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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 12.07.2023*

+ **SERTA 7/2023 and CM Nos. 34149/202 & 34150/2023**

PR. COMMISSIONER, CENTRAL EXCISE
AND CGST-DELHI SOUTH

..... Appellant

Through: Mr. Akshay Amritanshu, Senior
Standing Counsel, CBIC with
Mr. Ashutosh Jain and Mr.
Samyak Jain, Advs.

versus

BLACKBERRY INDIA PRIVATE
LIMITED

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The Revenue has filed the present appeal under Section 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 impugning the final order¹ dated 07.12.2022 (hereafter '**the impugned order**') passed by the Customs, Excise and Service Tax Appellate Tribunal (hereafter '**the CESTAT**').

2. In terms of the impugned order, the learned CESTAT had

¹ Final Order No. ST/A/51150/2022- in Service Tax Appeal No. 50281/2022 captioned **Blackberry India Private Limited v. Commissioner of Central Tax / Excise.**



allowed the respondent's appeal against an Order-in-Appeal dated 18.08.2021 passed by the Commissioner (Appeals) rejecting the respondent's appeal against an Order-in-Original dated 31.08.2020 passed by the Adjudicating Authority.

3. By the said Order-in-Original dated 31.08.2020, the Adjudicating Authority had rejected the respondent's claim for refund of ₹8,55,34,345/- on account of unutilised CENVAT Credit for three mentioned periods, that is, (i) April to June 2012; (ii) April to June 2013, and (iii) July 2013 to September 2013.

4. The respondent (hereafter '**BlackBerry India**') was registered with the Department for payment of service tax in respect of Business Auxiliary Services provided by it. BlackBerry India had filed claims for refund of unutilised CENVAT Credit amounting to ₹8,55,34,345/-. The said Credit was accumulated on account of various input services such as security services, manpower services, sponsorship services, legal consultancy services etc., which were utilized by BlackBerry India for providing output services – Business Auxiliary Services. BlackBerry India claimed that its output services were exported to its overseas client. A Tabular statement indicating the claims filed by the respondent is set out below:

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Sl. No.	Period/Quarter	Refund amount	Date of filing (Offline) refunds
1	April – June, 2012	3,18,11,287	28.03.2013



2	April – June, 2013	2,89,94,208	31.03.2014
3	July – September, 2013	2,47,28,850	30.06.2014
	Total	8,55,34,345	

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5. The Adjudicating Authority issued a Show Cause Notice dated 22.01.2020 proposing to reject BlackBerry India’s claim on the ground that the place of provisions of service appeared to be in India as the services rendered by BlackBerry India were as an intermediary.

6. BlackBerry India responded to the said Show Cause Notice dated 22.01.2020 explaining that it had entered into an agreement with BlackBerry Singapore Pte Ltd. (hereafter ‘**BlackBerry Singapore**’) for providing Marketing Administration and Support Services (hereafter ‘**the Agreement**’), which entailed promotion and marketing of BlackBerry Products; technical marketing assistance in relation to BlackBerry Marketing products, and other related services. BlackBerry India disputed that the services rendered to BlackBerry Singapore were services as an intermediary.

7. The Adjudicating Authority did not accept the said contention. The Adjudicating Authority found that the services rendered by BlackBerry India were Business Auxiliary Services as defined under Section 65(19) of the Finance Act, 1994 (hereafter ‘**the Act**’) and the same were taxable services for the period prior to 01.07.2012.

8. The Adjudicating Authority referred to the Agreement entered



into between BlackBerry India (then known as ‘Research in Motion India Private Limited’) with BlackBerry Singapore (then known as ‘Research in Motion Singapore Pte’) and held that in terms of the said Agreement, BlackBerry India had distributed products and services including BlackBerry solution, which included handheld devices, accessories, software, and other related services. Further, BlackBerry India had also performed various promotional and marketing services as set out in Schedule A to the Agreement. The Adjudicating Authority held that the aforesaid services would fall within the definition of intermediary services as defined in Rule 2(f) of the Place of Provision of Services Rules, 2012. According to the Adjudicating Authority, BlackBerry Singapore was a services provider to their customers in India and BlackBerry India was an intermediary.

9. The Adjudicating Authority held that for the period prior to 01.07.2012, the benefit of export services was covered under Rule 3 of the Export of Service Rules, 2005 and the same did not extend to services covered under Section 65(105)(zzb) of the Act. Consequently, BlackBerry India’s claim for CENVAT Credit for the period prior to 01.07.2012 was not tenable.

10. Aggrieved by the Order-in-Original dated 31.08.2020, BlackBerry India preferred an appeal before the Appellate Authority. However, the said appeal was rejected by the Appellate Authority as it found no infirmity with the Order-in-Original dated 31.08.2020 passed by the Adjudicating Authority.



11. Aggrieved by the same, BlackBerry India preferred an appeal before the learned CESTAT.

12. The principal controversy required to be addressed by the learned CESTAT was whether BlackBerry India is an intermediary within the definition of Rule 2(f) of the Place of Provision of Services Rules, 2012. Thus, in terms of Rule 9 of the Place of Provision of Services Rules, 2012, even though the service recipient (BlackBerry Singapore) was located outside India, the place of provision of services would be where the service provider is located – India.

13. The second question to be considered by the learned CESTAT was whether the services rendered by BlackBerry India were covered within the scope of export of services under Rule 3 of the Export of Taxable Service Rules, 2005.

14. The learned CESTAT accepted the contention that BlackBerry India was neither an agent nor was involved in the arrangement or facilitation of supply of services in question. Accordingly, the learned CESTAT held that BlackBerry India was not an intermediary within the meaning of Rule 2(f) of the Place of Provision of Services Rules, 2012.

15. Insofar as, the period prior to 01.07.2012 is concerned , the learned CESTAT did not accept the finding of the Adjudicating Authority that services covered under Section 65(105)(zzb) of the Act were excluded from the scope of Export of Taxable Services under Rule 3(1) of the Export of Services Rules, 2005.



16. The Revenue has preferred the present appeal projecting the following question for consideration of this Court:

- “a. Whether the services provided by the Respondent to RIM Singapore constitute intermediary service?
- b. Whether the Respondent is eligible for refund of service tax on services provided by it to RIM Singapore?”

17. It is relevant to note that the Revenue does not dispute that the services rendered by the BlackBerry India were covered under the Agreement entered into between BlackBerry India and BlackBerry Singapore.

18. In terms of the engagement under the Agreement, BlackBerry India had agreed to provide services in a timely and professional manner. Further, it had also agreed to acquire facilities, equipment and staff to effectively do so. The services to be provided by BlackBerry India to BlackBerry Singapore under the Agreement, as set out in Schedule A to the Agreement, are described as “*promotional and marketing; technical marketing assistance; and other related services*”.

19. The learned CESTAT had examined the Agreement and had concluded as under:

“30. It would, therefore, transpire from the Agreement that:

- (i) The appellant is engaged in providing marketing, administrative and support service to Blackberry Singapore, as an independent contractor;



- (ii) The appellant is not an agent or broker of Blackberry Singapore. There is no relationship of principal and agent between Blackberry Singapore and the appellant. The arrangement between the appellant and Blackberry Singapore is on a principal-to-principal basis. Further, the appellant does not have any authority to represent or bind Blackberry Singapore, which further supports the fact that the appellant is not an agent of Blackberry Singapore and, therefore, is not an intermediary;
- (iii) The appellant is not engaged in facilitating any supply between Blackberry Singapore and its Customers. The Agreement is only between the appellant and Blackberry Singapore wherein the appellant is providing the aforesaid services to Blackberry Singapore. The customers of Blackberry Singapore are not a part of the contract and the appellant at no point in time is involved in providing any service to the customers of Blackberry Singapore. The appellant does not even have any knowledge about the final customers of Blackberry Singapore;
- (iv) The appellant receives consideration on a Cost-Plus basis. The consideration is not dependent on the sale made by the Blackberry Singapore to their customers; and
- (v) The appellant raises invoices on Blackberry Singapore for the services provided by it in US dollars and Blackberry Singapore has to make the payment within 45 days of the date of such monthly invoices.”

20. We find no infirmity with the aforesaid conclusions.

21. The term ‘intermediary’ is defined under Rule 2(f) of the Place of Provision of Services Rules, 2012 as under:



“2(f) 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;”

22. It is apparent from the aforesaid definition that an intermediary merely arranges or facilitates provision of services. In the present case, the services rendered by BlackBerry India to BlackBerry Singapore under the Agreement, were not in the nature of facilitating services from another supplier. BlackBerry India, as an independent service provider, was required to render the promotional and marketing services; technical marketing assistance; and other related services. BlackBerry India did not arrange or facilitate these services from another supplier.

23. It is also relevant to refer to the Circular dated 20.09.2021 issued by the Central Board of Indirect Taxes and Customs. Although the said Circular has been issued in the context of the Goods and Services Tax, it notes that the concept of intermediary, as defined under Section 2(13) of the Integrated Goods and Services Tax Act, 2017, was borrowed from Rule 2(f) of the Place of Provision of Services Rules, 2012 and explains the said concept. The relevant extract of the said Circular is set out below:

“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 Service Rules, 2012 issued vide Notification No. 28/2012-S.T., dated 20-06-2012 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 own account.”

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 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 providers 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”.

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xxx”

24. It is clear from the aforesaid Circular that BlackBerry India cannot be considered as an intermediary in the context of the services rendered by it under the Agreement.

25. This Court had also considered a similar question *albeit* in the context of refund of input tax credit under the Integrated Goods and



Services Tax Act, 2017 in *M/s Ernst and Young Limited v. Additional Commissioner, CGST Appeals-II, Delhi and Anr.: W.P.(C) 8600/2022*, decided on 23.03.2023 and *M/s Ohmi Industries Asia Private Limited v. Assistant Commissioner, CGST: W.P.(C) 6838/2022*, decided on 29.03.2023. In our view, the said decisions are squarely covering the controversy sought to be raised by the Revenue in this appeal.

26. The conclusion of the Adjudicating Authority that the services covered under Section 165(105)(zzb) of the Act were excluded from the scope of Export of Taxable Services under Rule 3(1) of the Export of Service Rules, 2005 is, plainly, erroneous. The learned CESTAT has rightly concluded that all services except those specifically mentioned in Rule 3(1) of the Export of Services Rules, 2005 are covered within the scope of Export of Taxable Services. The Adjudicating Authority had clearly misread the said Rule.

27. In view of the above, we find that the present petition does not raise any substantial question of law.

28. The present appeal is, accordingly, dismissed. The pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JULY 12, 2023

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