



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 4852 OF 2022
WITH
CHAMBER ORDER NO. 292 OF 2022

Vistex Asia Pacific Pvt. Ltd. ...Petitioner
Versus
Union of India & Ors. ...Respondents

Mr. Bharat Raichandani with Mr. Pritesh Kumar i/b. UBR Legal Advocates for
Petitioner.

Mr. Jitendra Mishra with Ms. Sangeeta Yadav, Mr. Rupesh Dubey and Mr.
Ashutosh Mishra for Respondent Nos.1, 2, 3 & 6.

Ms. Jyoti Chavan, Addl. G. P. for State.

CORAM: G. S. KULKARNI &
AARTI SATHE, JJ.
DATE: 06 JANUARY 2026.

P.C.

1. Rule. Rule returnable forthwith. By consent of the parties, heard finally.
2. This petition under Article 226 of the Constitution of India assails an order dated 22 February 2022, passed in appeal by the Joint Commissioner of CGST, Mumbai.
3. The facts lie in a narrow compass. The petitioner is a subsidiary of M/s. Vistex Inc., USA (parent company), providing information system products and services to customers who own and operate proprietary information systems based on software licenses of 'SAP'. It is the petitioner's case that, it is primarily engaged in the export of Information Technology services and provides such services to its parent company under a Service Agreement dated 01 January 2017 executed

between the petitioner and M/s. Vistex Inc., USA. The petitioner contends that the services provided by it to its parent company, qualify as 'export of services' under the provisions of the CGST Act, hence, the petitioner was entitled to a refund of unutilized input tax credit in terms of Section 54(3) of the Central Goods and Services Tax Act, 2017 ('CGST Act').

4. Accordingly, the petitioner filed three refund applications for different periods: (i) refund application for the period from 01 January 2020 to 31 March 2020; (ii) refund application for the period from 01 April 2020 to 30 September 2020 and (iii) refund application for the period from 01 October 2020 to 31 December 2020.

5. The Assistant Commissioner, CGST, issued a show cause notice dated 19 September 2020 [in Form GST RFD-08], calling upon the petitioner to show cause as to why the petitioner's refund claim be not rejected, basis the verification of documents, as the documents including the said agreement revealed that the petitioner did not satisfy the conditions of 'export of services' under the Integrated Goods and Services Tax Act, 2017 ('IGST Act'). The show cause notice was replied by the petitioner. The Assistant Commissioner, considering the petitioner's reply, passed a refund sanction order.

6. The refund sanction order was, however, reviewed by the Principal Commissioner, who did not agree with the view taken by the Assistant Commissioner, in regard to the petitioner's entitlement on its refund claim, more particularly, examining the Service Agreement dated 01 January 2017 (supra).

Further, Deputy Commissioner, CGST, also filed appeals against the refund orders before the appellate authority, i.e., the Commissioner, CGST.

7. By the impugned common order dated 22 February 2022, the appellate authority allowed the appeals filed by the department, rejecting the petitioner's refund applications, primarily on the ground that the petitioner was acting as an agent/intermediary of its parent company, namely, M/s. Vistex Inc., USA. The appellate authority, after examining the contents of the agreement, was persuaded to allow the appeals for the following reasons:-

“9.1.2 Now the issue to be decided in above mentioned all three departmental appeals are as to whether the respondent have satisfied all notified conditions of export allegedly claimed for their services provided to their parent company in USA.

9.1.3 The Appellant submitted that the respondent have entered into service agreement dated 01.01.2017 with their parent company Vistex Inc. based in USA. The important clauses are given in para 2.4 above. Appellant also submitted that as per the above clauses of agreement, the respondents are performing various functions viz; (i) Carrying out programming services, (ii) Engaged in marketing of Parent Company's line of software products, (iii) Offer consultation/implementation services on parent's line of products, (iv) Receive royalty payments and maintenance charges on Vistex Software products from SAP and license fees from customers.

9.1.4 The Appellant further stated that as per the definition of intermediary agent, intermediary includes agent but apart from agents it includes all persons who facilitates or arranges supply of goods or services between two or more persons. Since the respondents are providing marketing service of the company's line of software products, they are arranging and facilitating supply of products of their parent company to customers in India and are rightly covered under the definition of intermediary.

9.1.8 From the above, I find that the respondents are providing consulting/implementation services on parents company's line of products; that these services are provided to Indian Customers on behalf of the parent company; that they are also receiving royalty payments and maintenance charges on parents software products and direct license fees from Indian customers; that these charges collected are appropriated by the respondent to the extent of 30% and remaining 70% is credited to the parent company; that the actual service of consulting and implementation service is provided by the recipient to the Indian customers on behalf of the parent company and they are receiving license fee from the customers for the services of parents company of line of software products; that the

services are being provided to Indian customers on behalf of parent company. So, I am of the considered view that they are working as an agent of parent company for provision of service to the Indian customers of parent company. Accordingly, they are acting as intermediary.

9.2.4 Hence, as per Section 13(12) of IGST Act, 2017, location of recipient of service is the place of supply of online information and data-based retrieval services. I also find that as per the Service Agreement, the actual recipient of these services is Indian customer which is clear from the fact that the respondents are providing marketing service of the parent company's line of software products, collecting maintenance charges on parent company software products and so also collecting license fees which means that actual location of recipient of service is in India and accordingly place of supply of these services are in India and hence does not qualify as exports.

9.2.5 Also I refer the definition of subsidiary, i.e. "In the corporate world, a subsidiary is a company that belongs to another company, which is usually referred to as the parent company or the holding company. The parent holds a controlling interest in the subsidiary company, meaning it has or controls more than half of its stock. In cases where a subsidiary is 100% owned by another firm, the subsidiary is referred to as a wholly owned subsidiary. A subsidiary company is the one that is controlled by another company, better known as a parent or holding company." In view of the above, I find that the subsidiary company is an intermediary for the Parent/Holding company in terms of the provision of services by the Parent/Holding company to the end customer located in a taxable territory. Further, from the service agreement between Vintex Inc. USA and Vistex Alia Pacific Pvt. Ltd. Also amply clear that M/s. Vistex Asia Pacific Pvt. Ltd. is acting as agent/ intermediary of M/s. Vistex Inc, USA, and as per section 13(8) of IGST Act, 2017, the place of provision of intermediary service shall be the location of the supplier of services. The place of suppliers in the instant case is in India. Accordingly, in both the situations, the place of provision of services in the instant three appeals would be India only, and accordingly these does not qualify to export.

10. In view of the above, I find that the adjudicating authority failed to observe that the respondent does not satisfy the requirement of Rule 2(6) of IGST Act, 2017 and therefore services provided by them do not qualify as export of services; that refund of accumulated ITC on grounds of export of service is not eligible to them. So, the Refund sanctioned vide Order-in-Original Nos. GST RFD-06 No. ZR27102000025266 dated: 03.10.2020, ZT2701210248246 dated 28/01/2021 and ZZ2705210135039 dated 10/05/2021 to the extent of Rs.7,49,206/-, Rs.7,48,804/- and Rs.8,57,664/- respectively are required to be recovered along with applicable Interest from M/s. Vistex Asia Pacific Private Limited.

11. Accordingly, I pass the following order:-

12. The Appeals filed by the Department are allowed, and refund orders bearing nos. (i) ZR27102000025266 dated: 03.10.2020, (ii) ZT2701210248246 dated 28/01/2021, and (iii) ZZ2705210135039 dated 10/05/2021 are set aside."

8. It is on the aforesaid backdrop, the present petition is filed *inter alia* praying that the impugned order dated 22 February 2022 passed by the appellate authority be quashed and set aside. It is also a prayer that a writ of mandamus be issued to the respondents to hold and declare that the petitioner is entitled to refund on account of export of services.

9. On behalf of the respondents, a reply affidavit of Shri. U. Niranjana, Principal Commissioner, CGST & C.Ex., Mumbai South, is placed on record, opposing the petition and supporting the impugned order. Mr. Jitendra Mishra, learned counsel for the respondents, has represented the respondents and made extensive submissions, relying on the department's case as set out in the reply affidavit.

10. On behalf of the petitioner, Mr. Raichandani, learned counsel, at the outset submitted that the impugned order needs interference in the present proceedings and the view taken by the Assistant Commissioner deserves to be restored. In support of this contention, apart from referring to the relevant provisions, Mr. Raichandani submitted that the issue is no longer *res integra* in view of the decision rendered by a co-ordinate Bench of this Court in **Sundyne Pumps and Compressors India Pvt. Ltd. vs. Union of India**¹. Mr. Raichandani has submitted a comparative chart to demonstrate similarity between both the cases under the heads "*nature of business; eligibility of refund; the issues which fell for consideration, the subsequent proceedings which were adopted and the rejection of appeals by the appellate authority filed by the assessee, etc.*". It is hence Mr.

¹ 2025 SCC Online Bom 2372

Raichandani's submission that the Division Bench in **Sundyne Pumps and Compressors India Pvt. Ltd.** (supra) had examined the terms and conditions of the agreement entered into between the parties in the said case, which, according to him, were substantially similar to the service agreement dated 01 January 2017 executed between the petitioner and its parent company, M/s. Vistex Inc., USA. Mr. Raichandani has therefore contended that in the present case, attributing a meaning to such an agreement different from what was agreed between the parties would not be an appropriate approach on the part of the appellate authority, particularly considering the view taken by the Division Bench.

11. We may observe that in **Sundyne Pumps and Compressors India Pvt. Ltd.** (supra), the Division Bench analyzing the agreement, arrived at a categorical finding that the petitioner therein was not an agent of the parent company. The Division Bench observed that the said conclusion was evident from a holistic reading of the agreement.

12. To appreciate Mr. Raichandani's contention, we have carefully gone through the decision of the Division Bench in **Sundyne Pumps and Compressors India Pvt. Ltd.** (supra). We find that the Division Bench, while considering the provisions of Section 16 of the IGST Act, examined the definitions of 'export of goods' (Section 2(5) of the IGST Act), 'export of services' (Section 2(6) of the IGST Act), as also examined the definition of 'agent' under Section 2(5) of the CGST/MGST Act. The Division Bench also considered the relevant circular issued by the Central Board of Indirect Taxes and Customs, bearing No. 161/17/2021-GST, dated 20 September 2021, in the context of 'export of

services', particularly with reference to condition (v), Section 2(6) of the IGST Act. In such context, the Division Bench made the following observations:-

“31. In terms of the aforesaid Circular, it is clear that what is sought to be covered under condition (v) to Section 2(6) of the IGST Act is the supply of services made by a branch or an agency or representational office of a foreign company, not incorporated in India, to any establishment of the said foreign company outside India, which shall be treated as supply between establishments of distinct persons and shall not be considered as “export of services”. Similarly, any supply of service by a company incorporated in India to its branch or agency or representational office, located in any other country and not incorporated under the laws of the said country, shall also be considered as supply between establishments of distinct persons and cannot be treated as export of services.

32. It is submitted that the said Circular has specifically clarified that the transactions between sister/ group companies, holding/subsidiary companies are not covered under condition (v) to Section 2(6) of the IGST Act.

33. In the present case, the Petitioner is not a mere establishment of the recipient of services located outside India by reason of supplies being made to sister/ group companies or holding/subsidiary companies.

34. The above Circular is issued by Respondent No. 1. Respondent No. 3 vide its Trade Circular No. 26T of 2021 dated 28.09.2021 has adopted the said Circular dated 21.09.2021 issued by CBIC. It is a settled principle that the Circulars issued by the department are binding on the Respondents.”

13. We may further observe that the Division Bench, in paragraphs 21 to 27 of the said judgment, examining the agreement between the parties, made a categorical observation that the petitioner therein was not providing services to the foreign recipient as its agent, nor was the recipient carrying on business in India through the petitioner. The Division Bench thus observed that there was absolutely no control exercised by the foreign recipient over the petitioner, which was also evident from the terms of the agreement.

14. From the impugned order, as also from the pleadings on record, we are not in a position to fully agree with the petitioner's case that this petition needs to be outrightly allowed applying the decision in **Sundyne Pumps and Compressors**

India Pvt. Ltd. (supra), this more particularly considering the terms and conditions of the service agreement dated 01 January 2017 (supra) also in the context of the definition of ‘agent’ as defined under Section 2(5) of the CGST/ MGST Act. In our opinion, considering the different clauses of the service agreement, the issues require a deeper scrutiny and examination by the appellate authority on the perspective as discussed hereinabove, including on the circular(s), the relevant provisions and the decision of this Court in **Sundyne Pumps and Compressors India Pvt. Ltd.** (supra). We also note the following relevant clauses of the said service agreement hereunder. :-

“EARLIER AGREEMENT SUPERSEDED

Prior hereto the Subsidiary Company was rendering and effecting services as required and desired by the Parent Company on a project basis having and keeping a statement of work for each project on the terms agreed upon and recorded in an Agreement dated 1st day of July 2004 and for services of each project the Parent Company used to and has been remunerating the Subsidiary Company. Now the Subsidiary Company has agreed to work mainly for the Parent Company and hence on this Agreement coming into force and effect, the earlier Agreement dated 1st July 2004 shall by mutual consent stand terminated and ineffective. The business relationship between the said Companies shall now be governed by terms of this Agreement.

WORK FLOW & WARRANTY

The Parent Company shall provide the requisite designs and the Subsidiary Company shall carry out programming services accordingly. The programming services shall be performed, executed and carried out and attended to in a professional manner in accordance with sound practices consistent therewith. Furthermore, such services will be performed by the subsidiary company’s employees qualified to perform the same and will be of quality conforming to standards generally acceptable in the field.

COMPENSATION

Since the Subsidiary Company shall be exclusively working for the Parent Company, the Parent Company has agreed to bear and compensate the Subsidiary Company all the expenses which the Subsidiary Company shall incur and shall be required to incur on various items all connected with, concerning and relating to such programming services. The main items of expenses are stated in the list attached hereto as Schedule ‘A’. The expenses to be reimbursed by the Parent Company shall not be limited only to those items mentioned in Schedule ‘A’ but shall bear and reimburse all expenses

of which a statement shall be duly maintained / prepared by the Subsidiary Company, periodically as per practice which may be adopted and accepted by parties hereto mutually. The agreement is on cost plus basis. Therefore, the Subsidiary Company shall be entitled to receive from the Parent Company all costs and expenses incurred including on items mentioned in Schedule 'A' plus 20% as mark up amount. The Subsidiary Company shall raise its invoice on the Parent Company, for the expenses incurred by the Subsidiary Company in rendering services and towards its mark up @20 % periodically, preferably every quarter. The payments can be received by the subsidiary company against monthly statements provided to the Parent Company and the amount so received be reconciled within a period of 15 days, from date of invoice.

MARKETING SERVICES BY SUBSIDIARY

The subsidiary company will engage in marketing of the Parent Company's line of software Products for which it will be compensated by the Parent Company.

CONSULTING SERVICES AND LICENSE FEES

The Subsidiary Company may also offer consulting/ implementation services on the Parent company's line of products. It may with the permission of the Parent Company also receive royalty payments and maintenance charges on Vistex software products from SAP and direct license fees from customers. The income generated from as stated above. will be apportioned in a manner. wherein a sum equal to 70% thereof shall be credited in the account of the Parent Company towards its share of cost as entire cost is borne and paid by Parent company and remaining 30% shall belong to the Subsidiary Company.

SUBSIDIARY LIABILITY

The Subsidiary Company shall not be liable to the Parent Company for any loss, damage or injury other than for gross negligence of it workers, assistants or employees or by reason of contingencies beyond the control of the Subsidiary Company. The liability of Subsidiary Company shall not exceed the amount of consideration paid to the Subsidiary Company under this Agreement and accordingly the Subsidiary Company shall not be liable for consequential or punitive damages.

INDEMNITY

The Parent Company shall indemnify the Subsidiary Company and its Directors, officers and employees from any loss, damages, costs or expenses arising from any claim, demand, assessment, action, suit or proceeding arising as a result of gross negligence or intentional avoidance on the part of the Parent Company similarly if by reason of any gross negligence or intentional avoidance of services on the part of the Subsidiary Company any loss or damage is caused, the Subsidiary Company shall indemnify the Parent Company and its Directors/Officers.

BUSINESS RELATIONSHIP

The Subsidiary Company is an independent subsidiary majority owned by the Parent Company. The Parent Company is interested only in results obtained and will not exercise any control or supervision over how the

Subsidiary Company provides Services. The Subsidiary Company is responsible for providing its own medical, life, workers' compensation, unemployment compensation, and liability insurance coverage, as the Parent Company's coverage does not extend to the Subsidiary Company; any personal liabilities incurred by the Subsidiary Company as an independent subsidiary while conducting/providing Services are solely the Subsidiary Company's responsibility, Nothing in this Agreement shall be construed as Making the Subsidiary Company the Parent Company's agent for any purpose and the Subsidiary Company shall not have the authority to enter into contracts or obligations on behalf of the Parent Company or to bind the Parent Company in any manner.”

15. Mr. Raichandani has also placed reliance on the circular dated 20 September 2021, which, in the context of ‘export of services’, was also referred in paragraph 30 of the order passed by the Division Bench of this Court. He also refers to a Circular of even date issued by the Central Board of Indirect Taxes and Customs in the context of “*clarification on doubts related to scope of intermediary and scope of intermediary services*”, and more particularly, as to what has been set out in paragraph 3 and its sub-paragraphs i.e. paragraphs 3.1 to 3.6 thereof. Mr. Raichandani has also drawn our attention to the specific case made out by the petitioner before the appellate authority, not only in the context of the purport of the said circular vis-a-vis the relevant provisions of the IGST Act and the CGST Act, but also to the contentions as urged by the petitioner in its appeal, wherein he submits that it was categorically contended that the petitioner was not engaged in marketing / consultation and implementation services (paragraph 2.4.2 of the memo of appeal) and the other grounds raised therein.

16. Having heard learned counsel for the parties and having perused the record, the circular(s) dated 20 September 2021 (supra), the impugned order, and the decision of the Division Bench of this Court in **Sundyne Pumps and Compressors India Pvt. Ltd.** (supra) as noted hereinabove, we are of the considered opinion

that, although the appellate authority has taken into consideration certain clauses of the agreement, in the light of what has been held by this Court in **Sundyne Pumps and Compressors India Pvt. Ltd.** (supra) and qua the applicability of the said circular(s) to the service agreement in question, the matter would require an appropriate examination by the appellate authority on all the points urged on behalf of the petitioner and the specific findings recorded.

17. In this view of the matter, keeping open all contentions of the parties, some of which we have discussed hereinabove, we are of the clear opinion that it would be in the interest of justice to remand the proceedings to the appellate authority for *de novo* consideration of the department's appeal, as allowed by the impugned order dated 22 February 2022. Hence, the following order:-

ORDER

- i. The impugned order dated 22 February 2022 is quashed and set aside.
- ii. The proceedings are remanded to the appellate authority (Joint Commissioner, CGST & CX, Appeals-I, Mumbai) for *de novo* consideration and for a fresh order to be passed in accordance with law, after hearing the parties.
- iii. The appellate authority shall complete the appropriate determination within a period of three months from today.
- iv. All contentions of the parties are expressly kept open.
- v. Rule is made absolute in the aforesaid terms. No costs.

(AARTI SATHE, J.)

(G. S. KULKARNI, J.)