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

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Date of Decision: 18.05.2023

+ W.P.(C) 10704/2022

M/S NETGEAR TECHNOLOGIES INDIA PRIVATE
LIMITED

..... Petitioner

Through: Ms. Priyanka Rathi, Mr. Ashwini
Chandrasekaran & Ms. Shubhangi
Gupta, Advs.

versus

JOINT COMMISSIONER CGST APPEALS I DELHI
& ANR.

..... Respondents

Through: Mr. Harpreet Singh, SSC with Ms.
Suhani Mathur & Mr. Jatin Kumar
Gaur, Advs.**CORAM:****HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MR. JUSTICE AMIT MAHAJAN****VIBHU BAKHRU, J. (ORAL)**

1. The petitioner has filed the present petition impugning an Order-in-Appeal (Appeal No.433/JC/Central Tax/App-I/Delhi/2019) dated 28.12.2021 (hereafter '**the impugned order**'), passed by the Appellate Authority (Joint Commissioner, CGST Appeals-I, Delhi), whereby the petitioner's appeal against an order dated 10.01.2020, passed by the Adjudicating Authority was rejected.

2. The petitioner claims that it is engaged in the business of exporting services to Netgear Pte. Ltd. without payment of Integrated Goods and Services Tax (IGST). The petitioner claims that since the supplies made are zero rated supplies, it is entitled to the refund of Input Tax Credit (ITC). In this context, on 04.08.2020, the petitioner filed an

application (ARN AA070820005153S), seeking refund of an amount of ₹64,50,259/- relatable to the period of April 2018 to March, 2019.

3. The Adjudicating Authority (respondent no.2) issued a show cause notice dated 19.08.2020, *inter alia*, proposing to reject the petitioner's claim for refund on the ground that the petitioner was merely facilitating and arranging services and thus, qualified as an intermediary within the meaning of Section 2(13) of the Integrated Goods and Services Tax Act, 2017 (hereafter '**the IGST Act**'). Consequently, the place of supply of services was in India and therefore, the supplies made could not be considered as zero-rated supplies within the meaning of Section 16(1) of the IGST Act.

4. The petitioner responded to the said show cause notice, *inter alia*, claiming that it is an independent supplier of services. The petitioner claims that during the relevant period, it had provided marketing and sales support services in terms of the Agreement dated 01.01.2010 (hereafter '**the Agreement**') entered into with Netgear Pte. Ltd, and was remunerated in cost plus basis. The Adjudicating Authority did not accept the said contention. The Adjudicating Authority examined the Agreement and found that the petitioner was engaged in facilitating and promoting supply of goods and services of Netgear Asia; and therefore, was an intermediary. The Adjudicating Authority based its conclusion on Clause 2.2 of the Agreement, Clause 2.2(a) provided that the petitioner would make best effort to promote the sales and licensing of the products in the territory. And, in terms of Clause 2.2(b) of the Agreement, all orders would be subject to scrutiny and acceptance by

Netgear in Hong Kong, on the conditions determined by Netgear in its own discretion.

5. The Adjudicating Authority proceeded on the basis that the petitioner was procuring orders for its principal (Netgear Pte. Ltd.). The Adjudicating Authority also rejected the petitioner's contention that the decision of the CESTAT in the case of *Lubrizol Advance Materials India Pvt. Ltd. v. CCE, Belapur: 2019 (22) G.S.T.L. 355(Tri.-Mumbai)* was applicable on the ground that the remuneration in the present case was not based on cost plus basis. The Adjudicating Authority concluded that the fee paid to the petitioner was relatable to the sales made by them to the customers in India.

6. The aforesaid conclusion is stoutly disputed by the petitioner. The petitioner submits that part of Clause 2.4 of the Agreement, which provides for the payment of fees, has been read out of context. The learned counsel for the petitioner submits that Clause 2.4 of the Agreement read as a whole clearly indicates that the fee paid to the petitioner is on cost plus basis.

7. Although the Adjudicating Authority has interpreted the Agreement, we find that there is insufficient analysis of the actual work performed by the petitioner. There is no material to relate the remuneration to the sales figure on empirical basis. The Adjudicating Authority has merely referred to a portion of Clause 2.4 of the Agreement, which provides that Netgear Technologies (India) Pvt. Ltd. would perform reconciliation of that year's sale, as a direct result of the

service provider's activity and would reasonably approve the cost incurred by the service provider in fulfilling its duties under the Agreement. The same does not, absent any other material, indicate that the remuneration is based on the sales achieved. The question whether an entity is an intermediary will have to be determined on the basis of actual work performed.

8. It is also relevant to note that the petitioner has prevailed before the Appellate Authority for an earlier period of August, 2017 to January, 2018 (Order-in-Appeal dated 10.01.2020) and October 2017 to March 2018 (Order-in-Appeal dated 09.03.2021).

9. In the circumstances, we consider it apposite to set aside the impugned order as well as the Order-in-Original dated 10.01.2020 and remand the matter to the Adjudicating Authority to decide afresh after examining the actual work performed by the petitioner. It would be open for the Adjudicating Authority to call for any information that it considers relevant for the said purpose including, invoices raised by the petitioner, as well as the reconciliation statement of the sales as referred in the Order-in-Original.

10. The Adjudicating Authority shall also take into account the decision of this Court in *M/s Ernst and Young Limited v. Additional Commissioner, CGST Appeals-II, Delhi & 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) 6852/2022 decided on 29.03.2023.

11. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MAY 18, 2023/Ch

