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

% *Date of Decision: 01.09.2023*

+ W.P.(C) 11413/2023

XILINX INDIA TECHNOLOGY
SERVICES PVT LTD

..... Petitioner

Through: Ms. Ashwini Chandrasekaran &
Ms. Priyanka Rathi, Advs.

Versus

THE SPECIAL COMMISSIONER
ZONE VIII & ANR.

..... Respondents

Through: Mr. Rajeev Aggarwal, Adv.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The petitioner has filed the present petition, *inter alia*, impugning the Refund Rejection Order dated 08.06.2023 (hereafter '**the impugned order**') whereby the petitioner's application for refund of Integrated Goods & Service Tax (IGST) amounting to ₹1,83,34,289/- was rejected.

2. The petitioner is a company incorporated under the Companies Act, 2013. It has its registered office in Hyderabad, Telangana and branch office in New Delhi. The petitioner is a subsidiary of Xilinx Inc., USA, a company registered in the United States of America. The petitioner is an Export Oriented Unit (hereafter '**EOU**') registered



with the Software Technology Parks of India (hereafter ‘**STPI**’) and is primarily engaged in exporting information technology software services to entities located overseas.

3. The petitioner entered into an Intercompany Service Agreement (hereafter ‘**the Agreement**’) dated 10.06.2016 with its holding company (Xilinx USA) for export of information technology services. In terms of the Agreement, it was agreed that the petitioner would be remunerated on costs plus 15% mark-up basis.

4. The respondents proposed to reject the petitioner’s application for refund of IGST and issued a show cause notice dated 18.01.2023. The said show cause notice indicates that the petitioner’s claim was proposed to be rejected on the ground that it did not satisfy the condition as laid down in condition (v) of Section 2(6) of the Integrated Goods & Service Tax Act, 2017 (hereafter ‘**the IGST Act**’), namely, “*that the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8*”.

5. The respondents also set out the Explanation I to Section 8 of the IGST Act, which is reproduced below:

“Explanation 1. —For the purposes of this Act, where a person has, —

- (i) an establishment in India and any other establishment outside India;
- (ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or
- (iii) an establishment in a State or Union territory and any other establishment registered



within that State or Union territory,

then such establishments shall be treated as establishments of distinct persons.”

6. According to the respondents, the petitioner and its holding company are establishments of a single person and therefore the services provided by the petitioner to its holding company did not constitute as export of services within the meaning of Section 2(6) of the IGST Act.

7. The petitioner responded to the said show cause notice clearly explaining that it was an independent company incorporated in India and its supplies to its holding companies were required to be considered as export of services. The petitioner also referred to Circular dated 20.09.2021 (Circular No.161/17/2021-GST) issued by Central Board of Indirect Taxes & Customs (hereafter ‘CBIC’). The said circular expressly clarifies that supply of services by a subsidiary/sister concern/group concern of a foreign company, which is incorporated in India under the Companies Act, 2013 by the establishments of the said foreign company located outside India would not be barred by condition (v) of Section 2(6) of the IGST Act.

8. The petitioner also set out the relevant paragraphs of the said circular in its response to the Show-cause notice. However, the respondents, without alluding or referring to the said circular, simply rejected the petitioner’s application for refund on the same ground as stated in the show cause notice. The respondents, after referring to the provisions of Section 2(6) of the IGST Act also mentioned that the petitioner was an intermediary in terms of Section 13 of the IGST Act



read with Circular dated 18.07.2019.

9. The petitioner is a separate entity and it is settled law that identity of an incorporated company is separate from that of its shareholders. This fundamental proposition was reiterated by the Constitution Bench of the Supreme Court in ***Bacha F. Guzdar v. Commissioner of Income-Tax: AIR 1955 SC 74.***

10. The services rendered by a subsidiary of a foreign company to its holding are not covered under Section 2(6)(v) of the IGST Act and the same is beyond any pale of controversy in view of the Circular dated 20.09.2022 issued by the CBIC. The said circular, in unambiguous terms, clarifies as under:

“5.1 In view of the above, it is clarified that a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate persons under CGST Act, and thus are separate legal entities. Accordingly, these two separate persons would not be considered as “merely establishments of a distinct person in accordance with Explanation I in section 8”.

5.2 Therefore, supply of services by a subsidiary/ sister concern/ group concern, etc. of a foreign company, which is incorporated in India under the Companies Act, 2013 (and thus qualifies as a 'company' in India as per Companies Act), to the establishments of the said foreign company located outside India (incorporated outside India), would not be barred by the condition (v) of the sub-section (6) of the section 2 of the IGST Act 2017 for being considered as export of services, as it would not be treated as supply between merely establishments of distinct persons under Explanation I of section 8 of IGST Act 2017. Similarly, the supply from a company incorporated in India to its related establishments outside India, which are incorporated under the laws outside India, would not be treated as supply



to merely establishments of distinct person under Explanation 1 of section 8 of IGST Act 2017. Such supplies, therefore, would qualify as ‘export of services’, subject to fulfilment of other conditions as provided under sub-section (6) of section 2 of IGST Act.”

11. It is clear from the above that the impugned order has been passed without application of mind and in disregard of the provisions of law. The relevant circular was brought to the notice of the respondents by the petitioner. But respondent no.1 completely ignored the same and proceeded to pass the order mechanically.

12. Although, it is mentioned that the petitioner is an intermediary but there is no ground whatsoever for holding the said view. The terms of the Agreement are unambiguous. The petitioner has provided services on principal-to-principal basis. The services provided by the petitioner are on its own count and not facilitated by provision of services from any third-party services provider. As stated above, the petitioner is a registered EOU for the services as exported by it.

13. We, accordingly, allow the present petition and direct the respondents to forthwith process the petitioner’s claim for refund along with interest.

14. We also express our displeasure in respect to the cavalier manner in which respondent no.1 has passed the impugned order without considering the settled law and the Circular dated 20.09.2021 issued by the department despite the same being brought to its notice. Such orders, apart from unnecessarily increasing the burden of tax litigation, have a debilitating effect on the confidence of taxpayers in the tax department.



15. The petition is disposed of with the aforesaid observations.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

SEPTEMBER 1, 2023

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