

PSV/VSA/PVR

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 39 OF 2023

Globolive 3D Private Limited,	)	
7 & 8, Ground Floor, 15/17,	)	
Raghavji Building-A, Cumbala Hill,	)	
A. K. Marg, Gowalia Tank,	)	
Mumbai – 400 036	)	...Petitioner

Versus

1. Union of India , represented by	)	
the Secretary, Department of Revenue	)	
Ministry of Finance, North Block,	)	
New Delhi – 110 001.	)	
2. Deputy Commissioner ,	)	
Div. VIII, CGST & CX,	)	
Mumbai South Commissionerate	)	
Commissioner of CGST & CX,	)	
13 th & 15 th Floor, Air India Building,	)	
Nariman Point, Mumbai – 400 021	)	
3. The Joint Commissioner of CGST	)	
&CX (Appeal-I) , Mumbai	)	
9 th Floor, Piramal Chambers,	)	
Jijibhoy Lane, Lalbaug, Parel,	)	
Mumbai – 400 012.	)	...Respondents

Mr. Bharat Raichandani with Mr. Prathamesh Gargate for Petitioner.

Mr. Jitendra Mishra with Mr. Umesh Gupta i/b. Ms. Sangeeta Yadav for Respondents.

CORAM : G. S. KULKARNI &
JITENDRA JAIN, JJ.

RESERVED ON: 21 AUGUST, 2023

PRONOUNCED ON: 24 AUGUST, 2023

Judgment (Per G.S. Kulkarni, J.)

1. Rule, made returnable forthwith. Respondents waive service. By consent of the parties, heard finally.
2. This is a petition under Articles 226 and 227 of the Constitution of India whereby in the absence of an appellate tribunal being constituted, the petitioner is before the Court praying for setting aside an order dated 31 March, 2021 passed by the appellate authority, being an order passed by the Joint Commissioner, CGST and Central Excise Appeal-I, Mumbai, by which the respondent's/department's appeal, against granting of the petitioner's refund application has been allowed, consequence being, declining of the refund of the tax paid by the petitioner.
3. The question which falls for determination is as to whether the services rendered by the petitioner of providing Satellite derived 3D model services, would fall within the purview of "export of services" as defined under Section 2(6) of the IGST Act or would be

categorized as Online Information Database Access or Retrieval services as defined under Section 2(17) of the IGST Act, in the context of Section 13 of the IGST Act.

4. The relevant facts as averred in the petition are:- The petitioner is a company incorporated under the Companies Act, 1956. The petitioner entered into a Service Agreement dated 09 September, 2019 with M/s. Emirates Defence Industries Co. PJSC, which was inter-alia in regard to providing of service of production of 3D city models of three cities being Abudhabi, AL Ain, AL Dhafra as per the specifications provided by M/s. Emirates Defence Industries Co. PJSC. The relevant clauses of the service agreement entered between M/s. Emirates Defence Industries Co. PJSC and the petitioner are as under:-

“1. SCOPE OF SERVICES:

The Scope of services performed by Consultant shall include the following:-

* Supply of Satellite derived 3D City model of Abu Dhabi Emirate with following specifications.

Using photogrammetric workstations, our team automatically or semi-automatically converts Aerial flight and Satellite stereo imagery into groups of polygons accurately configured and presented as 3D city models. Using stereo pairs of these images, relevant roof points are measured and coded. The walls result by intersecting the roof polygons with the Digital Terrain Model (DTM) and back projecting to the roof. This ensures the new 3D data is consistent with the existing 2D data. Quality management and editing is then prior exporting to a host of software file formats including Collada, Geodatabase, Multipatch shapefile, .dxf, .kml, .fbx, .skp, .fbx, & obj.”

2. Delivery Schedule and Deliverables

* The total period for completion of services is 90 days from commencement date which is distributed as follows:

S. No.	Deliverables	Part	Delivery	Delivery Method
1.	Abu Dhabi City	1	30 th September, 2019	Encrypted hard drive or through FTP
2.	Abu Dhabi City	2	31 st October, 2019	
	AI AIN City	1	31 st October, 2019	
3.	AI AIN City	2	28 th November, 2019	
	AI Dhafra	Final	28 th November, 2019	

B. Fees

Fees and Expense

S. No.	Item Description	KM2	Rate (USD)	Amount (USD)
1.	Satellite Imagery derived 3D Model of Abu Dhabi City with 1-2 Metre accuracy in accordance with consultant proposal dated 29 th	3000	219.666	659,000
Net Total Amount (USD) Six Hundred Fifty Nine Thousand only				659,000

In consideration of the performance of the Services by the Consultant, EDIC will pay the Consultant the total Fees USD 659,000 (USD Six Hundred Fifty Nine Thousand Only) inclusive of all costs and expenses.

Any additional fees not covered under this Agreement shall require a prior written approval of EDIC.

B.1 Payment Schedule

The total fees will be paid according to the following schedule:-

S. No	Deliverables	Part	Delivery Date	Payment Due	Due Amount (US \$)
1.	Submission of Abu Dhabi City	1	30 th September, 2019	Within 7 days from date of receipt of payment from End user (ADDA) and in accordance with clause 6.3	219,666.67
2.	Submission of Abu Dhabi City	2	31 st October, 2019		
3.	Submission of AI AIN City	1	31 st October, 2019		219,666.67
4.	Submission of AI AIN City	2	28 th November, 2019		
5.	Submission of AI Dhafra	Final	28 th November, 2019		219,666.67
				Total	659,000.00

WHEREAS:

(A) The Consultant is engaged in the business of providing Satellite derived 3D model services and has considerable skill, knowledge and experience in this field to perform such services.

(B) In reliance upon the representations, skill, knowledge and experience of the Consultant, EDIC has agreed to engage the Consultant to provide the Services (as defined below) to EDIC and any of its Affiliates designated by EDIC in writing for this purpose, and the Consultant has agreed to accept the engagement on the terms and conditions set out in this Agreement.”

5. The petitioner has contended that to provide technical service, the petitioner imported Very High Resolution (VHR) stereo satellite images from one M/s. 4 Earth Intelligence Limited. In terms of the scope of the service, the petitioner also processed and digitalized the satellite images. After processing, the 3D city models were sent to Abu Dhabi Digital Authority (ADDA) via file transfer protocol. The petitioner has also placed on record a copy of invoice raised by M/s. 4-Earth Intelligence

Limited. The petitioner contends that the aforesaid transaction as undertaken by the petitioner amounted to export of service as defined in Section 2(6) of the Integrated Goods and Services Tax Act, 2017 (for short, “**IGST Act**”). It is contended that all the conditions namely condition nos.(i) to (v) under the definition of “export of services” are met by the petitioner, hence, the petitioner was entitled to claim a refund of unutilized ITC accumulated due to export of such services, in terms of provision of Section 54 of the Central Goods and Services Tax Act, 2017 (for short, “**CGST Act**”) and rules made thereunder.

6. The petitioner accordingly filed a refund claim for the period 01 September, 2019 to 31 March, 2020 of an amount of Rs. 35,27,745/- of accumulated unutilized input tax credit in the form of GST RFD-01 dated 05 January, 2021 under Section 54(3) of the CGST Act. Respondent no.2-Deputy Commissioner passed an order dated 05 February, 2021 sanctioning the refund claim of the petitioner in form GST RFD-06.

7. The petitioner has contended that subsequent to the refund order passed by respondent no.2, the petitioner received a letter dated 14 July, 2021 from respondent no.2 directing the petitioner to submit a copy of

the agreement between the petitioner and M/s. Emirates Defence Industries Company PJSC and the FRCs, subsequent to which in terms of Section 70 of the CGST Act, a summons dated 19 July, 2021 was issued by respondent no.2 upon the petitioner to appear before him on 20 July, 2021 and tender evidence. The petitioner complied with the summons. The petitioner's statement was recorded as also all the relevant documents were submitted by the petitioner.

8. On 23 July, 2021 by an email, the petitioner submitted the invoices raised by M/s. 4-Earth Intelligence Limited. Further on 23 July, 2021 and 27 July, 2021 summons were issued to the petitioner. In response to the summons, the authorized representative of the petitioner appeared before the concerned officer of the respondents.

9. The petitioner has contended that the aforesaid exercise culminated into the department reviewing the refund sanction order dated 05 February, 2021 in passing an order dated 26 August, 2021. By such order, it was concluded that the refund order was not legal and proper. The Assistant Commissioner, CGST & Central Excise, Mumbai South consequently ordered that the Deputy Commissioner shall file an appeal along with the copies of relevant documents before the appellate authority

for the determination of following points:-

- “(a) Whether the services supplied by the respondent are export of services in terms of provisions of Section 2(6) of the IGST Act, 2017, or not.
- (b) Whether, after taking into consideration the facts and circumstances of the case, the said order of Deputy Commissioner, Division – II, CGST & CX, Mumbai South is legal and proper.
- (c) Whether the refund erroneously granted by the Adjudicating Authority needs to be recovered alongwith due interest.
- (d) Any other order so deemed appropriate by Appellate Authority.”

10. In pursuance of the review order dated 26 August, 2021 passed by the Assistant Commissioner, respondent no.2 filed a GST appeal before the appellate authority, namely, the Joint Commissioner, CGST & CX (Appeals-I), Mumbai-respondent no.3 against the refund sanction order passed in favour of the petitioner. The petitioner also filed a detailed cross objection/reply to the above appeal.

11. In the appeal, the department placing reliance on the provisions of the IGST Act and more particularly the definition of “export of services”, contended that for considering supply in question as export of service, recipient of service has to be located outside India and place of supply of service should also be outside India. It was contended that the supply of

service as rendered by the petitioner did not amount to export of service considering the fact that remittance for the service has been made by one M/s.Bayant LLC who was the partner of M/s. Emirates Defence Industries Co. PJSC. Thus, the amounts under the agreement having been received by the petitioner from M/s. Bayant LLC, it was concluded that the place of the supply shall be deemed to be located in taxable territory namely in India, in terms of explanation of Section 13(12) of the IGST Act, as M/s. Bayant LLC was not the foreign recipient as per the agreement. It was also contended that the services provided by the petitioner of purchasing satellite extracted images from others and after processing it as per the customer requirements and transferring the same online was nothing but Online Information Database Access or Retrieval as defined under Section 2(17) of the IGST Act.

12. The appellate authority heard the parties and by the impugned order in appeal dated 31 March, 2022, allowed the department's appeal.

13. It is in the above circumstances, the petitioner is before this Court praying for setting aside the order passed by the appellate authority and further praying that it be held that the petitioner is entitled to refund on account of export of services, as also direct that no recovery proceeding be

initiated against the petitioner on the basis of the impugned order dated 31 March, 2022.

14. A reply affidavit to the petition has been filed on behalf of the Department by Mr. U. Niranjan, Principal Commissioner, CGST & C.Ex. Mumbai-South. At the outset, an objection is raised that the petitioner has efficacious remedy of appeal provided in the statute and the petition ought not to be entertained on this ground. However, it is conceded that the GST Tribunal so far has not been set up. On merits it is contended that the impugned order is legal, valid and proper and would not require interference of this Court. In opposing the petitioner's case in the petition, it is contended that the petitioner has obtained GST registration for providing (i) survey & mapping service; (ii) IT software services and; (iii) OIDAR Services. It is contended that the nature of the services provided by the petitioner were ascertained and the same were related to IT Services of 3D model creation falling within the definition of OIDAR service under Section 2(17) of the IGST Act. The affidavit states that such nature of service provided by the petitioner was also confirmed by Shri Sanket Shah, Accountant of the petitioner during his statement dated 26 July, 2021. It is contended that the agreement between the petitioner and M/s. Emirates Defense Industries Company PJSC was examined

which revealed that the said agreement was for supply of satellite derived 3D city model of Abu Dhabi City by the petitioner. It is contended that as per Section 13(12) of the IGST Act, the place of supply of online information and database access or retrieval services shall be the location of the recipient of services, but subject to fulfillment of any two conditions given in the explanation to the Section 13(12) of the IGST Act, however, there was no material submitted by the petitioner evidencing that the recipient is located at non-taxable territory. It is next contended that the petitioner had provided the service of production of 3D city models after importing satellite images from M/s. Earth Intelligence Ltd. Bristol, UK and after processing and digitalizing their images, produced satellite derived 3D city models and made online transfer of the same to M/s. Emirates Defense Industries Company PJSC, Emirates of Abu Dhabi via FTP (File Transfer Protocol) i.e. online transfer, which clearly established that the services provided by the petitioner of purchasing satellite images from others and after processing it as per customers requirement and transferring the same online was nothing but OIDAR service, which would not fall under the category of export of service, as it did not fulfill the conditions specified under section 2(6)(ii) of IGST Act 2017. It is contended that nothing from the petitioner's submission would emerge to

establish that the recipient was located at non-taxable territory as per the Explanation of 13(12) of IGST Act. For such reasons, supply of services of the petitioner was not treated as 'export service'. The respondents have also contended that the FRCs produced by the petitioner also showed that the remitter was M/s. Bayanat For Mapping and Surveying Services – Banayat LLC and not the foreign recipient as per the agreement executed between the petitioner and M/s. Emirates Defense Industries Co. PJSC, Emirates of Abu Dhabi. That once the FIRC indicated the name of M/s. Bayanat for mapping and surveying services, it cannot be presumed that the services were rendered to Emirates Defense Industries Co. PJSC and the petitioner. Therefore, the petitioner has failed to substantiate fulfillment of Section 2(6)(4) of the IGST Act. On the above premise, it is submitted that the petition be dismissed.

15. It is on the above premise, we have heard learned counsel for the parties.

16. Mr. Raichandani, learned counsel for the petitioner has drawn our attention to the documents as placed on record and more particularly the agreement as entered between the petitioner and the foreign recipients of service namely Emirates Defence Industries Co. PJSC and the petitioner.

It is his submission that from the plain reading of the agreement, it was clear that the nature of the agreement between the parties was clearly an agreement for export of service whereunder the parties had clearly defined the scope of services in Schedule 1, which was inter-alia for the supply of satellite derived 3D City model of Abu Dhabi Emirate with particular specifications. It is submitted that the petitioner had fully complied with the requirement of Section 13(12) of the IGST Act, as also the case of the petitioner fully fell within the definition of export of service as defined under Section 2(6) of the IGST Act, whereby the petitioner complied with all the sub-clauses (i) to (iv) as falling under the said definition. Mr. Raichandani has also submitted that the location of recipient of service of the present case was a party located outside the Indian territory. Our attention is also drawn to the invoices under which the petitioner has received amounts in convertible foreign exchange, which according to him clearly indicate that the buyer of services was Emirates Defence Industries Company, Abu Dhabi entities in U.A.E. as the invoice clearly showed that the invoice value was also received in convertible foreign exchange. Mr. Raichandani would submit that the primary reason as set out by the appellate authority to allow the respondents appeal is contained in paragraph 5.7 wherein the appellate authority had observed that the

FRC's produced by the petitioner showed that the remittance was made by M/s. Bayanat for mapping and surveying services which was not a related party for the service agreement between M/s. Emirates Defence Industries Co. PJSC and the petitioner. It is submitted that for such reason, location of person receiving service was deemed to be taxable in the territory in terms of Section 13(12) of the IGST Act and such remittance received by the petitioner from M/s. Bayant for Mapping and Surveying Services cannot be considered as fulfillment of Section 2(6) of the IGST Rules, 2017. It is submitted that such reasoning of the respondents is completely contrary to the documents on record of the Appellate Authority, as also on erroneous application of the IGST Act. It is further submitted that the observations as made by the Appellate Authority that the Agreement in question between the M/s. Emirates Defence Industries Co. PJSC and the petitioner was in respect of "Online Information and Database Access or Retrieval" (OIDAR) as the same is related to I.T. services of 3D City Model Creation and the same are covered under Section 2(17) of the IGST Act, 2017, as 'OIDAR service' is totally untenable. The petitioner was thus not liable to pay tax as per the provisions of Section 9 of the GST Act.

17. On the other hand, Mr. Mishra, learned counsel for the

Department has supported the impugned order. He has submitted that this is a clear case that the service as rendered by the petitioner do not comply with clauses (ii) and (iv) falling within the definition of “export of service”. It is next contended that the case of the petitioner also does not comply with the provisions of Section 13(12) of IGST Act inasmuch as the place of supply of online information and database access in the present case is not the location of the recipient of services who is situated in a foreign territory. Mr. Mishra has referred to the reply affidavit filed on behalf of the department to contend that the petitioner does not fulfill any of the requirements to be entitled to refund. It is therefore contended that the impugned order would not call for interference.

Analysis :-

18. On the above conspectus, we have heard learned counsel for the parties and with their assistance, we have perused the record.

19. At the outset, as the claim of the petitioner is of export of service, we are required to note the relevant provisions of the IGST Act namely the definition of ‘export of service’, [Section 2(6)]; ‘location of recipient of service’, [Section 2(14)]; ‘online information and database access or retrieval services’ (OIDAR) [Section 2(17)]; and Section 13 where place of

supply of service where location of supplier or location of recipient is outside India. These provisions read thus:

“Section 2 - Definitions

(6) “export of services” means the supply of any service when,— (i) the supplier of service is located in India; (ii) the recipient of service is located outside India; (iii) the place of supply of service is outside India; (iv) the payment for such service has been received by the supplier of service in convertible foreign exchange [or in Indian rupees wherever permitted by the Reserve Bank of India]; and (v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;

(14) **“location of the recipient of services” means,—** (a) where a supply is received at a place of business for which the registration has been obtained, the location of such place of business; (b) where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment; (c) where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and (d) in absence of such places, the location of the usual place of residence of the recipient;

(17) **“online information and database access or retrieval services”** means services whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention and impossible to ensure in the absence of information technology and includes electronic services such as,-

- (i) advertising on the internet;
- (ii) providing cloud services;
- (iii) provision of e-books, movie, music, software and other intangibles through telecommunication networks or internet;
- (iv) providing data or information, retrievable or otherwise, to any person in electronic form through a computer networks;
- (v) online supplies of digital content (movies, television shows, music and the like);

(vi) digital data storage; and

(vii) online gaming;

“13. Place of supply of services where location of supplier or location of recipient is outside India

(1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

(3) The place of supply of the following services shall be the location where the services are actually performed, namely:—

(a) services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:

Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:

Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs or for any other treatment or process and are exported after such repairs or treatment or process without being put to any use in India, other than that which is required for such repairs or treatment or process;

(b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

(4) The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators, shall be the place where the immovable property is located or intended to be located.

(5) The place of supply of services supplied by way of admission to, or organisation of a cultural, artistic, sporting, scientific, educational or entertainment event, or a celebration, conference, fair, exhibition or similar events, and of services ancillary to such admission or organisation, shall be the place where the event is actually held.

(6) Where any services referred to in sub-section (3) or sub-section (4) or sub-section (5) is supplied at more than one location, including a location in the taxable territory, its place of supply shall be the location in the taxable territory.

(7) Where the services referred to in sub-section (3) or sub-section (4) or sub-section (5) are supplied in more than one State or Union territory, the place of supply of such services shall be taken as being in each of the respective States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed.

(8) The place of supply of the following services shall be the location of the supplier of services, namely:—

- (a) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;
- (b) intermediary services;
- (c) services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month.

Explanation.—For the purposes of this sub-section, the expression,—

- (a) “account” means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account;
- (b) “banking company” shall have the same meaning as assigned to it under clause (a) of section 45A of the Reserve Bank of India Act, 1934 (2 of 1934);
- (c) “financial institution” shall have the same meaning as assigned to it in clause (c) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);
- (d) “non-banking financial company” means,—
 - (i) a financial institution which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or

(iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette, specify.

(9) The place of supply of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of such goods.

(10) The place of supply in respect of passenger transportation services shall be the place where the passenger embarks on the conveyance for a continuous journey.

(11) The place of supply of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey.

(12) The place of supply of online information and database access or retrieval services shall be the location of the recipient of services.

Explanation.—For the purposes of this sub-section, person receiving such services shall be deemed to be located in the taxable territory, if any two of the following non-contradictory conditions are satisfied, namely:—

(a) the location of address presented by the recipient of services through internet is in the taxable territory;

(b) the credit card or debit card or store value card or charge card or smart card or any other card by which the recipient of services settles payment has been issued in the taxable territory;

(c) the billing address of the recipient of services is in the taxable territory;

(d) the internet protocol address of the device used by the recipient of services is in the taxable territory;

(e) the bank of the recipient of services in which the account used for payment is maintained is in the taxable territory;

(f) the country code of the subscriber identity module card used by the recipient of services is of taxable territory;

(g) the location of the fixed land line through which the service is received by the recipient is in the taxable territory.

(13) In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, the Government shall have the power to notify any description of services or circumstances in which the place of supply shall be the place of effective use and enjoyment of a service.”

20. To examine the contentions as urged on behalf of the petitioner, we may examine as to what is the nature of the agreement entered by the petitioner with M/s, Emirates Defence Industries Co. PJSC. As seen from the contents of the Agreement, the Agreement describes the petitioner to be engaged in the business of providing Satellite derived 3D model services and has considered skill, knowledge and experience in the field to perform such services and on such representation, the Emirates Defence Industries Co. PJSC had agreed to engage the petitioner to provide the services as defined in the Agreement to “EDIC and any of its Affiliates” designated by Emirates Defence Industries Co. PJSC.

21. As clearly seen from Schedule-I of the agreement defining the ‘Scope of services’ as also the ‘Delivery Schedule and Deliverables’ and the Fee Clauses namely the “Fees and Expenses” and “Payment Schedule”, which we have extracted in the foregoing paragraphs, it is clear that supply of service was to be made to M/s. Emirates Defence Industries Co. which

was not located in India. Also the place of supply of service was agreed to be outside India, as also the payment of such services was being received by the petitioner/supplier of service in convertible foreign exchange.

22. Further, the establishment of the petitioner (supplier of service) and the recipient of service (Emirates Defence Industries Co.) were not establishments of distinct person under Explanation 1 below Section 8. The petitioner had received consideration in convertible foreign exchange as seen from the copy of invoice as placed on record in regard to which there is no dispute. It is thus clear that the petitioner certainly qualified the requirement of Section 2(6) that it was dealing in export of services in relation to the Agreement in question.

23. The next question would be as to whether the impugned order is correct when it categorises the service offered by the petitioner to be online information and database access or retrieval services (OIDAR) within the meaning of Section 2(17) of the IGST Act. On a perusal of said definition, such services have been defined to mean services whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply their supply essentially automated and involving minimal human intervention

and impossible to ensure in the absence of information technology and includes electronic services such as advertising on the internet; providing cloud services; provision of e-books, movie, music, software and other intangibles through telecommunication networks or internet; providing data or information, retrievable or otherwise, to any person in electronic form through computer network; online supplies of digital content (movies, television shows, music and the like); digital data storage and online gaming. We would wonder as to how such specialized service as being provided by the petitioner under the Agreement as entered between the petitioner and Emirates Defence Industries Co., could at all be said to be of the nature falling under the OIDAR provided under Section 2(6) of the IGST Act. No doubt that in providing such services, the petitioner was required to transfer the files through electronic medium, but that would not mean that such services being rendered by the petitioner qua its nature, would fall under the definition of OIDAR as defined under Section 2(17) of the IGST Act. This more particularly for the reason that such service is not merely a delivery of the nature mediated by information technology over the internet or is a delivery available on an electronic network and the nature of which would render its supply essentially automated without and/or with minimal human intervention.

It is far different from what is included in any of the electronic services as set out in clauses (i) to (vii) in the definition of OIDAR.

24. Thus, in our opinion, if the interpretation to the Agreement in question as rendered by the respondents is to be accepted, it would lead to an absurdity inasmuch as any communication of information or providing of service through the medium of emails or any electronic transfer of data would be required to be held as OIDAR service, which is certainly not the purport and meaning an OIDAR service as defined under Section 2(17) of the Act.

25. In the present case, there is clearly an agreement of the petitioner with a party, which is a foreign party, whose location is outside the Indian territory. The agreement is clearly for a specialised work of providing 3D city models of Abudhabi, AL Ain, AL Dhafra. These are not works which would be freely available on the internet and / or are materials of the nature Section 2(17) would contemplate. Also undoubtedly the consideration as received by the petitioner for providing of such service is received in convertible foreign exchange, although through the foreign recipients / representative M/s. Bayanat LLP, as it is not the case of the department that such amounts as received by the petitioner are not under

the Agreement in question. In fact the invoices clearly refer to the payment in US dollars to be when the contract of the petitioner with Emirates. There is no material to disbelieve the case of the petitioner for any reason whatsoever that the recipient of the service is not a foreign recipient.

26. For such reasons, in our opinion, considering the material on record, the petitioner is correct in its contention that merely because the petitioner has secured data from different source so as to create the services to be supplied to Emirates, it would not amount to the petitioner falling within the definition of Section 2(17) .

27. We are thus of the opinion that the appellate authority is not correct in its conclusion that in the context of Section 13 of the IGST Act, the place of supply in the present case be deemed to be located in taxable territory, for the reasons as noted above, as also for the reasons that the mandate of Section 13(12) of the IGST Act is that for the purpose of Section 13(12) of the IGST Act, the place of supply for “online information and database access or retrieval services”, shall be the location of the recipient of services. If this be the position in law then, there was no material whatsoever before the appellate authority to come to a conclusion

that in the present case, the place of supply of such database access or retrieval services, was not the location of the recipient of services which in the present case was a supply to Emirates Defence Industries Co. PJSC outside the Indian taxable territory.

28. It is also quite clear to us that none of the conditions as provided for in the exception to section 13(12) were satisfied for the appellate authority to come to a conclusion that the person receiving such services i.e. Emirates Defence Industries Co. PJSC, was deemed to be located within the taxable territory as none of the two contradictory conditions as set out in the exception, were satisfied.

29. We are also in agreement with the petitioner when the petitioner contends that the stance as taken by the department would in fact nullify or obliterate the terms and conditions under the agreement in question which remain to be totally unquestionable in the absence of any contrary material. In **Bhopal Sugar Industries Ltd. Vs. Sales Tax Officer**¹ as relied by the petitioner, the Supreme Court has held that it is well settled principle that the Court, while interpreting the terms of the agreement, would be required to look to the substance rather than the form of the agreement and that the true relationship of the parties has to be gathered

from the nature of the contract and its terms and conditions. Thus, applying such well settled principle in interpretation of the terms and conditions of the agreement in question, we may observe that the purport and intent of the agreement in question has been totally misconstrued by the appellate authority. Further from the reading of the impugned order, we also note that meager reasons as set out in the impugned order were certainly not sufficient for the Appellate Authority to reach to a conclusion that the services in question was not export of service so as to deny the petitioner's the referred claim.

30. In the light of the above discussion, we are certain that the petition need to succeed. It is accordingly allowed in terms of prayer clauses (a) to (c) which read thus:-

“a) that this Hon'ble Court be pleased to issue a Writ of certiorari / mandamus or any other appropriate Writ / order/ direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioner case and after going into the validity and legality thereof to quash and set aside impugned order dated 31.03.2021 (Exhibit A);

b) that this Hon'ble Court be pleased to issue a Writ of certiorari / mandamus or any other appropriate Writ/order/ direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioner case and after going through the facts of the Petitioner's case hold and declare that the Petitioner is entitled to refund on account of export of services;

c) that this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction under

Article 226 of the Constitution of India ordering and directing the Respondent No. 5 & 6 by himself, his subordinates, servants and agents, pending disposal of the present petition, not to initiate any coercive action or recovery proceeding based on impugned order dated 31.03.2021 (Exhibit A), and stay the same thereof till the pendency of the present petition.”

31. Rule is made absolute in terms of prayer clauses (a) to (c).

32. No costs.

[JITENDRA JAIN, J.]

[G. S. KULKARNI, J.]