical presence of the goods or the data. Therefore, the Place of Provision has to be determined in compliance with Rule 3 of POPS Rules and is not covered under Rule 4(a) of POPS. Thus, the services provided by the appellant to its overseas entities clearly qualify to be exports and are eligible for a refund.

Our comments

The taxability of 'intermediary services' has been a matter of extensive litigation under the Goods and Services Tax (GST) law. However, the issue is expected to be settled post the verdict of the Punjab and Haryana High Court in the case of M/s Genpact India Ltd. The High Court has ruled that the petitioner engaged in providing various business process outsourcing (BPO) services, i.e., vendor data management, supply chain management, data analysis, technical IT support, developing, licensing, maintaining software, etc., to an overseas entity, cannot be regarded as an intermediary under the GST law.

Moreover, while pronouncing the aforementioned ruling, the High Court also stated that there had been no change in the definition of the term 'intermediary' under the GST regime vis-a-vis the service tax regime. Thus, it implies that all of the previous regime's decisions and clarifications would be squarely applicable under the GST regime as well.

The present ruling by the CESTAT is a welcome ruling and should also help clear working capital blockages due to the pendency of huge refund claims for businesses in a similar industry.

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