Punjab & Haryana High Court rules that Supply of BPO services qualify as export of services and not as intermediary services under GST

Writ Petition allowed by Hon'ble Punjab and Haryana High Court allowing GST refund, treating supply of BPO services including maintaining vendor/ customer master data, bookkeeping, developing, licensing, and maintaining software, technical IT support services, data analysis etc., as export of services.

Varied interpretations have been taken by the adjudicating authorities on the scope of intermediary services, especially while processing refund claims of ITC for an exporter of services. Accordingly, to bring clarity, the Central Board of Indirect taxes and Customs explained the scope of intermediary services through a circular issued in September 2021. In addition to the clarification brought last year by the circular, this High Court judgment would also aid the BPO industry that faces challenges on the intermediary issue. **This is a positive judgement from High Court agreeing that the BPO services qualify as export under GST, similar to situation in the service tax era**. The judgment should aid in resolving several pending litigations on this issue under GST.

Key Takeaways

⇒ The definition of "intermediary" under the service tax regime and GST is similar. Circular no. 159/15/2021-GST dated 20 September 2021 has also clarified that there is no change in the scope of intermediary services in the GST regime vis-à-vis service tax regime.

⇒ The following three conditions must be satisfied to qualify as an intermediary:
- Existence of principal-agent relationship
- Involvement in arrangement or facilitation of provision of service between two other parties
- Intermediary not to perform the main service

⇒ Revenue authorities cannot deviate from the view taken in service tax regime when there is no change in the definition of intermediary in the GST regime.

⇒ Principles of consistency apply in the case of the Petitioner as the department cannot take a differing view for different periods when there is no change in facts and law.

Facts of the case

- The Petitioner[1] was registered with the Haryana GST authorities and entered into a master services sub-contracting agreement with a group company located outside India.

- The Petitioner provided BPO services, including maintaining vendor/ customer master data, bookkeeping, developing, licensing and maintaining software, technical IT support services,

[1] Order dated 11 November 2022 passed by the High Court of Punjab & Haryana in CWP-6048-2021

data analysis etc., to clients of the group company located outside India, on a principal-to-principal basis, under the sub-contracting agreement.

- The Petitioner treated such services as export and accordingly filed an application with the GST authorities claiming refund of unutilised ITC from July 2017 to March 2018.

- The Deputy Commissioner, CGST agreed with the Petitioner that the BPO services qualify as export of services and sanctioned the refund. The refund claim was, however, partially rejected on account of ITC availed in respect of certain ineligible inputs and input services.

- Thereafter, Principal Commissioner, CGST passed a review order that the services provided by the Petitioner are intermediary services and do not qualify as export of services. Accordingly, Revenue authorities filed an appeal before Joint Commissioner CGST (Appeals) (Appellate Authority) against Order-in-Original (OIO) contesting the entire refund amount sanctioned.

- The Order-in-Appeal (OIA) was passed by the Joint Commissioner CGST (Appeals) contending that the services provided by the Petitioner are in the nature of intermediary services and do not qualify as export of services and thereby amount was erroneously refunded to the Petitioner.

- The Petitioner filed a writ against OIA which was disposed of by setting aside the OIA and remanded the matter to the Appellate Authority for fresh consideration.

- The Appellate Authority allowed the appeal filed by the department against OIO and held that the services rendered by the Petitioner fall within the category of intermediary services and do not qualify as export of services. Accordingly, refund of accumulated ITC was also denied.

- Refund applications for the periods April 2018 to September 2018 and October 2018 to March 2019 were also rejected on the same grounds.

- Aggrieved by the same, the Petitioner filed a writ Petition before Punjab and Haryana High Court.

Contentions of the Petitioner

- The Petitioner contended that the impugned order passed by the Appellate Authority is beyond the scope of remand order as directed by the Court.

- It was further contended that the Petitioner is rendering services on its account and is not facilitating any supply of services between group company and its customers. Petitioner is responsible for providing all services for all the risk related to performance and pricing of services.

- There is no separate agreement between the Petitioner and group company's customers and therefore, Petitioner cannot be equated to an agent or broker.

- In the case of a sub-contract, there is only one sale involved and the findings in the impugned order have no factual or legal basis to allege that there was a second contract of agency between the Petitioner and group company.

- It was also argued that the Appellate Authority has not taken into account the fact that the BPO services rendered by the Petitioner have been held as export of services under the erstwhile service tax regime and refund claims were sanctioned on a regular basis by the tax authorities.

- It was submitted that definition of intermediary services is similar under the service tax and GST regime and there is neither change in the facts nor any change in the statutory provisions. Department cannot take a different view for different periods when there is no change in the law and facts. Principle of consistency as such ought to apply in the present matter as well.

Contentions of Revenue authorities

- The Respondent made reference to different clauses of the agreement contending that two categories of services are involved. The first category comprised of the main services which were provided by group company to its customers and the second category comprised of ancillary and supportive services which were being provided by the Petitioner.

- Both categories of services are clearly identifiable and distinguishable from each other.

- The Respondent further contended that the Petitioner is acting on behalf of group company and supplying support services so that group company can supply main services to its customers.

- Further, as far as the issue of refunds being allowed for the previous periods under the pre-GST regime, it was contended that each assessment year is a separate unit and a decision/ view in one year is not to be carried forward and held good for a subsequent year. It is submitted that in tax matters, each year's assessment is final only for that year and does not govern subsequent years.

Observations and ruling of the Court

- The agreement is clearly for the purpose of sub-contracting services to petitioner by the group company. These are the same services which the group company was contractually supposed to provide to its own customers.

- A bare perusal of the recitals and relevant clauses of the agreement do not indicate that Petitioner is acting as an "intermediary" under GST law.

- Such clauses of the agreement do not conclude that the Petitioner has facilitated the services.

- The following three conditions must be satisfied to qualify as an intermediary:
  - Existence of principal-agent relationship
  - Involvement in arrangement or facilitation of provision of service between two other parties
  - Intermediary not to perform the main service

- Relationship between Petitioner and the group company is not of principal and agent, as per the agreement itself and the impugned order's finding on this is without any basis and clearly erroneous.

- No separate agreement was entered into between Petitioner and customers of the group company. It is undisputed that the Petitioner has an agreement only with the group company.

- Pursuant to the sub-contracting arrangement as per agreement, the Petitioner provides the main service directly to the overseas clients of the group company but does not get any remuneration from such clients. Pursuant to the arrangement, it is the group company which gets paid by its customers to whom the services are being provided directly by the Petitioner.

- Petitioner is not liaisoning or acting as an "intermediary" between group company and its customers. Circular No. 159/15/2021-GST dated 20 September 2021 in para 3.5, issued by the authorities, clarifies that sub-contracting for a service is not an "intermediary" service. The definition of "intermediary" under the service tax regime and GST is similar, and it is also clarified that there is no change in the scope of intermediary services in the GST regime vis-à-vis service tax regime.

- Revenue authorities cannot deviate from the view taken in service tax regime when there is no change in the definition of intermediary in the GST regime. Principles of consistency apply in the case of the Petitioner as the department cannot take a differing view for different periods when there is no change in facts and law.

- The Hon'ble Punjab and Haryana High Court has decided that the services supplied by the Petitioner qualify as export of services and are not in the nature of intermediary services as per the provisions of the GST law. The Revenue authorities were directed to grant refund of accumulated ITC to the Petitioner.