



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : GAPPL/ADC/GSTP/1846/2021 -APPEAL / 3383 - 88

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-001-APP-ADC-99/2022-23**
दिनांक Date : **30-08-2022** जारी करने की तारीख Date of Issue : **30-08-2022**

श्री मिहिर रायका_अपर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Mihir Rayka, Additional Commissioner (Appeals)

ग Arising out of Order-in-Original No. **ZN2407200319452 DT. 22.07.2020** issued by Assistant Commissioner, Division-VII, Satellite, Ahmedabad South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s. Synoptek India Private Limited, 1st Floor, B Block, Mondeal Heights, SG Road, Besides Novotel, Ahmedabad, Gujarat, 380015

(A)	इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है। Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.
(i)	National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017.
(ii)	State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para- (A)(i) above in terms of Section 109(7) of CGST Act, 2017
(iii)	Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand.
(B)	Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online.
(i)	Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying - (i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant, and (ii) A sum equal to twenty five per cent of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed.
(ii)	The Central Goods & Service Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.
(C)	उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbic.gov.in को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website www.cbic.gov.in .



ORDER IN APPEAL

M/s.Synoptek India Private Limited, I Floor, B Block, Mondeal Heights, SG Road, Ahmedabad 380 015 (hereinafter referred to as the appellant) has filed the present appeal online on dated 20-7-2021 against Order No.ZN2407200319452 dated 22-7-2020 (hereinafter referred to as the impugned order) passed by the Assistant Commissioner, Division VII, Satellite, Ahmedabad South (hereinafter referred to as the adjudicating authority).

2. Briefly stated the fact of the case is that the appellant registered under GSTIN 24AAACI6432R1Z9 has filed refund claim for Rs.1,10,90,302/- for refund of ITC accumulated due to export of goods/services without payment of tax under Section 54 (3) of CGST Act, 2017 for the period April 2019 to March 2019. The appellant was issued show cause notice reference No.ZQ2406200324184 DATED 25-6-2020 dated for rejection of refund claim on the following reasons:

- 1) *It is noticed that ITC accrued on capital goods considered as eligible for refund in attached Annexure B, please clarify the same and upload the Annexure B as per Circular No.135/05/2020-GST dated 31-3-2020 ;*
- 2) *Please submit the working of zero rated turnover of services as per Rule 89 (4) (D) of CGST Rules, 2017*
- 3) *It is noticed that some FIRC not on the name of M/s.Synoptek India Pvt.Ltd. please clarify the same.*
- 4) *Please clarify whether the condition of export of services mentioned in Section 2 (6) (v) of Integrated Goods and Services Tax Act, 2017 fulfilled or not. It is also requested to upload the copy of work contract/agreement made with M/s.Synoptek LLC.*

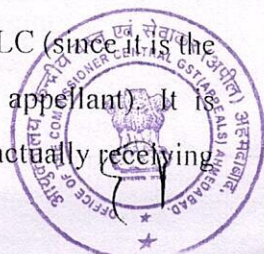
3. The appellant filed reply to show cause notice in Form RFD 09 under reference No. ZQ2406200324184 dated 10-7-2020. The adjudicating authority vide impugned order rejected the refund claim on the ground that the service provider and service receiver are establishment of distinct person and not fulfil the condition of export of services mentioned in Section 2 (6) (v) of Integrated Goods and Service Act, 2017.

3. Being aggrieved the appellant filed the present appeal on the following grounds wherein they interalia contended that ;

- i. The appellant and service recipient are two separately incorporated entities in India and USA respectively. Despite the foregoing the impugned order has observed that the appellant is merely an establishment of a distinct 'person' to conclude that the transaction in question do not qualify as 'export of services'.
- ii. As per sub clause (v) of Section 2 (6) of IGST Act, 2017 read with Explanation 1 to Section 8, it is evident that sub clause (ii) and (iii) are concerned with establishment within India and are entirely irrelevant in context of the present facts where the 'service recipient' is located outside India. However, sub clause (i) of Explanation 1 to Section 8 contemplates a scenario where the same 'person' has an establishment in India and any other

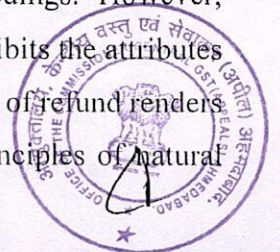
establishment outside India. The term person is statutorily defined at Section 2 (84) of CGST Act, 2017 which includes a company as well as any body corporate incorporated outside India. It therefore follows that the last condition to the definition of 'export of services' excludes transaction which transpire between two establishment of the same Company and not two distinct Companies. Therefore, the services provided by Indian subsidiary Company to its ultimate holding Company cannot be treated as transaction between establishment of a distinct person/company. This would only apply to transactions between branches or project offices of one Company. As per Explanation 2, the statutory concept of an establishment circumscribes its scope to a branch, agency or a representational office but does not extend to a statutorily incorporated entity such as the appellant. As a corollary, the appellant and the service recipient cannot by any stretch be construed as establishment of the same person as contemplated by Explanation 1 to Section 8. Basis the foregoing analysis, the Explanation 1 to Section 8 of IGST Act is rendered entirely inapplicable in context of the facts at a hand and the question of any contravention qua sub clause (v) of Section 2 (6) of IGST Act does not arise.

- iii. The appellant relied upon decision of Hon'ble High Court of Gujarat in the case of M/s.Linde Engineering Private Ltd Vs UOI (2020 (8) TMI 181-Guj HC) which was pronounced in the context of Finance Act, 1994 which is pari materia the provisions which are centric to the present dispute.
- iv. They also relied upon decision of Hon'ble CESTAT in M/s.QX Global Services LLP Services Vs CST Service Tax, Ahmedabad (2018 (6) TMI 1216 CESTAT (Ahd) ; M/s.Frame Movie Pvt.Ltd Vs CGST, Bhiwandi (2020 (9) TMI 2590-CESTAT Mumbai), M/s.Tandus Flooring India Private Ltd Vs The Commissioner of Service Tax, Bangalore (2014 (33) STR 33 (AAR).
- v. As per Q No.32 of FAQ on GST dated 15-12-2018 a subsidiary Company that is incorporated under Indian Laws is a separate legal entity and would not be governed by the Explanation 1 to Section 8 of the IGST Act. The aforesaid FAQ would be regarded as falling within the doctrine of contemporaneous exposition. As per the Law declared by the Hon'ble Supreme Court and various High Courts, such contemporaneous construction placed by the administrative or executive officers charged with administering a statute are entitled to considerable weight and are highly persuasive in determining the scope and coverage of the provisions.
- vi. The appellant cannot be treated as an establishment of a distinct person since it is a separate legal entity and the impugned order is thus patently illegal and is required to be quashed.
- vii. They are entitled to the refund claim for the impugned period. The definition of 'export of services' are set out under Section 2 (6) of IGST Act, specifies five conditions for a supply to qualify as an 'export of services'. It is submitted that the supply of services by the appellant to the 'service recipient' fulfils all such conditions. As per clause (i) of Section 2(6) it is undisputed that the appellant is a private limited Company located in India. As per clause (ii) it is undisputed that the 'service recipient' M/s.Synoptek LLC (since it is the person liable to pay consideration for the services rendered by the appellant). It is undisputed that M/s.Synoptek LLC is an entity incorporated in US and is actually receiving



the subject services. As per clause (iii), the services rendered are in the nature of IT consulting and software development and are received by the 'service recipient' which is located in US (ie outside India). Therefore, place of supply shall be United States. As per clause (iv) it is undisputed that the payment for services rendered by the appellant has been received in US Dollar which is a freely convertible currency. As per clause (v), the detailed analysis set out above amply elucidates that the appellant and service recipient are separate legal entities and not merely establishment of a distinct person as contemplated by Explanation 1 in Section 8 of IGST Act. Therefore, as demonstrated vide above, the supply of services by the appellant to the service recipient constitute export of services and the appellant is therefore entitled to the refund under Section 54 (3) of CGST Act, 2017 read with Section 16 of IGST Act, 2017 and Rule 89 of CGST Rules, 2017.

- viii. As per statutory mandate laid down in Section 54 (6) of CGST Act read with Rule 91 (2) of CGST Rules, the adjudicating authority was statutorily bound to provisionally disburse 90% of the refund claim amount on prima facie satisfaction qua the appellants entitlement to such refund. Such provisional refund was required to be sanctioned in favour of the appellant within 7 days from the date of issuance of acknowledgement in Form GST RFD 02. Despite the unequivocal mandate of the provisions no provisional refund was sanctioned in favour of the appellant. Further CBIC has issued specific instructions and standard operating process for adjudicating refund claims filed by the exporters to streamline the process vide Circular No.131/1/2020-GST dated 23-1-2020, Circular No.125/44/2019-GST dated 18-11-2019 and 21-11-2019 which are binding on the adjudicating authority. Therefore failure to disburse refund on a provisional basis, the adjudicating authority has also acted directly in the teeth of binding clarification issued by the Board. They appellant also referred to Instruction No.2/1/2020-GST dated 9-4-2020 issued by CBIC read with Press Note dated 8-4-2020 which directed expeditious processing of IGST refunds in the backdrop of the Covid 19 pandemic.
- ix. The impugned order without adducing an iota of evidence or reason has rejected the entire refund claim preferred by them by cryptically concluding that the appellant is merely an establishment of a distinct person. No reference has been made to the facts as to how the respondent has arrived at such a finding. Therefore, the entire basis of refund rejection is cryptic and unsupported by any concrete findings. It is also pertinent to highlight that a portion of services amounting to Rs.1,52,54,870/- were exported to parties other than the 'service recipient'. The impugned order has entirely ignored this aspect and processed to reject the entire refund claim without adducing an iota of reason to substantiate such rejection.
- x. It is well settled legal position that fair hearing, transparency and a reasoned decision are some of the essential criteria of the principles of natural justice which mandate the articulation of reasons and findings in the course of adjudicating proceedings. However, the impugned order for the reasons mentioned hereinabove does not exhibits the attributes of a speaking order. The failure to render findings justifying the rejection of refund renders the impugned order liable to be set aside for having impinged the principles of natural justice.



- xi. The instant appeal was filed within the statutory period of limitation in terms of Hon'ble Supreme Court judgment dated 23-3-2020 in suo motu writ petition (Civil) No.3/2020 in MA No.665/2020 in SMW (C) NO.3/2020.
- xii. The appellant relied upon decision of Hon'ble Madras High Court in the case titled M/s.Hitachi Payment Services (P) Ltd Vs the Joint Commissioner of Central Tax which was pronounced in the background of similar facts.
- xiii. In view of above averments, the appellant submitted that the appellant and the service recipient are not merely establishment of a distinct person since both the appellant and the service recipient are separate legal entities. Consequently, the appellant has not contravened sub clause (v) of Section 2 (6) of IGST Act, 2017. Thus, the impugned order deserves to be quashed forthwith and the refund claim of the appellant be sanctioned without demur along with applicable interest.
- xiv. That they had filed the present appeal to avoid the risk of time barring and to ensure that the relevant facts and submissions are brought on record before this office. They had preferred Writ Petition having reference R/SCA 4742 of 2021 before Hon'ble High Court of Gujarat wherein they had challenged the legal validity of the impugned order and hence requested to keep the instant appeal in abeyance till the foregoing Writ Petition is disposed of by the Hon'ble High Court of Gujarat.
- xv. The appellant vide letter dated 11-1-2022 reiterated the above submission and further stated that clarification set out in Circular No.161/17/2021-GST dated 20-9-2021 squarely settle the issue at hand. Pursuant to decision taken at the 45th GST Council Meeting, the CBIC issued above Circular clarifying that a Company incorporated in India and a body corporate incorporated under the laws of a country outside India are separate legal entities and accordingly these two separate persons would not be considered as 'merely establishment of a distinct person' in accordance with explanation 1 to Section 8. The Circular nullifies ambiguity, if any, on the issue of entitlement qua refund benefits where services are exported by a separate legal entity in India to another entity located outside India. The clarification are bindings on the Department are squarely applicable to the facts at hand and further bolster the submissions made vide the captioned appeal. The impugned order falls foul of the clarification set out in Circular and hence liable to be set aside on this count alone. That they will withdraw the petition filed before Hon'ble High Court of Gujarat upon processing and sanction of refund claims pertaining to the impugned period pursuant to disposal of the captioned appeal. The appellant further submitted that the appellant and the service recipient are not merely establishments of a distinct person since both the appellant and the service recipient are separate legal entities. Consequently the appellant has not contravened sub clause (v) of Section 2 (6) of IGST Act, 2017. Thus, the impugned order deserves to be quashed forthwith and refund may be sanctioned with applicable interest.

4. Personal hearing was held on dated 31-5-2022. Shri Pratjushprava Saha, Shri Mahir Chablani and Ms Kanika Sharma authorized representatives appeared on behalf of the appellant.



They stated that appeal NO.1846/2021 (present appeal) is subjudice before Hon'ble High Court of Gujarat.

5. The appellant vide letter dated 27-7-2022 further submitted that they had preferred a Writ Petition against the impugned order before Hon'ble High Court of Gujarat. During hearing held before Hon'ble High Court of Gujarat on 21-7-2022 they stated that they had availed the remedy of appeal under Section 107 of CGST Act, 2017 against the impugned order. They had withdrawn the said writ petition considering pendency of present appeal before this office. Considering their request Hon'ble High Court of Gujarat vide Order dated 21-7-2021 has recorded that the appellate authority shall dispose the appeal filed under Section 107 of CGST Act, 2017 expeditiously. In view of said Order the appellant requested that present appeal be heard and disposed of at the earliest. They further contended that they were not been granted provisional refund of 90% of total claim amount as required under Section 54 (6) of CGST Act, 2017 ; that they enclose copy of Service Agreement between Company and M/s.Syntopek LLC ; that similar tax controversy of services between two establishments of distinct person was dealt with in another case of M/s.Linda Engineering India Pvt.Ltd Vs UOI before Hon'ble High Court of Gujarat ; that it was also highlighted before the Hon'ble High Court that Circular No.161/17/2021-GST dated 20-9-2021 issued by CBIC squarely settled the issue by clarifying that a subsidiary/sister concern/group concern of any foreign company which is incorporated in India will be considered a separate legal entity under the provisions of CGST Act, 2017 ; that on the basis of above submission their service agreements be considered in the light of the judgement as given in the case of M/s.Linda Engineering along with Circular No. 161/17/2021-GST dated 20-9-2021. In view of above the appellant requested to pass an appropriate Order considering Order dated 21-7-2022 of Hon'ble High Court of Gujarat.

6. As requested, personal hearing was against held on dated 5-8-2022. Shri Pratyushprava Saha, authorized representative appeared on behalf of appellant on virtual mode. He stated that they have nothing more to add to their written submission till date.

7. I have carefully gone through the facts of the case, grounds of appeal, submission made by the appellant and documents available on record. At the outset, I find that the impugned order was communicated to the appellant on dated 22-7-2020 and present appeal was filed online on dated 20-7-2021 ie after a period of one year which is beyond the three months time limit prescribed under Section 107 of the Act. However in view of Hon'ble Supreme Court's Order dated 10-1-2022 in suo motu writ petition (C) No.3 of 2020 in MA No.665/2021, excluding the period from 15-3-2020 till 28-2-2022 in computing time limitation and providing 90 days extension from 1-3-2022 in filing appeals, I hold that the present appeal is not hit by time limitation under Section 107 of CGST Act, 2017.

8. Before proceeding further, I find that against the impugned order the appellant had filed R/SCA No.4742 of 2021 before Hon'ble High Court of Gujarat and simultaneously filed appeal under Section 107 of CGST Act, 2017 before this authority. The appellant now intimates that



considering their request to withdraw their petition, Hon'ble High Court of Gujarat has passed Order dated 21-7-2022 as under :

Learned advocate Mr. Abhishek Rastogi with learned advocate Mr. Bhavesh Chokshi for the petitioner stated that the petitioner has already availed the remedy of Appeal under section 107 of the Central Goods and Services Tax Act, 2017, challenging the order dated 22.07.2020 passed by the Assistant Commissioner, CGST Div-VII, Ahmedabad South Commissionerate which is impugned in this petition and that the petitioner has been pursuing the said remedy.

2. Learned advocate for the petitioner therefore sought permission to withdraw the present petition. Permission as prayed for is granted.

3. The petition is disposed of as withdrawn. Notice is discharged.

4. This Court has not gone into the merits, much less expressed any opinion on merits with regard to the controversy involved between the parties.

5. The appellate authority shall endeavor to dispose of the Appeal expeditiously.

9. In view of above Order, I proceed to decide the appeal on merit. The main issue under dispute is whether the appellant and M/s. Synoptek LLC can be considered as an establishment of distinct persons or not in terms of explanation 1 to Section 8 of IGST Act, 2017 so as to consider the supply made by the appellant to M/s.Synoptek LLC constitute export of services in terms of Section 2 (6) (v) of IGST Act, 2017 and consequent refund of ITC on export of goods and services to the appellant in terms of Section 54 (3) of CGST Act, 2017. For better appreciation of facts I refer to relevant statutory provisions as under:

Section 2 (6) of IGST Act, 2017.

(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; 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;

Explanation 1 to Section 8 of IGST Act, 2017.

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

(i) an establishment in India and any other establishment outside India;

(ii) an establishment in a State or Union territory and any other establishment outside that State;
or

(iii) an establishment in a State or Union territory and any other establishment being a business vertical registered within that State or Union territory, then such establishments shall be treated as establishments of distinct persons.



10. As per above statutory provisions in order to qualify supply of service as export of services the supplier and recipient should not be merely establishment of a distinct person ie having an establishment in India and another establishment outside India. I find that in the impugned order the adjudicating authority has rejected the refund claim on the reason that the appellant and service receiver viz M/s.Synoptek LLC are establishment of distinct person and not fulfil the condition of export of services under Section 2 (6) (v) of IGST Act, 2017. The above findings was made due non submission of contract/service agreement between the appellant and M/s. Syntopek LLC so as to verify the relation between them. The appellant has made strong submission countering the above findings basically relying upon CBIC Circular No. 161/17/2021-GST dated 20-9-2021 and decision of Hon'ble High Court in the case of M/s. Linde Engineering India Pvt. Ltd Vs UOI involving similar issue under erstwhile Finance Act, 1994 and Service Tax Rules, 1994.

11. I find that Circular No.161/17/2021-GST dated 20-9-2021 was issued providing clarification relating to export of services-condition (v) of section 2(6) of the IGST Act 2017 as under :

5.1 In view of the above, it is clarified that a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate persons under CGST Act, and thus are separate legal entities. Accordingly, these two separate persons would not be considered as "merely establishments of a distinct person in accordance with Explanation 1 in section 8".

5.2 Therefore, supply of services by a subsidiary/ sister concern/ group concern, etc. of a foreign company, which is incorporated in India under the Companies Act, 2013 (and thus qualifies as a 'company' in India as per Companies Act), to the establishments of the said foreign company located outside India (incorporated outside India), would not be barred by the condition (v) of the sub-section (6) of the section 2 of the IGST Act 2017 for being considered as export of services, as it would not be treated as supply between merely establishments of distinct persons under Explanation 1 of section 8 of IGST Act 2017. Similarly, the supply from a company incorporated in India to its related establishments outside India, which are incorporated under the laws outside India, would not be treated as supply to merely establishments of distinct person under Explanation 1 of section 8 of IGST Act 2017. Such supplies, therefore, would qualify as 'export of services', subject to fulfilment of other conditions as provided under sub-section (6) of section 2 of IGST Act.

12. I also refer to decision of Hon'ble High Court of Gujarat in the case of M/s.Linde Engineering, supra, wherein also similar view was taken by Hon'ble High Court of Gujarat on similar issue under Finance Act, 1994 read with Service Tax Rules, 1994 which is pari materia to the provisions of IGST Act, 2017.

11. On perusal of the above provisions of the Act, 1994 and the Rule, 1994 read with Rules, 2004, it emerges that Rule 6A of the Rules, 1994 provides that services rendered would be treated as



"Export of services" when clause (a) to clause (d) refers to provider of service is located in the taxable territory and recipient of service is located outside India and the service is not a service specified in Section 66D of the Act and the place of the provision of the service is outside India and as per clause (e) the payment for such service has been received by the provider of service in convertible Foreign Exchange. It emerges that the petitioner is fulfilling all the conditions, however, so far as the clause (f) of Rule 6A of Rules, 1994 is concerned, it provides that the provider of service and recipient of service are not merely establishments of a distinct person in accordance with Item (b) of explanation 3 of clause (44) of Section 65B of the Act. As per clause (44) of Section 65B of the Act, 1994 "service" means any activity carried out by a person for another for consideration, and includes a declared service. Item (b) of the explanation 3 stipulates that an establishment of a person in taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons. Therefore, a question arises in the fact of the present case, whether the services provided by the petitioner No.1 located in India which is a taxable territory and the recipient of the service i.e. holding Company of the petitioner No.1 located outside India which is a non-taxable territory, whether both of them would be two establishments of the same Company or not so as to treat them as distinct persons liable for service tax. If the answer to this question is in affirmative, as interpreted in the impugned show cause notice that providing the services by the petitioner No.1 to its parent Company would be to the establishment of the petitioner and therefore it would be a distinct person. then rendering of service by the petitioner No.1 cannot be treated as "Export of Services" as per Rule 6A (f) of Rules, 1994 because as per explanation 3(b) to Section 65B(44) of the Act, 1994, the petitioner and holding Company are to be treated as distinct person as per the understanding of the respondent No.3, and therefore the petitioner would be liable to pay service tax.

12. However, on analysis of the aforesaid provisions, it appears that the respondents have assumed the jurisdiction on mere misinterpretation of the provisions of explanation 3 (b) to Section 65B(44) of the Act, 1994 read with Rule 6A of the Rules, 1994 as by no stress of imagination, it can be said that the rendering of services by the petitioner No.1 to its parent Company located outside India was service rendered to its other establishment so as to deem it as a distinct person as per Item (b), explanation 3 of clause (44) of Section 65B of the Act, 1994, the petitioner No.1 which is an establishment in India, which is a taxable territory and its 100% holding Company, which is the other company in non taxable territory cannot be considered as establishments so as to treat as distinct persons for the purpose of rendering service. Therefore, the services rendered by the petitioner No.1-Company outside the territory of India to its parent Company would have to be considered "export of service" as per Rule 6A of the Rules, 1994 and Clause (f) of Rule 6A of the Rules, 1994 would not be applicable in the facts of the case as the petitioner No.1, who is the provider of service and its parent Company, who is the recipient of services cannot be said to be merely establishment so as to be distinct persons in accordance with Item (b) explanation 3 of Clause (44) of Section 65B of the Act, 1994.

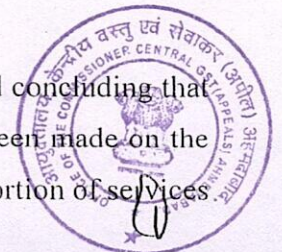
13. The above Circular and judgement settle the issue in hand. As per above Circular and judgement I find that supply of services between a service provider having an establishment in



India and incorporated under Indian Law and service recipient having an establishment outside India and incorporated/registered under the Law of that Country could not be treated as supply of services between merely establishment of distinct persons under Explanation 1 to Section 8 of IGST Act, 2017 and hence constitute 'export of services' under Section 2 (6) (v) of IGST Act, 2017. I have gone through Master Service Agreement submitted by the appellant. I find that the said agreement was entered between M/s.Synoptek LLC USA and M/s.Indusa Infotech Services Pvt.Ltd. It is further noticed that M/s. Synoptek LLC is a Company registered under the Laws of California USA having its Office at 9520, Jamboree Road, #110 Irvine CA 92612, USA and M/s.Indusa Infotech Services Pvt.Ltd is a Company registered under Companies Act in India having its registered Office at Mondeal Heights, B Block, I Floor, Besides I also find that M/s.Indusa Infotech Services Pvt.Ltd has changed its name to M/s.Synoptek India Pvt.Ltd with effect from 22-2-2019. In view of above it is very clear that the appellant as well as M/s.Syntopek LLC are separately incorporated under the Laws of respective Countries. Therefore, as per Circular referred above, the supply of services made by appellant to M/s.Syntopek LLC USA cannot be treated as supply between merely establishments of distinct persons defined Explanation 1 of section 8 of IGST Act 2017 and hence not hit by condition under clause (v) of Section 16 (2) of IGST Act, 2017. Accordingly, I firmly hold that supply of services made by the appellant with M/s.Synoptek LLC USA would qualify as export of services and hence the appellant is entitled to refund of ITC accumulated on account of export of services in terms of Section 54 (3) of CGST Act, 2017.

14. The appellant in their ground of appeal has also raised the plea of non grant of provisional refund in terms of Section 54 (6) of CGST 2017, I find that Section 54 (6) of CGST 2017 read with Rule 91 of CGST Rules, 2017 provide for grant of provisional refund the case of any claim for refund on account of zero rated supply of goods or services or both made by registered person, on a provisional basis, ninety per cent of total amount so claimed, excluding the amount of input tax credit provisionally accepted, within seven days from the date of acknowledgement of refund claim by issue of Order in Form GST RFD 04. Further CBIC vide Circular No.125/44/2019-GST dated 18-11-2019 has also given clarification on the issue as to whether provisional refund would be given even in those cases where the proper officer prima-facie has sufficient reasons to believe that there are irregularities in the refund application which would result in rejection of whole or part of the refund amount so claimed. It is clarified that in such cases, the proper officer shall refund on a provisional basis ninety percent of the refundable amount of the claim (amount of refund claim less the inadmissible portion of refund so found) in accordance with the provisions of rule 91 of the CGST Rules However, I find that in this case, no order in RFD 04 was issued which indicate that provisional refund in terms of Section 54 (6) read with Rule 91 was not sanctioned to the appellant which I find is against the statutory provisions and hence I find that there is lapse on the part of adjudicating authority for not granting provisional refund.

15. The appellant further contended that the entire claim amount was rejected concluding that appellant is merely an establishment of distinct person ; that no reference has been made on the facts as to how the adjudicating authority has arrived at such a findings ; that a portion of services

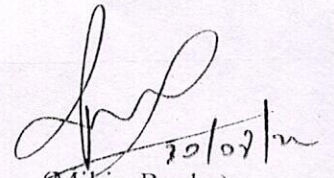


relevant to the refund claim amounting to Rs.1,52,54,870/- were exported to parties other than the service recipient and the impugned order entirely ignored this aspect and rejected the entire refund claim. I find from the impugned order that due to non submission of work contract/service agreement between the appellant and M/s.Synoptek LLC, the adjudicating authority has arrived to the decision that the appellant and service receiver are establishment of distinct person and not fulfil the condition of export of service. Apparently neither any discussion or finding was recorded to arrive at this decision. I also note that in para 4 of impugned order it was mentioned that the appellant has exported mostly part of service to M/s.Synoptek LLC USA. Evidently, the refund claim made by the appellant involve supply of services made not only to M/s.Synoptek LLC but also to other entities. However, in the subject order no discussion or findings was recorded with regard to admissibility or inadmissibility of refund in respect of export of services made to other entities and the entire claim amount was rejected considering supply of entire services to M/s.Synoptek LLC only and without considering export of service made other entities. As per Rule 92 of CGST Rules, 2017, the sanctioning authority is duty bound to sanction refund which is found admissible and reject the refund which is found inadmissible. Therefore, I find that impugned order passed rejection of refund claim in respect of export of service made to entities other than M/s.Synoptek LLC is also against the statutory provisions and hence not legally tenable and sustainable.

16. In view of above facts and findings, I hold that the impugned order passed by the adjudicating authority rejecting refund to the appellant is not legal and proper and deserve to be set aside. Therefore, I allow this appeal with consequential benefit to the appellant. I further order that any claim of refund made in consequence to this Order may be dealt with in accordance with provisions of CGST Act and Rules framed thereunder. Accordingly, I set aside the impugned order and allow the appeal filed by the appellant.

अपील कर्थाद्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है |

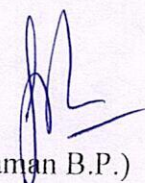
17. The appeal filed by the appellant stands disposed of in above terms.


(Mihir Rayka)

Additional Commissioner (Appeals)

Date :

Attested


(Sankara Raman B.P.)
Superintendent
Central Tax (Appeals),
Ahmedabad
By RPAD

To,

M/s.Synoptek India Private Limited,
I Floor, B Block, Mondeal Heights,
SG Road, Ahmedabad 380 015



Copy to :

- 1) The Principal Chief Commissioner, Central tax, Ahmedabad Zone
- 2) The Commissioner, CGST & Central Excise (Appeals), Ahmedabad
- 3) The Commissioner, CGST, Ahmedabad South
- 4) The Additional Commissioner, Central Tax (Systems), Ahmedabad South
- 5) The Asst./Deputy Commissioner, CGST, Division-VII, Ahmedabad South
- 6) Guard File
- 7) PA file

