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

\+ W.P.(C) 7530/2024 & CM APPL. 57554/2024 (Amendment of writ petition)

M/S ATLAN TECHNOLOGIES PRIVATE LIMITED .....Petitioner

Through: Ms. Charanya Lakshmi Kumaran, Mr. Yogendra Aldak, Mr. Kunal Kapoor & Mr. Sumit Khadaria, Advs.

versus

ASSISTANT COMMISSIONER, COMMISSIONERATE-SOUTH DELHI .....Respondent

Through: Mr. R. Ramachandran, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% **30.09.2024**

1. The writ petitioner impugns the Order-in-Appeal dated 22 June 2023 and seeks the framing of a consequential direction for the respondents granting refund in respect of an amount of INR 46,05,196/-. Pursuant to the liberty granted by us on the last occasion, the petitioner has additionally assailed the Orders-in-Original dated 19 December 2022 as well as 13 March 2023.

2. For the purposes of disposal of the present writ petition, it would be apposite to take note of the following essential facts.

3. The petitioner is stated to be a private limited company which is engaged in the business of providing Software Development and Support Services as well as Engineering Support Services **(ITS)**[1]. It is stated to have entered into a Service Level Agreement with its parent

[1] ITS

and holding company **M/s Atlan Pte. Ltd.**[2] located in Singapore for rendering ITS. The petitioner avers that the service provided to Atlan Singapore would amount to an '*export of services*' as defined in the **Integrated Goods and Services Tax Act, 2017**[3].

4. On 27 October 2022 and 11 January 2023 the petitioner filed two applications for refund seeking the return of unutilized **Input Tax Credit**[4] amounting to INR 46,05,196/- for the period June 2020 to September 2020 and INR 23,61,049/- for the period October 2020 to December 2020. It was these applications which came to be rejected by the Order-in-Original with the authority taking the view that the petitioner was liable to be treated as an "intermediary" between Atlan Singapore and others and consequently the services supplied not being entitled to be placed in the category of '*export of services*'. It was these orders which ultimately came to be challenged by way of appeal which met a similar fate in terms of the order dated 22 June 2023 and which too stands impugned before us.

5. Ms. Lakshmi Kumaran, learned counsel appearing for the writ petitioner, has taken us through the relevant provisions of the IGST Act as well as the **Central Goods and Services Act, 2017**[5] in order to buttress the challenge which stands raised.

6. Our attention was firstly drawn to Section 2(6) of the IGST Act which defines '*export of services*', as follows:

> "**2. Definitions**
>
> **xxxx xxxx xxxx**
>
> (6) "export of services" means the supply of any service when,-
>
> (i) the supplier of service is located in India;

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[2] Atlan Singapore
[3] IGST Act
[4] ITC
[5] CGST Act

(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;"

7. Learned counsel then took us through Section 13 of the IGST Act which determines the place of supply of services and reads thus:

"**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.

[***]

(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;
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> (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."

8. The respondents by holding the petitioner to be an intermediary essentially seek to extract the services rendered from the scope of Section 13(2) and it is in the aforesaid context that they seek to classify the services rendered as falling within the expression '*intermediary services*' and which is spoken of in sub-section (8) of Section 13.

9. On our record, we find a sample agreement which had been executed between the petitioner and its holding company. The salient clauses of that agreement are extracted hereunder:

> "(The Service Provider and the Service Recipient are individually also referred to as a "**Party**" and collectively as the "**Parties**").
>
> **WHEREAS:**
>
> A. The Service Recipient is a for-profit organization engaged in the business of marketing and further facilitating access to technology and technology enabled solutions in different fields and including all kinds of hardware and software, both in India and overseas to corporates. ("**Business**") ("**Purpose**");
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> B. The Service Provider is, *inter alia*, engaged in the business of developing, creating, conceptualizing, generating and accomplishing products and providing, administering, arranging, and transferring services in the field of technology and technology enabling solutions in different fields and including all kinds of hardware and software, both in India and overseas ("**Services**");
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> C. The Service Recipient is keen to leverage the resources and wherewithal of the Service Provider towards fulfillment of Service Recipient's Purpose outside India and had approached the Service Provider to provide an expression of interest to render the Services (as defined below) to the Service Recipient;
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> D. The Service Provider has expressed its willingness to provide

the Services to the Service Recipient from the Execution Date, on the terms and conditions as mutually agreed between the Parties, towards fulfillment of Service Recipient's Purpose outside India; and

E. Pursuant to various rounds of discussions between the Service Recipient and the Service Provider, the Parties are now executing this written agreement to record the terms and conditions agreed between them in respect of the Services and certain rights and obligations *inter se* the Parties.

THE PARTIES HERETO AGREE AS FOLLOWS:

1. Services.

1.1 The Service Provider shall act as an independent contractor to the Service Recipient and as per requirement of the Service Recipient, shall render certain services to the Service Recipient, as specified in **Annexure A** hereto ("**Services**"), on a principal to principal basis.

1.2 The Parties hereby agree and acknowledge that during the term of this Agreement, either Party may suggest that changes be made to the scope, nature or time schedule of the Services being rendered by the Service Provider to the Service Recipient, by a written notice and mutual agreement to this effect to the other Party. In the event that the proposed change shall, in the sole opinion of the Service Provider, require an excessive time delay in delivery or would result in additional cost being incurred by the Service Provider, then the Parties shall confer and may mutually elect either to withdraw the proposed change(s) or require the Service Provider to make the proposed change, subject to agreeing to the quantum of the delay and/or additional Service Fee payable to the Service Provider by the Service Recipient.

1.3 For the avoidance of any doubt, nothing contained in this Agreement shall prohibit the Service Provider from furnishing services similar to the Services provided to the Service Recipient under this Agreement to third parties.

2. Service Fees.

2.1 In consideration of the Services rendered by the Service Provider to the Service Recipient, the Service Recipient shall pay the Service Provider, a service fee of an amount equal to all direct and proportionate indirect costs incurred by the Service Provider in provision of Services to the Service Recipient plus a markup at such percentage as may be considered to be at arms' length basis ("**Service Fees**").

2.2 Invoices.

(a) The Service Provider shall generate and submit invoices to the Service Recipient for payment of Service Fees. The invoice shall clearly state the work or Services performed. The Service Recipient shall be responsible to make payment of Service Fees for a specific period only after the receipt of invoice for such specific period from the Service Provider. All invoices shall be settled within 30 (thirty) days, calculated from the date of invoice. The Service Provider can also be paid advance fee by Service Recipient based on specific requirement.

(b) The Service Provider shall provide its invoices to the Service Recipient in SGD/USD/INR denomination.

(c) Notwithstanding anything to the contrary contained herein, the Parties may mutually discuss and modify the due date and the period of settlement of invoices at any time after the Execution Date.

2.3 The Parties hereby agree and acknowledge that the payment of the Service Fees shall be promptly made by the Service Recipient SGD/USD/INR denomination to the designated bank account of the Service Provider. It is further agreed between the Parties that the Service Fees shall be adjusted in order to cover any loss incurred by the Service Provider on account of foreign exchange fluctuation and all the risk relating to foreign exchange fluctuation shall be borne by the Service Recipient. Similarly, any gain on account of foreign exchange fluctuation shall be adjusted by the Service Provider in the subsequent invoice. The payment of Service Fees shall not be unreasonably withheld by the Service Recipient in the event of the Service Provider being prevented from performing the Services or a part thereof due to any reason or happening of any event beyond the control of the Service Provider.

2.4 Out of Pocket Expenses- Any out of pocket expenses incurred by the Service Provider pursuant to providing Services to the Service Recipient under the Agreement, including, but not limited to, expenses incurred on account of travel, food, accommodation, server usage and tech expense (subscription to online tools and other platforms), if any, shall be reimbursed by the Service Recipient on an actuals basis to the Service Provider, if the Service Provider produces a copy of invoices of any such expenses incurred by the Service Provider during the Term. Vice Versa any out of pocket expenses incurred by Service Recipient pursuant to providing the service by the Service Provider under the Agreement, including, but not limited to, expenses incurred on account of travel, food, accommodation, server usage and tech expense (subscription to online tools and other platforms) if any shall be reimbursed by the Service Provider on an actuals basis to the Service Recipient if the Service Recipient produces a copy of invoices of any such expenses incurred by the Service Recipient during the Term.

2.5 Withholding Tax. Where the Service Recipient is required, under applicable Law, to deduct or withhold for or on account of, income taxes from any payment to the Service Provider under this Agreement, the Service Recipient shall

(a) withhold the required amount from payment;

(b) remit the amount of tax withheld to the applicable taxing authority; and

(c) deliver to the Service Provider, the original documentation or a certified copy evidencing such remittance of tax withheld, as soon as possible, after making such payment.

3. Roles and obligations of the Service Recipient.

3.1 Facilities and Resources. The Service Recipient shall ensure that the Service Provider has timely access to duly authorized personnel of the Service Recipient. The Service Recipient shall provide all necessary assistance which may be required by the Service Provider for rendition of the Services.

3.2 Limitations of Service Provider. The Parties hereby agree that the scope and nature of responsibilities of the Service Provider shall be limited to performance of Services, as provided in **Annexure A**.

3.3 The Service Recipient shall be responsible for all representations, facts and opinions that it makes whether in respect to itself, its relationships, its affiliates, its products/services, its actions/omissions and/or its activities. The Service Recipient shall assume all financial and legal liability for the quality, reliability, merchantability and/or accuracy of all such representations and fully understands that the outcome of the Services rendered by the Service Provider pursuant to this Agreement is contingent on the same.

4. Roles and obligations of the Service Provider.

4.1 Quality of Service. The Service Provider shall make reasonable endeavour that the Services are performed in a professional and competent manner, consistent with industry standards reasonably applicable to such services.

4.2 Approvals and Authorizations. The Service Provider shall procure, or cause to be procured, all necessary information, approvals, permissions, authorisations or decisions (collectively, "**Approvals**") that are reasonably necessary to render the Services to the Service Recipient. In an event the Service Provider requires certain Approvals from the Service Recipient, the Service Recipient or its authorized representatives shall respond promptly, and in any case, within 7 (seven) days, to any requests by the Service Provider or its authorized personnel in writing to this effect.

4.3 Performance of the Services. The Service Provider, and not the Service Recipient, shall have the right to control the manner and means by which the Services are to be completed by the Service Provider pursuant to this Agreement. The Service Recipient shall retain the right, however, to ensure that the Services are being performed according to agreed upon specifications.

4.4 The Service Provider does not make any representations or warranties, express or implied, in respect of the Services to be provided by it hereunder and shall not be liable to the Service Recipient or any Person for the Services provided by it hereunder. It is expressly clarified that the Service Provider disclaims all representations or warranties, express or implied, in respect of the Services, the quality of the performance and/ or provision of the Services, including any and all implied representations and warranties, whether alleged to arise by Law, by reason of custom, usage in trade and / or by course of dealing.

xxxx xxxx xxxx

ANNEXURE A

Services

1. The Service Provider shall develop, create, make, build technology platform including its maintenance, training, and support services to the Service Recipient that shall remain the sole and exclusive property the Service Recipient.

2. The Service Provider shall provide access, to the Service Recipient, of all or any technical platform at the administrator level without any condition or limitation.

3. The Service Provider may also work in collaboration and coordination with the other consultants to provide expert advice on the development of the total product mix. If and when needed, the Service Provider, at his discretion may bring on other experts and consultants to facilitate certain functions.

4. The Service Provider shall also provide for the following services to the Service Recipient in a form and manner elaborated herein below (as per need basis).

(a) Marketing and Sales. The Service Provider shall provide marketing services to the Service Recipient through communication and publicity in relation to Service Recipient's Business to the potential customers and shall be responsible for any sales and provision of services in relation to Service Recipient's Business.

(b) Business Development. The Services Provider shall investigate, select and contact prospective clients and business partners for the Business in India. The Service Provider shall also investigate and evaluate the opportunities for the Business to grow and expand in

India.

(c) Professional Assistance. The Service Provider shall seek, whenever it is necessary in the opinion of the Service Provider, at its own cost, services of professionals or professional firms, including legal and accounting firms, in order to properly render its roles and responsibilities under this Agreement in India.

(d) Branding and Publicity. The Service Provider shall engage in branding and publicity of Service Recipient's Business by engaging and investing the necessary resources and using its best efforts towards advertising, marketing and promoting the Service Recipient's Business."

10. We additionally take note of Circular No. 159/15/2021-GST dated 20 September 2021 issued by the GST Policy Wing of the Central Board of Indirect Taxes and Customs, which had issued a clarification on the doubts raised with respect to the scope of 'intermediary' services. The said Circular reads as follows:

"**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-ST, 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-à-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' subcontracts 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 above mentioned 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'.

<u>Illustration 2</u>

`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.

<u>Illustration 3</u>

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.

<u>Illustration 4</u>

‘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.

(Sanjay Mangal)

Principal Commissioner (GST)"

11. As is manifest from a reading of the aforenoted Circular, it becomes apparent that an entity involved in the 'main supply' between two principals and one which supplies goods or services in its own capacity would not fall within the ambit or criteria of an 'intermediary' as articulated. As the respondents themselves explain, for the purposes of evaluating whether an entity is an intermediary, it would have to be found that the contract or arrangement involves at least three entities with the intermediary acting as the conduit or facilitator for the supply of services. Furthermore and as per the Circular, the place of supply of 'intermediary services' as envisaged under Section 13 would be invocable only when the location of the supplier of intermediary services or the location of the recipient of intermediary services is situate outside India.

12. According to Mr. Ramachandran, learned counsel appearing for the respondents, the consideration which stood reserved under such

agreements clearly speaks of the service provider being entitled to a service fee of an amount equivalent to all direct and proportionate indirect costs *"plus a mark-up"* at such percentage as may be considered to be at arm's length. According to learned counsel, in the case of consideration received for supply of services to a holding company, there would have been no occasion for a stipulation with respect to mark-up being incorporated in the service agreement. It is this reasoning which also appears to have weighed upon the respondents to deny the writ petitioner the refund that was claimed.

13. We find ourselves unable to sustain the stand as taken by the respondent for the following reasons. As would be apparent from the material which has been placed on the record, the provision of ITS was made by the petitioner while located and situate in India. In view of the aforesaid, it would be sub-section (2) of Section 13 which would apply and the place of supply, consequently, being liable to be viewed to be the location of the recipient of service.

14. As we view Section 2(13), it becomes apparent that an intermediary would be one who arranges or facilitates the supply of goods or services between two or more persons. The sample agreement which has been placed on our record clearly belies the view that was taken by the respondents in this regard. As is manifest from a reading of that agreement, the ITS was envisaged to be provided by the writ petitioner itself to the entity situate outside India. The petitioner was clearly not one which was facilitating the supply between two or more persons. It was itself directly engaged in the provision of supply. In view of the above, the foundational basis of the impugned orders itself is rendered unsustainable.

15. The view taken by the respondents is additionally rendered

wholly untenable and erroneous when tested on the basis of the Circular extracted hereinabove. The impugned orders do not rest on any material or evidence which could have been even remotely read as being suggestive of the petitioner being an intermediary as explained. The consistent stand of the petitioner had been that it was supplying service on a principal to principal basis. The respondents do not rest their decision on a finding that there was a tripartite agreement for the supply of services.

16. The stress which was sought to be laid upon the petitioner being entitled to a mark-up is equally misconceived when we bear in consideration that the service fee which was ultimately paid to and received by the petitioner was to be and in any case considered at arm's length. Merely because the service was being provided to the holding company, the petitioner would not have been disentitled to a mark-up. In any case, it would clearly not be liable to be classified as an intermediary merely because such a mark-up had been obtained over and above the costs incurred.

17. Accordingly, and for all the aforesaid reasons, we allow the instant writ petition and quash the impugned Order-in-Appeal dated 22 June 2023 as well as the Order-in-Original dated 19 December 2022 and 13 March 2023. The petitioner is, consequently, held entitled to the refunds as claimed along with statutory interest as applicable.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

SEPTEMBER 30, 2024/kk