CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No. 86812 of 2019

(Arising out of Order-in-Appeal No. PK/999 TO 1003/ME/2018 dated 21.12.2018 passed by the Commissioner (Appeals-II), CGST & Central Excise, Bandra East

Idex India Pvt. Ltd. **.....Appellant**
Solitaire Corporate Park,
S-14, First Floor, 167,
Guru Hargovindji Marg,
Chakala, Andheri (E),
Mumbai

VERSUS

Commissioner of CGST, Mumbai East **.....Respondent**
9th Floor, Lotus Infocentre,
Near Parel Station, Parel East,
Mumbai

With

1)ST/86813/2019 Idex India Pvt. Ltd.; 2)ST/86814/2019 Idex India Pvt. Ltd.; 3)ST/86815/2019 Idex India Pvt. Ltd.; 4)ST/86816/2019 Idex India Pvt. Ltd.

APPEARANCE:

Shri Prasad Paranjape, Advocate a/w Shri Kumar Harshwardhan, Advocate for the appellant
Shri S.B.P. Sinha, Superintendent (AR) for the respondent

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/85157-85161/2023

DATE OF HEARING : 15.12.2022
DATE OF DECISION : 09.02.2023

Per: AJAY SHARMA

These appeals have been filed challenging the order dated 31.12.2018 passed by the Commissioner (Appeals) II, CGST & CX, Mumbai by which the appeals filed by the appellants were rejected by holding that the appellants are not eligible for refund of unutilised credit under the provisions of Notification No. 27/2012-CE(NT) dated 18.06.2012 issued under Rule 5 of Cenvat Credit Rules, 2004.

2. The issue involved herein is whether the appellants are eligible for the refund of unutilised credit under Rule 5 ibid read with Notification No. 27/2012-CE(NT) dated 18.06.2012 and whether the Place of Provision of Service herein is to be decided under Rule 3 or Rule 4(a) of Place of Provision of Service Rules, 2012?

3. The facts leading to the filing of the appeals are stated in brief as follows. The appellants i.e. M/s Idex India Pvt. Ltd. are into the business of providing taxable services in the categories of Business Support Service, Internet & Telecommunication Services, Information Technology Software and Legal Consultation Services since October, 2013. They are providing Business Support Services to its overseas holding company, M/s. Idex Corporation, USA and its subsidiaries such as Idex, Japan etc. The main activity of the holding company is to manufacture and sell precision engineered products through its various business units worldwide falling under Fluid & Metering Technology, Health & Science Technology and Fire, Safety and diversified product categories. The appellants aid the selling activities of various business units of Idex Corporation by rendering the services viz. Marketing and Promotion Services, Engineering Support Services to the distributors/customers and Accounting & Management Reporting Services. During the period in issue i.e. April, 2015 to June, 2016, the appellants filed five refund claims under notification no. 27/2012-CE(NT) (supra)

read with Rule 5 ibid for unutilised accumulated Cenvat Credit, the details of which are as under:-

S.No.	Quarter for which the Claim was filed	Amount involved (in Rs.)	Date of filing the claim
1	April, 2015 to June, 2015	670943	05.04.2016
2	July,2015 to Sept, 2015	1149967	01.07.2016
3	October, 2015 to Dec, 2015	783053	25.10.2016
4	Jan, 2016 to March, 2016	681373	24.01.2017
5	April, 2016 to June, 2016	730366	20.04.2017

4. The concerned authority vide letter dated 07.09.2016 asked the appellants to submit clarification on certain aspects which, according to the appellants, were submitted to the department immediately. Thereafter, the Adjudicating Authority vide Order-in-Original dated 31.05.2017 rejected all the five refund claims filed by the appellant on the ground that the services provided by the appellants to their clients cannot be treated as export of service as provided under Rule 6A of the Service Tax Rules and therefore they are not eligible for refund of the Cenvat Credit lying in balance under the provisions of Rule 5 ibid rather they 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 service in the instant matter, is the location of the service provider which is in India. On appeal, the learned Commissioner (Appeals) vide impugned order dated 21.12.2018 upheld the orders passed by the adjudicating authority.

5. Learned counsel appearing for the appellants submits that the rejection of refund claim filed under Rule 5 ibid on the ground that the service is not "export of services" cannot be sustained as the Revenue has not initiated any proceedings to demand Service Tax on the subject transactions. He further submits that the appellant is not acting as a 'intermediary' nor

can the service provided be termed as 'service' in respect of goods within the ambit of Rule 4 of POPS Rules. According to learned Counsel the appellant is engaged in providing various Business Support Services to its overseas group entities on its account and receiving consideration in convertible foreign exchange. These are by-partite services provided by the appellants to its group companies on its own and does not involve facilitation or procurement of goods or services for the group entities. While referring to the agreements between the appellant and its holding company overseas, learned Counsel submits that the appellant is an independent contractor in the performance of the services and cannot be construed as an agent, representative, servant or employee of service recipient and also that the appellant has no authority to commit or obligate in any manner whatsoever nor he has any authority to conclude the contract on behalf of the service recipient and therefore they cannot be termed as 'intermediary.' He further submits that in case of after sales support service or Engineering Support Service, the services are in respect of providing technical parameters of the product and design and no way make the goods physically available to the appellant i.e. to the service provider. Learned Counsel further submits that the impugned order travels beyond the scope of show cause notice as there were no reference in the show cause notice with respect to after sales support services and Account & Management Reporting Services or Rule 4 of POPS Rules whereas the impugned order relied upon them also while rejecting the refund claim of the appellant and therefore the orders of authorities below are beyond the scope of show cause notice and liable to be set aside on this ground itself. In support of his submissions, learned Counsel placed reliance on the decision of the Tribunal in the matters of *M/s BlackRock Services India Pvt. Ltd. vs. Commissioner, CGST* vide Final order No. 60111-60112/2022 dated 08.08.2022; *JFE Steel India Pvt. Ltd. vs. Commissioner of*

CGST, Gurugram 2021 (44) GSTL 292 (Tri-Chan); Macquarie Global Services Pvt. Ltd. vs. CCE & Service Tax, Gurugram 2021-TIOL-0790-CESTAT-CHD; and *Calibre Point Business Sales Ltd. vs. CST Mumbai 2010 (18) STR 737 (Tri-Mumbai).* Per contra Learned Authorised Representative appearing on behalf of Revenue reiterated the findings recorded in the impugned order and prayed for dismissal of the appeal.

6. I have heard learned Counsel for the appellants and learned Authorised Representative for the Revenue and perused the case records including the written submission and the case laws placed on record by the respective sides. The term 'intermediary' has been defined under Rule 2(f) of Place of Provision of Services Rules, 2012 which is reproduced hereunder:

> *"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 principal basis, 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'. In view of the facts involved herein the Appellant cannot be termed as an 'intermediary.'

7. Admittedly the refund claims have been filed by the appellants under Rule 5 ibid read with 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 appellants as '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 principle has been followed by the Tribunal in the matter of M/s. BlackRock Services (supra), *JFE Steel India Pvt. Ltd. (supra);* and also in Final Order No. 60959-60960/2021 dated 07/10/2021 in *Macquarie Global Service Pvt. Ltd v/s Commissioner C.E. & ST, Gudgaon-1*. In support of his submissions that the Revenue has not demanded any Service Tax on output service by denying the export status, the Vice-President Finance of the appellant has also filed an Affidavit dated 12.12.2022 to that effect. In my view this ground itself is sufficient to decide the issue in favour of the Appellant.

8. From the case record it is gathered that the appellant aids in the selling activities of various business units of its holding company by rendering the services of marketing support, providing application engineering support service to the distributors/customers, representing the issue of these distributors/customers, following up on behalf of the business units to end customers in India etc. The orders booked are updated in the financials books of the respective business units outside India and the sale out of those as and when fructify, also are covered in the P&L account of the respective business units outside India. I have also carefully gone through the agreements placed on record along with the Appeal and what has been gathered from the perusal of them is that the Appellant can in no way be construed as an agent, representative, servant of Idex holding company nor they have any authority to commit

or obligate their holding Company Idex in any manner whatsoever and neither the holding Company is restricted to appoint any other service provider in India nor the appellants is restricted from providing services to any other third parties. Therefore there is no iota of doubt that the Appellant is an independent contractor and not an agent or representative or to be more precise an intermediary. They are providing the service of marketing and market research to the overseas recipient of service. The services are provided on principal to principal basis and consideration is also decided, the cost plus mark up.

9. Undoubtedly there is no tripartite agreement at any given point of time. I am in agreement with the submission of the Learned Counsel that Rule 4 of POPS Rules, 2012 deals with the Place of Provisions in case of performance-based services and the services provided in relation to the goods required to be made physically available are only covered under the ambit of this Rule. Whereas undertaking the activities in relation to the accounting and management reporting services, the data in the incorporeal form is provided, which do not have any physical presence and hence not covered under Rule 4 ibid and the same is covered under Rule 3 ibid i.e. location of recipient of services which is overseas. The after sales support service or Engineering Support service are services which the appellant is doing in respect of providing technical parameters of the products, design and it in no way require the goods to be made physically available to the appellant i.e. service provider, therefore, for these services also place of provision has to be determined in terms of Rule 3 ibid and not under Rule 4. Similar is the position with regard to the Marketing & Promotion service. As a result in the facts of the present case, the Place of Provision has to be determined in terms of Rule 3 of POPS Rules, 2012 and are not covered under Rule 4(a) ibid, therefore the services provided by the appellant to its overseas entities clearly qualify to be export and they are eligible for refund.

10. In view of the discussion made in the preceding paragraph, the appeal is allowed with consequential relief, if any, as per law.

(Pronounced in open Court on 09.02.2023)

(Ajay Sharma)
Member (Judicial)

//SR