

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO.III

Service Tax Appeal No. 55106 of 2023

[Arising out of Order-in-Original No.183-184/Commr./Delhi-East/AP/2022-23 dated 10.03.2023 passed by the Commissioner (Adjudication), Central Tax, GST, Delhi East]

M/s. Amazon Internet Services Pvt.Ltd.
(Presently known as 'Amazon Web Services India Private Limited'),
Eros Plaza, Nehru Place,
New Delhi-110 019.

Appellant

VERSUS

Commissioner of CGST (East),
C.R. Building, I.P. Estate,
New Delhi-110 002.

Respondent

APPEARANCE:

Shri B.L. Narasimhan and Shri Ashutosh Choudhary, Advocates for the appellant.

Shri Mihir Ranjan, Special Counsel for the respondent.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NO.50081/2026

DATE OF HEARING:08.12.2025
DATE OF DECISION:19.01.2026

BINU TAMTA:

1. Challenge in the present appeal is to the Order-in-Original No.183-184/Commr./Delhi East/AP/2022-23 dated 10.03.2023, whereby the demand raised in the two show cause notices was upheld on the ground that the appellant is covered under the definition of

'intermediary' under Rule 2(f) of Place of Provision of Service Rules, 2012¹.

2. Amazon Internet Services Pvt. Ltd.² is engaged in providing data hosting services and marketing services to Amazon Web Services, Inc. USA³ under the Data Services Agreement⁴ and Marketing Services Agreement dated 1.07.2013. The data hosting services entail the management, operation and maintenance of data centres. AWSI with its principal place of business in America is engaged in the business of providing cloud computing services to customers around the world. Cloud computing is the on-demand delivery of computer, power, database, storage, applications, and other IT resources via, the internet with pay-as -you-go pricing. AWSI as one of the cloud computing service providers, offers over 200 fully featured services for a wide range of technologies, industries and use cases to its customers. One of the key characteristics of AWSI services is that it is self service and on demand which means that IT resources are readily accessible to users and anyone wishing to use such resources could go online right now, sign up and immediately start accessing the AWSI services. The cloud computing services are provided by AWSI to the customers around the world, including India pursuant to the Customer agreement between AWSI and such customers on principal to principal basis. Data hosting service is merely one of many input

¹ POPS Rules

² The Appellant

³ AWSI

⁴ DSA

services that AWSI acquires to enable it to develop and provide cloud computing services to its customers.

3. The Exhibits to DSA executed between the appellant and AWSI require the appellant to be responsible for various activities which includes:-

1. Ownership, operation, maintenance and management of equipment in data centres
2. Ensuring that the data centers meet the networking and telecommunication requirements needed to perform the data hosting services:
3. Maintaining effective, uninterrupted equipment performance, making or arranging necessary repairs to equipment or, if repairs are not feasible, replacing the equipment;
4. Managing the local physical security of the data centres based on global standards,
5. Temporary data storage and customized reports as reasonably requested by AWS Inc, USA relating to the provision of specific services

4. On investigation against the appellant for the services rendered, the Department was of the view that the appellant acts as a link between AWSI and its customers located in India by temporarily holding and routing the data through the edge servers installed in India. The appellant thereby acted as an intermediary between AWSI and the customers of AWSI located in India by facilitating/providing the necessary infrastructure so as to provide the customers of AWSI access to the data/content with low latency. In respect of marketing services, the allegation was that the appellant was marketing the cloud

services in India and getting the orders for the same from Indian customers and thereby providing marketing services to AWSI as an intermediary. In the present case, the appellant paid service tax of Rs.9,36,41,506/- on marketing service along with applicable interest of Rs.1,50,993/- for the period from April 2014, to January 2016, and informed the Department by a letter dated February 25, 2016 and requested for closure of the proceedings in terms of section 73(3) of the Finance Act, 1994.

5. Show cause notice dated August 22, 2017 for the period, October 2013 to March 2016, proposing demand of service tax of Rs.34,31,38,111/- and SCN dated March 25, 2019 for the period April 2016 to June 2017 for Rs.47,08,04,315/- were issued. On adjudication, demand was confirmed as proposed in the notices holding that the activity undertaken by the appellant is akin to an agent and, therefore, the appellant qualify as an 'intermediary' under Rule 2(f) of POPS Rules and liable to pay service tax.

6. The appellant has filed the present appeal on the findings that the appellant is covered under the definition of 'intermediary' as defined under Rule 2(f) of POPS Rules, 2012 and is, therefore, liable to pay service tax in terms of Rule 9. In so far as the demand of service tax on marketing support services, the appellant has restricted the challenge only to the levy of penalty thereon.

7. Shri B.L. Narasimhan, learned Counsel for the appellant submitted that the definition of 'intermediary' under Rule 2(f) and 2(13) of IGST Act are same which has been taken note of by the Punjab and Haryana High Court, Delhi High Court and also Bombay High Court. Therefore, the Circulars issued under the GST regime with regard to the applicability of the term 'intermediary' can be applied in the present case and following the analogy laid down therein, it is clear that the appellant is not an intermediary. He has also referred to the order-in-appeals passed by the Commissioner in terms of these circulars holding that the data hosting services are not covered under the definition of 'intermediary'. The Revenue has not challenged these orders and the same have therefore, attained finality. Even the Adjudicating Authority has passed orders-in-original in favour of the assessee, granting the refund of IGST on account of export of data hosting services. Referring to the provisions of the DSA, it is submitted that the appellant is not acting as an intermediary for supply of data hosting services as he is not a broker, an agent or any other person by whatever name called. In terms of the agreement, the appellant is not arranging or facilitating any services between two or more persons, rather the appellant is providing the main service of data hosting on its own account. It is also emphasised that the agreement is executed by the appellant with AWSI for providing data hosting services as an input and AWSI has separately entered into an agreement with its customers for rendering cloud computing services to which appellant is not a party. In support of his arguments, the learned Counsel has referred to series of decisions both under the service tax as well as

under the GST law. He also submitted that since the appellant is not an intermediary, Rule 9 of POPS Rules would not apply and therefore, the place of provision of service would have to be determined with reference to the general Rule 3, whereby place of provision of service is the location of the service recipient and since the recipient in this case is outside India, there is no scope of applicability of service tax thereon. The learned Counsel has also challenged the extended period of limitation as well as levy of interest and penalty.

8. Shri Mihir Ranjan, learned Special Counsel for the Revenue opposed the appeal. He submitted that 'data hosting services and marketing services' provided by the appellant to AWSI are not export of services as per Rule 6A of the Service Tax Rules, 1994 read with the Place of Provision of Services Rules, 2012. He submitted that AWSI is engaged in providing cloud computing services to its customers based across the world and has entered into Data Hosting Agreement with the appellant, who supports and assists the Indian customers of AWSI in accessing cloud services from AWSI by operating high-speed connected data servers at different locations in India and, therefore, the appellant acts as an intermediary facilitating AWSI cloud services to customers in India.

9. In support of the submissions, Shri Ranjan has pointed to the various clauses of the agreement which suggests that the appellant acts on behalf of AWSI and not on principal to principal basis. The learned Counsel submitted that the appellant has satisfied the four

conditions mentioned in Guidelines, Note 5 of CBEC, Taxation of Services dated June 20, 2012, namely:-

A). An intermediary arranges or facilitates the provision of goods or services between two or more persons.

B). An intermediary is involved with two supplies at a given point of time, i.e.

i). supply between the principal and the third party

ii). supply of services to his principal for which a consideration is usually charged. In this case, the appellant is involved with two supplies, i.e.

a) Here, the principal or main activity is of supply of cloud computing services of AWSI to its customers and

b) supply of appellants intermediary services to AWS, USA.

C). As per the data agreement, the appellant cannot alter the nature or value of cloud computing services offered by AWS, USA to its customers.

D). The consideration for an intermediate service is identifiable and distinguishable from the value of goods and services provided by the principal to the customers. The service fee, being an amount equal to cost plus mark up, is billed by the appellant to AWSI. The role of the appellant is to facilitate AWSI and his customers by providing data server infrastructure facilities in India and therefore the data hosting services provided by the appellant cannot qualify as an export of service and therefore the services are intermediary services. The appellant is facilitating the sale of cloud services provided by AWSI to the Indian customer by conducting market events, identifying and contacting prospective and existing customers through lead generation activities, following up on these leads and deputing technical persons to provide technical support and customers. Therefore, the appellant is an intermediary between the customers and AWSI and is not providing marketing services on their own. On limitation, it was submitted that appellant has misdeclared the data hosting and marketing services as export of service in the ST-3 returns and thereby failed to pay service tax correctly."

10. To ascertain whether the appellant falls in the category of 'intermediary' as defined in Rule 2(f) of the POPS Rules, we may consider the submissions made by the appellant with reference to the definition of 'intermediary' as provided under section 2(13) of IGST Act, 2017 and the Circulars issued in that regard. The definition of '**intermediary**' under the POPS Rules and the IGST Act is set out below:-

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| <p>Rule 2(f) of POPS Rules: "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."</p> | <p>Section 2(13) of IGST Act: "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.</p> |
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The requirements and conditions to be an intermediary either under the POPS Rules or under IGST Act are absolutely same. There is no difference even in the meaning of the term 'intermediary' as defined under the two provisions. In this context, considering the definition under the two provisions, CBIC has taken the view that broadly there is no change in the scope of intermediary services in the GST regime vis-a-vis the service tax regime, except addition of supply of securities in the definition of intermediary in the GST law. The Circular No.159/15/82021-GST dated September 20, 2021 takes note of the

fact that the concept of 'intermediary' was borrowed in GST from the service tax regime and laid down the basic prerequisites of intermediary services. Subsequently, clarification was issued on place of supply of data hosting services provided by service providers located in India to cloud computing service providers located outside India under Circular No. 232/26/2024-GST dated September 10, 2024.

The question framed and the clarification issued was as under:

3.1 Whether data hosting service provider qualifies as 'Intermediary' between the cloud computing service provider and their end customers/users/subscribers as per Section 2(13) of the IGST Act and whether the services provided by data hosting service provider to cloud computing service providers are covered as intermediary services and whether the place of supply of the same is to be determined as per section 13(8)(b) of IGST Act.

3.1.2 The cloud computing service providers generally enter into contract with data hosting service providers to use their data centres for hosting cloud computing services. Data hosting service provider either owns premises for data centre or operates data centre on leased premises, procures infrastructure and human resource, handles operations like infrastructure monitoring, IT management and equipment maintenance, etc. to provide the said supply of data hosting services to the cloud computing service providers. The data hosting service provider generally handles all aspects of data centre like rent, software and hardware infrastructure, power, net connectivity, security, human resource, etc. Importantly, the data hosting service providers do not deal with end users/consumers of cloud computing services and may not even know about the end users.

3.1.3 It is observed that data hosting service provider provides data hosting services to the cloud computing service provider on a web platform through computing and networking equipment for the purpose of collecting, storing, processing, distributing, or allowing access to large amounts of data. The cloud computing service provider provides cloud-based applications and software services to various end users/customers/subscribers for data storage, analytics, artificial intelligence, machine

learning, processing, database analysis and deployment services, etc.. The end users/customers/subscribers access cloud computing services seamlessly over the internet through technology hosted on data centers. There appears to be no contact between data Page 3 of 5 hosting service provider and the end users/ consumers/ subscribers of the overseas cloud computing service provider. Thus, it is observed that the data hosting service provider provides data hosting services to the cloud computing service provider on principal-to-principal basis on his own account and is not acting as a broker or agent for facilitating supply of service between cloud computing service providers and their end users/consumers.

3.1.4 Accordingly, it is clarified that in such a scenario, the services provided by data hosting service provider to its overseas cloud computing service providers cannot be considered as intermediary services and hence, the place of supply of the same cannot be determined as per section 13(8)(b) of IGST Act.”

In view of the clarification, the Appellate Authority under the GST laws (S.No.10-11) decided the issue of providing data hosting services in favour of M/s Amazon Data Services India Pvt. Ltd. that the services provided by data hosting service provider to its overseas cloud computing service cannot be considered as 'intermediary services'. On that basis, the Adjudicating Authority vide order dated November 22, 2024 and March 5, 2025 allowed the refund claim as the services in question qualified as export of services. The claim of the Department that the appellant rendered intermediary services as defined under section 2(13) of the IGST Act stood rejected. These decisions have been accepted by the Revenue as they have not been challenged stands accepted by the High Court of Delhi in its Order dated May 29, 2025 in batch of writ petitions (Writ Petition Nos.7191/2025) in the case of M/s Amazon Data Services India Pvt. Ltd.

11. We are of the considered view that the interpretation given with reference to the definition under the IGST Act in identical circumstances would equally apply in the case of treating one to be an intermediary under the service tax regime which is also the opinion of the Board in view of the circular issued. In the circumstances, we hold that the definition of intermediary in the GST regime which has been picked up from the service tax laws squarely covers the issue at hand and consequently, the appellant cannot be held to be an intermediary as the services provided are export of services.

12. The issue, whether an assessee can be categorised as intermediary and whether the services rendered falls under the export of services have been the subject matter of concern in various decisions with reference to providing support services in India to foreign universities and institutions where the assessee arranges and facilities provisional student recruitment services. In these cases, the agreement for the search services was between the appellant and the foreign universities and there was no agreement with the Indian students. Further, the amount as commission or consideration was received from the foreign universities in convertible foreign exchange and not from Indian students and in such circumstances, the High Court in **Commissioner of Central Tax, CGST, Delhi East versus T.C. Global India Pvt Ltd**⁵ has held that the Indian students are not service recipients of the impugned services rendered by the appellant. While noticing that the very issue has been considered by the Bench in **Commissioner of DGST Delhi versus Global Opportunities**

⁵ Final Order dated 24.11.2025 in SERTA 20/2025 & CMAPPL 65505/2025

Pvt. Ltd⁶ with reference to the provisions of the IGST Act and the present case relates to the service tax regime, it was observed that the definition of 'intermediary' under rule 2(f) of the POPS Rules is in parimateria to the definition of 'intermediary' under section 2(13) of the IGST Act. In view thereof, line of decisions under the IGST Act were considered and it was observed that the consistent opinion in the aforesaid judicial precedents has been that services such as those offered by the respondent are not intermediary services. The Court also categorically held that since the recipient of the services provided by the petitioner therein, was located outside India, the services provided by the petitioner were held to be export of service under section 2(6) of the IGST Act. We may refer to some of the decisions cited in the said decision.

13. In the case of **Ernest and Young Limited Pvt. Ltd. Vs. CST, Delhi-II**⁷, Delhi High Court examined the issue whether the service agreement constitute service as an intermediary with reference to the provisions of Section 2(13) of the IGST Act and observed as under:

"20. A plain reading of the aforesaid definition makes it amply clear that an intermediary merely "arranges or facilitates" supply of goods or services both between or more persons. Thus, it is obvious that a person who supplies the goods or services is not an intermediary. The services provided by the intermediary only relate to arranging or facilitating the supply of goods or services from the supplier. In the present case, there is no dispute that the petitioner does not arrange or facilitate services to EY entities from third parties; it renders services to them. The petitioner had not arranged the said supply from any third party."

⁶Final Order dated 25.09.2025 in W.P (C) 10189/2025 & CM APPL.42299/2025

⁷ 2020 (35) GSTL 202 (Tri.-Delhi)

The aforesaid view of the Delhi High Court in **Ernst and Young** has been accepted by the Bombay High Court in the case of **K.C. Overseas Education Private Limited Vs. Union of India**⁸ while observing that the definition of intermediary in service tax regime as well as the GST regime are identical and the same has not been disputed by the Revenue. The special leave petition (C) No. 21104-21105/2025 filed by the Department has been dismissed by the Apex Court as under:

“We also bear in mind the dictum of this Court dated 04.11.2024 in SLP(C) No. 25992/2024 Commissioner, Central Excise, CGST – Delhi South Commissionerate & Anr. versus Blackberry India Pvt. Ltd.”

14. The Delhi High Court in **Commissioner of Central Tax, CGST, Delhi East Vs. T.C. Global India Pvt. Ltd.** has also taken into account similar view expressed by CESTAT, Mumbai Bench in **M/s. Krishna Consultancy versus Commissioner of CGST, Nagpur**⁹ as under:-

“ We have carefully gone through the record of the case and submissions made. We note that the appellants providing guidance to Indian students without charging any consideration from them. In view of the definition of service, we hold that the appellant is not providing any service to prospective students in India. We hold that the appellant is providing service to universities located in foreign countries who are paying consideration to the appellant. We, therefore, hold that the services covered by these proceedings are export of service.”

⁸ 2025:BHC-NAG:2166-DB

⁹ Service Tax Appeal No. 85867/2016

15. It is also relevant to quote the decision in the case of **Verizon Communication, India Pvt. Ltd versus Assistant Commissioner, ST, Delhi –III¹⁰**, where the Delhi High Court had observed as under:-

“46. The position does not change merely because the subscribers to the telephone services of Verizon US or its US based customers ‘use’ the services provided by Verizon India. Indeed in the telecom sector, operators have network sharing and roaming arrangements with other telecom service providers whose services they engage to provide service to the former’s subscribers. Yet, the ‘recipient’ of the service is determined by the contract between the parties and by reference to (a) who has the contractual right to receive the services; and (b) who is responsible for the payment for the services provided (i.e., the service recipient). **This essential difference has been lost sight of by the Department. In the present case there is no privity of contract between Verizon India and the customers of Verizon US. Such customers may be the ‘users’ of the services provided by Verizon India but are not its recipients.**

50. The decision of Larger Bench of CESTAT in *Paul Merchants Ltd. v. CCE, Chandigarh* (supra) may be referred to at this stage. The period with which the dispute in that case related to was between 1st July, 2003 and 30th June, 2007. It involved, therefore, the interpretation of the ESR, 2005 as amended and applicable during the said period. There the assesseees were intermediary agents providing money transfer services to foreign travellers who were the end user on behalf of their principals. The contention of the Department that this did not qualify as ‘export of service’ was rejected by the CESTAT. It noted that the C.B.E. & C. had to issue a clarification Letter No. 334/1/2010-TRU, dated 26th February, 2010 acknowledging the difficulties that were faced by the trade in complying with the condition that the services had to be ‘used outside India’. It was clarified that “as long as the party abroad is deriving benefit from service in India, it is an export of service.”

51. In the considered view of the Court, the judgment of the CESTAT in *Paul Merchants Ltd. v. CCE, Chandigarh* (supra) is right in holding that “The service recipient is the person on whose instructions/orders the service is provided who is obliged to make the payment from the same and whose need is satisfied by the provision of the service.” The Court further affirms the following passage in the said judgment in *Paul Merchants Ltd. v. CCE, Chandigarh* (supra) which correctly explains the legal position :-

“It is the person who requested for the service is liable to make payment for the same and whose need is satisfied by the provision of service who has to be treated as recipient of the service, not the person or persons affected by the performance of the service. Thus, when the person on whose

¹⁰ 2018(8) GSTL 32(Del.)

instructions the services in question had been provided by the agents/sub-agents in India, who is liable to make payment for these services and who used the service for his business, is located abroad, the destination of the services in question has to be treated abroad. The destination has to be decided on the basis of the place of consumption, not the place of performance of Service.”

16. More important and clear observations of the Tribunal in the case of **M/s. Vodafone Essar Cellular Limited versus CCE**, clarify the principal in such transactions, which is as under:

“Your customer’s customer is not your customer. When a service is rendered to a third-party at the behest of your customer, the service recipient is your customer and not the third-party. For example, when a florist delivers a bouquet on your request to your friend for which you make the payment, as far as the florist is concerned, you are the customer and not your friend.”

17. Shri B.L. Narasimhan, the learned Counsel also referred to the decision of the Punjab and Haryana High Court in the case of **Genpact India (P) Ltd versus Union of India**¹¹, where the appellant provided BPO service to customers located in India as well as outside India for which Master Services Subcontracting Agreement was entered with Genpact International located outside India. The services were provided by the petitioner from India remotely through telecommunication/internet links using its own infrastructure and workforce and the issue was whether the services provided by the petitioner were in the nature of “intermediary services” as per section 2(13) of IGST Act and did not qualify as “export of services, the learned Division Bench considering the definition of “intermediary

¹¹ 2023 (68) GSTL 3 (P &H)

services” under the service tax regime and the GST observed as under:

“37. A perusal of the definition of “intermediary” under the service tax regime vis-a-vis the GST regime would show that the definition has remained similar. Even as per circular dated 20-9-2021 issued by the Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs (GST Policy Wing), the scope of “intermediary” services has been dealt in Para 2 thereof. In Para 2.2 it stands clarified that the concept of “intermediary” was borrowed in GST from the Service Tax Regime. The circular after making a reference to the definition of “intermediary” both under Rule 2(f) of the Place of Provision of Service Rules, 2012 and under Section 2(13) of the IGST Act clearly states that there is broadly no change in the scope of “intermediary” services in the GST regime vis-a-vis the service tax regime except addition of supply of securities in the definition of “intermediary” in the GST law.”

18. Holding the petitioner therein not to be an “intermediary” under section 2(13) of the IGST Act, the Bench observed as under:-

“46. Pursuant to the sub-contracting arrangement as per MSA (Annexure P-1), the petitioner provides the main service directly to the overseas clients of GI but does not get any remuneration from such clients. Pursuant to the arrangement, it is GI which gets paid by its customers to whom the services are being provided directly by the petitioner. Nothing has been brought on record to show that the petitioner has a direct contract with the customers of GI. Still further there is nothing on record to show that petitioner is liaising or acting as an “intermediary” between GI and its customers. All that is evident from the record is that the petitioner is providing the services which have been sub-contracted to it by GI. As a sub-contractor it is receiving fee/charges from the main contractor *i.e.* GI for its services. The main contractor *i.e.* GI in turn is receiving commission/agents from its clients for the main services that are rendered by the petitioner pursuant to the arrangement of sub-contracting. Even as per the afore-noticed circular dated 20-9-2021 and in reference to Para 3.5 it stands clarified that sub-contracting for a service is not an “intermediary” service.”

19. We may also take note of the decision of the Karnataka High Court in **M/s. Amazon Development Centre India Private Limited**

versus Additional Commissioner of Central Tax, GST (Appeals-II), Bangalore, Asstt. Commissioner of Central Tax, Bangaldore ¹² where the petitioner therein provided information technology and information technology enabled services, including customer support services to Amazon group companies in India and outside India. Various Amazon group companies in different countries around the world operate E-commerce marketplace in their respective regions and either sell goods directly to customers or list the products of third-party selling partners for sale to end customers and some of these consumer entities engage other Amazon group companies located outside India to provide support services. Vide separate independent customer services agreement, the said foreign affiliates have in turn subcontracted the provision of support services to the petitioner who in turn then provided the customer support services to the foreign affiliates. The learned Single Judge by a very elaborate judgement held that the petitioner in that case is not an "intermediary" under section 2(13) of the IGST Act in terms of the circular dated 20.09.2021 and the customer support services provided by the petitioner to foreign affiliates qualify as "export of service" under section 2(6) of the IGST Act.

20. Having examined the judicial decisions rendered by several High Courts as well as the various Benches of the Tribunal, both under the service tax law and under the IGST provisions, the law is settled that an intermediary merely arranges or facilitates supply of goods or services or both between two or more persons and a person, who

¹² 2025-VIL 409-KAR

supplies the goods or services is not an intermediary. On the interpretation placed on the term intermediary, the Courts have formulated the following criteria for the purpose of classifying any service as an intermediary service:-

- (a)** Such person must be acting in the capacity of a broker, an agent or any other person, by whatever name called;
- (b)** Such person must arrange or facilitate a provision of a service or supply of goods;
- (c)** Such arrangement or facilitation must be between two or more persons; and
- (d)** The person must not provide these services or supply of goods on his own account."

21. We may now consider whether in the present case the appellant satisfies the conditions for being an intermediary in terms of the definition under Rule 2(f) and also as per the agreement entered between the appellant as the provider and AWSI, as the recipient of the service.

22. To satisfy the first condition, the service provider must be appointed as a broker or an agent of the service recipient, who is the principal. Clause 5.1 of DSA titled as "Relationship Between Parties" in clear terms says that any services performed by a party pursuant to this agreement are performed by such party as an independent contractor on a non-exclusive basis and nothing in this agreement creates a partnership, joint venture, franchise or agency relationship between the parties. The necessary implication is that the appellant is not an agent by any means. It is a settled principle of law that the terms of the agreement has to be read as they are and there cannot

be innovation in the terms of the agreement contrary to the intention of the parties. The learned Counsel placed reliance on the decision of the Punjab and Haryana High Court in **Genpact India Pvt. Ltd.** holding that on the terms of the agreement, there was no principal – agency relationship. Reference is also invited to the decision in **Principal Commissioner of CGST, Delhi South, New Delhi versus Comparex India Pvt Ltd**¹³ as affirmed by the **Supreme Court** ¹⁴.

23. The next condition is whether the appellant is arranging or facilitating any service between two or more persons. As per Service Tax Education Guide, while dealing with intermediary services stated that 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. ”

As per the agreement, the appellant is rendering only one service, i.e. data hosting services to AWSI. The cloud computing services provided by AWSI to its customers is by virtue of a separate agreement between them, to which appellant is not a party. The role of the appellant is altogether for an independent activity in the nature of data hosting services, which is one of the inputs for provision of cloud computing services by AWSI. There is no scope for arranging or facilitating any provision of service by the appellant. The submission of the appellant that the term arranging or facilitating when interpreted in conjunction with the terms brokers or agents suggest activity of

¹³ 2021(47) GSTL 355 (Tri.Del.)

¹⁴ 2021 (50) GSTLJ9(SC).

negotiations and interactions on behalf of the principal so as to ensure the provision of service or sale of service by the principal with a third-party, appears to be correct. In the present case, the activities with respect to negotiations, contracts, invoicing, payment from customers are undertaken by AWSI independently whereas the appellant has been engaged only for providing data hosting services by setting up and maintaining complete turnkey data centre services required for high availability data catching as per Exhibit B to DSA which provides for 'Data Service'. Further, as per Exhibit C titled as 'Service Fees', clause 1.3 provides the manner of payment of consideration for the services performed on cost plus percentage basis and not under sales service fee or commission basis, which is a typical arrangement prevalent with Broker/Commission agent/intermediary. Reference is invited to the illustrative list of services ordinarily covered within the scope of an 'intermediary' as per Service Tax Education Guide, which clarifies where the provider of service can be termed as an 'intermediary' which is as under:-

- “ In accordance with the above guiding principles, services provided by the following persons will qualify as 'intermediary services'-
- (i)** Travel Agent (any mode of travel)
 - (ii)** Tour Operator
 - (iii)** Commission agent for a service [an agent for buying or selling of goods is excluded]
 - (iv)** Recovery Agent.”

24. The allegation made by the revenue that Indian customers access cloud computing services from AWSI via appellant's data server facility and, therefore, the appellant facilitates the provision of cloud

services for its customers from AWSI is not the scope of services. The data hosting service is one of the inputs for the provision of cloud computing services by AWSI.

25. Lastly, examining the condition of the definition of 'intermediary' that it does not include a person, who provides the main service or supplies on his own account, we find that the appellant is providing the data hosting service on his own account. The various clauses provided in Exhibit 'B' to DSA indicates that the provider will be solely responsible for all activities relating to the operations and maintenance of the facility and supply of furnishing, fixtures, etc. The entire responsibility for rendering the main service of data hosting services under the agreement was on the appellant on his own account and is not connected in any manner for rendering the cloud computing services which is in the exclusive domain of AWSI. Therefore, the appellant is outside the purview of intermediary services.

26. From the terms of the agreement, it is evident that the appellant is a provider of input services on principal to principal basis. The principle that intermediary should not be a sub-contractor for the main supply excludes the appellant from providing intermediary services.

27. For determining the place of provision of service, the Central Government introduced the Place of Provision Service Rules, 2012. Rule 3 is the General Rule, which provides place of provision of a service shall be the location of the recipient of service. Rule 9 provides that

'Place of Provision of Specified Services shall be the location of the service provider and Rule 9(c) incorporates 'intermediary services'. Since we have already held that appellant is not rendering any intermediary services, the scope of applicability of Rule 9 is ruled out, and consequently, under the General Rule 3, the place of provision shall be the location of the recipient of service. There is no dispute that the service recipient ASWI is located outside India and therefore, the services provided by the appellant would be taxable outside the taxable territory and as a result there is no scope for levy of service tax.

28. Having decided the issue on merits that the appellant is not an 'intermediary' as per the definition given in Rule 2(f) of POPS Rules and, therefore, the place of supply of service being the location of the service recipient, which is outside India, no service tax is leviable. On the issue of invocation of extended period of limitation, we are of the considered view that this is not a case which falls under any of the exceptions provided for invocation of the extended period. The appellant bonafide believed that the services rendered by them were covered under export of services as per Rule 6A of the Service Tax Rules, 1994 and since they were not falling under the category of 'intermediary' the incidence of service tax would not fall on them. In view thereof, the appellant cannot be said to have suppressed or misdeclared so as to justify the extended period of limitation.

29. With respect to show cause notice dated August 22, 2017 on marketing services, it is submitted that the appellant had already paid the tax amount along with interest before the issuance of SCN and informed the Department vide letters dated February 25, 2016 and October 6, 2016. Therefore, in terms of the provisions of section 73(3) the proceedings were required to be closed. The learned Counsel for the appellant has relied on series of decisions, observing that once the assessee has paid the service tax and interest before the issuance of notice, the provisions of Section 73(3) would apply and no show cause notice can be issued. The provisions of Section 73(3) has to be read with the Explanation-I, which provides that interest under Section 75 shall be payable on the amount paid by person under this sub-section. Though, the appellant in their submissions referring to the letter dated February 25, 2016 has stated that the amount of service tax along with applicable interest was paid on the marketing services for the period from April 20 14 to January 2016, however, the adjudicating authority in para 7.2 has observed that the appellant has not paid the interest on such amount as reflected in the relevant ST-3 returns. Para 7.2 is quoted below:-

“7.2 In the case of the noticee I find that they paid service Tax on Marketing Services during the investigation, however, they have not paid the interest on such amount, as reflected in relevant ST-3 returns. Further the noticee have not paid service tax on Data Service. However, for the application of Section 73(3), the noticee was required to pay complete amount of the tax along with interest under section 75 of the Act. Under the condition the noticee cannot claim the application of the Section 73(3) of the Finance Act, 1994.”

In view of the contrary stand taken by the appellant and the Adjudicating Authority, we consider it appropriate to remand the matter to examine as to whether the appellant has paid the interest amount before the issuance of SCN and if so, no penalty is leviable. At the same time, we would like to refer to the decision of the Karnataka High Court, which the adjudicating authority may keep in mind while recording a finding thereto. The Division Bench of the Karnataka High Court in **CCE & ST, LTU, Bangalore versus Adecco Flexione Workforce Solutions Ltd.**¹⁵, by a short order has very strongly observed as:-

“3. Unfortunately the assessing authority as well as the appellate authority seem to think. If an assessee does not pay the tax within the stipulated time and regularly pays tax after the due date with interest. It is something which is not pardonable in law. Though the law does not say so, authorities working under the law seem to think otherwise and thus they are wasting that valuable time in proceeding against persons who are paying service tax with interest promptly. They are paid salary to act in accordance with law and to initiate proceedings against defaulters who have not paid service tax and interest in spite of service of notice calling upon them to make payment and certainly not to harass and initiate proceedings against persons who are paying tax with interest for delayed payment. It is high time, the authorities will change their attitude towards these tax payers, understanding the object with which this enactment is passed and also keep in mind the express provision as contained in sub-sec. (3) of Sec. 73. The Parliament has expressly stated that against persons who have paid tax with interest, no notice shall be served. If notices are issued contrary to the said Section, the person to be punished is the person who has issued notice and not the person to whom it is issued. We take that, in ignorance of law, the authorities are indulging in the extravaganza and wasting their precious time and also the time of the Tribunal and this Court. It is high time that the authorities shall issue appropriate

¹⁵ 2012 (26) STR 3 (Kar.)

directions to see that such tax payers are not harassed. If such instances are noticed by this Court hereafter, certainly it will be a case for taking proper action against those law breakers.”

30. We, therefore, hold as under:-

- (i) The impugned order in so far as the liability of service tax on the appellant in respect of data hosting services is concerned, the same is set aside and consequently, neither any interest nor penalty is leviable.
- (ii) The challenge to the levy of penalty in respect of the service tax amount paid before the issuance of show cause notice is concerned, the issue is remanded to the limited extent as to whether the interest amount has also been paid by the appellant.

31. The impugned order is set aside to the extent specified above. The appeal is partly allowed and remanded to the Adjudicating Authority.

[Order pronounced on 19th January, 2026]

(BINU TAMTA)
Member (Judicial)

(HEMAMBIKA R. PRIYA)
Member (Technical)

Ckp.