

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH**

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REGIONAL BENCH – COURT NO. 1

**Service Tax Appeal No. 60117 Of 2022**

[Arising out of Order-in-Appeal No.88/ST/CGST-APPEAL-GURUGRAM/SKS/2021-22 dated 27.12.2021 passed by the Commissioner (Appeals), CGST, Gurugram]

**M/s Airbnb Payments India Private Limited** : **Appellant**  
241, Phase-I, Udyog Vihar, Gurgaon,  
Haryana-122016

*VERSUS*

**The Commissioner of Central Excise &  
Service Tax, Gurugram** : **Respondent**  
GST Bhavan, Plot No.36-37, Sector-32,  
Gurugram, Haryana 122001

**With**

**Service Tax Appeal No. 60248 Of 2022**

[Arising out of Order-in-Original No. CGST/CGM/Comm/Adj./AIRBNB/19/2020-21/10277 dated 16.03.2022 passed by the Commissioner of CGST, Gurugram]

**M/s Airbnb Payments India Private Limited** : **Appellant**  
241, Phase-I, Udyog Vihar, Gurgaon,  
Haryana-122016

*VERSUS*

**The Commissioner of Central Excise &  
Service Tax, Gurugram** : **Respondent**  
GST Bhavan, Plot No.36-37, Sector-32,  
Gurugram, Haryana 122001

**APPEARANCE:**

Shri Krishna Rao, Advocate for the Appellant  
Shri Aneesh Dewan and Shri Narinder Singh, Authorised Representatives  
for the Respondent

**CORAM:**

**HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)**  
**HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER Nos.60505-60506/2024**

DATE OF HEARING: 15.05.2024  
DATE OF DECISION: 04.09.2024

**PER: P. ANJANI KUMAR**

The appellants, M/s Airbnb Payments India Pvt. Ltd, are engaged in the provision of services taxable under Section 66B of the Finance Act, 1994; the appellants filed two refund claims, on account of unutilized CENVAT credit, for the period October 2016 to December 2016 for an amount of Rs.53,97,035/- and for the period January 2017 to March 2017 for an amount of Rs.31,47,583/-; the Original Authority vide Orders dated 14.10.2019 and 15.11.2019 respectively allowed the refunds; Revenue went in appeal before the Commissioner (Appeals) against the order dated 14.10.2019 passed by the Original Authority on the grounds that an amount of Rs.26,25,042/- was wrongly refunded and in respect of order dated 15.11.2019, the entire refund was erroneously granted; Commissioner (Appeals) vide his order dated 21.04.2020 remanded both the orders back to the Adjudicating Authority with a direction to check whether the appellant was an intermediary between Airbnb, Ireland and their customers; in the remand proceedings, the Original Authority did not pass any order in respect of the refund for the period October 2016 to December 2016 in respect of refund, for the period January 2017 to March 2017, rejected the refund, saying that the appellant is an intermediary, vide order dated 26.03.2021; on an appeal filed by the appellant, learned Commissioner (Appeals) vide impugned order dated 26.03.2021 upheld the order passed by the Original Authority. Hence, the appellants filed Appeal No. ST/60117/2022.

2. Meanwhile, Department has issued another Show Cause Notice dated 21.10.2021 seeking the re-payment of refund of Rs.57,72,625/-

(i.e. Rs.31,47,583/- + Rs.26,25,045/-) alleged to have been erroneously sanctioned to the appellants by the Original Authority vide orders dated 15.11.2019 and 30.09.2019 respectively; the Show Cause Notice also seeks to recover service tax, of Rs.2,04,15,167/-, allegedly not paid by the appellants on the output services rendered by them. The proposals in the Show Cause Notice have been confirmed, along with interest and penalties, by the Commissioner vide impugned order dated 15.03.2022; accordingly, the appellants have filed Appeal No.ST/60248/2022.

3. Shri Krishna Rao, learned Counsel for the appellant, submits in respect of Appeal No.ST/60117/2022 that the impugned order comes to the conclusion that PayU and the appellant are one and the same and therefore, the appellant is an intermediary between Airbnb, Ireland and the customers; learned Commissioner has given the finding on the basis of the website payubizz.in wherein it was claimed that PayU was only an intermediary; learned Commissioner also relies on the RBI Circular wherein it was stated inter alia that payment aggregators and the payment gateways are intermediaries playing an important function in facilitating the payments in online space; Commissioner also relies on Clause 3.3 of the Agreement with PayU wherein it was stated that PayU will act as an intermediary by creating a link between the merchant site and respective acquiring banks.

4. Learned Counsel for the appellants submits in respect of Appeal No.ST/60248/2022 that learned Commissioner comes to the conclusion for the reasoning that the appellant is arranging and

facilitating main service of Airbnb, Ireland to the Indian customers; there are two supplies; the appellant arranges and facilitates Airbnb, Ireland's main service; the test of agency is satisfied because the appellant can accept payments on behalf of Airbnb, Ireland; the Commissioner also relies on CBEC Circular issued in 2012.

5. Learned Counsel submits that the appellants provide only one main service which is "Payment Collection Service" to Airbnb, Ireland; there are only two parties; Airbnb, Ireland instead of taking the responsibility of the payments on themselves outsourced the same to the appellant; outsourcing of provision of service does not make the appellant an intermediary. Learned Counsel submits in addition that as per Clause 8.3 of the Contract with Airbnb, the appellant can sub-contract but the responsibility to provide the service is on the appellant and therefore, the appellant is not an intermediary; Clause 20.1 of the Agreement between the appellant and the PayU specifically mentions that the appellant is not an agent; Department cannot ignore these conditions. He further submits that the Department is not clear in its stand inasmuch as they have taken different stand in different orders; OIO dated 14.10.2019 and 15.11.2019 categorically holds that the appellant is not an intermediary, while the appeals against this order mention that the appellant might be an intermediary; while OIA dated 21.04.2020 and 26.03.2021 hold that the appellant is in an intermediary between Airbnb, Ireland and PayU, OIA dated 26.12.2021 holds that the appellant is an intermediary between Airbnb and their customers.

6. Learned Counsel submits that CBIC Circular dated 20.09.2021 clarifies the position of an intermediary and supports the claim of the appellants. He relies on the following cases:

- Genpact India Pvt. Ltd. – CWP-6048-2021 (P&H)
- Blackrock Services India Pvt. Ltd. – (ST/61877/2018)
- Chevron Phillips Chemicals India Pvt. Ltd. – 2012 (12) TMI 1066-CESTAT Mumbai. (Civil Appeal filed by Department has been dismissed by Supreme Court in Civil Appeal No.4370 of 2024)
- SNQS International Socks Private Ltd. – ST/41459/2019 (Civil Appeal filed by Department dismissed by Hon'ble Supreme Court in Civil Appeal No.1431 of 2024)
- JFE Steel India Pvt. Ltd. – 2021 (44) GSTL 292 (Tri. Chan.)
- Torm Shipping India Pvt. Ltd. – 2021 (44) GSTL 195 (Tri. Mumbai)
- Singtel Global India Pvt. Ltd. (ST/52609/2019), CESTAT
- Singtel – SERTA 10, 11 and 12 of 2023 (Delhi High Court)

7. Learned Counsel for the appellants submits that once Civil Appeal is dismissed by the Hon'ble Supreme Court, the order of the Tribunal stands merged with the Supreme Court's order as held by the Hon'ble Apex Court in Kunhayammed Vs State of Kerala- (2007) 7 SCC 359. Learned counsel submits that the appellants get paid the cost plus a certain markup. Tribunal held in the case of Verizon India Pvt. Ltd. – 2021 (45) GSTL 275 (Tri. Del.) and Blackrock Services India Pvt. Ltd. (supra) that the intermediary gets paid a commission and not cost plus markup.

8. Learned Counsel for the appellants submits that there is no fraud and suppression and therefore, extended period is not invocable; the refund claim filed by the appellant for the quarters October to December 2016 and January to March 2017 contained all

relevant details; copies of ledgers, bank statements, invoices and contracts were also submitted; therefore, Show Cause Notice dated 21.10.2021 covering the period April 2016 to June 2017 is clearly barred by time. He submits that the reasoning given by the Department, that had the investigation not happened, suppression would not have come to light, cannot stand in view of M/s G D Goenka Private Limited – ST/51787/2022.

9. Shri Aneesh Dewan, assisted by Shri Narinder Singh, learned Authorized Representative for the Department, reiterates the findings of the impugned orders and submits that the appellants are covered by the definition of an "Intermediary" as per Rule 9(iii) of POPS Rules, 2012 as the appellants facilitate and arrange provision of a service; from the Master Service Agreement dated 27.05.2015, it is clear that the appellants have provided services during the material period for facilitating the operation of Airbnb Platform which is the main service in the instant case; moreover, the appellants are not providing the main service on their own account and have no role in provision of the said services and therefore, the appellants are an intermediary as per the inclusive Clause as well as exclusive Clause of the definition of an "Intermediary". He relies on Excelpoint Systems (India) Pvt. Ltd. – 2018 (10) GSTL 254 (Tri. Bang.) and Saber Travel Network India Pvt. Ltd. – 2019 (27) GSTL 754 (App. A.A.R. – GST) and submits that the Market/ Technical Support Services falling under BAS provided by the assessee to group company located outside India fall under the definition of "Intermediary" under Rule 2(f) of the Place of Provision of Service Rules, 2012; in terms of Rule 9 read with Rule 3, *ibid*, the

place of provision of services shall be the location of service provider and therefore, services rendered by the appellant cannot be treated as export of services.

10. Heard both sides and perused the records of the case. The brief issue that requires to be decided in the instant appeals is as to whether the appellants are an intermediary and whether the appellant are eligible for refunds filed by them periodically and as to whether the demand of duty is sustainable. We find that it would be beneficial to have a look at statutory provisions in this regard.

10.1. Section 2(f) of POPS Rules, 2012 defines "Intermediary" as below:

"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".

10.2. We find that CBIC Circular No.159/15/2021 dated 20.09.2021 explains the concept of Intermediary Services as below:

Intermediary services — Scope of —  
Clarification on doubts

Circular No. 159/15/2021-GST, dated 20-9-2021

F. No. CBIC-20001/8/2021-GST

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Indirect Taxes & Customs,  
New Delhi

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-S.T., 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-a-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 persons and, does not himself provide the main supply.

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

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

(2) Ancillary supply, which is the service of facilitating or arranging the main supply between the two principals. 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' sub-contracts 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. Applying the abovementioned guiding principles, the issue of intermediary services is clarified through the following illustrations :

Illustration 1

'A' is a manufacturer and supplier of a machine. 'C' helps 'A' in selling the machine by identifying client 'B' who wants to purchase this machine and helps in finalizing the contract of supply of machine by 'A' to 'B'. 'C' charges 'A' for his services of locating 'B' and helping in finalizing the sale of machine between 'A' and 'B', for which 'C' invoices 'A' and is paid by 'A' for the same. While 'A' and 'B' are involved in the main supply of the machinery, 'C', is facilitating the supply of machine between 'A' and 'B'. In this arrangement, 'C' is providing the ancillary supply of arranging or

facilitating the 'main supply' of machinery between 'A' and 'B' and therefore, 'C' is an intermediary and is providing intermediary service to 'A'.

#### Illustration 2

'A' is a software company which develops software for the clients as per their requirement. 'A' has a contract with 'B' for providing some customized software for its business operations.

'A' outsources the task of design and development of a particular module of the software to 'C', for which 'C' may have to interact with 'B', to know their specific requirements. In this case, 'C' is providing main supply of service of design and development of software to 'A', and thus, 'C' is not an intermediary in this case.

#### Illustration 3

An insurance company 'P', located outside India, requires to process insurance claims of its clients in respect of the insurance service being provided by 'P' to the clients. For processing insurance claims, 'P' decides to outsource this work to some other firm. For this purpose, he approaches 'Q', located in India, for arranging insurance claims processing service from other service providers in India. 'Q' contacts 'R', who is in business of providing such insurance claims processing service, and arranges supply of insurance claims processing service by 'R' to 'P'. 'Q' charges P a commission or service charge of 1% of the contract value of insurance claims processing service provided by 'R' to 'P'. In such a case, main supply of insurance claims processing service is between 'P' and 'R', while 'Q' is merely arranging or facilitating the supply of services between 'P' and 'R', and not himself providing the main supply of services. Accordingly, in this case, 'Q' acts as an intermediary as per definition of sub-section (13) of section 2 of the IGST Act.

#### Illustration 4

'A' is a manufacturer and supplier of computers based in USA and supplies its goods all over the world. As a part of this supply, 'A' is also required to provide customer care service to its customers to address their queries and complains related to the said supply of computers. 'A' decides to outsource the task of providing customer care services to a BPO firm, 'B'. 'B' provides customer care service to 'A' by interacting with the customers of 'A' and addressing / processing their queries/complains. 'B' charges 'A' for this service. 'B' is involved in supply of main service 'customer

care service' to 'A', and therefore, 'B' is not an intermediary.

5. The illustrations given in para 4 above are only indicative and not exhaustive. The illustrations are also generic in nature and should not be interpreted to mean that the service categories mentioned therein are inherently either intermediary services or otherwise. Whether or not, a specific service would fall under intermediary services within the meaning of sub-section (13) of section 2 of the IGST Act, would depend upon the facts of the specific case. While examining the facts of the case and the terms of contract, the basic characteristics of intermediary services, as discussed in para 3 above, should be kept in consideration.

6. It is requested that suitable trade notices may be issued to publicize the contents of this Circular.

7. Difficulty, if any, in the implementation of this Circular may be brought to the notice of the Board. Hindi version will follow.

10.3. We find that Hon'ble Punjab & Haryana High Court has held in the case of Genpact India Pvt. Ltd. (supra) that the following three conditions must be satisfied primarily for a person to qualify as an Intermediary:

- the relationship between the parties must be that of a principal-agency relationship.
- the person must be involved in arrangement or facilitation of provisions of the service provided to the principal by a 3rd party.
- the person must not actually perform the main service intended to be received by the service recipient itself. Scope of an "intermediary" is to mediate between two parties i.e. the principal service provider (the 3rd party) and the beneficiary who receives the main service and expressly excludes any person who provides such main service "on his own account"

11. Now, we find that it is necessary to go through the Agreement between the appellant and Airbnb, Ireland. We find that the salient

features of the Master Service Agreement dated May 27, 2015 are as follows:

1.1 Performance of Services. Service Provider will provide certain services to Airbnb Ireland for its business operations and any additional services for Airbnb Ireland that are mutually agreed to by Airbnb Ireland and Service Provider to be added under the Agreement ("Services"). All Services should be described in detail on a statement or statements of work that are substantially in the form of the attached Exhibit A (each a "Statement of Work"). Each Statement of Work shall include a description, as applicable, of the Services to be performed and a schedule of payments related to such Services. Each Statement of Work shall be sequentially numbered and dated. Any changes to a Statement of Work shall be documented and agreed to in writing (each a "Change Order"). Each Change Order will identify any changes to the Statement of Work, including changes to scope of Services, associated deliverables, timelines and any increases or decreases in the compensation.

1.2. Airbnb Ireland Performance. This Agreement does not prohibit Airbnb Ireland from performing Services on its own behalf or obtaining Services from others.

1.4....

(d) Nothing in this Agreement or in the arrangements hereby contemplated shall constitute or be taken to mean that Service Provider acts as the agent of Airbnb Ireland or Member for any purpose whatsoever and Service Provider shall not hold itself out or make any warranty, representation or do any act on behalf of the Airbnb Ireland or Member except in accordance with this Agreement.

2. RELATIONSHIP OF PARTIES.

2.1 Independent Contractor and Arms Length Relationship. The relationship of Airbnb Ireland and Service Provider established by this Agreement is that of independent contractors, and nothing in this Agreement shall be construed: (a) to give either party the right or power to direct or control the daily activities of the other party, (b) to constitute the parties as principal and agent, employer and employee, partners, joint ventures, co-owners or otherwise as participants in a joint undertaking, or (c) to allow either party (i) to create or assume any obligation on behalf of the other party for any

purpose whatever except as provided in this Agreement, or (ii) to represent to any person, firm, or entity that such party has any right or power to enter into any binding obligation on the other party's behalf, except as provided in this Agreement, provided that Service Provider will at all times comply with Applicable Law.

11.1. Relevant clauses of the Agreement between the appellant and PayU are as follows:

3.3 PayU will act as an intermediary by creating a link between the Merchant Site and the respective Acquiring Banks by means of the Software Application and PayU Site, for enabling the Customers in make payment of Customer Charge on the Merchant Site for Transactions carried through the Payment Mechanisms using Acquiring Bank Services ("Internet Payment Gateway").

12. On going through the Agreements in this regard, it is clear that the appellants are working on a principal-to-principal basis as far as Airbnb, Ireland and PayU are concerned. Airbnb, Ireland is engaged in provision of accommodation to tourists/ visitors all over the places; Airbnb has a pool of accommodation which is offered by the owners of the properties to Airbnb for a consideration; the customers who require accommodation book the same on the website of Airbnb, Ireland. The appellant, pursuant to the Master Service Agreement provides Payment Processing Services by collection reservation amounts booked on Airbnb platform by Indian guests originating in India by initiating payment of fees due to hosts for utilization of their accommodation. The appellants get remuneration on cost plus markup basis in foreign exchange; once the visitors/ tourists originating in India pay, the appellants liaise with the banks to ensure that the owners of the accommodation received the payment once their

accommodation is leased by Airbnb, Ireland to their customers; the appellants have outsourced the work to PayU platform. It is clear that the appellant and Airbnb, Ireland or for that matter the PayU work on principal-to-principal basis. Thus, the conclusion arrived by the impugned orders though inconsistent do not seem to flow from the work arrangement between the parties. As far as the customers or the property owners are concerned, the appellant is not privy to any contract by Airbnb, Ireland with them and they also do not have any agreement vis-à-vis the provision of service by Airbnb to their customers. The appellants can at best be described to perform certain services regarding the payments which are outsourced to them by Airbnb, Ireland. There is nothing in the agreements to indicate that the appellants are an intermediary. We find that in the instant case, the conditions laid down by Hon'ble Punjab & Haryana High Court in the case of Genpact (supra) are not satisfied as the relationship between the appellant and the Airbnb, Ireland is not that of a principal agent; there is nothing in the agreement to indicate that the appellants are facilitating the main service provided by Airbnb to their customers; in fact, the appellants are rendering services to ensure that the property owners received their consideration for renting of the property to M/s Airbnb, Ireland; the appellants are not mediating between Airbnb, Ireland and their customers in the provision of the main service. There are no main service and the auxiliary service in the instant case. Though the appellant is located in India, the recipient of the service rendered by the appellant is located outside India; the appellant receives remuneration in foreign exchange and the appellant and Airbnb, Ireland is not different establishments of a distinct person.

13. We find that as far as the provision of main service is concerned, there are only two parties in the present case i.e. the appellant and Airbnb, Ireland; the appellant provides single service of processing of payment to Airbnb, Ireland; the appellants have no relation whatsoever with the customers accessing the platforms of Airbnb; there is no tripartite agreement either; the clauses of the agreements do not create a principal-agent relationship; the appellant does not receive a commission and does not facilitate any main service between Airbnb, Ireland and their customers. In fact, in the facts and circumstances of the case, the appellants are providing Back Office Services which are outsourced which cannot be called Intermediary Services.

14. We find that Tribunal in the case of Orange Business Solutions Pvt. Ltd. 2019 (27) GSTL 523 (Tri. Chd.) held that:

10. From the above Guidance Note of C.B.E. & C. dated 20-6-2012 and definition of intermediary, the following conclusion has drawn :-
  - (a) An intermediary arranges or facilitates 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.

11. From the agreement placed before us and arguments adduced before us, we find that the activity of computer networking is networking service which is an application running at the network application layer and above, that provides data storage, manipulation, presentation, communication or other capability which is often implemented using a client-server or peer-to-architecture based on application layer network protocols.

12. In view of the above, we do not find any arrangement or facilitation of the main service between two parties by a third person under the category of computer networking services.

13. We further find that the mandate from the group involves various companies more than two. So it is delivered to third entity on the direction of one M/s. Equant Network Services International Limited (ENSIL) and they act as intermediary. The appellant are 'processing equipment supply order's including liaison/coordination', so the liaison/coordination is also equivalent to solicitation and is more near to intermediary nature than the act of solicitation. Each mandate where there are two or more than two companies are involved would not automatically be termed as intermediary merely on the ground of involvement of two or more companies. To be intermediary, the criteria laid down has been discussed hereinabove. We hold that the respondent is not intermediary.

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.

14. Further, we find that this Bench in the case of Lubrizol Advanced Materials India Pvt. Ltd.- 2019 (1) TMI 720-CESTAT Mumbai held that:

"On perusal of the contracts, I find that the service fee charged by the appellant 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 mark-up 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."

15. We find that the Principal Bench of the Tribunal in the case of Verizon India Pvt. Ltd. (supra) held that:

30. We find that the said stand of Revenue is wholly mis-construed and erroneous. Firstly, no demand notice was issued on the appellant refusing or questioning the status of the export of service to Verizon US, as declared in their ST-3 Returns. Further, we find that the Hon'ble Delhi High Court has held, that its findings applied to post-Negative List also i.e. from July, 2012 onwards, as held by the Hon'ble High Court in its aforementioned judgment particularly in para-54 (supra). Further, admitted facts are that the appellants have provided output services and raised invoices on principal to principal basis. The appellant has not been acting as intermediary between another service provider and Verizon US. This fact is also supported from the fact that the appellant has raised their bills for the services provided on the basis of cost plus 11% mark-up. As the services have been provided by the appellant under contract

with Verizon US, who are located outside India and have raised their invoices, for such services and have received the remittance in convertible foreign exchange, the appellant satisfies all the conditions, as specified under Rule 6A of Service Tax Rules, 1994, inserted w.e.f. 1-7-2012.

16. We further find that Authority for Advance Ruling held in the case of GoDaddy India Private Limited v. Commissioner of Service Tax, Delhi-IV [AAR/ST/08/2016] ['GoDaddy'] 2016 (46) S.T.R. 806 (A.A.R.) and in the case of Universal Services India Private Limited v. The Commissioner of Service Tax, Delhi-IV [AAR/ST/07/2016] 2016 (42) S.T.R. 585 (A.A.R.) held that Payment Processing Services are not Intermediary Services. These two cases were relied upon by the Tribunal in the case of Verizon India Pvt. Ltd. (supra).

17. We find that Hon'ble Punjab & Haryana High Court has dealt the matter in the case of Genpact India Pvt. Ltd. (supra) and held as follows:

36. In the pre-GST regime the term "intermediary services" was defined under Rule 2(f) of the Place of Provision of Service Rules, 2012. Under the 2012 Rules "intermediary services" were defined to mean 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 on his account.

37. 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 20-9-2021 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.

38. We also find that in the impugned order dated 15-2-2021 (Annexure P-18) there has been a clear misreading of the ruling in the case of *Infinera* (supra) while observing that there has been a material change in the definition of "intermediary" under the GST regime. To the contrary a bare perusal of the ruling in the case of *Infinera* (supra) which stands reproduced by the Appellate Authority in the impugned order itself would show that the definition of the term "intermediary" had been noticed both under the pre-GST regime as also under the GST regime and it had been observed as under :-

"From the above definitions, in essence, there does not seem to be any difference between the meaning of the term "intermediary" under the GST regime and pre-GST regime. In the pre-GST regime, an intermediary referred to a person who facilitates the provision of a main service between two or more person but did not include a person who provided the main service on his account. Similarly, in the GST regime, an intermediary refers to a person who facilitates the supply of goods or services or both between two or more persons but excludes a person who supplies such goods or services or both on his own account."

Accordingly, in the light of such position wherein there is no change in the legal position i.e. with regard to the scope and ambit of "intermediary" services under the service tax regime vis-a-vis the GST regime and there being no change of facts as it is the MSA of 2013 (Annexure P-1) which continues to operate, the department cannot take a different view for different periods. In *Radhasoami Satsang v. CIT* - [1992] 60 Taxman 248/193 ITR 321 (SC)/[1992] 1 SCC 659, even though it had been observed that *res judicata* does not apply to income tax proceedings, yet it was observed as follows :-

16. We are aware of the fact that strictly speaking *res judicata* does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect

permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

17. On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter - and if there was no change it was in support of the assessee - we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-tax in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under sections 11 and 12 of the Income-tax Act of 1961”.

39. In *Bharat Sanchar Nigam Ltd. v. Union of India* - [2006] 3 STT 245 (SC)/[2006] 3 SCC 1, the Hon’ble Supreme Court had reiterated that where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view.

40. Paragraph 20 of the judgment would be relevant to the issue at hand and is reproduced hereunder :-

“20. The decisions cited have uniformly held that *res judicata* does not apply in matters pertaining to tax for different assessment years because *res judicata* applies to debar Courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of *res judicata* but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of

distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction."

41. The principle of consistency as such ought to apply in the present matter as well and we find merit in the stand taken on behalf of the petitioner that the view taken in the order-in-original dated 25-1-2018 (Annexure P-2) holding the petitioner to be not an "intermediary" under the MSA, should prevail even under the GST regime.

42. Furthermore, we find that the finding recorded by the respondents-department to hold the petitioner to be in a principal agent relationship with the GI to be without any basis and to be clearly erroneous. The impugned order proceeds oblivious of clause 21.6 of the MSA and which is in the following terms :-

21.6 Relationship of Parties Nothing in this Agreement shall constitute or be deemed to constitute a relationship of employer and employee, agency, joint venture or partnership between the parties hereto or constitute or be deemed to constitute one Party as agent of the other for any purpose whatsoever, and except as expressly provided herein, neither Party shall have the authority or power to bind the other, or to contract in the name of or create a liability against the other, in any way or for any purpose."

During the course of arguments, Mr. Sharan Sethi, Learned Senior Standing Counsel for the respondents would concede that there is no separate agreement entered between the petitioner and GI's customers. In no manner as such can the petitioner be equated to be an agent or broker. It would also be useful at this stage to advert to the stand taken by the respondents-department in the written statement that had been filed in the previous round of litigation i.e. CWP No. 10302 of 2020 that had been filed by the petitioner. In Para 8 of the written statement that stands placed on record and appended as Annexure P-11 it had been stated as follows :-

"It is further mentioned that the service is primarily in the nature of various types of backend services which are in the nature of call centre services, back office management, IT helpdesk services etc. ('BPO services') to the overseas entity. The petitioner

provides these services to third parties on behalf of its client located outside India. The arrangement requires the company to complete the assigned processes/scope of work and submit the deliverables directly to the third parties, either online or on-call or through e-mail using dedicated electronic networks and voice circuits.

43. Still further in Para 9 of the written statement it was clearly averred to the following effect :-

“the test of agency must be satisfied between the principal and the agent i.e. the “intermediary” which is not the case in the present case”

44. The findings as regards the petitioner to be an agent is in contradistinction to the clear stand taken by the department in the previous round of litigation.

45. It is undisputed that the petitioner has an agreement only with the GI.

46. Pursuant to the sub-contracting arrangement as per MSA (Annexure P-1), the petitioner provides the main service directly to the overseas clients of GI but does not get any remuneration from such clients. Pursuant to the arrangement, it is GI which gets paid by its customers to whom the services are being provided directly by the petitioner. Nothing has been brought on record to show that the petitioner has a direct contract with the customers of GI. Still further there is nothing on record to show that petitioner is liaising or acting as an “intermediary” between GI and its customers. All that is evident from the record is that the petitioner is providing the services which have been sub-contracted to it by GI. As a sub-contractor it is receiving fee/charges from the main contractor i.e. GI for its services. The main contractor i.e. GI in turn is receiving commission/agents from its clients for the main services that are rendered by the petitioner pursuant to the arrangement of sub-contracting. Even as per the afore-noticed circular dated 20-9-2021 and in reference to Para 3.5 it stands clarified that sub-contracting for a service is not an “intermediary” service.

47. In the present case we find that in the written statement reference is made to a Transfer Pricing Report (Annexure P-24) as also to draw a distinction between two categories of supplies as per MSA i.e. main supply and the ancillary supply. The passing of the impugned order is sought to be justified that the main supply takes place between GI and its customers whereas it is the ancillary

supply which is provided by the applicant to facilitate the provision of the main supply.

48. We find that the written statement seeks to justify the impugned order on grounds which are not even part of the impugned order and which is clearly impermissible in law. A reference in this regard may be made to the judgment of the Apex Court in *Mohinder Singh Gill v. Chief Election Commissioner* [1978] 1 SCC 405, wherein it had been held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of an affidavit or otherwise. It was further observed that an order which was otherwise bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

49. For the reasons recorded above, we are of the considered view that the impugned order dated 15-2-2021 (Annexure P-18) holding the petitioner to be an "intermediary" under Section 2(13) of the IGST Act, cannot sustain.

18. Though, the judgment of Hon'ble High Court of Punjab & Haryana was delivered at the context of GST, we find that Hon'ble Court held that there is no material change in the definition of "Intermediary" in the Service Tax Regime and the GST Regime. Hon'ble High Court has laid down the principals/ the conditions that should be satisfied so that a service is qualified to be called an "Intermediary Service". In view of our discussion as above and the ratio of the cases cited and discussed, we find that in the instant case, the appellants do not satisfy the conditions so as to render their services to be "Intermediary". It is clear from the terms of the Agreement that they are on principal-to-principal basis; there is no principal-agent relationship and the appellants do not render any service to facilitate the provision of main service by Airbnb, Ireland. On the other hand, they satisfy the conditions of Rule 6A of Service

Tax Rules and accordingly, the services rendered by them to Airbnb, Ireland are to be treated as Export of Services. Therefore, we are of the considered opinion that the appellants are eligible for the refunds claimed and they are not liable to pay any service tax on the services rendered by them. Accordingly, the impugned orders are liable to be set aside and we do so. When the service tax is not payable and in fact is refundable, the question of payment of interest and penalty on the service tax demanded does not arise.

19. In view of the above, both the appeals are allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on 04/09/2024)

**(S. S. GARG)**  
**MEMBER (JUDICIAL)**

**(P. ANJANI KUMAR)**  
**MEMBER (TECHNICAL)**

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