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

% *Date of Decision: 29.03.2023*

+ **W.P.(C) 6838/2022**

M/S OHMI INDUSTRIES ASIA PRIVATE
LIMITED

..... Petitioner

Through: Mr. Sparsh Bhargava, Adv.

versus

ASSISTANT COMMISSIONER, CGST Respondent

Through: Mr. Anish Roy, SSC.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The petitioner has filed the present petition impugning an order dated 30.09.2021 (Order-in-Appeal No. 342/JC/Central Tax/Appl-I/Delhi/2020) rejecting the petitioner's appeal against an order dated 26.11.2019 (Order-in-Original No.151/DIV-NP/GST/REFUND/2019-20). Although the petitioner has statutory right of an appeal to the Appellate Tribunal, the petitioner cannot avail the same as the Appellate Tribunal has not been constituted.

2. In view of the above, this Court considers it apposite to entertain the present petition.

3. The controversy involved in the present petition relates to

whether denial of integrated tax is justified on the ground that the petitioner is an intermediary.

4. The petitioner is a company incorporated in India and provides services to an affiliated entity, OHMI Industries Ltd., Japan (hereafter '**OHMI, Japan**'). The petitioner had entered into two separate agreements with OHMI Japan, one for rendering Business Support Services and the other for providing Market Research Services.

5. The petitioner had filed an application dated 29.11.2018 seeking refund of integrated tax on zero rated supply. The petitioner's application related to refund of integrated tax paid on two invoices, both dated 20.07.2018, for the value of USD 84,152 & USD 30,000/- respectively. Against the aforesaid invoices, the petitioner had received a remittance of USD 1,14,073.52/-. The petitioner had paid the integrated tax under the Integrated Goods and Services Tax Act, 2017 (hereafter '**the IGST**') amounting to ₹14,14,604/- in respect of the said two invoices and therefore, sought refund of the said amount.

6. The petitioner was issued a deficiency memo dated 04.01.2019 calling upon the petitioner to provide a copy of the Service Agreement with the service recipient. Admittedly, the petitioner complied with the said requirement and provided copies of the two agreements entered into with OHMI Japan. In addition, the petitioner also submitted a note on the activity performed under the two agreements.

7. The Adjudicating Authority, did not issue any show-cause notice but proceeded to reject the petitioner's application by an order dated

26.11.2019. The adjudicating authority found that the petitioner was engaged in the business of “providing support to customer directly”. According to the adjudicating authority, providing support to the customers of OHMI, Japan directly meant that the petitioner was rendering intermediary services. Consequently, the place of supply of services was located at the place of business of the petitioner. Accordingly, the adjudicating authority held that the services provided by the petitioner were not zero-rated supply and therefore, rejected the petitioner’s application for refund.

8. The petitioner preferred an appeal against the order dated 26.11.2019, before the appellate authority confined to the denial of refund of integrated tax on amount received from providing Market Research Services. It is relevant to note that the petitioner did not contest the denial of refund on account of amounts received for providing Business Support Services. The petitioner stated that in terms of the Market Research Agreement, OHMI, Japan had agreed to pay a sum of USD 1,20,000/- per annum as full compensation for providing Market Research Services. The petitioner claimed that it had paid integrated tax of a total amount of ₹3,71,767/- for the services invoiced during the period of July, 2018 and therefore, confined its relief for seeking refund of the said amount.

9. The petitioner’s appeal was rejected by the appellate authority by upholding the order passed by the adjudicating authority without noticing that the petitioner had confined the appeal to refund of integrated tax on Market Research Services and had not challenged the

denial of refund on account of services provided to customers directly.

10. The appellate authority held that the petitioner was not eligible for refund of amount of ₹14,14,604/- without noting that the petitioner's appeal was confined to seeking a refund of ₹3,71,767/- which was integrated tax paid on invoices raised for the Market Research Services.

11. The learned counsel for the petitioner submits that the issue involved in the present petition is covered by the decision of this Court in *M/s Ernst And Young Limited v. Additional Commissioner, CGST Appeals-II, Delhi and Anr.*; **W.P.(C) No.8600/2022** decided on 23.03.2023. He submits that there is no dispute that the petitioner had rendered Market Research Services on its own account and had not acted as an intermediary between any service supplier and OHMI, Japan.

Reasons and conclusions

12. It is apparent that the impugned order passed by the appellate authority is without application of mind. As noted above, the appellate authority has failed to notice that the petitioner's appeal was confined only for refund of integrated tax paid on invoices raised in respect of Market Research Services. The order passed by the adjudicating authority was premised on the basis that the petitioner was rendering services directly to the customers of OHMI, Japan. This was in the context of the Business Support Services rendered by the petitioner to OHMI, Japan.

13. There is no dispute as to the nature of services rendered by the petitioner under the Market Research Services Agreement. The counter-affidavit filed by the respondent clearly sets out the scope of work under the Market Research Agreement. The relevant extract from the counter-affidavit setting forth the scope of services is reproduced below:-

“1. That in this instance case, it is established that the following is the scope of the work performed by the petitioner:

1. Research and analyse details of product requirements in steel industry, together with details/background of its opportunities.
- ii. Research and analyse trend of business agreements related to prospective customers.
- iii. Research and analyse the situation of prospective customers competitors.
- iv. Research and analyse the price trend of steel products in the market.
- v. Research and analyse information production of major steel mills in India.”

14. According to the respondent, the above activities indicate that the petitioner has facilitated the supply of services between OHMI, Japan and its customers in India. This contention is clearly unsustainable.

15. The term intermediary is defined under Section 2(13) of the 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.”

16. It is also apparent from the plain language of Section 2(13) of the IGST that intermediary is one that arranges or facilitates supply of goods and services. In the present case, there is no dispute that the petitioner had rendered Market Research Services on its own; there is no allegation that it had arranged supply of such services from a third party.

17. It is also relevant to refer to the Circular dated 20.09.2021 (Circular No.159/15/2021-GST) issued by the Central Board of Indirect Taxes. The said circular makes it clear that the concept of intermediary services contemplates minimum of three parties. The said Circular explains as under:

“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.”

18. Admittedly, in the present case, the petitioner is rendering the Market Research Services directly to OHMI, Japan. Therefore, insofar as providing Market Research Services is concerned, the petitioner

cannot be held to be an intermediary.

19. The issue involved in the present case is covered by the decision of this Court in *M/s Ernst And Young Limited v. Additional Commissioner, CGST* (supra).

20. In view of the above, the present petition is allowed. The impugned order is set aside.

21. The respondent is directed to process the petitioner's claim for refund of integrated tax of ₹3,71,767/- relating to Market Research Services as claimed. The petitioner would also be entitled to interest in accordance with the law.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MARCH 29, 2023

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