CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Service Appeal No.60473 Of 2019

[Arising out of Order-in-Original No.CHD-CED-001-COM-15-16-2017 dated 21.06.2017 passed by the Commissioner of Central Excise & Service Tax (Audit), Chandigarh]

M/s Oceanic Consultants Pvt. Ltd. **: Appellant**
SCO-124-126, Sector-9C, Madhya Marg,
Chandigarh-160009

VERSUS

Commissioner or Central Excise
And Service Tax, Chandigarh-I **: Respondent**
Central Revenue Building, Plot No. 19,
Sector-17C, Chandigarh-160017

APPEARANCE:
Shri B.L. Narasimhan, Shri Ankit Awal and Ms. Khushbu Sood, Advocates
for the Appellant
Shri Siddharth Jaiswal, Shri Narinder Singh, Authorised Representatives
for the Respondent

CORAM: HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60469/2024

DATE OF HEARING: 08.04.2024
DATE OF DECISION: 06.08.2024

PER: P. ANJANI KUMAR

The appellants, M/s Oceanic Consultants Private Limited, have been engaged by M/s Oceanic Consultants Pvt. Ltd, Australia (OCA), vide Agreement dated 23.11.2009, to promote and market the services provided by the Australian Company to Foreign Educational Universities/ Institutions; in terms of the Agreement, the appellants were required to provide all necessary information about the course, fee, level of English proficiency to the prospective students in India and to assist them in completing application forms and their submissions to the foreign universities/ institutions; the appellants were to be reimbursed marketing
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and operating expenses and management fee calculated at 10% of the expenses. On the basis of an inquiry conducted, the Department was of the opinion that as the appellant is rendering services which culminate prior to the proceeding of Indian students for study in Australia, the services are very much rendered in India and therefore, the same cannot be held as export of service and the appellants are liable to pay service tax under the category of "Business Auxiliary Service" under Section 65(105) (zzb) read with Section 65 (19) of the Finance Act, 1994 for the period up to 30.06.2012; for the period from 01.07.2012, the appellants are required to pay service tax in terms of Section 66B of the Finance Act, 1994; a Show Cause Notice dated 22.10.2014, covering the period 2009-10 to 2013-14 was issued to the appellants; similarly, a statement under Section 73 (1A) dated 03.05.2016, alleging that the services rendered by the appellants are Intermediary Services and as such the appellants are liable to pay service tax and they are not eligible to claim the same as export of services, was issued to the appellants for the year 2014-15; both the Show Cause Notices were decided by a common adjudicating order confirming the service tax of Rs.6,69,40,313/- along with interest and penalties. Hence, this appeal.

2. Shri B.L. Narasimhan, learned Counsel for the appellants, submits that the services provided to Oceanic Consultants, Australia constitute export of service; learned Commissioner wrongly observed that the appellant has performed the services in India and therefore, the condition, as provided in Rule 3(2)(a) of Export of Service Rules, 2005, was not satisfied; the appellants have entered into an agreement/ MOU with M/s OCA for marketing and promotion of the services provided by

M/s OCA to foreign universities/ institutions; the service receiver is located outside India and the benefit of the service was directly accruing to M/s OCA; the services provided by the appellant cannot be considered as used and consumed in India as the students intended to study in foreign universities/ institutions and such services get completed only when the student is admitted to a foreign university/ institution; further, the service has been provided by the appellant to M/s OCA for use in their business and the payment for which was made by the M/s OCA; the service has been used outside India only; no consideration is charged from the Indian students for the information provided to them; they are merely beneficiaries in the transaction; CBEC Circular No.111/05/2009 dated 24.02.2009 clarified that the phrase "used outside India" has to be interpreted to mean that the benefit of the service should accrue outside India; in the instant case, the benefit is accruing to M/s OCA; he relies on the decision of the Larger Bench in the case of Arcelor Mittal Stainless (I) P. Ltd. – 2023-TIOL-469-CESTAT-MUM-LB and submits that M/s OCA, clearly the service recipient, is located outside India and therefore, provisions of Rule 3(2)(a) of Export of Service Rules, 2005 are satisfied. He relies on the following cases:

- The Commissioner of Service Tax-VII v. M/s. Wartsila India Ltd. - 2019 (24) G. S. T. L. 547 (Bom.).
- The Commissioner of Service Tax, Mumbai-VI Commissionerate v. M/S. A.T.E. Enterprises Pvt. Ltd. – 2018 (8) G. S. T. L. 123 (Bom.)
- The Commissioner Service Tax-VII v. M/s. Blue Star Ltd - 2018-TIOL-1976-HC-MUM-ST.
- IBM India Pvt. Ltd. v. Commissioner of Central Excise and Service Tax - 2020 (34) G.S.T.L. 436 (Tri. - Bang.)
- M/s Paul Merchants Ltd. v. CCE, Chandigarh - 2012 (12) TMI - 424 - CESTAT New Delhi (LB)

3. Learned Counsel submits as regards the period 27.02.2010 to 30.06.2012 that the Export of Service Rules were amended w.e.f. 27.02.2010 whereby the condition prescribed under Rule 3(2)(a) of Export of Service Rules, 2005 to the extent that service be provided from India and used outside India was omitted; he submits that consequentially, in order to qualify as export, the only condition which is required to be satisfied in terms of Rule 3(1)(iii) read with Rule 3(2) of Export of Service Rules, 2005 was that the service receiver should be located outside India and consideration for such service should be received in foreign exchange; in the instant case, both the conditions are satisfied. He relies on the following cases:

- Verizon Communication India Pvt. Ltd.- 2017-VIL-DEL-ST.
- Vodafone Cellular Ltd.- 2019 (3) TMI 617-CESTAT Chennai.
- Involute Engineering Pvt. Ltd. – 2020 (12) TMI 533-CESTAT New Delhi.

4. As regards the period 01.07.2012 to 31.03.2015, learned Counsel submits that the impugned order confirms the demand on the premise that the appellant was acting as an intermediary to connect its foreign principal to the end user of the service located in India; “Intermediary” as defined means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service or a supply of goods between two or more persons but does not include a person who provides the main service on his account. He submits that in the instant case, the foreign universities have engaged M/s OCA for marketing their education courses in India and they pay the consideration to M/s OCA who engaged the appellant; the appellant assists Indian students on behalf of M/s OCA by making them aware of the courses, the

fee and helping other procedures like filling up the application form of various universities; the students pay tuition fee to the universities directly without the involvement of either the appellant or the M/s OCA; therefore, there is no main service between M/s OCA and the Indian students and therefore, the appellant cannot be said to be a link between the students and the M/s OCA; the work undertaken by the appellants in the nature of sub-contract and not an intermediary service provided; Tribunal in the case of IDP Education India Pvt. Ltd. Vs Additional Director General of Central Excise, Intelligence, New Delhi – 2021 (10) TMI 1174-CESTAT- New Delhi that services provided under "Student Recruitment Service Agreement" entered into by the appellant with its holding company to help recruit students from India does not constitute intermediary services. He also relies on the following cases:

- Genpact India Pvt. Ltd. v. Principal Commissioner of GST and Central Excise Gurugram - 2023 (77) G.S.T.L. 512 (P & H).
- Singtel Global India Pvt. Ltd. v. Union of India - 2023 (70) G.S.T.L. 254 (Del.).
- M/s Sunrise Immigration Consultants Private Limited v. CCE & ST, Chandigarh - 2018 (5) TMI 1017-CESTAT Chandigarh.
- Genpact India Pvt. Ltd. and Others v. Union of India - 2021 (2) TMI 816 - Punjab and Haryana High Court.
- M/s Medway Educational Consultant P. Ltd v. Commissioner, CGST Commissionerate, Delhi-West - 2024 (3) TMI 1178 (Tri. Del.)
- M/s Valmiki Consultants Pvt Ltd v. Commissioner of Customs, Central Tax, Hyderabad - 2018 (11) TMI 1085 - CESTAT Hyderabad.
- M/s Study Overseas Global (P) Ltd. v. CST Delhi - 2017 (5) TMI 887 - CESTAT New Delhi.

5. Learned Counsel submits also that Circular No.159/15/2021-GST dated 20.09.2021 clarified that sub-contracting of a service is not an intermediary service; the Circular further clarifies that there is no change

in the scope of intermediary services in the GST Regime vis-à-vis the Service Tax Regime. He relies on Genpact India Pvt. Ltd. – 2023 (68) GSTL 3 (P&H) and M/s Ernst & Young Ltd. – 2023 (3) TMI 1117-Delhi High Court.

6. Learned Counsel further submits that services provided by the appellant qualify as services relating to admission to recognized courses and thus do not attract service tax; it is the settled principle that only services are to be exported and not the taxes. He also submits that the Department has computed the demand incorrectly including the income relating to non-taxable sources such as reimbursement of expenses, miscellaneous income from sale of assets, interest income, visa facilitation services and foreign exchange gains (up to 30.06.2012); income from other sources than the reimbursement from OCA was never disputed by the Revenue; further, benefit of cum-duty tax and CENVAT credit was not given. He submits that impugned order was issued in violation of principles of natural justice as it copies word-to-word from the Show Cause Notice and was passed without considering the submissions made in this regard. Lastly, he submits that the issue being of interpretational in nature, extended period cannot be invoked; when duty itself is not liable to be recovered, questions of penalty and interest do not arise.

7. Learned Authorized Representative for the Department reiterates the findings of the impugned order and distinguish the cases relied upon by the appellants as follows:

- The case of IDP Education India Pvt. Ltd. (supra); the Tribunal decided the case on the basis of the findings that Revenue has not

established that the appellant is acting as an Intermediary between IDP, Australia and foreign universities as alleged in the Show Cause Notice; in the instant case, it is alleged that the appellant is an Intermediary between its principal OCA and the customers i.e. Indian students.

- Sunrise Immigration Consultants Private Ltd. (supra); in this case, the appellant therein was providing services to their clients viz. banks/ colleges/ university, who are paying commission/ fee to the appellant; whereas in this case, the appellant is providing facilitation to their principal under Agency Agreement and the principal is providing service to the universities; therefore, the facts are distinguishable.
- Singtel Global India Pvt. Ltd. (supra); in the case of SGIPL, they had to provide, at its own expenses, all facilities and resources necessary to enable SGIPL to provide the services to SingTel, whereas in the instant case, the appellant is clearly appointed as an agent of their principals.
- Medway Educational Consultant Pvt. Ltd. (supra) and Valmiki Consultants Pvt. Ltd. (supra); in these cases, the appellant was providing services directly to their clients i.e. colleges or universities, who were paying commission to the appellant, whereas in the instant case, the appellant is facilitating their principal in the provision of main service.
- Genpact India (P) Ltd. (supra); in this case, the assessee was providing services directly to the third parties located outside India and as per the terms of master services, sub-contracting agreement various services were to be provided by the petitioner

on a principal-to-principal basis; whereas in the instant case, the appellant is providing facilitation to its principal OCA under an agreement and the OCA was providing main service to the colleges.

8. Learned Authorized Representative takes us to different provisions of the Statute concerning the definition of "Intermediary" and relies on the following cases:

- 2018 (10) G.S.T.L. 254 (Tri. - Bang.)- Excelpoint Systems (India) P. LTD.VersusC.S.T., Bangalore.
- 2019 (28) G.S.T.L. 31 (Tri. - Mumbai)- C.S.T., Mumbai-IIVersusLamhas Satellite Services Ltd.
- 2020 (43) G.S.T.L. 222 (Tri. - Mumbai)- Sabre Travel Network India P. Ltd. VersusC.CGST& C. EX., Mumbai.

9. Heard both sides and perused the records of the case. The brief issue to be considered in this case is as to whether the services rendered by the appellants to the overseas master i.e. M/s OCA constitutes an export of service during the impugned period i.e. 2009-10 to 2013-14 and whether the same constitutes Intermediary Service post 01.07.2012. Learned Commissioner comes to a conclusion that, for the period up to 30.06.2012, the services provided by the appellants to M/s OCA gets completed with the grant of admission and issuance of travel visa and thus, the services get culminated in India prior to travelling abroad of a student; the nature of service provided by the appellant falls under the category of "Business Auxiliary Service". Learned Commissioner finds that post 01.07.2012, the Service provided by the appellant being intermediary in nature cannot be construed to be export.

10. Learned Counsel for the appellants submits that for the period 01.04.2009 to 26.02.2010, learned Commissioner finds that the

appellants did not fulfill the conditions of Rule 3(2)(a) of the Export of Service Rules, 2005; learned Counsel submits that the appellant has provided services only to the overseas master i.e. M/s OCA and as M/s OCA is outside India, the services cannot be held to have been performed and consumed in India; the service provided by the appellant to M/s OCA is in relation to their business contract is a overseas institutions/ universities; he submits that Circular No.111/05/2009 dated 24.02.2009 clarifies that the phrases "used outside India" is to be interpreted to mean that the benefit of the service should accrue outside India; in the instant case, the benefit is undoubtedly accruing to M/s OCA. We find Arcelor India, a service provider, is providing BAS service to Arcelor France, which is a service recipient. Arcelor India is, therefore, providing service to Arcelor France which is situated outside India and Arcelor India receives consideration in convertible foreign exchange. The service provided by Arcelor India is, therefore, delivered outside India and used outside India as is the requirement under the 2005 Export Rules prior to 01.03.2007 and Arcelor India provides services from India which are used outside India as is the requirement after 01.03.2007. It cannot, therefore, be doubted that Arcelor India provides "export of service" as contemplated under rule 3 of the 2005 Export Rules". We find that the arguments of the appellants are acceptable as the contract entered into by the appellants was with M/s OCA who in turn had entered into contract with Australian institutions/ universities for canvassing and procuring admission of the students. M/s OCA has engaged the appellants to help their work in India. In pursuit of the same, the appellants have contacted the students in India; explained the procedures of admission; helped in filling up the forms and payment of fees directly to the Australian

universities. There is no contract between either the foreign universities and the appellants or the Indian students and the appellants. Therefore, it cannot be said that the appellants have rendered any service to the students in India so as to come to a conclusion that the services are utilized and consumed in India. The services rendered by the appellants are consumed by M/s OCA who gets a commission from the Australian universities. Therefore, during the period 01.04.2009 to 26.02.2010, services rendered by the appellants have satisfied the condition of Rule 3(2)(a) of Export of Service Rules. We find that Larger Bench in the case of M/s Arcelor Mittal (supra) observed as follows:

> "Arcelor India, a service provider, is providing BAS service to Arcelor France, which is a service recipient. Arcelor India is, therefore, providing service to Arcelor France which is situated outside India and Arcelor India receives consideration in convertible foreign exchange. The service provided by Arcelor India is, therefore, delivered outside India and used outside India as is the requirement under the 2005 Export Rules prior to 01.03.2007 and Arcelor India provides services from India which are used outside India as is the requirement after 01.03.2007. It cannot, therefore, be doubted that Arcelor India provides "export of service" as contemplated under rule 3 ofthe 2005 Export Rules.

11. For the period 27.02.2010 to 30.06.2012, we find that vide amendment carried out in the EOS Rules, the only condition left is that this service receiver should be located outside India and the consideration should be received in convertible foreign exchange. We find that there is no dispute on this fact and therefore, the services rendered by the appellants require to be held to be exported in terms of the said Rules; we find that Hon'ble Delhi High Court in the case of Verizon Communication India Pvt. Ltd. (supra) held as follows:

> 48. Circular No. 141/10/2011 dated 13th May, 2011 also throws light on this aspect. It was issued to clarify the position prior to 28th February, 2010 and became necessary in view of the question raised whether for the period prior thereto the requirement that the service should be "used outside India" invariably meant the location of the recipient. It was clarified that the words 'accrual of benefit' was not restricted to mere impact on the bottom-line of the person who pays for the service. It had to be given a harmonious interpretation in the context where the effective use and enjoyment of the service has been obtained.
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> 49. The position becomes even clearer in the post July 2012 period during which the POPS Rules 2012apply. As already noted, provision of telecommunication services does not have a specific rule and so Rule 3 of the POPS Rules, which is the default option, applies. In terms thereof, the place of provision of telecommunication service shall be the location of the recipient of service.
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> 50. The decision of larger Bench of CESTAT in Paul Merchants Ltd v. CCE, Chandigarh (supra) may be referred to at this stage. The period with which the dispute in that case related to was between 1st July, 2003 and 30th June, 2007. It involved, therefore, the interpretation of the ESR 2005 as amended and applicable during the said period. There the Assessees were intermediary agents providing money transfer services to foreign travelers who were the end user on behalf of their principals. The contention of the Department that this did not qualify as 'export of service' was rejected by the CESTAT. It noted that the CBEC had to issue a clarification letter No. 334/1/2010-TRU dated 26th February, 2010 acknowledging the difficulties that were faced by the trade in complying with the condition that the services had to be 'used outside India'. It was clarified that "as long as the party abroad is deriving benefit from service in India, it is an export of service.

12. As far as the period post 01.07.2012 is concerned, the learned Counsel for the appellants submits that learned Commissioner erred in holding that the appellant is acting as an intermediary to connect its foreign principal to the end users of service who were the consumers in India. We find that during the relevant period, Intermediary Service has

been defined by Rule 2(f) of Place of Provision of Service Rules, 2012 (introduced by the Notification No.28/2012-ST dated 20.06.2012) 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 service (hereinafter called the main service) or 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.

13. In the facts of the case, we find that in any of the transactions, three parties are not involved; be it between the Australian universities and M/s OCA or be it M/s OCA and the Indian students. M/s OCA is rendering services to the Australian universities and the universities pay remuneration to M/s OCA; M/s OCA has appointed the appellant to help the Indian students who intend to study in Australian universities. In the scheme of arrangements, it is not brought on record if there is any agreement or arrangement between the foreign universities and the appellant or M/s OCA and Indian students. Therefore, it appears that the primary requirement of existence of three parties in the scheme of things is absent in the instant case. The main service is rendered by M/s OCA to the foreign universities and the appellant helps M/s OCA as far as the Indian students are concerned; neither the appellant nor M/s OCA charged any amount from the Indian students. Therefore, in the circumstances, as submitted by the learned Counsel for the appellants, the appellants can at best be held to be the sub-contractor or the sub-agent of M/s OCA and not an intermediary between the India students and the universities or the Indian students and M/s OCA.

14. We find that Circular No.159/15/2021-GST dated 20.09.2021 issued by CBIC envisages that in respect of Intermediary Services, there should be a minimum of three parties and two distinct supplies i.e. main supply and ancillary supply; it also clarifies that a person involved in supply of main supply on principal-to-principal basis to another person cannot be considered as supplier of Intermediary Service. In the instant case, the appellants and M/s OCA are rendering the same service i.e. helping the students get admission in Australian universities and the appellants are rendering the same main service as M/s OCA; whereas M/s OCA get the remuneration from the universities on the fees paid by the students, the appellants get their remuneration. A doubt can arise as to whether the clarification issued by CBIC in the contacts of GST Act can be applicable to service tax. It is pertinent to note that the same circular clarifies categorically that there is no difference between the Service Tax regime and the GST regime as far as the treatment of "Intermediary Service" is concerned. We find that Hon'ble High Court of Punjab & Haryana, in the case of Genpact India Pvt. Ltd. (supra), has enunciated the conditions that are required to be satisfied, primarily for a person to qualify as an "intermediary".

- the relationship between the parties must be that of a principal-agency relationship.
- the person must be involved in arrangement or facilitation of provisions of the service provided to the principal by a 3rd party.
- the person must not actually perform the main service intended to be received by the service recipient itself. Scope of an "intermediary" is to mediate between two parties i.e. the principal service provider (the 3rd party) and the beneficiary who receives the main service and expressly excludes any person who provides such main service "on his own account".

15. We find that Principal Bench of CESTAT has gone into a case involving similar facts and held in the case of M/s IDP Education India Pvt. Ltd. (supra) as follows:

> 8. We have gone through the records of the case and considered the submissions on both sides. It is undisputed that the appellant has an agreement only with IDP Australia. The appellant recruits or facilitates students in India, but does not get any remuneration from Australian universities. For the students who are recruited or admitted by the university in Foreign Country, recommended by appellant in India, IDP Australia gets paid by the Australian/Foreign universities. A share of that commission is given to the appellant by IDP Australia. This scheme of arrangement clearly shows that the IDP Australia is providing services to the foreign universities and is receiving consideration for the same. Insofar as recruitment of students in India is concerned, IDP Australia has created the appellant as a fully owned subsidiary, and has sub-contracted the work to the appellant. Nothing has been brought on record in the show cause notice or in the order to show that the appellant has a direct contract with the foreign universities. There is nothing on record to show that the appellant is liasioning or acting as intermediary between the foreign universities and IDP Australia. All that is evident from the records is that the appellant is providing the services which have been sub-contracted to it by M/s IDP Australia. As a sub-contractor, it is receiving commission from the main contractor for its services. The main contractor - IDP Australia, in turn, is receiving commission from the foreign universities who pay a percentage of the tuition fee to IDP Australia. From the records, we find that Revenue has not established that the appellant is acting as an intermediary between M/s IDP Australia and the foreign universities, as alleged or held in the impugned order and the show cause notice. Hence, we find in favour of the appellant on merits.

16. As the facts of the instant case are identical to the above cited case, we find that the case law submitted by the Revenue is of no avail. In view of the above, we are of the considered opinion that the services

rendered by the appellants to M/s OCA during the period 01.07.2012 to 31.03.2015 do not fall under the category of "Intermediary Services" and thus, the appellants are eligible for the benefit of export of services.

17. Learned Counsel for the appellants submits, without prejudice to the other submissions, that the services provided by the appellants do qualify as services relating to admission to recognized courses and thus do not attract any service tax. He also submits that the impugned order has been passed in gross violation of principles of natural justice inasmuch as the same was passed without considering the submissions made in the reply to the Show Cause Notice. He further submits that the issue being about interpretation of law and there being no positive act of suppression, collusion etc. with intent to evade payment of duty, extended period cannot be invoked and penalties cannot be imposed. As we find that the appeal succeeds on merits, other submissions are rendered superfluous as far as the facts of this case is concerned.

18. In view of the above, the appeal is allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on 06/08/2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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