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

% **Judgment reserved on : 29 August 2023**
Judgment pronounced on: 06 September 2023

\+ SERTA 10/2023

COMMISSIONER OF CENTRAL TAX ..... Appellant

Through: Ms. Sonu Bhatnagar, SC along with Ms. Monica Benjamin and Ms. Nishtha Mittal, Advs.

versus

M/S SINGTEL GLOBAL INDIA PVT LTD ..... Respondent

Through: Mr. Kamal Sawhney, Mr. Krishna Rao and Ms. Aakansha Wadhwani, Advs.

\+ SERTA 11/2023

COMMISSIONER OF CENTRAL TAX ..... Appellant

Through: Ms. Sonu Bhatnagar, SC along with Ms. Monica Benjamin and Ms. Nishtha Mittal, Advs.

versus

M/S SINGTEL GLOBAL INDIA PVT LTD ..... Respondent

Through: Mr. Kamal Sawhney, Mr. Krishna Rao and Ms. AakanshaWadhwani, Advs.

\+ SERTA 12/2023

COMMISSIONER OF CENTRAL TAX ..... Appellant

Through: Ms. Sonu Bhatnagar, SC along with Ms. Monica Benjamin and Ms. Nishtha Mittal, Advs.

versus

M/S SINGTEL GLOBAL INDIA PVT LTD ..... Respondent

Through: Mr. Kamal Sawhney, Mr. Krishna Rao and Ms. AakanshaWadhwani, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

DHARMESH SHARMA, J.

1. This common judgment shall decide the above-noted three Service Tax Appeals (for short 'STA') filed by the appellant in terms of Section 35G of the Central Excise Act, 1944[1] read with Section 83 of the Finance Act, 1994[2] along with Section 174 of the Central Goods and Services Tax Act, 2017[3] which are directed against a common Final Order passed by the Customs, Excise and Service and Service Tax Appellate Tribunal[4] dated 07 December 2022. In terms of the said order the CESTAT had dismissed three separate appeals preferred by the appellant viz. STAs Nos. 52609/2019, 52682/19 and 50023/2020 directed against the common order passed by the Commissioner (Appeals). The sum result of the aforesaid orders is that refund claimed by the respondent, M/s. SingTel Global (India) Pvt. Ltd.[5] under Rule 5 of the CENVAT Credit Rules, 2004 read with the Place of Provision of Service Rules, 2012[6], of the unutilized input service credit of input services by SGIPL towards export of telecommunication services to Singapore Telecommunication Limited[7] located in Singapore has been allowed.

FACTUAL BACKGROUND:

2. In order to clarify the factual background, it is relevant to take note that the Commissioner (Appeals) vide order dated 31 January

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[1] CE Act
[2] Fin. Act
[3] CGST Act
[4] CESTAT
[5] SGIPL
[6] POPS Rules
[7] SingTel

2019 upheld the order dated 18 June 2017 passed by the Assistant Commissioner allowing a refund claim of Rs.1,32,70,532/- for the period July, 2015 to September, 2015 in favour of the SGIPL and the appeal filed by the Revenue was dismissed, which was challenged by the appellant in appeal No. 52609/2019.

3. However, in the other two appeals, there is a slight twist to the tale inasmuch as the Assistant Commissioner declined the claim for refund by SGIPL and on challenge the Commissioner (Appeals) vide order dated 05 July 2019 set aside the order dated 23 October 2018 passed by the Assistant Commissioner and allowed the refund claim of Rs. 8,69,82,565/- for the period October, 2015 to December, 2016, which led to filing of appeal No.52682/2019 by the appellant. Similarly, the Commissioner (Appeals) passed an order dated 31 October 2019 thereby setting aside order dated 23 July 2019 passed by the Assistant Commissioner by which refund claim of Rs. 3,30,37,934/- for the period January, 2017 to June, 2017 claimed by the SGIPL was rejected, which led to the appellant filing STA No. 50023/2019. The three appeals were disposed of by the impugned common order dated 07 December, 2022, whereby it was held that SGIPL is not an 'intermediary' and was entitled to refund towards the CENVAT credit for the period in question i.e., July, 2015 to June, 2017.

4. The aforesaid decisions arose in the background of SGIPL, which is a company based in India, being engaged in providing global telecommunication and ancillary support services, and it is claimed that part of its services is also exported. It entered into an agreement

dated 14 July 2011 with SingTel, which is a licensed telecommunications service provider in Singapore. The aforesaid agreement envisaged SGIPL providing necessary infrastructure in India so as to enable SingTel to facilitate seamless global telecommunication services to its customers based in Singapore and other foreign territories.

5. The plea of the appellant in each of the matters as also canvassed before this Court, has been that SGIPL merely procures services from other service providers in India viz., Airtel, Vodafone, Tata, Reliance etc. and supplies the same to Singtel without any alteration; and that SGIPL does not provide the aforesaid services of telecommunications "*on their own account"* and thus fall within the definition of 'intermediary services' on a conjoint reading of Rule 6A(1)(d) of the Services Tax Rules[8] read with Rule 9(C) of the POPS Rules.

6. *Per contra*, SGIPL contends that the place of provision of services would be considered as per the location of the *recipient of services* by virtue of Rule 3 of the ST Rules, which is outside India, and that it is not an 'intermediary'.

7. In a nutshell, learned CESTAT vide the impugned common order dated 07 December 2022 interpreted the terms and conditions of the agreement dated 14 July 2011 executed between SGIPL and SingTel and in light of relevant statutory rules as well as the decision of this Court in the case of **Verizon Communications India Ltd. v.**

[8] ST Rules

Assistant Commissioner of ST, Delhi-III[9] besides the decision of the CESTAT itself in **M/s. Black Rock Service India Private Ltd. v. Commissioner of CGST**[10], held that there was no scope for doubt that services provided by SGIPL do not qualify as 'intermediary services' and the services are provided by it out of its own account to SingTel. Accordingly, SGIPL has been held entitled to claim refund totalling Rs. 13,32,91,031/- for the period July, 2015 to June, 2017 towards CENVAT credit.

8. On filing of the instant appeals before this Court, advance notice was issued to the respondent and the learned counsel for the respondent has opposed the appeals. Ms. Sonu Bhatnagar, learned Standing Counsel for the appellant has vehemently urged that in terms of Rule 9 of the POPS Rules, the place of provision of services is stipulated to be the location of the service provider and on a combined reading of the said provision along with Rule 2(f) of the POPS Rules which defines the expression 'intermediary services', would show that the provisions for 'intermediary services' cannot be considered as export of service particularly when it is considered that SGIPL is merely arranging or facilitating the main service of telecommunication services from the Indian telecom operators to Singtel in its original form and not providing the main service of telecommunication services on their own account, thereby charging handling fee and getting charges reimbursed on actual basis from SingTel.

[9] 2018 (8) GSTL 32 (Del.)
[10] Service Tax Appeal No. 61877/2018 decided on 08 August 2022

9. Learned Standing Counsel has urged that the impugned order passed by the learned CESTAT raises the following issues:-

(a) Whether the services provided by the respondent are covered under 'export of services'?
(b) Whether the services provided by the respondent qualify as 'intermediary services'?
(c) Whether the respondent is entitled to refund of unutilised CENVAT credit under Rule 5 of Cenvat Credit Rules 2004?

10. It was further canvassed that reliance on the decision ***Verizon Communications India Ltd. (supra)*** was misplaced since the SLP filed by the Revenue against the said decision has been admitted for hearing by the Hon'ble Supreme Court. It was also pointing out that **Verizon** India has in fact admitted their liability under Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019[11] and is no longer a party to the pending SLP proceedings. It was urged that the substantial question of law that arises for consideration in the present appeals is also *sub-judice* for consideration before the Apex Court in a batch of SLPs filed by the Revenue as well other concerned parties.

ANALYSIS AND REASONS FOR DECISION

11. Having bestowed our thoughtful consideration to the submissions advanced by the learned counsel for the parties and on perusal of the record, at the outset, we find that the instant appeals preferred by the appellant are devoid of any merits. First things first, although it does appear that the decision in ***Verizon Communications India Ltd. (supra)*** and other connected Writ Petitions have been assailed by the parties concerned before the Apex Court, yet there is no stay order in favour of the department/appellant, and therefore,

[11] SVLDRS

there is no bar in this Court to consider the broad issues raised in the present appeals, for which reference can be made to decisions in **Kunhayammed and Others v. State of Kerala**[12]**,** wherein the legal impact of pendency of the special Leave petition was explained as under:

> "(1) While hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal. The petitioner is still outside the gate of entry though aspiring to enter the appellate arena of the Supreme Court. Whether he enters or not would depend on the fate of his petition for special leave;
> (2) If the petition seeking grant of leave to appeal is dismissed, it is an expression of opinion by the Court that a case for invoking appellate jurisdiction of the Court was not made out;
> (3) If leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in the appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the Court may dismiss the appeal without noticing the respondent.
> (4) In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge."

12. Reverting back to the instant appeals, it would be expedient to take note of the relevant statutory provisions. Rule 6(A) of the ST Rules provides as under:-

> **"6A.Export of services.-**
> (1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-

[12] (2000) 6 SCC 359

(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 establishments of a distinct person in accordance with item(b) of Explanation 3 of clause (44) of section 65B of the Act.
(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification. "

13. Further, Rule 3 of the POPS Rules provides as under:

"3. Place of provision generally.-
The place of provision of a service shall be the location of the recipient of service:
Provided that in case of services other than online information and database access or retrieval services, where 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. "

14. Thus, as per Rule 6(A), the provision of service shall be treated as export of service *when the place of provision of service is outside India*. As per Rule 3 of the POPS Rules, the place of provision of a service shall be the location of the **recipient of service**. However, vide Rule 9(c) of POPS Rules, the place of provision for "Intermediary services" would be the location of the service provider. The term "intermediary" has been defined in rule 2(f) as follows:

"**2(f)** 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."

15. It is pertinent to mention here that vide a communication dated 16 March 2012 by the Department of Revenue (Tax Research Unit), the term "Intermediary" services has been explained as follows:

> **"3.7.7 What are "Intermediary Services"?**
> 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 (commission agent le a buying or selling agent) is excluded by definition.
> In order to determine whether a person is acting as an Intermediary or not, the following factors need to be considered:-
> **Nature and value:** An 'intermediary' cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the 'intermediary' to negotiate a different price. Also, the principal must know the exact value at which the service is supplied (or obtained) on his behalf, and any discounts that the 'intermediary' obtains must be passed back to the principal.
> **Separation of value:** The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging. It can be based on an agreed percentage of the sale or purchase price. Generally, the amount charged by an agent from his principal is referred to as "commission".
> **Identity and title:** The service provided by the intermediary on behalf of the principal are clearly identifiable.
> In accordance with the above guiding principles, services provided by the following persons will qualify as "Intermediary services:-
> (i) Travel Agent (any mode of travel)
> (ii) Tour Operator
> (iii) Stockbroker
> (iv) Commission agent [an agent for buying or selling of goods is excluded
> (v) Recovery Agent

> Even in other cases, wherever a provider of any service acts as an agent for another person, as identified by the guiding principles outlined above, this rule will apply."

16. A careful perusal of Rule 2(f) shows that an entity or person to qualify as an "intermediary" must be shown to work as a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service to be 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 own account. The communication dated 16 March 2012 referred to above, also clarifies that an intermediary service is involved with two supplies at any one time namely:

> (i) the supply between principal and the third party;
> (ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

17. It is borne out from the record that while SingTel is a licensed telecommunication service provider in Singapore and on its own as well through a network of affiliates or suppliers, is engaged in providing telecommunication services to its registered consumers in Singapore and other foreign territories. On the other hand SGIPL, is a licensed provider of certain telecommunication services in India, which has undertaken to ensure seamless global telecommunication services to the customers registered with SingTel in Singapore and elsewhere. At this juncture, it would be expedient to refer to the relevant clauses/stipulations in the agreement dated 14 July 2011 executed between the parties, that read as under:-

"3. Scope of Agreement

3.1 SGIPL agrees to supply and SingTel agrees to procure from SGIPL the Service in accordance with the terms and conditions of this Agreement**.**
3.2 SingTel shall place an order for such Services in the format mutually agreed by both parties from time to time.

4. Responsibilities of SGIPL

4.1 SGIPL shall provide or use its reasonable endeavors to procure Service in India as ordered by SingTel.
4.2 SGIPL shall provide the Services when SingTel's Customers require the services originating in Territories and terminating in India**.**
4.3 SGIPL shall provide at its own expense, all facilities and resources whatsoever necessary to enable SGIPL to provide the Services to SingTel**.**
4.4 SGIPL shall provide to SingTel customer care, customer support (including assistance to a Customer in matters relating telecommunications access, data entry and data retrieval to and from the Services provided hereunder) and other services as may be reasonably required by SingTel from time to time.
4.5 SGIPL shall maintain detailed records and other supporting documentation associated with the provision of the Services.
4.6 SGIPL shall provide the Services in accordance with the terms and conditions of its telecom licenses and all applicable laws**.**
4.7 SGIPL shall bill on SingTel for the Services provided by SGIPL.

5. Responsibility of SingTel

5.1 SingTel shall, whether itself or through its distributors or suppliers, provide, operate, maintain and manage all ILCs and network equipment in the Territories.
5.2 SingTel shall also bear the exchange risk realizable and arising from any transactions transacted in foreign currency and similarly will be remunerated fully for any realised exchange gains attributable to SGIPL.
5.3 When SingTel submits an order for the Services, SingTel must submit a Letter of Undertaking signed by the End User Customer in India In the form attached as [Schedule C) attached.
5.4 SingTel and SGIPL shall each be responsible for all planning, design and capacity management activities required for its respective network, including associated bandwidth, to support the launch and delivery of Services. This includes responsibility for any future enhancements and changes to the network.

6. Charges and Payment

6.1 Service provided by SGIPL will be charged at market prices exclusive of any applicable Indirect tax, which will be separately levied and payable by SingTel**.**

6.2 SGIPL will invoice SingTel for the Services by the end of the month following the month of the provision of Services.

6.3 SingTel will be required to pay such monthly invoices within 30 days of the date of such monthly invoices (or upon such other basis as the parties may mutually agree from time to time).

6.4 The Invoice shall be in US dollars and shall be accompanied by a statement detailing the Services to which the Invoice relates. Any changes to SGIPL's prices must be notified in writing to SingTel and will be applicable to those Services supplied after the date of serving such notice.

6.6 Notwithstanding that the above invoices are rendered, both parties agree that transfer pricing adjustments to prices may be made at any time in order to ensure that prices are at acceptable arm's length in accordance with transfer pricing legislation in the applicable country**.** Such transfer pricing adjustments may be computed on an aggregated basis (rather than identified to a specific transaction). When such adjustments are made by SGIPL to increase the price. SingTel agrees to pay the additional amounts including any applicable Indirect taxes. Where such adjustments result in a lower price, SGIPL will refund the applicable amounts to SingTel.

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19. Independent Contractor

19.1 The Relationship of the parties to this Agreement shall always and only be that of Independent contractors and nothing in this Agreement shall create or be deemed to create a partnership or the relationship of principal and agent or employer and employee between the parties."

18. On a careful perusal of the terms and conditions of the aforesaid Agreement dated 14 July 2011 between SingTel and SGIPL, we find no legal infirmity or irrational approach adopted by the learned CESTAT when it comes to conclude that SGIPL is not providing 'intermediary services'. The plea that SGIPL is not providing any services *on its own account* is misplaced. It is manifest that there is no contract between SingTel and service providers in

India like Airtel, Vodafone, Reliance etc., and the agreement between SGIPL and SingTel is on principal-to-principal basis. Indeed, SGIPL has entered into separate contracts with the telecom operators in India but on its own account and not as in the nature of a broker or agent for SingTel. The above-referred communication dated 16 March 2012 also supports such a disposition. The agreement envisages that SGIPL has to provide, at its own expenses, all necessary infrastructure in order to provide the services to SingTel and its customers. It further envisages that SGIPL shall raise invoices upon SingTel in US dollars for the services rendered on a monthly basis and on such transfer prices as may be agreed upon from time to time. Clause 19 of the Agreement specifically stipulates that the relationship of the parties to the Agreement shall always and only be that of independent contractors and nothing in the Agreement shall create or be deemed to create a partnership or the relationship of principal and agent or employer and employee between the parties. Incidentally, the appellant has not even alleged that the aforesaid agreement is a camouflage, fraudulent or designed to get over the service tax dragnet.

19. In the end, in so far as the decision in ***Verizon Communications India Ltd. (supra)***, the factual narration reads that Verizon India had entered into a Master Supply Agreement with Verizon US for rendering connectivity services for the purpose of data transfer to the end user based in USA. The issue that came to be was addressed by the Co-ordinate Bench was: whether the telecommunication services provided by Verizon India for the period in question amounted to 'export of services' within the meaning of Rule 6(A) of the ST Rules.

This was answered in the affirmative. It was held that since the recipient of the service Verizon US was outside India, Verizon India rightly treated it as an 'export of service' and accordingly it was exempted from the liability of paying service tax. It was pointed out that the 'recipient' of services is determined by the contract between the parties and this would depend on who has the contractual right to receive the services and who is responsible for the payment for the services provided to the service recipient; there was no privity of contract between Verizon India and the customers of Verizon US; while such customers may be 'users' of the services provided by Verizon India but were not its recipients; even though Verizon India may have been using the services of a local telecom operator but that would not mean that the services to Verizon US were being rendered in India; and the place of provision of such service to Verizon US remains outside India. It is pertinent to mention that a reference was made to the decision of the Apex Court in the case of **All India Federation of Tax Practitioners v. Union of India**[13], wherein the nature of service tax was explained and it was observed that:

> "6. At this stage, we may refer to the concept of "Value Added Tax" (VAT), which is a general tax that applies, in principle, to all commercial activities Involving production of goods and provision of services. VAT is a consumption tax as It is borne by the consumer.
> 7. In the light of what is stated above, it is dear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax".

[13] 2007 (7) STR 625 (SC)

20. Without further ado and applying the same analogy to these matters, we find that the submissions advanced by the learned Standing counsel for the appellant overlooks the fact that the recipient of services is based outside India. At the cost of repetition it may be stated that SGIPL apart from facilitating main service of telecommunication services also provides services of customer care and customer support services to the end consumers based in Singapore and foreign territories registered with SingTel Singapore in matters relating to telecommunication, access, data entry and data retrieval. SingTel has no contract with telecom service providers in India and the end consumers are based in Singapore and other foreign territories covered by SingTel and are independently entitled to demand service from SingTel and pay for the services accordingly to it too.

21. Before parting with the instant appeals, our attention has been drawn to the earlier round of litigation between the parties with regard to refund applications moved by SGIPL under Section 11B of the CE Act as made applicable to the Service Tax vide Section 83 of the Fin. Act and which had led to a decision by a Co-ordinate Bench of this Court in **SingTel Global (India) Pvt. Ltd. v. Union of India**[14] whereby for the same period i.e. July, 2015 to June, 2017 after the appeal was allowed by the Commissioner (Appeals) vide order dated 05 July 2019 (subject matter of ST Appeal No. 56682/19), the Assistant Commissioner while processing the claim of SGIPL for

[14] WP (C) No. 8876/2021 decided on 14.12.2022: (2023) 2 centax 203 (Del)

refund of input tax for the aforesaid rather questioned the decision of the Commissioner (Appeals) in allowing the claim of the SGIPL for unutilized CENVAT Credit *inter alia* observing that the decision in ***Verizon Communications India Ltd. (supra)*** was flawed and there was already an appeal pending against the view expressed therein before the Apex Court. Suffice it to note that the said action on the part of the Assistant Commissioner in trying to overreach the orders passed by the superior authority was deprecated by our Court and *inter alia* a passing reference was made that the view that SGIPL is a provider of 'intermediary services' was not correct and there was no option but for the Revenue to await the outcome of the appeals preferred by them before the learned CESTAT. It was simultaneously observed that by that time even the learned CESTAT had also dismissed the appeals, presumably vide the impugned order dated 07 December 2022.

22. In view of the aforesaid discussion, we find that the present appeals are bereft of any merit. Accordingly, the same are dismissed.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

September 06, 2023
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