आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५.
CGST Bhavan,Revenue Marg,Ambawadi,Ahmedabad-380015
☎ 26305065-079 : टेलेफैक्स 26305136 – 079 :
Email- commrappl1-cexamd@nic.in

DIN-20220764SW0000507C5D
स्पीड पोस्ट

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क फाइल संख्या : File No : GAPPL/COM/STP/1997/2021-Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-12/2022-23**
दिनाँक Date : **30.06.2022** जारी करने की तारीख Date of Issue : **11.07.2022**

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original Nos. **08/JC/MT/2021-22 dated 21.06.2021**, passed by the Joint Commissioner, Central GST & Central Excise, Ahmedabad-North.

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant- M/s. Inos Technologies Pvt. Ltd., 452-455, C-Block Sobo Centre, Gala Gymkhana Road, South Bopal, Ahmedabad-380058.

Respondent- The Joint Commissioner, Central GST & Central Excise, Ahmedabad-North.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(7) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) (Section) खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(iv) amount determined under Section 11 D;
(v) amount of erroneous Cenvat Credit taken;
(vi) amount payable under Rule 6 of the Cenvat Credit Rules.

इस इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER IN APPEAL

This appeal has been filed by M/s. Inos Technologies Pvt. Ltd., 452-455, C-Block Sobo Centre, Gala Gymkhana Road, South Bopal, Ahmedabad-380058 (hereinafter referred to as '*the appellant*') against the OIO No.08/JC/MT/2021-2022 dated 21.06.2021 (in short '*impugned order*') passed by the Joint Commissioner, Central GST, Ahmedabad North (in short '*the adjudicating authority*').

2. The facts of the case, in brief, are that during the course of investigation undertaken by the officers of Directorate General of Goods and Service Tax Intelligence (DGGSTI), Ahmedabad Zonal Unit, non-payment of service tax by the appellant was noticed, on the services rendered as 'Intermediary' during the period October, 2014 to June, 2017. Investigation revealed that the appellant had received commission income from foreign manufacturers for facilitating the sale of machineries manufactured by the foreign manufacturers to Indian buyers. This activity was carried out under agreements/contracts entered, wherein the appellant appeared to have acted as an intermediary between foreign machinery manufacturers and their potential customers in India. Thus, the service rendered by the appellant to the foreign manufacturers in facilitating the deal for sale of their machineries to Indian buyers was in the nature of intermediary which appeared to be falling within the purview of definition of "Intermediary" defined under Rule 2(f) of the Place of Provision of Service (POPS) Rules, 2012, as amended w.e.f. 01.10.2014. However, this commission income in their ST-3 returns was mis-declared as "Export of Service" income, on which they availed exemption from service tax payment. Total value of taxable service rendered to foreign clients by the appellant during October, 2014 to June, 2017 was Rs.6,09,19,142/- on which service tax liability of Rs.87,31,127/- was arrived by the officers of DGGSTI. Further, scrutiny of ST-3 returns and Profit and Loss account of said period, revealed that the appellant has also short paid service tax amount of Rs.1,16,777/- on income received under various heads (i) Commission income (for providing services to Indian buyers) (ii) Income from installation and commission (for providing installation and commissioning services to Indian clients/buyers) (ii) Consulting income (reimbursement of advertisement expenses from foreign principals, over and above the expenses made by appellant) and (iv) service income (for providing maintenance service to Indian buyers i.e. after sale support service provided to Indian buyers). It, therefore, appeared that the appellant had provided the total taxable service valued at Rs.6,17,57,363/- during October,2014 to June,2017, on which the service tax liability of Rs.88,47,904/- was worked out by the officers of the DGGSTI.

2.1 A Show Cause Notice No. DGGI/AZU/G.C/36-15/2020-21 dated 30.05.2020, was therefore issued to the appellant, proposing the activity of arranging purchase and sale of machinery and facilitating the deal for sale of machineries by overseas manufactures to Indian buyers, as '*Intermediary service with respect to goods*' as defined in Rule 2(f) of the POPS, Rules, 2012; considering the commission income of Rs.6,17,57,363/- received as consideration towards commission income received from overseas manufacturers and other income received under various heads, as the consideration received towards provision of intermediary service. Recovery of service tax amount of Rs.88,47,904/- alongwith interest was proposed u/s 73(1) & 75 respectively. Imposition of penalty u/s 78 & 77(1)(b) was also proposed.

2.2 The said SCN was adjudicated vide the impugned order wherein the demand proposed in the SCN was confirmed alongwith interest and equivalent penalty. Penalty of Rs.10,000/- was also imposed u/s 77(1)(b) of the Act.

3. Aggrieved by the impugned order, the appellant has filed the present appeal contending the impugned OIO, on following grounds;

- As per the "Service Agreement" entered in relation to the provision of "Business Service" with various parties, they are rendering Business Services including sales support, marketing, advertising, billing etc on principal to principal basis. They are independent contractors and have acted on their own account only.
- In order to fall under the ambit of Rule 9(c) of the POP Rules, an intermediary should not provide the main service on his own account. Further, a person who facilitates or arranges the supply of goods between two or more persons does not qualify as intermediary.
- The demand of service tax has been raised on the basis of ST-3 returns filed by the appellant, the department has calculated and demanded service tax on the amount of Rs.95,97,704/- @14.5% rate, which resulted excess demand of Rs.13,91,667/- This amount was shown as receipt in ST-3 return, while demand has to be on the billing basis, so 2016-17 receipt has been billed in the year 2014 to 2016, so the amount has been double calculated.
- The service tax demand of Rs.1,16,777/- for the period 2014-15 to 2016-17, has been arrived merely on the basis of reconciliation of ST-3 returns with financial statements without ascertaining the factual details. The appellant wants to submit the reconciliation wherein there is no short payment.
- They relied on catena of decision, as listed below:-
  - ✓ 2013 (31) STE 673 (Tri-Bang)- Regional Manager, Tobacco Board
  - ✓ 2010 (20) STR 789(Tri-Mumbai) –Anvil Capital Management
  - ✓ 2010 (19) STR 242 (Tri-Ahmd)- Purni Ads Pvt. Ltd.
- As there is no suppression involved, the notice is time barred.
- Penalty u/s 78 of the F.A, 1994 is not imposable, as no evidence /facts establish suppression on the part of the appellant. Reliance placed on Hon'ble Gujarat High Court decision in the case of Steel Cast Ltd-2011(21) STR 500 (Guj).
- Penalty u/ 77 of the Finance Act, 1994, is also not imposable as there is no short payment of service tax. They were under the bonafide belief that their activities are not taxable hence cannot be treated as suppression from the department. Reliance placed on;
  - ✓ Hindustan Steel Ltd.-AIR 1970 (SC) 253,
  - ✓ Kellner Pharmaceuticals Ltd. – 1985 (20) ELT 80
  - ✓ Pushpam Pahrmaceuticals Company-1995 (78) ELT 401 (SC)
- The issue involved is of interpretation of statutory provisions, hence penalties cannot be imposed. Reliance placed on citation reported at 146 ELT 118 (Tri-Kolkata), 2001 (135) ELT 873 (Tri-Kolkata), 2001 (129) ELT 458 (Tri-Del)

4. Personal hearing in the matter was held on 21.04.2022, through virtual mode. Shri Vipul Khandhar, Chartered Accountant, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum and stated that he would be submitting additional written submission.

5. In the additional written submission made via e-mail dated 21.04.2022, the appellant has reiterated the submissions made in the appeal memorandum and relied on following citations:

- Beaumanoir India Pvt. Ltd. -2019 (25) G.S.T.L. 274 (Tri. - Chan.)
- Abbott Healthcare Pvt. Ltd.- 2019 (31) G.S.T.L. 83 (Tri. - Mumbai)

6. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum, the submissions made at the time of personal hearing as well as the additional written submissions. I find that the issues to be decided under the present appeal are;

(i) Whether the activity undertaken by the appellant by way of facilitating the sale of machineries manufactured by foreign companies to Indian buyers, falls within the purview of 'Intermediary' defined under Rule 2(f) of the Place of Provision of Rules, 2012 or otherwise?

(ii) Whether the amount of Rs.6,17,57,363/- received by the appellant from overseas manufacturers under various income heads can be considered as consideration received towards provision of services as intermediary?

(iii) Whether demand for short payment of service tax of Rs.1,16,777/- is sustainable or not?

The demand pertains to period from October, 2014 to June, 2017.

6.1 Shri Gaurav Soni, Director of the appellant company, in his statement recorded on 01.02.2018, stated that they are engaged in the business of arranging purchases and sale of machineries, mostly pertaining to pharmaceutical sector. They had facilitated the sale of machineries manufactured by foreign suppliers to buyers based in India. They had entered into contracts with the foreign suppliers/manufacturers to act as broker between these foreign manufacturers and earn commission income from them for facilitating the sale of their machineries to Indian buyers. As per the agreement, they had charged commission ranging (2% to 15%) of the ex-work value of the machineries sold. They were also engaged in after sale service and maintenance of these machineries. For providing after sale services, they had entered into maintenance contract with Indian buyers, after getting consent from foreign principal. The service report of each maintenance activity was sent to the Indian customer as well as to the foreign principal, from whom the machinery has been purchased by the Indian buyer.

6.2 It is the contention of the appellant that they had entered into a "Service Agreement" in relation to the provision of "Business Services" with various parties and had rendered business support services including sales support, marketing, advertising, billing etc. They had provided services to the manufacturers on principle to principle basis and hence they are not covered under definition of "intermediary". As they had provided services on principal to principal basis, the activities undertaken by them in fact and circumstances of the case amounted to export of service and hence they had correctly availed exemption and not discharged service tax accordingly.

6.3 I find that the **"Support Services of Business or Commerce"** was introduced under erstwhile Section 65(104c) of the Finance Act, 1994 vide Notification No.15/2006-ST, dated 24.04.2006, which means *services provided in relation to business or*

commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing. Going by the nature of services rendered by the appellant, it is evident that the service rendered by them falls under definition of 'support services of business or commerce' and is a taxable service. However, with effect from 01.07.2012, the service tax regime shifted from selective taxation to comprehensive taxation, thus the business support service are now taxable as 'service' defined under Section 65B(44) of the Finance Act, 1994. The appellant has not disputed that the activities undertaken by them falls under the scope of the term 'service' defined under Finance Act, 1994. However, the only dispute is whether the activity of facilitating the sale of machineries manufactured by foreign companies to Indian buyers can be treated as export of service as claimed by the appellant or whether it falls within the purview of 'Intermediary' defined under Rule 2(f) of the Place of Provision of Rules, 2012?

7. In order to examine the matter in proper perspective, relevant clause of the Agreement dated 16.01.2018, entered between M/s Inos Technologies Private Limited and M/s Servolift Lifetime Solution, is reproduced below.

3.3.1 ROLES AND RESPONSIBILITIES OF M/S INOS AS PER THE PARA "2% OF THE AGREEMENT ENTERED INTO BY M/S INOS WITH M/S SERVOLIFT LIFETIME SOLUTION:

i) The Agent has to promote business in the territory and represent the interest of M/s Servolift Lifetime Solution. This duty applies to all the M/s Servolift Lifetime Solution products and to all customers in the whole territory.

ii) The Agent shall undertake to visit all customers and potential customers in his territory on a regular basis. He further assists all M/s Servolift Lifetime Solution employees, who travel to his territory for customer meetings, negotiations or service activities, with the organisation of the journey (e.g. arranging meetings with customers, organizing hotel reservation and transport as well as obtaining travel visa.)

iii) The Agent will regularly report in writing on his activities and performance and provide M/s Servolift Lifetime Solution with the respective documentation (amongst others in relation to the market and the competitive situation). In particular, he will immediately advise M/s Servolift Lifetime Solution as to any prospective business. On request, he will provide M/s Servolift Lifetime Solution with copies of his correspondence with customers.

v) Sub-agents can only be employed with the prior written consent of M/s Servolift Lifetime Solution.

vi) *M/s Servolift Lifetime Solution reserves the right to act in the agent's territory. In such cases M/s Servolift Lifetime Solution will regularly inform the Agent of the result of negotiations.*

(vii) *The Agent shall assist M/s Servolift Lifetime Solution related to patents and other industrial property rights as well as in defending M/s Servolift Lifetime Solution against unfair competition by third parties. After conclusion of a transaction the Agent assists M/s Servolift Lifetime Solution with the processing of the contractually agreed services in the interest of M/s Servolift Lifetime Solution. He thereby assists both with the processing of orders as well as with respect to on-site activities (e.g. assembling and starting of the operation).*

3.3.2 COMMISSION INCOME TERMS AND CONDITIONS AS PER "8"OF THE AGREEMENT ENTERED INTO BY M/S INOS WITH SERVOLIFT LIFETIME SOLUTION:

a. *10% of the Net value of goods (after reduction of discount) for machines that are manufactured by Servolift.*

b. *10% of the Net value of goods (after reduction of discount) for spare parts.*

c. *The entitlement to commission arises upon delivery of the products and on invoicing the customer. The payment of commission is due 30 days after receiving the final payment from the customer. A commission invoice is to be send to Servolift.*

3.5 AGREEMENT BETWEEN M/S INOS TECHNOLOGIES PRIVATE LIMITED AND HOWORTH AIR TECHNOLOGY LIMITED:

3.5.1 APPOINTMENT OF AGENT AS PER PARA 3 OF THE AGREEMENT BETWEEN M/S INOS TECHNOLOGIES PRIVATE LIMITED AND HOWORTH AIR TECHNOLOGY LIMITED:

(i) *The principal appoints the Agent as its agent for the promotion of, and solicitation of customers for the product sub the Exclusive Territory and Non Exclusive Territory and the Agent agrees to act in that capacity, subject to the terms and conditions of this Agreement.*

(iii) *The Agent shall be entitled to describe itself as the Principal's "Authorised Sales Agent" for the products.*

3.5.2 DUTIES OF M/S INOS AS PER PARA 4 OF THE AGREEMENT ENTRERD BETWEEN M/S INOS TECHNOLOGIES PVT LIMITED AND HOWORTH AIR TECHNOLOGYLIMITED.

(i) *The Agent shall use best endeavors to promote business and market the products to customers and prospective customers in the Territories and generally to assist the* ***Principal (Foreign machine manufacturer)*** *in sale of the products in the territories but Inos shall not be entitled to sell or enter into any contracts for sale of the products on behalf of Principal.*

(iii) The representatives and employees of M/s Inos shall, at the expanse of the Agent, attend meetings with representatives of the Principal and such actual or potential customer in the Territories as may be necessary for the performance of the duties of the Agent under this Agreement.

(vi) The Agent shall maintain an up to date list of customers of the Products in the Territories and supply a copy of that list to the Principal upon demand.

(vii) The Agent shall keep the Principal fully informed of the Agent's promotional and marketing activities in respect of the products and when required provide the Principal with n report of such activities.

(viii) The Agent shall keep the Principal informed of conditions in the market for the Products in the Territories, and of competing products and the activities of the Principal's competitors in the Territories.

3.5.4 *SECOND SCHEDULE OF THE AGREEMENT BETWEEN M/S INOS LIMITED TECHNOLOGIES PRIVATE AND M/S HOWORTH AIR TECHNOLOGY LIMITED:*

The Commission:

Commission will be earned on orders taken by the Company in accordance with the terms of this Agreement.

- *Twenty Percent (20%) of the Commissionable value of the Order where the inquiry originates and where the formal offer is delivered and presented to the Purchaser,*
- *Sixty Percent (60%) of the Commissionable value of the Order to the territory that entails the Engineering and/or the Primary Decision Point.*
- *Twenty Percent (20%) of the Commissionable value of the Order where the ordered goods are to be delivered.*

On going through the above agreements, entered into by the appellant with various overseas companies manufacturing pharmaceutical machineries (like M/s. Servolift Lifetime Solution and M/s Howorth Air Technologies Ltd), it is noticed that the appellant is entrusted to carry out the activities like; to visit all the customers and potential customers in India on regular basis, promote and market the products to Indian customers, to sell products of these companies to Indian buyers, promote their business in India, regularly report in writing the activities and performance as well as financial capacity of the customers in India, assist the company by arranging travel, hotel reservation for their employees who would travel in India for customer meetings etc. They have earned 'commission income' for facilitating the deal between these overseas companies and Indian customers/clients, depending on the percentage fixed (ranging from 2% to 15%) on the value of ordered goods or value of the machineries sold. Thus, it is apparent that the appellant is acting as an agent for the foreign manufactures for facilitating the sale of their machineries to Indian buyer. For rendering these services, they are receiving commission income from foreign principal/suppliers.

7.1 In terms of Rule 2(f) of POP Rules, 2012, intermediary means;

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;*

The definition of intermediary was subsequently amended vide Notification No. 14/2014-ST dated 11.07.2014, with effect from 01.10.2014, to include 'supply of goods' in its scope. Thus, in terms of the above amended definition, intermediary is one who arranges or facilitates the provision of a service or a supply of goods between two or more persons, but does not include a person who provides the main service or supplies. This meant that as per amended definition, 'Intermediary' in relation to goods and services both are liable to be taxed under Service Tax law. Any intermediary engaged in supply of goods, such as commission agents and consignment agents, shall be covered under the scope of the term 'Intermediary'. In order to determine whether a person is acting as an intermediary or not, depends on factors like, nature and value of the service/goods. An intermediary cannot alter the nature or value of the service/goods, 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/goods is supplied (or obtained) on his behalf, and any discounts that the intermediary obtains must be passed back to the principal. The value of an intermediary's service is invariably identifiable from the main supply of goods 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" and the service provided by the intermediary on behalf of the principal is clearly identifiable. The appellant, in the instant case, was facilitating the sale/supply of goods i.e. machineries manufactured by the overseas companies, to the Indian buyers for which they earned commission income from these foreign companies, hence they are covered within the scope of the term 'Intermediary' defined under Rule 2(f) of the POPS Rules, 2012 above.

7.2 In the SCN, it is alleged that the appellant was claiming exemption of service tax on the services rendered during October, 2014 to June, 2017 by mis-declaring the said services as export of service. I find that there is no dispute regarding the fact that the services rendered by the appellant are in the nature of 'Business Support'. After introduction of the term '**service**' defined in Section 65B(44), any activity carried out by a person for another for consideration shall be taxable including the declared services specified in Section 66E. Therefore, irrespective of the classification of the service, if the service is not covered under negative list, and is provided (or agreed to be provided) in the taxable territory, it becomes taxable. So it becomes crucial to determine the "place" where the services have been provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided.

7.3 I find that during the relevant period, the provisions of Place of Provision of Services Rules, 2012 (POPS Rules, 2012) were applicable. In terms of Rule 3 of POP Rules, generally the place of provision of a service shall be the location of the recipient of service, however in case of intermediary services, the place of provision of service,

shall be the location of the service provider, as stipulated in Rule 9 (c) of the POP Rules, 2012. Relevant text of Rule 9(c) is reproduced below:-

> ***RULE 9. Place of provision of specified services.*** *— The place of provision of following services shall be the location of the service provider:-*
>
> *(a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;*
> *[(b) x x x]*
> *(c)* ***Intermediary services;***
> *[(d) Service consisting of hiring of all means of transport other than,-*
> *(i) aircrafts, and*
> *(ii) vessels except yachts,*
> *upto a period of one month.]*

It is observed that, the appellant had facilitated the sale of pharmaceuticals machinery manufactured by the foreign principal by way of identifying the customers in India and promoting the sale of said goods to Indian buyers. As the said service were provided by the appellant who is having location in India and the services being covered under the scope of 'intermediary services' with effect from 01.10.2014, the same shall be governed by the provisions of Rule 9(c) of the POPS Rules, 2012. Even in terms of Rule 2(h) of the POPS Rules, the location of the service provider is where the service provider has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained. Therefore, in the instant case, the service would be considered as provided in the taxable territory as the location of the appellant is in India, where such registration has been obtained.

8. The appellant on the contrary have argued that they have entered into an agreement for provision of 'Business Support Services' on principal to principal basis and have acted on their own account only, therefore, provisions of Rule 9(c) of the POP Rules, shall not apply. The person, who facilitates or arranges the supply of goods between two or more persons, does not fall under 'intermediary' hence remains outside the ambit of Rule 9(c) of the said rules.

8.1 I find that generally, 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. Moreover, the consideration for an intermediary's service is separately identifiable from the main supply of service/goods that he is arranging and is in the nature of fee or commission charged by them. The intermediary or the agent must have documentary evidence authorizing him to act on behalf of the provider of the 'main service'. As per the contracts entered by the appellant, they cannot alter the nature or value of the goods, as they are merely facilitating the supply on behalf of principal foreign company nor do they have the right to sell or enter into any contract for sale of products on behalf of the Principal. The value of their intermediary service is invariably identifiable from the main supply of goods as the commission rates is fixed either on the net value of goods or on the value of the order placed. So the amount

charged by the appellant from their principal is "commission" which is a consideration received for facilitating the supply of goods.

8.2 Considering the facts narrated above, I find that the service provided by the appellant to the foreign companies/principal cannot be treated as being provided on principal to principal basis, as the service provided by the appellant is clearly identifiable as agent to principal basis where the appellant have acted as an agent in facilitating the deal with Indian customer for which they earned commission income. The foreign company is making an Indian Company, i.e., the appellant, its intermediary, thus considering the amendment in the definition of term '*intermediary service*' with effect 01.10.2014, the service of facilitating the supply of goods by the appellant from the foreign principal to the Indian customer, shall be covered under the scope of intermediary service and shall be treated as being provided in the taxable territory, as the appellant is located in India. Therefore, applying the provisions of Rule 9(c) of the POPS Rules, 2012, I find that the service of facilitating the supply of goods by the appellant from the foreign principal to the Indian customer shall be covered under intermediary service and is considered to be taxable as is provided by the appellant in the taxable territory.

8.3 The appellant have relied on the decisions passed in the case of Beaumanoir India Pvt. Ltd. -2019 (25) G.S.T.L. 274 (Tri. - Chan.) and Abbott Healthcare Pvt. Ltd- 2019 (31) G.S.T.L. 83 (Tri. - Mumbai). Both the decisions, I find are distinguishable of facts. In the case of Beaumanoir, Hon'ble Tribunal has held that the appellant is assisting or facilitating their principal to purchase goods from India. These services are purely between the appellant and their principal and no third party is involved. In the present case, I however, find that there are three parties involved, foreign principal as supplier of goods, appellant as agent and Indian buyer as third party. The supply/sale of goods is facilitated between the principal and the third party. So the ratio of above decision cannot be made applicable here.

8.4 Further, Hon'ble Tribunal in the case of Abbott Healthcare Pvt. Ltd, at para 5.9, held that;

5.9…

> *"the term intermediary has been defined by the Rule 2(f) ibid and the phrase "intermediary services" used in Rule 9(c) will have to be interpreted accordingly. Revenue has not shown as to how the appellant has acted as intermediary between the two persons namely service provider and service receiver of the main service. Since nothing has been brought on record to show that appellants were providing the intermediary services to the recipient in manner as defined by Rule 2(f) we do not find any merits in the submissions of the Revenue that place of provision of services in the present case will be location of service provider as per Rule 9. In our view Commissioner has correctly determined the place of provision of service by application of Rule 3 as the location of the service recipient."*

This decision is also not squarely applicable, as there was nothing on record to show that the assessee therein was providing intermediary services to recipient in manner as defined by Rule 2(f) of Place of Provision of Services Rules, 2012. In the instant case, however, the contract/agreement clearly mention that the appellant is

acting as an agent by arranging prospective customers for promoting and marketing of machineries manufactured by the foreign manufacturers.

9. Further, the appellant have also argued that there was excess demand of Rs.13,91,667/-, as the demand of service tax was raised on the basis of ST-3 returns value filed, without looking the factual value as per the books of account. They have claimed that though this amount was shown as receipt in ST-3 return, the services were received & billed in the year 2014 to 2016, so the amount has been calculated twice.

9.1 I find that the point of taxation is determined in terms of the Point of Taxation Rules (POTR), 2011. As per Rule 3 of POTR, 2011, point of taxation is (i) the time when the invoice for the service provided or agreed to be provided is issued; if invoice is not issued within prescribed time period (30 days except for specified financial sector where it is 45 days) of completion of provision of service then the (ii) date of completion of service or (iii) the date of receipt of payment where payment is received before issuance of invoice or completion of service, whichever is earlier. I find that the appellant has claimed that the amount of Rs.95,97,704/- was towards the services which were billed in 2014-15 to 2016-17, therefore demanding the tax on the said amount, again leads to double taxation. In this regard, it is noticed that the appellant in their ST-3 returns, filed for the period October, 2012 to June, 2017, have not paid service tax on the commission income earned from foreign clients as they have declared these services under Export of Services category and claimed exemption. This fact was also admitted by Shri Gaurav Soni, Director of the appellant firm. Moreover, no documentary evidence was placed before me to substantiate the above claim, I, therefore, find, that the argument of double taxation is also not sustainable on facts.

9.2 The appellant have relied on catena of decision, which I find are distinguishable on facts. In the case of Anvil Capital Management-2010 (20) STR 789(Tri-Mumbai), the brokerage income of the transactions done for the period 21/24-3-2001 to 30-3-2001 was accounted for in books of account of the Company in the year 2001-2002, whereas the service tax on the same was already paid in 2000-01, hence the difference between ST-3 returns and amount of brokerage shown in Ledger Account/(Balance Sheet). However, the order confirming the demand was passed without considering the aspect of tax already paid, therefore, the matter was remanded back to the original adjudicating authority for fresh adjudication by the Tribunal. However, in the instant case, I find that on comparing the value of export of service, declared in ST-3 returns filed for the period October, 2014 to June, 2017 vis-à-vis, the commission income mentioned in the Trial Balance and the Profit & Loss Account, it was noticed that no service tax payment was made as this income was mis-declared as export of service.

Similarly, in the case of Purni Ads Pvt. Ltd- 2010 (19) STR 242 (Tri-Ahmd), the respondent has filed explanations to reconcile the differences pointed out by the department during the course of investigation, but the adjudicating authority did not bother to consider the same. However, in the present appeal, the appellant has not submitted any substantive explanation for the differences noticed, in fact the Director, Shri Gaurav Soni, himself admitted that they had paid service tax on income from commission (inland), income from installation & commissioning (inland) and service income but failed to pay service tax on income from commission (overseas), as they

treated the same as Export of Service. I, therefore, find that the ratio of above decisions relied by the appellant are not squarely applicable to the present case and are distinguishable.

10. As regards the second issue, it is observed that the demand of Rs.1,16,777/- was raised on the grounds that the appellant had short paid service tax on the income received under other heads viz (i) Commission income (inland), (ii) Income from installation and commission (inland) and (iii) service income. It is observed that the appellant had not only facilitated the sale of machineries manufactured by the overseas companies but had also provided after sale services to the Indian buyers. For providing these services they had entered into maintenance contract with the Indian buyers after getting consent from the foreign principal. They had prepared the service report for each maintenance activity and sent the same to the Indian customers as well as to the foreign principal, from whom the machinery was purchased by the Indian buyers. It is not disputed that the services rendered in the case was a taxable service and the appellant had been discharging their tax liability on such income. However, the limited dispute is regarding the disparity in income noticed in the ST-3 returns filed by the appellant vis-à-vis their Profit and Loss account, which was revealed during investigation. This variation had led to short payment of taxes. The appellant had claimed that there was no short payment and they would be submitting the reconciliation statement to prove the same. Having gone through their appeal memorandum and the additional written submission, I find that no documentary evidence was placed before me to substantiate their claim that the department has ignored the factual details. In the absence of any documentary proof evidencing the facts contra to the allegation made in the SCN, I have no option but to uphold the service tax demand of Rs.1,16,777/-.

11. Further, the argument of demand, being time barred is also not maintainable. The entire demand was raised based on reconciliation of income shown in ST-3 return vis-a-vis the income shown as commission in the Trial Balance and Profit & Loss Account. The onus to disclose full and correct information about the value of taxable services lies with the service provider. The assessee pays the tax on self assessment basis and files the ST-3 returns, which is a report of transactions and a basic document. It is the bounden duty of the assessee to disclose all and correct information in the ST-3 returns. Non disclosure of full and correct information in returns would amount to suppression of facts. Non-payment of tax, by mis-declaring the commission income received from foreign clients, as export of service, and short payment of tax by suppressing the value of taxable income clearly establishes the conscious and deliberate intention to evade the payment of service tax. I, therefore, find that all these ingredients are sufficient to invoke the extended period of limitation provided under proviso to Section 73(1) of the F.A, 1994.

12. I find that the penalty imposed on the appellant under Section 78 of the Finance Act, 1994, is also justifiable as it provides for penalty for suppressing the value of taxable services. The crucial words in Section 78(1) of the Finance Act, 1994, are *'by reason of fraud or collusion'* or *'willful misstatement'* or *'suppression of facts'* should be read in conjunction with *'the intent to evade payment of service tax'.* Hon'ble Supreme Court in case of *Union of India* v/s *Dharamendra Textile Processors* reported in [2008 (231) E.L.T.

3 (S.C.)], considered such provision and came to the conclusion that the section provides for a mandatory penalty and leaves no scope of discretion for imposing lesser penalty. I find that the demand was raised based on the investigation carried out by the department and it is the responsibility of the appellant to correctly assess and discharge their tax liability. The suppression of taxable value, non-payment and short payment of tax, clearly show that they were aware of their tax liability but chose not to discharge it correctly instead tried to mislead the department by declaring the income under export of service, which undoubtedly bring out the willful mis-statement and fraud with an intent to evade payment of service tax. Thus, if any of the ingredients of proviso to Section 73(1) of the Finance Act, 1994 are established, the person liable to pay duty would also be liable to pay a penalty equal to the tax so determined.

13. It is further observed that penalty under Section 77(1)(b) of the Finance Act, 1994 was imposed on the grounds that the appellant has failed to keep, maintain or retain the books of accounts and other documents as required in accordance with the provisions of Act or Rules made there under. Relevant text of Section 77 is reproduced below:-

SECTION [77. Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. *— (1) Any person, —*

["(a) XXXX

(b) who fails to keep, maintain or retain books of account and other documents as required in accordance with the provisions of this Chapter or the rules made thereunder, shall be liable to a penalty which may extend to [ten thousand rupees];

(c) who fails to —
(i) XXXX
(ii) XXXX
(iii) XXXX

I find that neither the SCN nor the adjudicating authority in the impugned order could bring out the violation of the provisions of Section 77(1)(b). In fact, the non-payment of tax was noticed on reconciliation of the income shown in ST-3 return vis-a-vis the income from commission mentioned in the Trial Balance and Profit & Loss Account, maintained by the appellant. The allegation that the appellant has failed to keep, maintain or retain books of account and other document, is in fact contrary to the facts and not supported by evidences. As the demand of duty has been calculated on the basis of records maintained by the appellant, I, find that penalty is imposed under Section 77(1)(b) is not sustainable.

14. When the demand sustains there is no escape from interest, hence, the same is therefore also recoverable under Section 75 of the F.A., 1994. Appellant by failing to pay service tax on the taxable service are liable to pay the tax alongwith applicable rate of interest.

15. In view of the above discussions and findings, I uphold the service tax demand of Rs.88,47,904/- alongwith interest and penalty imposed under Section 78 (1) in the impugned order. However, the penalty of Rs.10,000/- imposed by the adjudicating authority under Section 77(1)(b) is set-aside. Accordingly, the appeal filed by the appellant is partly allowed and partly rejected to that extent.

अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed off in above terms.

(अखिलेश कुमार) 30 June, 2022
आयुक्त(अपील्स)

Date: 6.2022

Attested
Rekha. Nair
(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Inos Technologies Pvt. Ltd., - **Appellant**
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Ahmedabad-380058

The Joint Commissioner - **Respondent**
CGST, Ahmedabad North,
Ahmedabad.

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
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