
(2023) 08 DEL CK 0164

In the Delhi High Court

Case No : Civil Writ Petition No. 14427, 14461 Of 2022, 6014 Of 2023

M/S Cube Highways And Transportation Assets Advisor
Private Limited

APPELLANT

Vs

Assistant Commissioner Cgst Division & Ors.

RESPONDENT

Date of Decision : 17-08-2023

Acts Referred:

Place of Provision of Services Rules, 2012 — Rule 2(f)
Central Goods and Services Tax Act, 2017 — Section 2(84), 17(5), 54, 107 Integrated
Goods and Services Tax Act, 2017 — Section 2(6), 2(13), 8, 13(1), 13(2), 13(3), 13(3)
(b), 13(4), 13(7), 13(7)(b), 13(8), 13(8)(b), 13(13)

Citation : (2023) 08 DEL CK 0164

Hon'ble Judges : Vibhu Bakhru, J; Amit Mahajan, J

Bench : Division Bench

Advocate : Tarun Gulati, Kishore Kunal, Parth, Shakaib Khan, Shubham Bajaj, R.
Ramachandran

Final Decision : Allowed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petitions impugning the orders passed by the Appellate Authority (respondent no.2) rejecting the appeals preferred by the petitioner against the orders passed by the Adjudicating Authority (respondent no.1).

2. The principal issue involved in these petitions are common. The controversy, essentially, relates to whether the services rendered by the petitioner to I Squared Asia Advisors Pte. Ltd., a company having its principal place of the business in Singapore (hereafter referred to as 'I Squared') in terms of the Amended Support Service Agreement dated 06.06.2015 (hereafter 'the Agreement') constitutes export of services. The petitioner claims that the services rendered by it are export of services because I Squared, the service recipient, is located overseas. However, the respondent authorities have held, on

varying grounds, that services provided by the petitioner do not qualify as 'export of services' as the place of supply of services is in India.

Factual Context

3. The petitioner is a company incorporated under the Companies Act, 2013. It is engaged in the business of rendering investment advisory services related to the investment by non-resident group companies in the target companies in India, which are engaged in the transportation sector. The petitioner and I Squared belong to the same group of companies. The petitioner had entered into a Support Service Agreement on 30.05.2015 with I Squared. The scope of services to be provided under the said agreement were subsequently altered, therefore, the said agreement was terminated and the parties (the petitioner and I Squared) entered into the Amended Support Service Agreement on 06.06.2015 (the Agreement). In terms of the Agreement, the petitioner agreed to provide Advisory Support Services as mentioned in the Agreement, the parties agreed that the petitioner would be remunerated at an arm's length price to be determined on cost-plus markup basis.

4. The services rendered by the petitioner were accepted as 'export of services' by the Revenue under the Finance Act, 1994 (Pre-GST Regime) and the Input Tax Credit (hereafter 'ITC') was refunded to the petitioner as claimed.

5. The petitioner filed its applications for refund of unutilized ITC for the financial years 2018-19 to 2020-21, which were rejected. The claims are subject matter of the present petitions.

Proceedings for the Financial Year 2018-19, subject matter of the W.P.(C) 14461/2022

6. The petitioner filed an application on 13.07.2020 seeking refund of unutilized ITC on export of services amounting to ₹ 26,52,799/-relating to the tax period April 2018 to March 2019 under Section 54 of the Central Goods and Services Tax Act, 2017 (hereafter 'the CGST Act').

7. The Adjudicating Authority issued a show cause notice dated 18.07.2020 proposing to reject the petitioner's claim for refund for the following reasons:

- "i. Place of provision appear to be in India;
- ii. Refund claims in respect of remittances received on or before 13.07.2018 is time barred;
- iii. difference in the value of supply as reflected in GSTR-1, GSTR-3B vis a vis RFD-01 and remittances received during 2018-19; and
- iv. refund claimed in respect of capital goods and construction activities, repair and maintenance, rent-a-cab etc. not admissible under Section 17(5) of the CGST Act."

8. The petitioner responded to the said show cause notice contesting the reasons

for proposing rejection of its claim. Insofar as the place of supply of services is concerned, the petitioner responded as under:

"In this respect, we would like to reiterate that the Company is engaged in the provision of Management Consultancy services in the nature of Investment Advisory and Marketing Survey and Advisory services to entities located outside India. The Company provides update on market information, market trends and businesses, legal and regulation information/ environment in India to entities outside India. Its services inter-alia includes identifying potential opportunities for investments in India, analysing investment returns and related risks, preparing report etc. basis which the overseas entity make a decision whether to make a particular investment or not."

9. The petitioner claimed that although it had provided the services from its registered place of business in Delhi, the place of supply of services was required to be considered to be overseas by virtue of Sub-section (2) of Section 13 of the Integrated Goods and Services Tax Act, 2017 (hereafter 'the IGST Act') as the location of the recipient of the service was overseas.

10. Insofar as the other grounds for proposing rejection of the petitioner's claim is concerned, the Adjudicating Authority was satisfied with the petitioner's response. The same are not subject matter of controversy in the present petitions. The petitioner's claim for refund was rejected by the Adjudicating Authority by an order dated 15.08.2020 on the sole ground that the place of supply of services was in India and therefore, the services rendered could not be considered as export of services. The relevant extract of the impugned order denying the said refund is set out below:

"I find that the taxpayer fails to provide the documentary evidence as to what type of Investment Advisory / Market Survey and Advisory Services were provided to their foreign counterpart. The service recipient has made the expenditure at large volume but, on the basis of advisory provided by the taxpayer, where the service recipient has invested the amount for their trade promotion. Thus, it is nothing but the services provided by the taxpayer to the customers of service recipient and, thus, squarely covers under the ambit of 'Intermediary services'. Therefore, the place of provision will be in taxable territory.

Thus, I observe that the taxpayer is providing bundle of services of which primary and main element is business support services and the said supply of service fall under Sub-section (3) to (13) of Section 13 of the IGST Act. Hence, place of supply of such services will be within India in view of Section 13(8) of the IGST Act. My views are also supported with the order dated 26.07.2018 pronounced by the Maharashtra Authority of Advance Ruling in the case of Sabre Travel Network India Pvt. Ltd.

Hence, I find that (i) the supplier of service is located in India, (ii) the recipient of service is located outside India, (iii) the place of supply of service is within

India, (iv) the payment for such service has been received by the supplier of service in convertible foreign exchange and (v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with explanation I in Section 8 of IGST Act. Hence, as per Section 2(6) of the IGST Act, the supply of service will not be treated as "export of service".

11. Aggrieved by the said order, the petitioner filed an appeal under Section 107 of the CGST Act before the Appellate Authority which was rejected by an order dated 29.03.2022. The Appellate Authority noted the scope of services as specified under Article 3 of the Agreement and observed that the petitioner was engaged in providing support services on behalf of I Squared regarding information of the Indian market for identifying potential opportunities / customers. The Appellate Authority held that the petitioner was engaged in rendering services for furtherance of the business for the foreign entity, which was investing in "large volume" through the petitioner. The Appellate Authority also observed that the petitioner was providing services to customers of the service recipient and held that the petitioner was an 'Intermediary' under Sub-section (13) of Section 2 of the IGST Act. Thus, the services rendered were considered to be 'Intermediary Services'. Paragraph 5.5 and paragraph 5.6 of the findings of the learned Appellate Authority are relevant and are set out below:

"5.5 I also observe from the agreement that the appellant, as an agent, identifies potential opportunities, provides analytical, operational support and market information in India for his principal's output. The appellant, in his submissions to the appeal document, stated that the services, being provided to the entities outside India, inter-alia includes identifying potential opportunities for investments in India, analyzing investment returns and related risks, preparing report etc.

5.6 Therefore, in view of the above, I find that the appellant is performing these activities in India in his liaison capacity and the person, acting in liaison capacity, has to act as go-between his principal and his principal's customers which are opportunities for investments' in the instant case. Thus, these activities of the appellant are clearly in the nature of arranging or facilitating supply by the foreign entity in the taxable territory i.e. India and these activities are to be considered as intermediary services as defined in section 2(13) of IGST Act, 2017 as under:

"(13). 'intermediary' means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account."

12. Aggrieved by the said order, the petitioner has filed the present petition [W.P.(C) 14461/2022].

Proceedings for the Financial Year 2019-20, subject matter of the W.P.(C)

14427/2022

13. The petitioner had filed an application dated 22.07.2021 seeking refund of ITC amounting to ₹ 60,64,843/- in respect of the financial year 2019-20 under Section 54 of the CGST Act. The petitioner received a show cause notice dated 18.08.2021 proposing to reject the petitioner's claim for refund inter alia on the ground that the place of supply of services was in India. The Adjudicating Authority referred to the invoices raised by the petitioner that reflected the place of supply as Delhi and drew support from the same. In addition, the show cause notice also mentioned that on scrutiny of documents, it appeared that the petitioner was acting as an 'Intermediary' in terms of Sub-section (13) of Section 2 of the IGST Act.

14. The petitioner replied to the show cause notice on 02.09.2021 reiterating its stand as in the previous year.

15. The Adjudicating Authority rejected the petitioner's claim for refund by an order dated 21.09.2021, inter alia, on the ground that the services rendered were covered in Sub-section (3)(b) and Sub-section (4) of Section 13 of the IGST Act. According to the Adjudicating Authority, the place of supply of service was the location where services were actually performed as services supplied to an individual, which required physical presence of the recipient or a person acting on his behalf for supply of service in India. The Adjudicating Authority also reasoned that the petitioner was "rendering services in relation to immovable property viz. roads, tolls, etc.", which were covered by under Sub-section (4) of Section 13 of the IGST Act. In addition, the Adjudicating Authority also observed that the petitioner was rendering services only to I Squared and was not providing services to any other company. It also observed that "The service agreement has substantively every term and condition to make the taxpayer act as a facilitator of their services and products for their customers." Accordingly, the Adjudicating Authority held that the petitioner was an 'Intermediary' and the place of supply of services provided by it were in India.

16. The petitioner appealed against the said decision. The Appellate Authority upheld the decision of the Adjudicating Authority and rejected the petitioner's appeal. The Adjudicating Authority also observed that Cube Highways Group of Companies was engaged in construction of highways, toll operations etc. in India. And the services provided by the petitioner were in relation to immovable property in India being the roads, tolls etc. The Appellate Authority further held that such activities required the physical presence of the recipient, and the recipient was represented by the petitioner. The Appellate Authority also held that in terms of Sub-section (3)(b) and Sub-section (4) of Section 13 of the IGST Act, the place of supply of services by the petitioner were in India.

Proceedings for the Financial Year 2020-21, subject matter of the W.P.(C) 6014/2023

17. The petitioner filed an application dated 12.04.2022 seeking refund of ITC

amounting to ₹ 36,70,056/- for financial year 2020-21 under Section 54 of the CGST Act. A show cause notice dated 06.05.2022 was issued by the Adjudicating Authority, proposing to reject the petitioner's claim for refund inter alia on the ground that the place of supply of services was in India. The Adjudicating Authority stated that certain invoices on which ITC was claimed were not reflected in the returns filed in form GSTR-2A of the petitioner. In addition, the Adjudicating Authority also observed that the petitioner rendered services in relation to immovable property in India, therefore its activities were not covered under Sub-section (6) of Section 2 of the IGST Act. The petitioner responded to the show cause notice on 30.05.2022 and its response was the same as in previous years.

18. The petitioner's claim for refund was rejected by the Adjudicating Authority by an order dated 03.06.2022, inter alia, on the ground that the services rendered by the petitioner were covered under Sub-section (3)(b) and Sub-section (4) of Section 13 of the IGST Act. According to the Adjudicating Authority, in case of services supplied to an individual, which require physical presence of the recipient or a person acting on his behalf for supply of service, the place of supply of service would be the location where services were actually performed. The Adjudicating Authority observed that the petitioner was "rendering services in relation to immovable property viz. roads, tolls, etc.", which were covered under Sub-section (4) of Section 13 of the IGST Act. The Adjudicating Authority also reasoned that since the immovable property was situated in India, the services rendered in relation to those properties also required physical presence of the recipient. This was also corroborated by the invoices disclosing the place of services as 'New Delhi'. Accordingly, the Adjudicating Authority held that the place of services rendered by the petitioner were in India and did not qualify as export of services under Sub-section (6) of Section 2 of the IGST Act.

19. The petitioner filed an appeal before the Appellate Authority against the said order. By an order dated 24.02.2023, the Appellate Authority upheld the decision of the Adjudicating Authority. The Appellate Authority referred to Clause 3 of the Agreement and observed as under:

"6.2 From the above, I find that the appellant is engaged in providing marketing support services, regarding information of Indian market to identify potential opportunities in India, for and on behalf of I Squared Asia Advisors Pte. Ltd. As such, the appellant is engaged in rendering services which are for furtherance of business of the foreign entity as is evident from clause 3.7 of the agreement. As per para 3 read with clause 1.3 of the agreement, these services have been rendered by the appellant in the taxable territory i.e. India. I also find that the appellant is acting as a communication channel for I Squared Asia which is definitely with the prospective customers in India."

20. In addition, the Appellate Authority held that the petitioner was providing services on behalf of a foreign entity yet the place of supply of services was in

the taxable territory, that is, India.

21. The Appellate Authority referred to the submissions filed by the petitioner and noted that the said services were in relation to construction, operation and maintenance of roads and tolls and concluded as under:

"6.4 From the conjoint reading of the nature of services, as given in the service agreement, and the submissions made by the appellant, I find that the appellant has provided their services to M/s I Squared Asia Pte. Ltd. directly in relation to immovable property. M/s I. Squared Asia Pte. Ltd. has appointed the appellant to provide the services for better understanding and upkeep the construction and operation of roads and tolls in India. Therefore, the place of supply of these services is clearly to be decided by invoking the provisions of section 13(4) of IGST Act, 2017 where the place of supply of these services shall be the place where the immovable property is located or intended to be located which is, in the appellant's case, in the taxable territory i.e. India. It is relevant to mention here that section 13(1) of the IGST Act, 2017 specifically states that the provisions of this section (i.e. section 13) shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India. As such the appellant's submissions, that the place of supply of their services supplied to I Squared Asia cannot be determined under section 13(4) of IGST Act, hold no ground."

22. The Appellate Authority also found that the place of supply was in India in terms of Section 13(3)(b) of the IGST Act. The Appellate Authority referred to the said provision and concluded as under:

"7.2 I find that the appellant has provided marketing support services in India specifically for and on behalf of M/s I Squared Asia Pte. Ltd. for furtherance of their business of M/s I Squared Asia Pte. Ltd. in India. I find that for a service for which the place of supply has to be interpreted under section 13(3)(b) of the IGST Act, 2017, it should first be supplied to an individual. I find that the term 'individual' has the meaning of the 'person' which is defined in section 2(84) of the CGST Act, 2017 and also includes a Hindu Undivided Family, a Company, a Firm, a Limited Liability Partnership, an Association of Persons or Body of Individuals, any Body Corporate incorporated by or under the laws of a country outside India, etc.

7.3 I find that the appellant has provided services to M/s I Squared Asia Pte. Ltd., Singapore by representing themselves physically or otherwise or by acting on behalf of M/s I Squared Asia Pte. Ltd. in India. Therefore, I find that the contentions of the appellant that the services are provided by way of reports/deliverables which are directly sent to I Squared Asia which do not require physical presence of any individual hold no ground as the term 'individual' has the same meaning as of 'the Company' or 'a Body Corporate incorporated under the laws of a country outside India. As such, I conclude that the provisions of section 13(3)(b) of the IGST Act, 2017 shall also apply in the appellant's case to

determine the place of supply.”

23. Thus, according to Appellate Authority, Sub-section (3)(b) and Sub-section (4) of Section 13 of the IGST Act would be applicable to the petitioner’s case and the place of supply of services by the petitioner is in India.

Reasons & Conclusion

24. As is apparent from the above, the petitioner was denied refund of ITC on, essentially, three grounds. First, that the petitioner is an ‘Intermediary’ in respect of the services provided by it to I Squared, in terms of Sub-section (13) of Section 2 of the IGST Act; therefore, in terms of Sub-section (8)(b) of Section 13 of the IGST Act, the place of supply of service is in India, as the petitioner is located in India. Consequently, the services rendered by the petitioner did not qualify as export of services under Sub-section (6) of Section 2 of the IGST Act. Second, that the place of supply of services provided by the petitioner was in India by virtue of Sub-section (3)(b) of Section 13 of the IGST Act. And third, that the place of supply of services provided by the petitioner was in India by virtue of Sub-section (4) of Section 13 of the IGST Act.

25. The provisions of Section 13 of the IGST Act, which provide for the place of supply of services, as are relevant to the present petitions, are set out below:

“13. (1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

(3) The place of supply of the following services shall be the location where the services are actually performed, namely:—

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(b) services supplied to an individual, represented either as the recipient of services or a person acting on behalf of the recipient, which require the physical presence of the recipient or the person acting on his behalf, with the supplier for the supply of services.

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(4) The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or

interior decorators, shall be the place where the immovable property is located or intended to be located.

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(8) The place of supply of the following services shall be the location of the supplier of services, namely:--

*** **

(b) intermediary services;"

26. Sub-section (6) of Section 2 of the IGST Act, which defines the expression "export of services" is set out below:

"2. In this Act, unless the context otherwise requires, --

*** **

(6) "export of services" means the supply of any service when,--

(i) the supplier of service is located in India;

(ii) the recipient of service is located outside India;

(iii) the place of supply of service is outside India;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India; and

(v) 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;"

27. Sub-section (13) of Section 2 of the IGST Act defines the term "Intermediary" and is reproduced below for ready reference:

"2. In this Act, unless the context otherwise requires, --

*** **

(13) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account;"

28. The principal questions to be addressed are whether in the context of services rendered by the petitioner to I Squared under the Agreement, the petitioner is an 'Intermediary' and its services are covered under Sub-section (8) (b) of Section 13 and / or under Sub-section (4) of Section 13 and / or under Sub-section (3)(b) of Section 13 of the IGST Act.

29. In addition, it is also the petitioner's case that the orders passed

by the Adjudicating Authority and the Appellate Authority have travelled beyond the show cause notices and therefore, are liable to be set aside.

30. Mr. Ramachandran, learned counsel for the respondents submitted that the petitioner and I Squared are group companies of I Squared Capital, which is a subsidiary of Abu Dhabi Investment Authority, International Finance Corporation and a consortium of Japanese investors. The said group has nineteen projects in India with a long-term concession to build toll highways on BOT (Build, Operate and Transfer) basis. The said concessions span over twenty to thirty years. He also submitted that the petitioner had agreed to supply services in India and it was not clear from the invoices as to the nature of services provided. He stated that the Adjudicating Authority was required to call for more information and documents to ascertain the true nature of services before arriving at any conclusion and therefore, the matters ought to be remanded back to the Adjudicating Authority to consider afresh. He stated that orders have been passed in other cases remanding the matters for re-adjudication in the light of the earlier decision rendered by this Court in *M/s Ernst & Young Ltd. v. Additional Commissioner, CGST Appeals-II, Delhi & Anr.*:2023:DHC:2116-DB. He also referred to such orders passed in *Bharat Sanchar Nigam Ltd. v. Union of India & Ors.*:2023:DHC:2482-DB and in *M/s GAP International Sourcing (India) Pvt. Ltd. v. Additional Commissioner CGST Appeals-II & Ors.*:W.P.(C) No.11399/2022 dated 01.05.2023.

31. Mr. Gulati, learned senior counsel appearing for the petitioner contested the aforesaid submissions. He contended that there was no dispute as to the nature of services rendered by the petitioner. He submitted that petitioner had filed responses to the show cause notices setting out the nature of services and also provided a copy of the Agreement with I Squared in terms of which services were rendered. He pointed out that the Appellate Authority had also alluded to the nature of services in the impugned orders. Thus, there was no requirement for remanding the matters for re-adjudication as the controversy involved was squarely covered by the decisions of this Court in *M/s Ernst & Young Ltd. v. Additional Commissioner, CGST Appeals-II, Delhi & Anr.* (supra) and *M/s Ohmi Industries Asia Pvt. Ltd. v. Assistant Commissioner, CGST*:2023:DHC:2440-DB.

32. Before proceeding further, it would be relevant to note that there is no real dispute that the services rendered by the petitioner are covered under the Agreement. It was contended on behalf of the Revenue that petitioner is a part of a group of companies, and some of those companies have projects in India; however, there is no material on record, which even remotely suggests that petitioner had rendered any services other than advisory services. The petitioner had claimed refund of accumulated ITC in respect of export of services to I Squared under the Agreement and there is no material indicating that those services were other than advisory services.

33. At this stage, it would be relevant to refer to Clauses 2 and 3 of the Agreement relating to appointment of service provider and the scope of services.

The same are set out below:

"2. Appointment of Service Provider

I Squared Asia hereby engages Cube Highways India to render Advisory Support Services to I Squared Asia (collectively, the "Services") subject to the terms and conditions of this Agreement and scope of services as specified in Section 3 of this Agreement.

The Parties agreed that Cube Highways India is and at all times shall be an independent service provider, contracting with I Squared Asia on principal-to-principal basis and is not intended to be an agent or partner of the I Squared Asia.

3. Scope of Services

Cube Highways India shall provide services to I Squared Asia related to transportation sector in India. The scope of services would be as follows:

3.1 Providing update on market information, market trends & business and legal regulations.

3.2 Providing assistance in identifying potential opportunities in India consistent with the parameters and guidance provided by I Squared Asia from time to time and under communication of the same to I Squared Asia.

3.3 Providing I Squared Asia with advices and suggestions with respect to the financial feasibility and viability of any proposed project.

3.4 Providing analytical support and support for completing due diligence.

3.5 Acting as a communication channel for I Squared Asia as may be requested by I Squared Asia on a time to time basis.

3.6 Providing management advisory, management consulting and operational support services.

3.7 Providing such other services in furtherance of the foregoing, as I Squared Asia may reasonably request.

The Parties agree and acknowledge that at all times during the Term of this Agreement, Cube Highways India staff shall remain employees of Cube Highways India, both legally and economically. The employees of Cube Highways India shall never be considered as employees of I Squared Asia.

As stated above in the scope of services, the role of Cube Highways India shall always remain that of service provider and I Squared Asia shall solely take its decisions. At its own discretion, I Squared Asia may communicate the same to Cube Highways India for further communication.

I Squared Asia shall have sole and exclusive right to either accept or reject any proposal or any request and Cube Highways India shall have no say in exercise

of such decision.

Cube Highways India at no point in time can represent or reflect to anyone that it has the authority to negotiate and conclude any terms on behalf of I Squared Asia or its affiliates in this regard or that it can decide on acceptance / rejection of a project/ contract on behalf of I Squared Asia or its affiliates”

34. It is apparent from Clause 2, stated hereinabove, that petitioner at all time was required to act as an independent service provider and the Agreement with I Squared was on principal to principal basis. It was expressly specified in the said Clause that the petitioner is not intended to be an agent or partner of I Squared. Similarly, the last paragraph of Clause 3 of the Agreement clearly states that the petitioner could at “no point in time can represent or reflect to anyone that it has the authority to negotiate and conclude the terms on behalf of I Squared or its affiliates”.

35. The first show cause notice – relating to Financial Year 2018-19 neither contained any allegation that the petitioner was an ‘Intermediary’ nor raised any question regarding the nature of services rendered by the petitioner. No doubt was raised that the services rendered by the petitioner were not those as claimed by the petitioner. However, the Adjudicating Authority had rejected the petitioner’s claim for refund on the ground that it was rendering ‘Intermediary Services’. The Adjudicating Authority had referred to Clause 3 of the Agreement and also noted the petitioner’s submission that it was engaged in providing Management Consultancy Services in the nature of Investment Advisor, Market Survey and Advisory Services to entities located outside India. It was explained that the petitioner provides updates on market information, market trends and businesses, legal and regulatory information / environment in India.

36. The Adjudicating Authority concluded that the petitioner was rendering ‘Intermediary Services’. It reasoned that “.....The service recipient has made the expenditure at large volume but, on the basis of advisory provided by the taxpayer, where the service recipient has invested the amount for their trade promotion. Thus, it is nothing but the services provided by the taxpayer to the customers of service recipient and, thus, squarely covers under the ambit of ‘Intermediary services’.....”.

37. It is not easy to discern the import of the aforesaid reasoning of the Adjudicating Authority. However, it does appear that the Adjudicating Authority had proceeded on the basis that since the service recipient had invested amounts on the basis of advisory services rendered by the petitioner, the services provided by the petitioner were to customers of I Squared and therefore the petitioner was an ‘Intermediary’. Plainly, the said reasoning is fundamentally flawed. Merely because I Squared may have, on the basis of advisory services given by the petitioner, made the investments in entities in India, cannot be construed to mean that the petitioner had rendered the advisory services as an ‘Intermediary’.

38. As noted above, the Appellate Authority had accepted that the services provided by the petitioner included identifying potential opportunities for investments in India, analyzing investment returns and related risks, preparing reports etc. However, the Adjudicating Authority concluded that the petitioner was "...performing these activities in India in his liaison capacity and the person acting in liaison capacity, has to act as a go-between his principal and his principal's customers which are opportunities for investments' in the instant case".

39. Concededly, the said view is unsustainable.

40. The petitioner is the service provider. It is rendering the advisory services directly to I Squared and is not acting as a facilitator for providing such services.

41. 'Intermediary' as defined under Sub-section (13) of Section 2 of the IGST Act is a person who facilitates supply of services – he does not supply services himself but merely arranges the same. The Central Board of Indirect Taxes and Customs had issued a Circular dated 20.09.2021 which clearly defines the scope of 'Intermediary Services'. The relevant extracts of the said Circular are set out below:

"2. Scope of Intermediary services

2.1 'Intermediary' has been defined in the sub-section (13) of section 2 of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "IGST" Act) as under –

'Intermediary means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account."

2.2 The concept of 'intermediary' was borrowed in GST from the Service Tax Regime. The definition of 'intermediary' in the Service Tax law as given in Rule 2(f) of Place of Provision of Service Rules, 2012 issued vide Notification No. 28/2012-S.T., dated 20-06-2012 was as follows:

"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 own account."

3. Primary Requirements for Intermediary services

The concept of intermediary services, as defined above, requires some basic prerequisites, which are discussed below:

3.1 Minimum of Three Parties: By definition, an intermediary is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus a natural corollary that the arrangement requires a

minimum of three parties, two of them transacting in the supply of goods or services or securities (the main supply) and one arranging or facilitating (the ancillary supply) the said main supply. An activity between only two parties can, therefore, NOT be considered as an intermediary service. An intermediary essentially "arranges or facilitates" another supply (the "main supply") between two or more other persons and, does not himself provide the main supply.

3.2 Two distinct supplies: As discussed above, there are two distinct supplies in case of provision of intermediary services:

(1) Main supply, between the two principals, which can be a supply of services or securities:

(2) Ancillary supply, which is the service of facilitating or arranging the main supply between the two principals. This ancillary supply is supply of intermediary service and is clearly identifiable and distinguished from the main supply. A person involved in supply of main supply on principal to principal basis to another person cannot be considered as supplier of intermediary service.

3.3 Intermediary service provider to have the character of an agent, broker or any other similar person: The definition of "intermediary" itself provides that intermediary service providers-means a broker, an agent or any other person, by whatever name called... "This part of the definition is not inclusive but uses the expression "means" and does not expand the definition by any known expression of expansion such as "and includes". The use of the expression "arranges or facilitates" in the definition of "intermediary" suggests a subsidiary role for the intermediary. It must arrange or facilitate some other supply, which is the main supply, and does not himself provides the main supply. Thus, the role of intermediary is only supportive.

3.4 Does not include a person who supplies such goods or services or both or securities on his own account: The definition of intermediary services specifically mentions that intermediary "does not include a person who supplies such goods or services or both or securities on his own account". Use of word "such" in the definition with reference to supply of goods or services refers to the main supply of goods or services or both, or securities, between two or more persons, which are arranged or facilitated by the intermediary. It implies that in cases wherein the person supplies the main supply, either fully or partly, on principal to principal basis, the said supply cannot be covered under the scope of intermediary".

xxx xxx xxx"

42. It is, thus implicit in the concept of an 'Intermediary' that there are three parties, namely, the supplier of principal service; the recipient of the principal service and an intermediary facilitating or arranging the said supply. Where a party renders advisory or consultancy services on its own account and does not merely arrange it from another supplier or facilitate such supply, there are only

two entities, namely, service provider and the service recipient. In such a case, rendering of consultancy services cannot be considered as 'Intermediary Services' or services as an 'Intermediary'.

43. It is also relevant to note that Rule 2(f) of the Place of Provision of Services Rules, 2012 also defined 'Intermediary' in similar terms as Sub-section (13) of Section 2 of the IGST Act. The said Sub-section is set out below:

"(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;"

44. Undisputedly, this question is also squarely covered by an earlier decisions of this Court in *M/s Ernst & Young Ltd. v. Additional Commissioner, CGST Appeals-II, Delhi & Anr* (supra) and in *Ohmi Industries Asia Pvt. Ltd. v. Assistant Commissioner, CGST* (supra).

45. It is also relevant to refer an Order-in-Original dated 26.07.2018 passed by the Adjudicating Authority (Order-in-Original No.15-17/MN-DIV/2018-19/R). In that case, the Adjudicating Authority had observed that the basic nature of services provided by the petitioner to

I Squared is "Management and Business Consultant Services". The Adjudicating Authority had, thus, accepted that the input services as claimed by the petitioner such as business auxiliary services, consulting engineers, courier expenses, management consultant, online information and database access services etc. qualified as input services and the petitioner was, thus, entitled to refund of accumulated service tax in respect of those input services. The Adjudicating Authority had thus sanctioned refund of ₹ 17,75,393/- for tax period prior to July, 2017.

46. As noticed above, the definition of 'Intermediary' under Rule 2(f) of the Place of Provision of Service Rules, 2012 is similar to the definition of 'Intermediary' under Sub-section (13) of Section 2 of the IGST Act. It is not disputed that the services rendered by the petitioner were considered as export of services for the purpose of levy of service tax under the Finance Act, 1994. Concededly, the petitioner was not held to be an 'Intermediary' under Rule 2(f) of the Place of Provision of Services Rules, 2012, in respect of services rendered under the Agreement, prior to the rollout of GST with effect from 01.07.2017.

47. The petitioner's claim for refund in respect of the next two financial years, that is, Financial Years 2019-20 and 2020-21 was rejected on two other additional grounds. The Adjudicating Authority held that the place of supply of services rendered by the petitioner was its location in terms of Sub-section (3) (b) and Sub-section (4) of Section 13 of the IGST Act.

48. The impugned order dated 21.09.2021 passed by the Adjudicating Authority

rejecting the petitioner's claim in respect of the Financial Year 2019-20 on the aforesaid grounds cannot be sustained as no such allegations are made in the show cause notice dated 18.08.2021 that preceded the said impugned order. In the said show cause notice, it was alleged that the petitioner was an 'Intermediary' but it was not alleged that the place of service was in India as it was covered under Sub-section (3)(b) or Sub-section (4) of Section 13 of the IGST Act. However, we also consider it apposite to examine whether the place of supply of services rendered by the petitioner is India by virtue of Sub-section (3) (b) and Sub-section (4) of Section 13 of the IGST Act.

49. The reasons recorded in the impugned order dated 21.09.2021 rejecting the petitioner's claim for refund for the Financial Year 2019-20 are cryptic. The Adjudicating Authority had noted the scope of services as specified under Clause 3 of the Agreement. The order also indicates that the Adjudicating Authority had made further enquiries by visiting the website, www.cubehighways.com. The Adjudicating Authority observed that the group of companies, which included the petitioner, was engaged in construction of highways, toll operations etc. in India and held that the petitioner renders services in relation to those projects in India. The Adjudicating Authority, thus, concluded that Sub-section (3)(b), Sub-section (4) and Sub-section (7)(b) of Section 13 of the IGST Act were attracted.

50. Sub-section (7)(b) of Section 13 of the IGST Act has no application whatsoever. Sub-section (7) of Section 13 of the IGST Act reads as under:

"(7) Where the services referred to in sub-section (3) or sub-section (4) or sub-section (5) are supplied in more than one State or Union territory, the place of supply of such services shall be taken as being in each of the respective States or Union territories and the value of such supplies specific to each State or Union territory shall be in proportion to the value for services separately collected or determined in terms of the contract or agreement entered into in this regard or, in the absence of such contract or agreement, on such other basis as may be prescribed."

51. Concededly, the petitioner has not rendered any services in more than one state or union territory as envisaged in Sub-section (7) of Section 13 of the IGST Act. Mr. Ramachandran has also made no attempt to support this conclusion.

52. Sub-section (3)(b) of Section 13 of the IGST Act is equally inapplicable. First of all, it relates to services which are supplied to an individual and which require physical presence of the recipient (or a person acting on his behalf) with the supplier of the services. There is no allegation that the petitioner has rendered any service to an individual. Plainly, the Adjudicating Authority has misunderstood the nature of services covered under Sub-section (3)(b) of Section 13 of the IGST Act. These are essentially in the nature of personal services which require the physical presence of the service recipient. A publication issued by the Central Board of Excise & Customs captioned "Taxation of Services: An Education Guide" explains the significance of the words 'physical

presence of an individual', whether represented either as the service receiver or a person acting on behalf of the receiver, as under:

"This implies that while a service in this category is capable of being rendered only in the presence of an individual, it will not matter if, in terms of the contractual arrangement between the provider and the receiver (formal or informal, written or oral), the service is actually rendered by the provider to a person other than the receiver, who is acting on behalf of the receiver.

Illustration

A modeling agency contracts with a beauty parlour for beauty treatment of say, 20 models. Here again is a situation where the modeling agency is the receiver of the service, but the service is rendered to the models, who are receiving the beauty treatment service on behalf of the modeling agency. Hence, notwithstanding that the modeling agency does not qualify as the individual receiver in whose presence the service is rendered, the nature of the service is such as can be rendered only to an individual, thereby qualifying to be covered under this rule."

53. We are, also, unable to accept that the services rendered by the petitioner can be covered under Sub-section (4) of Section 13 of the IGST Act. As is apparent from the plain language of Sub-section (4) of Section 13 of the IGST Act, the supply of services contemplated under the said Clause are those that are supplied directly in relation to an immovable property. Such services include services supplied by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite. It includes grant of rights to use immovable property, carrying out construction work and further include services as that of architects or interior decorators. In the present case, the petitioner is rendering advisory services to I Squared. The petitioner had repeatedly filed submissions before the concerned authorities (Adjudicating Authority as well as Appellate Authority) explaining that

it is rendering "advisory services to overseas group companies with respect to investment avenues in transportation sector after performing its own analysis and due diligence". It had also explained that its overseas group company [I Squared] is not bound by its advices and takes its own decision at its discretion as expressly stated in the Agreement.

54. The petitioner had also provided invoices which indicated that it was charging "market services and advisory fee".

55. In view of the above, the orders impugned in the present petitions are liable to be set aside.

56. Mr. Ramachandran had filed written submissions, inter alia, praying that the matter be remanded for re-adjudication in the light of the decision in *M/s Ernst & Young Ltd. v. Additional Commissioner, CGST Appeals-II, Delhi & Anr* (supra) by, inter alia, praying as under:

"In view of the foregoing facts and circumstances, it is respectfully prayed that this Hon'ble Court be pleased to remand the matter for re-adjudication in the light of the decision of this Hon'ble Court in the case of M/s Ernst & Young Ltd. v. Additional Commissioner, CGST Appeals-II, Delhi & Anr in W.P.(C) 8600/2022 by calling for additional documents / information if any, required."

57. However, we are unable to accept that the present petitions are required to be remanded to the Adjudicating Authority for consideration afresh. There is no material which would even remotely suggest that the services rendered by the petitioner are not as claimed, that is, advisory services relating to investments in India. As noticed above, the concerned authorities had also accepted the same as is apparent from some of the observations made in the impugned order. Neither the Adjudicating Authority nor the Appellate Authority had any material to doubt the petitioner's claim that it had rendered advisory services for making investments in India. We do not consider it apposite to remand the present petitions for fresh adjudication. The decisions in *Bharat Sanchar Nigam Ltd. v. Union of India & Ors.* (supra) and in *M/s GAP International Sourcing (India) Pvt. Ltd. v. Additional Commissioner CGST Appeals-II & Ors.* (supra) relied upon by the Revenue in support of the aforesaid prayer are inapplicable in the facts of the present case. In *Bharat Sanchar Nigam Ltd. v. Union of India & Ors.* (supra), the petitioner's claim for refund was rejected on the ground of limitation and not on merits. Thus, it was essential that the Adjudicating Authority consider the merits of the claim in the first instance. In *M/s GAP International Sourcing (India) Pvt. Ltd. v. Additional Commissioner CGST Appeals-II & Ors.* (supra), this Court had noted that there was a serious controversy as to the exact nature of the services rendered by the petitioner. Thus, it was apposite to remand the matter for re-adjudication.

58. In view of the above, the present petitions are allowed. The impugned orders are set aside. The Adjudicating Authority is directed to process the petitioner's claim for refund as expeditiously as possible and preferably within a period of eight weeks from today.