IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.15228 OF 2023

Sundyne Pumps and Compressors India Pvt Ltd
(Formerly known as HMD Seal/Less Pumps
Industrial Pvt Ltd)
3rd Floor, S. No.169/1, CTS 2495,
Section II, Westend Center 3, Bldg D,
Maratha, Senani Mahadji Shinde Marg,
Pune 411 007 ..Petitioner

Versus

The Union of India
the Revenue Secretary
Ministry of Finance,
Department of Revenue,
New Delhi & Ors ..Respondents

Mr. Prakash Shah, Senior Advocate with *Mr. Jas Sanghavi, Mohit Raval, Vikas Poojary i/b PDS Legal, Advocates for the Petitioner.*

Ms. S. D. Vyas, Addl. G.P. with *Mr. Aditya Deolekar, AGP, for the State/ Respondent Nos.2 to 5.*

CORAM: B. P. COLABAWALLA &
FIRDOSH P. POONIWALLA, JJ.

Reserved On: 6th May, 2025.

Pronounced On: 16th June, 2025.

JUDGMENT (Per B. P. Colabawalla, J.)

1. Rule. Respondent Nos.2 to 5 waive service. With the consent of the Petitioner and Respondent No.2 to Respondent No.5, Rule made returnable forthwith and heard finally.

2. The present Writ Petition filed under Article 226 of the Constitution of India seeks to challenge two Orders-in-Appeal Nos. DC/ APP-1/ P-488/ 22-23/ 27AAFCH1404FIZ2/ HMD SEAL/ ORDER/ 23-24/195 (for the period July 2021 to September 2021) and DC/ APP-1/ P-489/ 22-23/ 27AAFCH1404F1Z2/ HMD SEAL/ ORDER/ 23-24/ 196 (for the period October 2021 to December 2021) both dated 10.08.2023 passed by the Deputy Commissioner of State Tax, PUN-APP-E-001, the 4th Respondent herein, upholding the rejection of refund of unutilized Input Tax Credit (**"ITC"**) relating to zero rated supplies (Exports) of goods and services.

3. The facts of the present Petition reflect that the Petitioner had filed two refund applications for the period ***July to September 2021*** and ***October to December 2021*** claiming refund of Rs.13,75,244 and Rs.25,88,634 respectively, of the unutilised ITC under Section 54(3) of Central Goods and Services Act, 2017 (***"CGST Act")*** / Maharashtra Goods and Services Tax Act, 2017 (***"MGST Act"***) read with Rule 89 (4) of Central

Goods and Services Rules, 2017 ("***CGST Rules***") / Maharashtra Goods and Services Tax Rules, 2017 (***"MGST Rules"***) for making zero rated supplies, which came to be rejected by the Original Authority – State Tax officer - Respondent No. 5 and, upheld by the Appellate Authority – Respondent no. 4 on the ground that the recipients of the services located outside India are carrying on business through the ***"agency"*** in India i.e. the Petitioner and hence the Petitioner qualifies as "*mere establishment of distinct person*". Thus, the Petitioner did not provide zero rated supplies and consequently, not entitled to a refund of unutilized ITC under Section 54(3) of the CGST/MGST Act.

4. The Petitioner supplies engineering services for industrial and manufacturing projects, specialized office support services, management consulting and management services, maintenance and repair services etc., and also supplies goods to its customers. The said supplies are to Petitioner's group companies/ related persons located outside India. The Petitioner does not supply either goods or services in the Domestic Tariff Area (***"DTA"***).

5. The Petitioner was earlier registered in the name of *HMD Seal/ Less Pumps Industrial (India) Private Ltd.* The name of the Petitioner was

changed to *Sundyne Pumps and Compressors India Private Ltd.* with effect from 19.07.2023. The GST registration was appropriately amended.

6. It is the submission of the Petitioner that the overseas entities [to which supplies were made] are independent body corporates/ legal undertakings incorporated under the laws of their respective jurisdictions. Since, the entire supplies of the Petitioner were to the recipient located outside India, the said supplies qualified as "Exports of Goods" and "Export of Services", under Section 2(5) and 2(6) of the Integrated Goods and Services Tax Act, 2017 (***"IGST Act"***), respectively, and they were zero-rated supplies in terms of Section 16 of the IGST Act. Therefore, the Petitioner was entitled to a refund of unutilised ITC in terms of Section 54(3) of the CGST/MGST Act read with Rule 89(4) of the CGST/MGST Rules.

7. This being their case, the Petitioner filed two separate refund applications under Section 54(3) of CGST Act/ MGST Act read with Section 16 of the IGST Act and Rule 89(4) of the CGST Rules/ MGST Rules for refund of unutilized ITC on account of zero-rated supplies made by the Petitioner for the period April 2020 to March 2021 and April to June 2021. The said applications were duly allowed, and the Petitioner was granted the refunds. According to the Petitioner, the said orders granting refund are not

challenged by the State and have attained finality. These two refund applications are not the subject matter of this Petition.

8. Similarly, the Petitioner filed two more refund applications for the periods July to September 2021 and October to December 2021, on identical grounds, claiming refund of unutilized ITC of Rs.13,75,244/- and Rs. 25,88,634/-, respectively.

9. Respondent No. 5, after issuing a show cause notice to the Petitioner, rejected the above two applications, vide its Order dated 25.08.2022 (for the period July – September 2021), and Order dated 24.08.2024 (for the period October – December 2021), by holding that the Petitioner did not qualify the conditions of export of services by invoking clause (v) of Section 2(6) IGST Act, which defines “Export of Service” (Exh. K-1 & K-2 to the Petition).

10. Being aggrieved by the orders of Respondent No. 5 rejecting both the refund applications, the Petitioner filed two appeals before Respondent No. 4, which appeals came be rejected by Respondent No. 4. Hence the present Petition.

11. Prior to passing the impugned orders, Respondent No. 4 had issued show cause notice (page 317-323 of the paperbook) calling upon the Petitioner to show cause as to why the Petitioner should not be treated as an "agent", and the foreign recipients be treated as "Principals" of the Petitioner for the following reasons:

> *"In view of the fact of the case and the clauses of the agreement, reimbursement of expenses, fixed profit margin or mark up, relationship between group companies in terms of "related persons" as provided in section 15 of CGST Act, availability of books of accounts for inspections and perusal, and other clauses of the agreements as mentioned hereinabove, TP may be covered by the term "AGENCY" as provided in explanation 2 / and 1 appended to section 8 of IGST Act, if the definition of 'AGENT' (section 2 (5) of CGST Act) is referred to.*
>
> *From the perusal of the clauses in the agreement, it is discernible that overall control of the business of TP in terms of financial control, management, business policies and work to be done and the manner in which the work is to be done, remained with the foreign party/ recipient of service."*

12. After hearing the Petitioner and the officer of the department on different dates, Respondent no. 4 passed the impugned orders, both dated 10.08.2023, and concluded thus:

> *"52. Conclusion:*
> *In view of the aforementioned discussion, the following is concluded:*
>
> *(a) Whether the clauses in the agreement, conduct of parties, and other documentary evidences prove that the Foreign recipient has been carrying on a business through "agency" in India?*
> *Answer: YES.*
>
> *(b) Whether the foreign recipient has an "establishment" in India by*

virtue of conducting the business through "agency" as provided in section 8, explanation (2) and consequentially sub-section (1) of section 8?
Answer: YES.

(c) Whether the Taxpayer has violated conditions (v) of section 2(6) of IGST Act. i.e. the supplier of service and the recipient of service should not merely be establishments of a distinct person?
Answer: YES, as the Taxpayer has acted as an "agency" of foreign recipient, they have violated this condition.

(d) Whether the Taxpayer has provided zero rated supply as provided in section 16 of IGST Act?
Answer: No zero rated supply of services has been provided.

(e) Whether the tax payer is entitled to refund under section 54 of MGST Act / CGST Act?
Answer: No refund can be granted to the Taxpayer as per section 54(3) as no zero rated supply of services / export of services has been effected."

13. Having heard the learned counsel for the parties, we will first analyse the relevant provisions of the IGST Act and the CGST / MGST Act. Section 16 of the IGST Act defines "Zero Rated Supply" to mean export of goods or services or both. Section 2(5) of the IGST Act defines, 'export of goods', which reads thus:

> *"2(5) Export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India."*

Section 2 (6) of the IGST Act defines, 'export of services', which reads thus:

> *"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;"*

14. From the record we find that Respondent No. 4 framed issues in paragraph 17 of the impugned orders. It can be seen from the impugned orders that Respondent No. 4 has not disputed that the Petitioner has satisfied all the conditions of "export of services" under Section 2(6) of IGST Act, except condition (v). The said condition (v) provides that '*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'*.

15. Since condition (v) of Section 2(6) refers to Section 8, it would be necessary to examine that as well. Section 8 of the IGST Act defines "Intra State Supplies". It provides that in cases where the location of the supplier and place of supply are in the same State or Union Territory, the said supply shall qualify as Intra-State supplies. Explanation 1 to Section 8 explains what is an *establishment of a distinct person*. Clause (i) of Explanation 1 to Section 8 provides that *"where a person has an establishment in India and any other establishment outside India, then such establishments shall be treated as establishments of distinct persons"*.

Explanation 2 to Section 8 reads thus:

> ***"Explanation 2.*** *- A person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory."*

16. The term "Agent" is defined under Section 2(5) of the CGST / MGST Act, which reads thus:

> *"2. Definitions: - In this Act, unless the context otherwise requires,-*
>
> *(5) "agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;"*

17. In terms of Section 2(5) of the CGST/ MGST Act a person shall qualify as an agent only when the said person carries on the business of supply or receipt of goods or services or both on behalf of another.

18. From the record we find that the impugned orders hold that the foreign recipient of goods and services are Principal and the Petitioner is their Agent in India and thus, according to Respondent No. 4, the overseas recipient of services are carrying on business in India through ***"agency"*** of the Petitioner. Consequently, Petitioner is a mere establishment of the foreign recipients.

19. It is the case of Respondent No. 4 that in the instant case the Petitioner is not an independent contractor but an agent as defined under Section 2(5) of CGST/MGST Act, as clauses of the agreement and conduct of the parties prove that the foreign recipient has created an agency in India through the Petitioner (last paragraph of page 102). The purported finding of the Respondent No. 4 is based on the following:

i. *Foreign party exerts control over the Petitioner, the latter being a subsidiary of former.*

ii. *The managerial control vests with foreign recipient and all the decisions of the Petitioner's business shall be taken by foreign recipient.*

iii. *All the expenses incurred by the Petitioner are reimbursed by the foreign recipient and the Petitioner is remunerated on costs plus basis, resulting in a situation of revenue surplus always and, the said mark up is nothing but fixed commission being paid to the Petitioner;*

iv. *Books of accounts of the Petitioner are readily available for inspection and audit to the foreign recipient, as and when needed.*

v. *The relationship between Petitioner and foreign recipient is of group companies, particularly parent and subsidiary, and therefore, there is fiduciary relationship between these companies.*

20. However, we find that Respondent No.4 has completely lost sight of the fact that the agreement clearly provides that the Petitioner is an independent contractor and that neither the Petitioner nor its officers, directors, employees or sub-contractor are servants, agents or employees of the recipient of services. (clause 14 at page 211). One specimen agreement dated 01.04.2021 between the Petitioner and SISA International S.A. ("SISA"), registered in France is annexed to the above Petition (Exhibit B). The relevant clauses of the said agreement are reproduced below:

> *"This Agreement, made and be effective from 1st April 2021 between HMD Seal/Less Pumps Industrial (India) Pvt. Ltd ("HMD India") registered under the Companies Act, 2013 with the Corporate Identity Number U29309PN2019FTC188383 and Sur dyne International, S.A.("SISA") registered in France.*
>
> *Whereas, SISA has a continuing need for Engineering, Application, Information Technology and other technical services.*
>
> *Whereas, the departments of HMD India are staffed with highly experienced personnel and are prepared to provide Services in the aforementioned areas. In providing these services, HMD India may engage its own human resources as and when required and will also procure the same from its other affiliated companies or from third parties;*
>
> *Whereas, SISA will place Purchase order and HMD India will supply the goods to meet the requirements.*
>
> *1. Services*
>
> *HMD India agrees to render services to SISA in the areas specified above.*
>
> *1.1 Apart from the services mentioned and specified in this Agreement, SISA may also request HMD India to render additional special services and HMD India undertakes to comply with such request to the extent it deems, in its sole discretion, that it is capable to service such requests. Such additional special*

services shall be rendered subject to the terms of this Agreement as at the discretion of both parties.

2. Fees

……..
2.2 HMD India will raise an invoice on SISA as under:
a. Services: Mark up on the cost associated with the services incurred by HMD India as established in Exhibit I

b. For supply of Goods to SISA: Mark up on the cost as established in Exhibit I.
……..
2.4 If the supply of goods and rendering of services is subject to value-added taxes or similar levies, these amounts shall be paid by SISA.

2.5 When funds are required in advance to perform the services under this Agreement, HMD India may request an advance from SISA. Such advance shall be adjusted without additional charges or fees.
……

4. Records and Documentation of Actual Cost and Revenues

4.1 To facilitate the calculation of amounts to be invoiced, HMD India shall keep true and accurate books and records in such detail as is necessary to identify the actual costs related to rendering the Services and supply of goods.

4.2 SISA has the right to audit the actual costs of HMD India for the services to determine whether the charges are true and fair under this agreement. The costs of such an audit, including any outside accounting firm assistance, shall be at the sole expense of SISA
……..

14. Independent Agreement
It is expressly understood that HMD India is an independent contractor, and that neither HMD India nor its officers, directors, employees or subcontractors are servants, agents or employees of SISA.
……..

Fee Schedule

Effective as of 1st April 2021, in consideration of the services to be rendered by HMD India under this Agreement, SISA agrees and undertakes to pay HMD India for all such services provided and goods supplied as follows:

For Supply of Services: At present, Mark up of 10% on the cost associated with

the services incurred by HMD India

For supply of Goods: At present, Mark up of 5% on the cost associated"

21. The reading of the above agreement does not in any way bring out that the Petitioner is providing services to the foreign recipient as its agent or that the recipient is carrying business in India through the Petitioner.

22. In other words, the Petitioner does not carry on business of supply of goods or services or both on behalf of another (foreign recipient). The Petitioner provides design and engineering services to its customers on principal-to-principal basis by employing its own manpower and other resources.

23. The Petitioner earns consideration of 110 per cent of the costs fixed between the parties, which is consistent with general commercial practice and as per the transfer pricing norms. Merely because consideration is fixed and the Petitioner receives a fixed mark-up, the same does not become commission paid to the Petitioner as an agent. The agreement does not contemplate any commission to be paid to the Petitioner. The consideration is paid for supply of goods and services.

24. There is absolutely no control by the foreign recipient on the Petitioner, which is contemplated in the agreement. Also, the clause for inspection of books of account is to facilitate the verification of the actual costs charged by the Petitioner for services rendered by them and to determine that such costs are true and fair. Such a clause is very common where consideration is costs plus a reasonable mark up. In India, most of the overseas entities have established their back office to supply services, and consideration is paid on costs plus reasonable mark up. Such a clause does not necessarily make the Indian entity (incorporated under Indian Laws) as the agent of their counterpart located outside India.

25. As submitted above, it is an undisputed fact that, in the present case, the Petitioner by itself provides design and engineering services to its overseas customers on its own account. The Respondents have not found any other person on whose behalf, the Petitioner allegedly supplies goods and services.

26. It is submitted, and correctly in our view, that to qualify as an agent under Section 2(5) of the CGST/MGST Act, the person has to act on behalf of or representing the other. In such case, there would be an involvement of a 3rd party viz. on whose behalf supply is made. However, in

the present case, there are only 2 parties viz. the Petitioner and the recipients and hence, there is no “agency” relationship between the Petitioner and its recipient of services.

27. It is well settled that the agreement has to be read as whole and the intention of parties to agreement is of paramount importance. In absence of a specific agreement/ arrangement that one person is an agent of another acting as a principal, “agency” cannot be created. On the contrary, the agreement categorically states that the Petitioner shall not be an agent of the foreign recipient.

28. It is now well settled that once an expression in any Act has been defined, the said expression will have same meaning and is not necessary to find out what is the general meaning of the said expression. In this regard useful reliance can be placed on the following judgements:

i. *United Bank Ltd vs DRT & Ors (1999) 4 SCC 69*

> *“13. Mr Sanghi, the learned Senior Counsel appearing for the appellant relied upon the decision of this Court in Kesoram Industries & Canon Mills Ltd. v. CWT in support of his contention that the plaintiff's claim would be a debt. In the aforesaid case, the Court was considering as to what is the meaning of the expression "debt" as it was required to ascertain whether a liability to pay income tax and supertax on the income of the accounting year would be a "debt" within the meaning of ` Section 2(m) of the Wealth Tax Act, 1957. This decision to our mind will be not of much assistance inasmuch as the expression "debt" has been defined in the Act in*

question though the general meaning of "debt" may be of a persuasive value in interpreting the expression "debt" in the Act but it is too well settled that where an expression in any Act has been defined, the said expression will have the same meaning and is not necessary to find out what is the general meaning of the expression. In the aforesaid case, the Court noticed as to how the word "debt" was interpreted in Webb v. Stenton wherein it was held a "debt" is a sum of money which is now payable or will become payable in the future by reason of a present obligation, debitum in praesenti solvendum in ficturo. After noticing a large number of authorities, the Court also held that all the decisions agree that the meaning of the expression "debt" may take colour from the provisions of the Act concerned, it may have different states of meaning, but the following definition is unanimously accepted, a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation."

(emphasis supplied)

ii. *CCE Cochin vs Tata Tea Ltd, (2002) 9 SCC 17*

"6. In order to satisfy the definition of "tea" under Section 3(n), a product should be commercially known as tea and it should be made from the leaves of the plant Camellia Sinensis (L) O. Kuntze. "Instant tea" satisfies both these conditions. By the very name, the product, namely, "instant tea" conveys that it is a "tea", The term "instant tea" is not the brand name of the product manufactured by the assessee but the name of the product itself. It is a variety of tea. Further, the term "instant tea" gives a meaning that it is a "tea", which can be prepared/used instantaneously. Merely because the product is known as "instant tea", it does not cease to be known commercially as "tea". Whether tea is consumed as a hot beverage or a cold beverage depending upon one's liking and taste, it does not make any difference in deciding whether it is a tea falling within the definition of Section 3(n) of the Act. In our view, the manner of preparation of tea and the process of manufacture of "instant tea" powder cannot take away "instant tea" out of the definition of "tea" under the Act. Ultimately "instant tea" is produced from the leaves of the plant Camellia Sinensis (L) O. Kuntze. In these circumstances, "instant tea" is covered by the definition of tea within the meaning of Section 3(n). Once "instant tea" falls within the definition of Section 3(n), a cess can be levied on it under Section 25 of the Act. In our view, the Commissioner (Appeals) was right in upholding the order of the Assistant Commissioner but the Tribunal went wrong in holding that "instant tea" is different from "tea" and it fell outside the scope of

> *Section 3(n) of the Act referring to the Prevention of Food Adulteration Rules, 1955 and the Tea Waste (Control) Order, 1959. When the Act defined "tea" specifically, the Tribunal ought not to have strained itself by referring to other enactments to construe "instant tea" as the product not included within the definition of "tea" under the Act."*
>
> *(emphasis supplied)*

29. In view of the aforesaid legal position, the references by Respondent No.4 to the meaning of the term "agent" or "agency" in Blacks Law Dictionary, various judicial pronouncements, Bowstead on Agency, Halsbury's Laws of England, in the impugned orders, are wholly misplaced and irrelevant. Respondent No. 4 is bound by the definition of the word "agent" under Section 2(5) of the CGST/MGST Act.

30. This apart, we find that the Central Board of Indirect Taxes and Customs has issued a Circular No. 161/2017/2021 dated 20.09.2021 in the context of "export of services" and particularly condition (v) of Section 2(6) of the IGST Act. The relevant extract of the said Circular, reads thus:

> *"Various representations have been received citing ambiguity caused in interpretation of the Explanation 1 under section 8 of the IGST Act 2017 in relation to condition (v) of export of services as mentioned in sub-section (6) of the section 2 of the IGST Act 2017. Doubts have been raised whether the supply of service by a subsidiary/ sister concern/ group concern, etc. of a foreign company in India, which is incorporated under the laws in India, to the foreign company incorporated under laws of a country outside India, will hit by condition (v) of sub-section (6) of section 2 of IGST Act.*
>
> ……

Analysis of the issue:

4.1 Clause (v) of sub-section (6) of section 2 of IGST Act, which defines "export of services", places a condition that the services provided by one establishment of a person to another establishment of the same person, considered as establishments of distinct persons as per Explanation 1 of section 8 of IGST Act, cannot be treated as export. In other words, any supply of services by an establishment of a foreign company in India to any other establishment of the said foreign company outside India will not be covered under definition of export of services.

4.2 Further, perusal of the Explanation 2 to section 8 of the IGST Act suggests that if a foreign company is conducting business in India through a branch or an agency or a representational office, then the said branch or agency or representational office of the foreign company, located in India, shall be treated as establishment of the said foreign company in India. Similarly, if any company incorporated in India, is operating through a branch or an agency or a representational office in any country outside India, then that branch or agency or representational office shall be treated as the establishment of the said company in the said country.

……..

4.4 From the perusal of the definition of "person" under sub-section (84) of section 2 of the CGST Act, 2017 and the definitions of "company" and "foreign company" under Section 2 of the Companies Act, 2013, it is observed that a company incorporated in India and a foreign company incorporated outside India, are separate "person" under the provisions of CGST Act and accordingly, are separate legal entities. Thus, a subsidiary/ sister concern/ group concern of any foreign company which is incorporated in India, then the said company incorporated in India will be considered as a separate "person" under the provisions of CGST Act and accordingly, would be considered as a separate legal entity than the foreign company.

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."*
>
> *(emphasis supplied)*

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.

35. The Hon'ble Delhi High Court in the case of ***Xilinx India Technology Services (P.) Ltd. Vs. Special Commissioner Zone VIII, 2023 (78) G.S.T.L. 24 (Del.)***, in identical facts and circumstances, by relying upon the judgment of the Hon'ble Supreme Court in the case of ***Bacha F. Guzdar, Bombay Vs Commissioner of Income Tax, Bombay, 1954 (10) TMI 2 (SC) and above Circular dated 20.09.2021*** has held:

"9. The Petitioner is a separate entity and it is settled law that identity of an incorporated company is separate from that of its shareholders. This fundamental proposition was reiterated by the Constitution Bench of the Supreme Court in Bacha F. Guzdar v. CIT, AIR 1955 S.C. 74 = [1955] 27 ITR 1.

10. The services rendered by a subsidiary of a foreign company to its holding are not covered under Section 2(6)(v) of the IGST Act and the same is beyond any pale of controversy in view of the Circular dated 20-9-2021 issued by the CBIC. The said circular, in unambiguous terms, clarifies as under:

……

12. Although, it is mentioned that the petitioner is an intermediary but there is no ground whatsoever for holding the said view. The terms of the Agreement are unambiguous. The petitioner has provided services on principal-to-principal basis. The services provided by the petitioner are on its own count and not facilitated by provision of services from any third-party services provider. As stated above, the petitioner is a registered EOU for the services as exported by it."

(emphasis supplied)

36. In our view, the impugned orders run contrary to above Circular and wrongly refuses to follow the same by holding that since the Petitioner is an agent of foreign recipient, condition (v) of Section 2(6) of the IGST Act is violated and the facts of the case are not matching with that mentioned in the Circular.

37. The reliance placed by Respondent No.4 on Section 15 of the CGST/MGST Act is wholly irrelevant. The purported findings that Petitioner and foreign recipient are related persons in terms of Section 15 and the

requirement of a third party in the transaction to qualify as an "agent" is irrelevant, is clearly unsustainable in view of the above circular, which clearly clarified that supply to a related party will also qualify as export of services. The said finding is otherwise absurd and perverse, since the primary requirement to satisfy the definition of an "agent" is that the agent supplies goods or services or both on behalf another person viz. third party to the transaction. Undisputedly, in the present case there are only two parties viz. the Petitioner and its foreign recipient and thus, the Petitioner, by no stretch of the imagination, can qualify as an agent.

38. In view of the above, it is beyond doubt that the Petitioner is not an agency of the foreign recipient and both are independent and distinct persons. Thus, condition (v) of Section 2(6) is fully satisfied in the present case.

39. Having satisfied all the conditions of Section 2(6) of the IGST Act, the services supplied by the Petitioner qualifiy as export and thereby zero rated supplies.

40. Before parting, we must note that the for the period April 2020 to March 2021 and April to June 2021 the Petitioner for the same services

applied for a refund and was granted. Respondents did not prefer any Appeal against the earlier two orders passed granting refund to the Petitioner. The refunds were granted on the premise that the services provided by the Petitioner qualify as "export of services". These orders have reached finality. Having done so, it is not open for the department now to reject the refund claim on the ground that the services provided by the Petitioner do not qualify as "export of service", especially when the agreements with the clients and all other surrounding facts remain the same.

41. Accordingly, we hold that the Petitioner is eligible for refund of unutilized ITC on account of zero rated supplies in terms of Section 54 of the CGST Act and the same shall be granted to them along with statutory interest under Section 56 of the CGST Act. This exercise shall be done within a period of 4 weeks from the date of uploading of this order on the High Court website.

42. Rule is made absolute in the aforesaid terms and the Petition is also disposed of in terms thereof. However, there shall be no order as to costs.

43. Though we have disposed of the above Petition, we place it on board for reporting compliance on 16th July 2025.

Aswale

44. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[FIRDOSH P. POONIWALLA, J.] **[B. P. COLABAWALLA, J.]**

Aswale