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

Service Tax Appeal No. 60064 Of 2020

[Arising out of Order-in-Appeal No.153-ST-CGST-APPEAL-GURUGRAM-SG-2019 dated.31.10.2019 passed by the Commissioner (Appeals), CGST, Gurugram, Haryana]

M/s Viavi Solutions India Pvt.Ltd. **: Appellant**
(Infotech Centre, 3rd Floor, 14/2 Mile Stone
Old Delhi, Gurugram-122017)

VERSUS

The Commissioner of CGST, Gurgaon-I **: Respondent**
(Plot No.36-37, Sector 32, Near Medanta Hospital,
Gurugram-122001)

APPEARANCE:
Shri Gajendra Maheshwari and Ms. Priyamwada Singh, Advocates
for the Appellant

Shri Siddharth Jaiswal, Shri Nikhil Kumar Singh, Shri Aneesh Dewan and
Shri Yashpal 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.60294/2024

DATE OF HEARING: 05.02.2024
DATE OF DECISION: 03.06.2024

PER: S. S. GARG

The present appeal is directed against the impugned order dated 31.10.2019 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) rejected the appeal of the appellant and upheld the Order-in-Original.

2. Briefly the facts of the present case are that the appellant is engaged in providing software and hardware platforms and instruments which deliver end-to-end visibility across physical, virtual and hybrid
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networks. The Appellant entered into an agreement with JDS Uniphase Corporation, a Delaware, United States Corporation ("JDSU USA") on 01.04.2013 ("Agreement") and as per the terms of the Agreement, the Appellant was engaged in the following:

(a) Promotion/ Marketing of JDSU USA products by directly liasing with customers and providing demonstration of JDSU USA's products as and when required;

(b) Identification of prospective customers (in India) for JDSU USA;

(c) Liasing between JDSU USA and prospective channel partners/customers.

3. For the provision of such promotional and marketing activity of JDSU USA's products, the Appellant received a consideration in form of commission from JDSU USA. It is further alleged that during the period from 01.10.2013 to 31.03.2014 (period of dispute), the appellant raised the following invoices on JDSU USA for the services provided under the Agreement:

S. No.	Name of Recipient	Address of Recipient	Invoice No.	Date of Invoice	Value of Invoice (Rs.)
1.	JDS Uniphase	USA	84904731	31.01.2014	10,11,48,510
2.	JDS Uniphase	USA	84904732	20.02.2014	17,50,26,867
Total value of Invoice					**27,61,75,377**

4. The Appellant did not charge Service tax on these invoices since the Appellant was under the *bona fide* belief that in terms of the Finance Act, 1994 ("the Act") read with Service Tax Rules, 1994 ("ST Rules") and Rule 3 of the Place of provision of Services Rules, 2012 ("POPS Rules"), the services provided by the Appellant to JDSU USA qualified as export of service.

5. The Appellant erroneously deposited Service tax of Rs. 3,03,80,274 on the aforesaid invoices under the category of 'Business Auxiliary Service' and reported the same in the ST-3 returns for the period 01.10.2013 to 31.04.2014. The details of the Service tax pad on the aforesaid invoices are summarized below:

Invoice No.	**Value of Invoice (Rs.)**	**Value of Invoice for Service tax purpose (Rs.)**	**Service Tax calculated @ 12.36% (Rs.)**	**Paid through challans (Rs.)**	**Paid through CENVAT credit (Rs.)**
84904731	10,11,48,510	9,00,21,814	1,11,26,696	NIL	1,11,26,696
84904732	17,50,26,867	15,57,73,287	1,92,53,578	1,92,53,578	NIL
Total	**27,61,75,377**	**24,57,95,101**	**3,03,80,274**	**1,92,53,578**	**1,11,26,696**

6. On account of erroneous discharge of service tax of Rs.3,03,80,274 on the export invoices, the appellant filed an application for refund of the service tax discharged vide application dated 23.12.2014. Subsequently, on 28.08.2015, the appellant filed a letter before the Service Tax Department stating that they had raised a credit note of Rs.89,08,370

against the commission invoice for the services rendered during the period April 2013 to December 2013. Accordingly, the Appellant adjusted the amount of applicable Service tax of Rs. 9,79,952 on such credit note against output Service tax liability and accordingly, the Appellant reduced the refund claim of Service tax to Rs. 2,94,00,322. The refund application filed by the Appellant was rejected by the Adjudicating Authority vide Order-in-Original dated 31.01.2017 on the ground of unjust enrichment. Aggrieved by the said order, the Appellant filed appeal before the Commissioner (Appeals), Gurugram and submitted that the principle of unjust enrichment was not applicable in respect of export of services. Thereafter, The Commissioner (Appeals) vide Order-in-Appeal dated 31.10.2017 remanded the appeal filed by the Appellant to the Adjudicating Authority with the direction to examine the matter on merits. On remand, the Appellant submitted all the information/ documents before the Adjudicating Authority. However, the Adjudicating Authority vide Order-in-Original dated 09.05.2019 again rejected the refund claim filed by the Appellant on the ground that the technical services provided by the Appellant had been performed in India and therefore were covered under Rule 4 of the POPS Rules (Place of Provision of Service Rules 2012). Further, the marketing services which included "Business Auxiliary Services" provided by the Appellant fell under the definition of intermediary services as provided under Rule 2(f) of POPS Rules. Aggrieved by the said order, the appellant filed appeal before the Commissioner (Appeals) and the Commissioner (Appeals) upheld the Order-in-Original and held that the services provided by the appellant qualified as intermediary and dismissed the appeal of the

appellant. Aggrieved by the said order, the appellant has filed the present appeal.

7. Heard both sides and perused the material on record.

8. During the hearing, the Department raised a preliminary objection that the Hon'ble Apex Court, in the case of ITC Ltd. Vs CCE, Calcutta reported 2019 (368) ELT 216 (SC), has held that the refund claim is not maintainable in the absence of any challenge to assessment or self-assessment in appeal. Accordingly, the refund claim filed by the appellant was not maintainable. The Tribunal observed that two different Benches of the Tribunal, in the case of Karanja Terminal & Logistics Pvt. Ltd. Vs Assistant Commissioner, Mumbai, Service Tax Appeal No.85110/2020 dated 13.01.2021 and Cadila Healthcare Ltd. Vs CST, Ahmedabad, Service Tax Appeal No.445 of 2011 dated 27.04.2021, has taken divergent views on the issue of maintainability of refund claim filed under Service tax. Accordingly, this Tribunal referred the matter to the Larger Bench to decide the following issue:

> *"Whether refund claim of service tax is maintainable in absence of any challenge to assessment or self-assessment in appeal or not?"*

9. The Larger Bench of this Tribunal passed an order on 29.09.2023 in favour of the appellant and it was held by the Larger Bench that refund claims are maintainable in the absence of challenge to the self-assessment under the Service Tax Regime. After the Larger Bench decision, the appeal was listed for hearing on merits but the Department again raised an objection on the maintainability of the refund claim filed

by the appellant in view of the judgment of the Hon'ble Delhi High Court in the case of BT (India) Pvt. Ltd. Vs UOI, W.P (C) 13968/2021n dated 20.09.2023.

10. To counter the preliminary objection of the Department, the learned Counsel submits that the BT (India) judgment is distinguishable from the Larger Bench order and the same does not apply to the present case because both the judgments operate on different facts and issues. Learned Counsel further submits that the Larger Bench order arose out of the claim for refund of service tax that was erroneously deposited but the BT (India) judgment arouse out of a claim for refund of unutilized CENVAT credit on export of services. Both the refund claims are different as in the case of refund of CENVAT credit, Rule 5 of the CENVAT Credit Rules, 2004 is applicable and such surplus credit is reflected in the self-assessed return.

11. Subsequently, the Larger Bench Order specifically addressed the issue regarding the possibility of filing an appeal against a self-assessed Return, whereas this issue was not deliberated in the BT India Judgment. The Larger Bench Order duly discussed Section 85 of the Finance Act, 1994 to hold that no appeal could be filed against a self-assessed return because the return is not an order passed by an adjudicating authority. Learned Counsel further submits that the Hon'ble Delhi High Court verdict in BT India Judgment is *sub silentio* on the issue of permissibility of filing an appeal against a self-assessed return. Learned Counsel further submits that Larger Bench order was passed based on judgments of various High Courts which was not considered in BT (India) judgment. He

further submits that the Larger Bench order has been passed in the appellant's own case and after the decision of the Larger Bench, the matter is now listed before the Division Bench for an order on merits of the case. He also submits that the Larger Bench has not been challenged yet in an appeal before the Hon'ble High Court and accordingly, the Larger Bench order continuous to remain binding on the Division Bench of this Tribunal and even the Hon'ble High Court of Delhi has not reversed or even considered the Larger Bench order in the case of BT (India).

12. In reply to this submission on maintainability, learned DR fairly conceded that BT (India) judgment has not considered the Larger Bench but he still submits that BT (India) judgment has also relied upon the Hon'ble Apex Court judgment in the case of ITC Limited and therefore, he submits that the present appeal is not maintainable.

13. After considering the submissions of both the parties on the issue of maintainability of appeal, we are of the considered view that the Larger Bench in the appellant's own case has categorically held that refund of service tax is maintainable even in the absence of any challenge to assessment or self-assessment in an appeal. The Larger Bench has considered the decision of Hon'ble Apex Court in the case of ITC Limited and has distinguished the same by holding that the same is not applicable in the facts and circumstances of the present case. Moreover, after the Larger Bench order, this case has been listed before this Division Bench to decide the issue of refund on merits. Therefore, we are of the view that the present appeal is very much maintainable and its maintainability cannot be questioned at this stage on the basis of the

judgment of BT (India). Accordingly, the objections raised by the Department on maintainability are hereby overruled.

14. Now coming to the legal submissions made by the learned Counsel on merits, learned Counsel for the appellant submits that the impugned order is not sustainable in law as the same has been passed without appreciating the facts and law in proper perspective. He further submits that the appellant does not qualify as an intermediary under Rule 2(f) of the POPS Rules, 2012. During the period of dispute, the definition at the relevant time was only restricted to the facilitation of provision of service, he then referred to the definition of intermediary provided under Rule 2(f) of POPS Rules. During the period in dispute as well as the definition of "Intermediary" which was applicable w.e.f. 01.10.2014 that is from the date when the definition of "Intermediary" was amended. He further submits that the term "Intermediary" only pertains to the facilitation of provision of service during the period prior to 01.10.2014 and the facilitation of supply of goods was inserted only w.e.f. 01.10.2014. Thus, he submits that the definition that would be applicable in the present case is the one that was relevant prior to the amendment dated 01.10.2014. He further submits that it is an undisputed fact that the appellant was engaged in the development and maintenance of volume of sales of goods of JDSU USA which is acknowledged in Para 7 & 8 of the impugned order passed by the learned Commissioner (Appeals). Thereafter, learned Counsel took us through the Paras 7 & 8 of the impugned order wherein it is observed that the appellant is involved in the business of promotion of selling of goods, providing of warranties on goods and it is also observed that the appellant was involved in dealing

with goods and the Adjudicating Authority has rightly held that where goods are involved then Rule 4 of the POPS Rules 2012 are applicable and the said service with respect to goods cannot be treated as export of service. He further submits that in Para 8 of the impugned order, the learned Commissioner (Appeals) has observed that in the instant case, the appellant arranged supply of goods between JDSU Corporation and their customers in India, JDSU India is providing services on his own account. He further submits that in view of this finding of the learned Commissioner (Appeals), the appellant would not fall under the definition of "Intermediary" applicable at the relevant time. Learned Counsel also referred to the Education Guide 2012 wherein in Para 5.9.6 of the said Guide, it is observed as under:

> *5.9.6 What are "Intermediary Services"? Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time:*
>
> *(i) The supply between the principal and the third party, and*
>
> *(ii) The supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.*
>
> ***For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition."***
>
> *(Emphasis supplied)*

15. He further submits that the concept of intermediary has been considered in various decisions and it has been held that during the relevant time, the appellant who was providing the main service in his own account falls within the exclusion part of the definition of "Intermediary" services. He relied upon the following decisions:

- Chevron Phillips Chemicals India Pvt Ltd. v. Commissioner of CGST & Central Excise, Mumbai East, 2019-VIL-763-CESTAT-MUM-ST
- Lubrizol Advanced Materials India Pvt. Ltd. v. C.C.E. Belapur, 2019 (22) GSTL 355 (Tri.- Mumbai)
- Evalueserve.Com (P) Ltd. V. Commissioner of Service-tax, Gurgaon: [2019] 106 taxmann.com 74 (Chandigarh - CESTAT)
- Sunrise Immigration Consulting Private Limited v CCE & ST, Chandigarh 2018-VIL-539-CESTAT-CHD-ST

16. Learned Counsel also submits that the services rendered by the appellant fall within the category of export of service as provided in Rule 6A of the Service Tax Rules and also Rule 3 of POPS Rules. He further submits that in terms of the said Rule 6A, the criteria prescribed for a service to qualify as an export of service are as follows:

(a) service provided is located in the taxable territory (i.e. within India);

(b) service recipient is located outside India;

(c) service provided is a service other than in the Negative List;

(d) place of provision of service is outside India;

(e) payment is received in convertible foreign exchange;

(f) service provider and the service recipient are not merely a branch of head office of the same person.

17. He further submits that in view of the above said criteria, the services provided by the appellant squarely falls within the ambit of export of service because the appellant in view of the agreement as well

as the definition of export of service falls in the category of exporter of service. He also submits that the place of provision of service by the appellant to JDSU USA is outside India as per Rule 3 of POPS Rules which provide that the place of provision of services is location of the service recipient. He also submits that the services of the appellant does not fall under Rule 4 to 12 of POPS Rules which provide specific provisions for specified services. In support of his submission, he relied upon the following decisions:

- Verizon Communication India pvt. Ltd. Vs. Assistant Commissioner, Service Tax, Delhi-III, 2018 (8) G.S.T.L. 32 (Del.) Delhi High Court (relied upon Paul Merchant Decision)
- Paul Merchants v. CCE, Chandigarh, 2013 (29) STR 257 (Tri-Del)
- IBM India (P) Ltd. v. CCE, Customs and Service Tax, [2016] 68 taxmann.com 94 (Tri-Bang)
- Vodafone Essar Cellular Ltd. v CCE., Pune-III, 2013(31) STR 738 (Tri-Mum)
- KSH International Pvt. Ltd. Vs. Commissioner of C.Ex, Belapur, 2018 (18) S.T.R 404 (Tri. - Mumbai)
- Microsoft Corporation (I) (P) Ltd. v. CST, New Delhi - 2014 (36) STR 766 (Tri-Del)
- Gap International Sourcing India Pvt. Ltd. v. CST, Delhi- 2015 (37) STR 757 (Tri- Del)
- Alpine Modular Interiors (P.) Ltd. v. CST (Adjudication), New Delhi -[2014] 48 taxmann.com 163 (Tri-Del)
- Samit Enterprises (P.) Ltd. v. Commissioner of Central Excise & Service Tax (Adj.), New Delhi -[2016] 70 taxmann.com 134 (Tri-Del)

18. On the other hand, learned Authorized Representative for the Department reiterated the findings of the impugned order.

19. We have considered the submissions made by both the parties and perused the material on record and has also gone through the judgments relied upon by both the parties. The only issue involved in the present case is whether the services in question fall under the category of export

of service as claimed by the appellant or under intermediary service as claimed by the Department.

20. Now, first of all, we will examine whether the services by the appellant to JDSU USA qualified as export of service and hence not exigible to service tax. Here is pertinent to refer Rule 6A of the Service Tax Rules which provides the meaning of the term export of service. It is also important to take note of Rule 3 of POPS Rules; both the Rules are reproduced here in below:

> *Rule 6A of the ST Rules*
> *"(1) The provision of any service provided or agreed to be provided shall be treated as export of service on fulfillment of following conditions:*
> *a) the provider of service is located in the taxable territory,*
> *b) the recipient of service is located outside India,*
> *c) the service is not a service specified in the section 66D of the Act,*
> *d) the place of provision of the service is outside India,*
> *e) the payment for such service has been received by the provider of service in convertible foreign exchange, and*
> *f) the provider of service and recipient of service are not merely establishment of a distinct person in accordance with item (b) of Explanation 2 of clause (44) of section 65B of the Act...."*
> *Rule 3 of the POPS Rules*
> *"The place of provision of a service shall be the location of the recipient of service:*
> *Provided that in case the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service."*

21. Further, as per the Agreement dated 01.04.2013 entered into by the appellant and JDSU USA, the appellant is providing following services:

a) *Promotion/ Marketing of JDSU USA products by directly liasing with customers and providing demonstration of JDSU USA's products as and when required;*

b) *Identification of prospective customers (in India) for JDSU USA;*

c) *Liasing between JDSU USA and prospective channel partners/ customers.*

22. If we examine the services provided by the appellant as per their Agreement and the provisions of Rule 6A of the Service Tax Rules, we will find that the services provided by the appellant squarely fall within the ambit of export of services because:

i. *Location of the service provider- The Appellant is located within the taxable territory;*
ii. *Location of the service recipient - The principal place of business of JDSU USA is at 430, North McCarthy Boulevard, Milpitas, CA 95035, USA. In other words, the service recipient is located outside the taxable territory;*
iii. *The services provided by the Appellant to JDSU USA are not covered by the list of negative services;*
iv. *The Appellant is receiving payment in convertible foreign exchange;*
v. *In terms of Rule 3 of the POPS Rules which is the general rule, the place of provision of a service would be the location of the service receiver. Accordingly, the place of provision in this case is outside India.*
vi. *JDSU USA and the Appellant are independent entities.*

23. Further, Rule 3 of POPS Rules provides that the place of provision of services is the location of service recipient. It is to be seen that the services provided by the appellant to JDSU USA does not fall in any of the specific provisions as provided in Rule 4 to 12 of POPS Rules, 2012. Further, the CBEC Education Guide 2012 had made observation with

regard to the application of Rule 3 of POPS Rules which is reproduced herein below:

> *5.3 Main Rule- Rule 3- Location of the Receiver*
> *5.3.1 What is the implication of this Rule?*
> ***The main rule or the default rule provides that a service shall be deemed to be provided where the receiver is located. The main rule is applied when none of the other later rules apply (by virtue of rule 14 governing the order of application of rules- see para 5.14 of this guidance paper). In other words, if a service is not covered by an exception under one of the later rules, and is consequently covered under this default rule, then the receiver's location will determine whether the service is leviable to tax in the taxable territory.***
>
> *The principal effect of the Main Rule is that:-*
> *A. Where the location of receiver of a service is in the taxable territory, such service will be deemed to be provided in the taxable territory and Service tax will be payable.*
> *B.* ***However if the receiver is located outside the taxable territory, no Service tax will be payable on the said service.***
> *(Emphasis supplied)*

24. Considering the above Rules and the instant facts of the case, we are of the considered opinion that the place of provision of business promotion service shall be the location of the recipient of service which is outside India and such services shall qualify as export of service and hence not subject to service tax and this view has been taken by the Tribunal in various decisions stated/ relied upon by the appellant cited supra.

25. Now, coming to the issue of intermediary, it is appropriate to reproduce first the definition of "Intermediary" as provided in Rule 2(f) of the POPS Rules which was applicable before 01.10.2014:

> *"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) between two or more persons, but does not include a person who provides the main service on his account"*
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> *(Emphasis Supplied)*

26. The definition of "Intermediary" which was applicable after 01.10.2014 is reproduced below:

> *"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"*
>
> *(Emphasis Supplied)*

27. From the perusal of the definition of the "Intermediary" during the period prior to 01.10.2014, it only pertained to facilitation of provision of service but facilitation of supply of service was inserted only w.e.f. 01.10.2014. Here it is pertinent to note that the period of dispute in the present case is from October 2013 to March 2014 and the definition of "Intermediary" during that time is applicable wherein the learned Commissioner (Appeals) in the impugned order in Para 7 & 8 has wrongly observed that the appellant is involved in the business promotion of selling of goods, providing of warranties of goods and hence covered under Rule 4 of POPS Rules, 2012 and further held that

service provided by the appellant cannot be treated as export of service. In this regard, it is to be seen that both the authorities have wrongly applied amended definition of "Intermediary" which was made applicable from 01.10.2014 whereas the period of dispute in this case is from October 2013 to March 2014 and therefore the amended definition of "Intermediary" service cannot be applied in the present case. Here we may site few decisions relied upon by the appellant wherein the concept of intermediary service has been considered. Firstly, in the case of Chevron Phillips Chemicals India Pvt Ltd. v. Commissioner of CGST & Central Excise, Mumbai East, 2019-VIL-763-CESTAT-MUM-ST wherein it was observed as under:

> *"16.* ***There is merit in the contention of the appellant that since 'goods' was not covered under the scope of definition of 'intermediary', therefore, for the period prior to 1.10.2014 confirmation of demand is bad in law.*** *I find that the definition of intermediary cannot be made applicable to sale of goods for the period prior to 01.10.2014 in view of the principle law laid down by the Tribunal in Croda India Co. Pvt. Ltd. Vs. CST, Mumbai - 2019 (5) TMI 1139-CESTAT MUMBAI - 2019-VIL-309-CESTAT-MUM-ST. It is observed as :*
>
> *"4.4.12 We cannot agree with the conclusion of the Commissioner, holding the services provided by the Noticee as "intermediary service". From the Rule 2(f) of Place of Provision of Service Rules, 2012, it is quite evident that service provided in relation to sale of goods by a commission agent cannot be classified as intermediary service. We are further supported in our view because para 5.9.6 of the Education Guide issued by the CBEC clearly states:-*
> *…*
> *Thus while it is true that intermediary includes intermediary in respect of sale of goods, but legislature has while framing these rules deemed it fit to exclude the intermediaries in respect of sale of goods from the definition of intermediary. Hence we cannot sustain the view expressed by the*

> *Commissioner, contrary to the express definition of intermediary provided by the Place of Provision of Service Rules, 2012.* ***Hence in our view the services provided by the appellant in respect of the sale of goods of associated group companies cannot be said to be services provided by intermediary as defined by said Rules ibid. Since Rule 9 is applicable to specified services and the services provided in this case being not the intermediary services, this Rule will not be applicable for determination of place of provision of service."***
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> *(Emphasis supplied)*

28. Further, in the case of Lubrizol Advanced Materials India Pvt. Ltd. v. C.C.E. Belapur, 2019 (22) GSTL 355 (Tri.- Mumbai), the Tribunal has held as under:

> ***"6. I find that the Learned Commissioner (Appeals) has denied the benefit of export with effect from 1-10-2014 under the Place of Provision of Services Rules, 2012, holding that the appellant had facilitated supply of goods between its foreign counterpart and processing of goods and thus, it should be considered as an intermediary.*** *On perusal of the contracts, I find that the service fee charged by the appellant to its overseas group entities for provision of service has no direct nexus with the supply of goods by the overseas group entities to its customers in India.* ***Further, the appellant had provided the service to the overseas entities on principal to principal basis. Thus, the appellant cannot be termed as an intermediary between the overseas entity and the Indian customers. It is an admitted fact on record that the consideration received by the appellant for providing the services was based upon cost plus markup and is nowhere connected with the main supply of goods. In otherwords, the main supply may or may not happen and thus, cannot be directly correlated with the service provided by the appellant. Thus, the appellant is not acting as a bridge***

> ***between the overseas group entities and supplies made to their customers in India*** *and accordingly, it cannot be said that the appellant has provided intermediary service and should be governed under the provisions of Rule 9 of the rules."*
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> *(Emphasis supplied)*

29. In the case of Evalueserve.Com (P) Ltd. V. Commissioner of Service-tax, Gurgaon: [2019] 106 taxmann.com 74 (Chandigarh - CESTAT), the Tribunal Chandigarh has held as under:

> *"11. On going 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 principal to principal basis, therefore, the activity undertaken by the appellant does not qualify intermediary as defined in Rule 2(f) of Place of Provision of Services Rules, 2012…"***
>
> *(Emphasis supplied)*

30. In the case of Sunrise Immigration Consulting Private Limited v CCE & ST, Chandigarh 2018-VIL-539-CESTAT-CHD-ST, the Tribunal Chandigarh has held as under:

> *"10. 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.*** *It was held by the authority that the referral services and visa felicitation services provided by Sunrise Immigration Consulting to a foreign-based university qualifies as export of service and not an intermediary service.*
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> *(Emphasis supplied)*

31. After considering the submissions of both the parties and after examining the facts and the relevant clause of the Agreement between the JDSU India and JDSU USA, we hold that the services of business promotion / support and marketing service do not qualify as intermediary service on account of the following key facts:

- *The Appellant provides* ***main service on its own account*** *i.e., business support service and other allied services such as liaising with customers, identification of prospective customer in India on behalf of JDSU USA;*
- *The Appellant provides services to JDSU USA on* ***principal to principal basis****;*

- *The Appellant provides service with the **sole intention of promoting the business of JDSU USA in India;***
- *The Appellant provides **the main services to its client** (i.e., JDSU USA) and not directly to the customers of JDSU USA;*
- *The **privity of contract is between the Appellant and JDSU USA** and payment for rendering the business support service and other allied services is received by the Appellant from JDSU USA.*

32. We also find that in the impugned order both the authorities below have wrongly observed that the appellant is providing technical services whereas, in fact, the appellant has provided promotional/ marketing services and not provided technical services viz. Repair Service, Erection Commissioning and Installation Service to JDSU USA; the said observation in the impugned order is factually erroneous.

33. In view of our discussion above, we are of the considered opinion that the impugned order is not sustainable in law and therefore, we set aside the same by allowing the appeal of the appellant with consequential relief, if any as per law.

(Order pronounced in the open court on 03.06.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

PK