



AMERICAN CHAMBER OF COMMERCE IN INDIA

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Annexure A

Intermediary: Gist of Key Decisions

A. Decisions in favour of the Assessee

- A.1 **M/s Evalueserve.Com Pvt. Ltd. vs. CST, Gurgaon [2018 (3) TMI 1430 – CESTAT Chandigarh]** wherein it has been held that the appellant has themselves provided the services to their client as the main service provider on principal to principal basis, therefore, the activity undertaken by the appellant do not qualify as 'intermediary' as defined in Rule 2(f) of Place of Provision of Services Rules, 2012. The relevant extract of the said judicial pronouncement is as under:

“11. Ongoing through the agreement placed before us, the appellants are themselves engaged in providing of services to their client and the facilitating their clients for providing those services by third party. In that circumstance, it is to be seen whether the provider of services is covered as intermediary or not. We have gone through the impugned order also. In the impugned order, the Commissioner (Appeals) has fell in error holding that the appellant provided services on behalf of Evalueserve Ltd., Bermuda. In fact, the appellant has provided the services to customers of their Client and having no direct nexus with the customers of their client has been provided by the appellant to their client and nowhere has facilitated or arranged for the services provided to their client by third party. Furthermore, the appellant has themselves provided the services to their client as the main service provider on principal to principal basis, therefore, the activity undertaken by the appellant do not qualify intermediary as defined in Rule 2(f) of Place of Provision of Services Rules, 2012. Similar view was taken by the Advance Rulings Authority of India in the case of Universal Services India Pvt. Ltd (supra) and Godaddy India Web Services Pvt Ltd. (supra), wherein the Advance Rulings Authority of India has observed as under.....

In view of the above analysis, we find that there are various decisions relied upon by the appellant in support of their argument and also had observed the same. Therefore, we hold that the appellant are not intermediaries in terms of Rule 2(f) of the Place of Provision of Service Rules, 2012. Therefore, the appellants are not liable to pay service tax being provider of service in India in

terms of Rule 9 of the Place of Provision of Service Rules, 2012. Therefore, the demands against the appellants are not sustainable. Consequently, refund claim filed by the appellants are admissible.”

A.2 **M/s Evaluesrevice Sez Gurgaon Pvt. Ltd. vs. CST – LTU Delhi [2018 (7) TMI 436 – CESTAT Chandigarh]** wherein the same view as the abovementioned judicial pronouncements has been upheld.

A.3 **AMD India Pvt. Ltd. vs. Cst, Bangalore, [2017 (12) TMI 772 – CESTAT Bangalore]:** it was held that the Information Technology Software Services (ITSS), Information Technology Enabled Services (ITES) provided by appellant does not fall under ‘intermediary services’ and thus the concerned services falls within the definition of export. The relevant extract of the said judicial pronouncement is as under:

“6.1 After considering the submissions of both the parties and perusal of material on record and the judgments relied upon by the appellant, I find that the appellant is a subsidiary of its holding company and is providing services under the Master Services Agreement and the same Master Services Agreement does not provide that the appellant will facilitate or will arrange the purchase and sale on behalf of the AMD entities outside India. Further I also find that the services rendered by the appellant do not fall under the definition of intermediary and it satisfies all the conditions prescribed under rule 6A of the Service Tax Rules, 1994 because the services recipient is located outside India and the place of provision of service is outside India and the consideration has also been received in convertible foreign for exchange. Further I find that the appellant’s potential customers for the products of the foreign company are located abroad. Though the services are provided with respect to buyer in India, the benefit of the same accrued to the company abroad. Further the case laws relied upon by the appellant are applicable in the facts and circumstances of the case. Further I find that in the case of Lenovo India Pvt. Ltd. (supra), this Tribunal has held that promoting sale of goods of foreign client in India being BAS fulfills the conditions under Export of Service Rules, 2005 and qualifies as export of service.”

A.4 **M/s Sunrise Immigration Consultants Private Limited vs. CCE & ST, Chandigarh, [2018 (5) TMI 1417 – CESTAT Chandigarh]** wherein it has been held that the appellant did not arrange or facilitate provision of main service of its customers i.e. education or loan rendered by colleges/ banks and thus, not an intermediary. The relevant extract of the said judicial pronouncement is as under:

“11 We find that the appellant is nowhere providing services between two or more persons. In fact, the appellant is providing services to their clients namely banks/colleges/university who are paying commission/fees to the appellant.

The appellant is only facilitating the aspirant student and introduced them to the college and if these students gets admission to the college, the appellant gets certain commission which is in nature of promoting the business of the college and for referring investors borrow loan from foreign based bank to the people who wishes settled in Canada on that if the deal matures, the appellant is getting certain commission. So the nature of service provided by the appellant is the promotion of business of their client, in terms, he gets commission which is covered under Business Auxiliary Service which is not the main service provided by the main service providers namely banks/university. As the appellant did not arrange or facilitate main service i.e. education or loan rendered by colleges/banks. In that circumstances, the appellant cannot be called as intermediary in the light of the judgment issued by the Advanced Ruling Authority in the case of Universal Services India Pvt. Ltd. reported in 2016 (42) STR 585 (AAR) = 2016-TIOL-09-ARA-ST and Godaddy India Web Services Pvt. Ltd. reported in 2016 (46) STR 806 (AAR) = 2016-TIOL-08-ARA-ST.....”

A.5 **M/s Analog Devices India Pvt. Ltd. vs. Commissioner of Central Tax, Bengaluru East, [2018 (4) TMI 301 – CESTAT Bangalore]** wherein it has been held that the appellant are not rendering the intermediary service and they are rendering consulting engineer services and BAS and hence fall under definition of export. The relevant extract of the said judicial pronouncement is as under:

“6. After considering the submissions of both the parties and perusal of records and the judgements relied upon by the assessee, especially the assessee’s own case for the previous period, I find that the appellants are not rendering the intermediary service and they are rendering consulting engineering service and BAS and fall in the definition of export of service. After holding that the appellants are not rendering intermediary services, I am of the view that the case needs to be remanded back to the original authority as held by the Commissioner (Appeals) to pass a fresh order after considering all the submissions, of the appellant.”

A.6 **Commissioner Of Central Excise and Service Tax, Bangalore-V vs. Analog Devices India Pvt. Ltd., [2017 (12) TMI 830 – CESTAT Bangalore]** wherein it has been held that the appellant are not rendering the intermediary service and they are rendering consulting engineer services and BAS and fall in definition of export. The relevant extract of the said judicial pronouncement is as under:

“6. The foreign company of the appellant is located in Ireland and the sole recipient of services rendered by them. Further it is on record that they locate potential customers for the products of the foreign company located abroad.

Though the services are provided with respect to buyers in India, the benefit of the same accrued to the company located abroad. It is undisputed that M/s. Analog Devices India Pvt. Ltd., India and the parent company abroad are independent legal entities. They do not render any service to any Indian customers and the benefit is derived by the foreign recipient. Further the Commissioner (Appeals) has also relied upon the decision in the case of ABS India Ltd. Vs. CST Bangalore [2009(13) STR 65 (Tri. Bang.)] = 2008- TIOL-1500-CESTAT-BANG wherein the Tribunal has held that booking of orders for sale of goods manufactured by the subsidiary of the appellant which is located in Singapore was services exported and the appellant was not required to pay service tax. Further the Commissioner (Appeals) has discussed in detail the provisions of Rule 6A of the Service Tax Rules, 1994 to come to a conclusion that the services rendered by the respondent are not intermediary services but an export of services. In view of my discussion above and the ratios of the case laws relied upon by the respondent, I do not find any infirmity in the impugned which is upheld by dismissing the appeal of the Revenue. Cross-objections are accordingly disposed of.”

B. Advance Rulings under Service tax regime in favour of assesseees

- B1. **M/s GoDaddy India Web Services Pvt. Ltd. vs. Commissioner of Service Tax, Delhi-IV, [Ruling No.AAR/ST/08/2016, Application No. AAR/44/ST/15/2014]** wherein it has been held that provision of marketing support services, call centre services, payment processing, business support services, etc. does not amount to provision of ‘intermediary’ services.
- B2. **M/s Universal Services India Pvt. Ltd. vs. The Commissioner of Service Tax, Gurgaon, [Ruling No.AAR/ST/07/2016 in Application No. AAR/44/ST/14 /2014]** wherein it has been held that customer support and payment processing services provided by the service provider does not make the service provider an intermediary, as long as the services are provided on own account.
- B3. **M/s North American Coal Corporation India Pvt. Ltd. vs. Commissioner of Central Excise, Pune-III, [Advance Ruling No. AAR/ST/13/2015, Application No. AAR/44/ST/2/2014]** wherein it has been held that mere presence of three parties involved (individual, group-company and subsidiary company) does not make the service as an intermediary service.

C. Judicial Precedent under services tax regime in favour of revenue

- C1. **M/s Excelpoint Systems India Private Limited vs. Commissioner of Service Tax, Bangalore; [2017-TIOL-4158-CESTAT-BANG]** wherein it was held that project

support services, consulting services, marketing of product, technical support services etc. being provided by the appellant to the foreign company have been held as 'intermediary services' and the said decision does not provide sufficient basis for such conclusion. The relevant extract of the said judicial pronouncement is as under:

"7.2 Further I also find that the learned Commissioner (Appeals) has also analysed the various clauses of the agreement and has come to the conclusion that as per the agreement also appellant is engaged in providing project support services, consulting services, marketing on product, technical support services etc. to the foreign company. The learned Commissioner has also come to the conclusion on the basis of the relevant documents available on record that such services are rendered to the group company located outside India and the payment of such services is received by the appellant in convertible foreign exchange. Further the findings of both the authorities that the services rendered by the appellant fall under the definition of intermediary under Rule 2(f) of the Place of Provisions of Service Rules, 2012 and in terms of Rule 9 of the Place of Provision of Service Rules, 2012 specified vide Notification No.28/2012 dt. 20/06/2012 which is effective from 01/07/2012 in the case of intermediary service, place of provision of services shall be the location of the service provider and therefore the services rendered by the appellant cannot be treated as export of services in terms of Rule 3 of the Export of Service Rules, 2012. More so, as condition No.(d) laid down in Rule 6(9) of the Service Tax Rules are not satisfied. The learned consultant tried to argue that the appellant does not fall in the definition of intermediary but I do not find force in his argument if I see the various clauses of the agreement between the appellant and the foreign company and after considering the various documents produced by the appellant on record, I am of the considered view that there is no infirmity in the impugned order which is upheld by dismissing the appeals of the appellant."

D. Advance Rulings under GST regime in favour of revenue

- D1. **VSERVGLOBAL Private Limited vs. GST officer [2018-VIL-270-AAR]:** M/s Vservglobal Private Limited (Appellant), is engaged in providing multiple services like-creation of purchase orders, dispatch of sales related documents, liaise with supplies for cargo readiness, process payment request, payroll processing, etc. to overseas companies ("Clients") who are engaged in the trading of chemicals. It has been held that the sum of activities performed by the Applicant indicate that it arranges or facilitates the supply of goods/ services between its overseas Client and customers of the overseas Client and therefore the applicant falls under the definition of 'intermediary'. Accordingly, the services provided by the Applicant shall not be treated as a zero rated supply / export of service under Section 16 of the IGST Act, 2017.

- D2. **M/s Five Star Shipping vs. State Tax officer [MAH/AAAR/SS-RJ/11/2018-19]:** The appellant is engaged in providing various services which includes identifying potential customers for charterer of vessels and providing support services after the contract is executed between its client and the end customer such as monitoring voyage execution, lay time calculations, account settlements, etc. It has been held that the services provided by appellant are intermediary service since (i) the appellant is arranging for the supply of the main service of renting of vessels between the foreign ship owner and the service receiver i.e. the vessels charterer and (ii) when the contract for the supply of main services are finalised, the appellant facilitates the provision of the main services.
- D3. **M/s Toshniwal Brothers (SR) Private Limited [2018-VIL-203-AAR]:** As per the service agreement the appellant is referred as agent and shall act as intermediary in negotiating business transactions with prospective customers in his territory. However, the appellant shall not be entitled to conclude contracts on behalf of the principal. Further, he shall receive a percentage commission on the value of goods. Thus, it was held that contract of services supplied are not merely promotion and marketing services, but in the nature of facilitating the supply of goods, and hence would amount to “intermediary services”.

Annexure A1

Intermediary: Gist of Key Decisions

E. Decisions in favour of the Assessee

A.7 **M/s Evalueserve.Com Pvt. Ltd. vs. CST, Gurgaon [2018 (3) TMI 1430 – CESTAT Chandigarh]** wherein it has been held that the appellant has themselves provided the services to their client as the main service provider on principal to principal basis, therefore, the activity undertaken by the appellant do not qualify as 'intermediary' as defined in Rule 2(f) of Place of Provision of Services Rules, 2012. The relevant extract of the said judicial pronouncement is as under:

“11. Ongoing through the agreement placed before us, the appellants are themselves engaged in providing of services to their client and the facilitating their clients for providing those services by third party. In that circumstance, it is to be seen whether the provider of services is covered as intermediary or not. We have gone through the impugned order also. In the impugned order, the Commissioner (Appeals) has fell in error holding that the appellant provided services on behalf of Evalueserve Ltd., Bermuda. In fact, the appellant has provided the services to customers of their Client and having no direct nexus with the customers of their client has been provided by the appellant to their client and nowhere has facilitated or arranged for the services provided to their client by third party. Furthermore, the appellant has themselves provided the services to their client as the main service provider on principal to principal basis, therefore, the activity undertaken by the appellant do not qualify intermediary as defined in Rule 2(f) of Place of Provision of Services Rules, 2012. Similar view was taken by the Advance Rulings Authority of India in the case of Universal Services India Pvt. Ltd (supra) and Godaddy India Web Services Pvt Ltd. (supra), wherein the Advance Rulings Authority of India has observed as under.....

In view of the above analysis, we find that there are various decisions relied upon by the appellant in support of their argument and also had observed the same. Therefore, we hold that the appellant are not intermediaries in terms of Rule 2(f) of the Place of Provision of Service Rules, 2012. Therefore, the appellants are not liable to pay service tax being provider of service in India in

terms of Rule 9 of the Place of Provision of Service Rules, 2012. Therefore, the demands against the appellants are not sustainable. Consequently, refund claim filed by the appellants are admissible.”

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A.9 **AMD India Pvt. Ltd. vs. Cst, Bangalore, [2017 (12) TMI 772 – CESTAT Bangalore]:** it was held that the Information Technology Software Services (ITSS), Information Technology Enabled Services (ITES) provided by appellant does not fall under ‘intermediary services’ and thus the concerned services falls within the definition of export. The relevant extract of the said judicial pronouncement is as under:

“6.1 After considering the submissions of both the parties and perusal of material on record and the judgments relied upon by the appellant, I find that the appellant is a subsidiary of its holding company and is providing services under the Master Services Agreement and the same Master Services Agreement does not provide that the appellant will facilitate or will arrange the purchase and sale on behalf of the AMD entities outside India. Further I also find that the services rendered by the appellant do not fall under the definition of intermediary and it satisfies all the conditions prescribed under rule 6A of the Service Tax Rules, 1994 because the services recipient is located outside India and the place of provision of service is outside India and the consideration has also been received in convertible foreign for exchange. Further I find that the appellant’s potential customers for the products of the foreign company are located abroad. Though the services are provided with respect to buyer in India, the benefit of the same accrued to the company abroad. Further the case laws relied upon by the appellant are applicable in the facts and circumstances of the case. Further I find that in the case of Lenovo India Pvt. Ltd. (supra), this Tribunal has held that promoting sale of goods of foreign client in India being BAS fulfills the conditions under Export of Service Rules, 2005 and qualifies as export of service.”

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“11 We find that the appellant is nowhere providing services between two or more persons. In fact, the appellant is providing services to their clients namely banks/colleges/university who are paying commission/fees to the appellant.

The appellant is only facilitating the aspirant student and introduced them to the college and if these students gets admission to the college, the appellant gets certain commission which is in nature of promoting the business of the college and for referring investors borrow loan from foreign based bank to the people who wishes settled in Canada on that if the deal matures, the appellant is getting certain commission. So the nature of service provided by the appellant is the promotion of business of their client, in terms, he gets commission which is covered under Business Auxiliary Service which is not the main service provided by the main service providers namely banks/university. As the appellant did not arrange or facilitate main service i.e. education or loan rendered by colleges/banks. In that circumstances, the appellant cannot be called as intermediary in the light of the judgment issued by the Advanced Ruling Authority in the case of Universal Services India Pvt. Ltd. reported in 2016 (42) STR 585 (AAR) = 2016-TIOL-09-ARA-ST and Godaddy India Web Services Pvt. Ltd. reported in 2016 (46) STR 806 (AAR) = 2016-TIOL-08-ARA-ST.....”

- A.11 **M/s Analog Devices India Pvt. Ltd. vs. Commissioner of Central Tax, Bengaluru East, [2018 (4) TMI 301 – CESTAT Bangalore]** wherein it has been held that the appellant are not rendering the intermediary service and they are rendering consulting engineer services and BAS and hence fall under definition of export. The relevant extract of the said judicial pronouncement is as under:

“6. After considering the submissions of both the parties and perusal of records and the judgements relied upon by the assessee, especially the assessee’s own case for the previous period, I find that the appellants are not rendering the intermediary service and they are rendering consulting engineering service and BAS and fall in the definition of export of service. After holding that the appellants are not rendering intermediary services, I am of the view that the case needs to be remanded back to the original authority as held by the Commissioner (Appeals) to pass a fresh order after considering all the submissions, of the appellant.”

- A.12 **Commissioner Of Central Excise and Service Tax, Bangalore-V vs. Analog Devices India Pvt. Ltd., [2017 (12) TMI 830 – CESTAT Bangalore]** wherein it has been held that the appellant are not rendering the intermediary service and they are rendering consulting engineer services and BAS and fall in definition of export. The relevant extract of the said judicial pronouncement is as under:

“6. The foreign company of the appellant is located in Ireland and the sole recipient of services rendered by them. Further it is on record that they locate potential customers for the products of the foreign company located abroad.

Though the services are provided with respect to buyers in India, the benefit of the same accrued to the company located abroad. It is undisputed that M/s. Analog Devices India Pvt. Ltd., India and the parent company abroad are independent legal entities. They do not render any service to any Indian customers and the benefit is derived by the foreign recipient. Further the Commissioner (Appeals) has also relied upon the decision in the case of ABS India Ltd. Vs. CST Bangalore [2009(13) STR 65 (Tri. Bang.)] = 2008- TIOL-1500-CESTAT-BANG wherein the Tribunal has held that booking of orders for sale of goods manufactured by the subsidiary of the appellant which is located in Singapore was services exported and the appellant was not required to pay service tax. Further the Commissioner (Appeals) has discussed in detail the provisions of Rule 6A of the Service Tax Rules, 1994 to come to a conclusion that the services rendered by the respondent are not intermediary services but an export of services. In view of my discussion above and the ratios of the case laws relied upon by the respondent, I do not find any infirmity in the impugned which is upheld by dismissing the appeal of the Revenue. Cross-objections are accordingly disposed of.”

F. Advance Rulings under Service tax regime in favour of assesseees

- B4. **M/s GoDaddy India Web Services Pvt. Ltd. vs. Commissioner of Service Tax, Delhi-IV, [Ruling No.AAR/ST/08/2016, Application No. AAR/44/ST/15/2014]** wherein it has been held that provision of marketing support services, call centre services, payment processing, business support services, etc. does not amount to provision of ‘intermediary’ services.
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- B6. **M/s North American Coal Corporation India Pvt. Ltd. vs. Commissioner of Central Excise, Pune-III, [Advance Ruling No. AAR/ST/13/2015, Application No. AAR/44/ST/2/2014]** wherein it has been held that mere presence of three parties involved (individual, group-company and subsidiary company) does not make the service as an intermediary service.

G. Judicial Precedent under services tax regime in favour of revenue

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support services, consulting services, marketing of product, technical support services etc. being provided by the appellant to the foreign company have been held as 'intermediary services' and the said decision does not provide sufficient basis for such conclusion. The relevant extract of the said judicial pronouncement is as under:

"7.2 Further I also find that the learned Commissioner (Appeals) has also analysed the various clauses of the agreement and has come to the conclusion that as per the agreement also appellant is engaged in providing project support services, consulting services, marketing on product, technical support services etc. to the foreign company. The learned Commissioner has also come to the conclusion on the basis of the relevant documents available on record that such services are rendered to the group company located outside India and the payment of such services is received by the appellant in convertible foreign exchange. Further the findings of both the authorities that the services rendered by the appellant fall under the definition of intermediary under Rule 2(f) of the Place of Provisions of Service Rules, 2012 and in terms of Rule 9 of the Place of Provision of Service Rules, 2012 specified vide Notification No.28/2012 dt. 20/06/2012 which is effective from 01/07/2012 in the case of intermediary service, place of provision of services shall be the location of the service provider and therefore the services rendered by the appellant cannot be treated as export of services in terms of Rule 3 of the Export of Service Rules, 2012. More so, as condition No.(d) laid down in Rule 6(9) of the Service Tax Rules are not satisfied. The learned consultant tried to argue that the appellant does not fall in the definition of intermediary but I do not find force in his argument if I see the various clauses of the agreement between the appellant and the foreign company and after considering the various documents produced by the appellant on record, I am of the considered view that there is no infirmity in the impugned order which is upheld by dismissing the appeals of the appellant."

H. Advance Rulings under GST regime in favour of revenue

- D4. **VSERVGLOBAL Private Limited vs. GST officer [2018-VIL-270-AAR]:** M/s Vservglobal Private Limited (Appellant), is engaged in providing multiple services like-creation of purchase orders, dispatch of sales related documents, liaise with supplies for cargo readiness, process payment request, payroll processing, etc. to overseas companies ("Clients") who are engaged in the trading of chemicals. It has been held that the sum of activities performed by the Applicant indicate that it arranges or facilitates the supply of goods/ services between its overseas Client and customers of the overseas Client and therefore the applicant falls under the definition of 'intermediary'. Accordingly, the services provided by the Applicant shall not be treated as a zero rated supply / export of service under Section 16 of the IGST Act, 2017.

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- D6. **M/s Toshniwal Brothers (SR) Private Limited [2018-VIL-203-AAR]:** As per the service agreement the appellant is referred as agent and shall act as intermediary in negotiating business transactions with prospective customers in his territory. However, the appellant shall not be entitled to conclude contracts on behalf of the principal. Further, he shall receive a percentage commission on the value of goods. Thus, it was held that contract of services supplied are not merely promotion and marketing services, but in the nature of facilitating the supply of goods, and hence would amount to “intermediary services”.

Annexure B.1

An Education Guide ('Guidance Note') on June 20, 2012 issued by the Central Board of Excise and Customs clarifying the meaning of intermediary.

The definition of "Intermediary" read with the guidance note reflects that the following conditions need to be satisfied to establish the existence of an "Intermediary" in a service scenario:

- There is arrangement / facilitation of provision of a 'main service' between two more persons.
- Presence of two supplies at any point in time: (i) the supply between the principal and the third party; and (ii) the supply of his own service (agency service) to his principal.
- Intermediary cannot alter the nature or value of service, the supply of which he facilitates on behalf of his principal.
- The consideration for an intermediary's service is separately identifiable from the main supply of service that he is arranging and is in the nature of fee or commission charged by him.
- The test of agency must be satisfied between the principal and the agent i.e. the intermediary.

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- The consideration for an intermediary's service is separately identifiable from the main supply of service that he is arranging and is in the nature of fee or commission charged by him.
- The test of agency must be satisfied between the principal and the agent i.e. the intermediary.
