

Taxation of Intermediary Services under GST

Hyderabad Branch of SIRC of ICAI

Coverage

- Legal Background Related to Intermediary Services
- Understanding Taxation Implications of Intermediary Services
- Recommendations of Parliamentary Standing Committee
- Constitutional Validity of the provisions of section 13(8)(b)
- Understanding Global Position with reference to EU/UK VAT and Australian GST laws
- Understanding the meaning & scope of 'Intermediary Services' with reference to various judgments
- Closing Remarks

Legal Background Related to Intermediary Services

Relevant Provisions under Constitution

- Article 246A— Special provision with respect to goods and services tax

(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation.-The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.

Relevant Provisions under Constitution

- **Article 269A— Levy and collection of goods and services tax in course of inter-State trade or commerce—**

*(1) Goods and services tax on supplies in the course of inter-State trade or commerce shall **be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States** in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.*

Explanation.-For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

Relevant Provisions under Constitution

- **Article 269A— Levy and collection of goods and services tax in course of inter-State trade or commerce—**

(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under article 246A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as tax levied by a State under article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Relevant Provisions under Constitution

- **Article 286— Restrictions as to imposition of tax on the sale or purchase of goods—**

(1) No law of a State shall impose, or authorise the imposition of, a tax on the supply of goods or of services or both, where such supply takes place-

(a) outside the State; or

(b) in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1).

Relevant Provisions under GST Laws

- Section 9 of CGST Act/SGST Act provides for levy of CGST & SGST on intra-state supply.
- Section 5 of IGST Act provides for levy of IGST on inter-state supply
- Section 7 of IGST Act provides for determination of Inter-state supplies.
- Section 8 of IGST Act provides for determination of intra-state supplies.
- Section 13 of IGST Act provides for determination of place of supply w.r.t. cross border supplies

Relevant Provisions under GST Laws

- **Section 7— Interstate Supply.**

(3) Subject to the provisions of section 12, supply of services, where the location of the supplier and the place of supply are in—

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of services in the course of inter-State trade or commerce.

(4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.

Relevant Provisions under GST Laws

- **Section 7— Interstate Supply.**

(5) Supply of goods or services or both,—

(a) when the supplier is located in India and the place of supply is outside India;

(b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or

(c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section,

shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.

Relevant Provisions under GST Laws

- **Section 13 — Place of supply of services where location of supplier or location of recipient is outside India.**

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

(8) The place of supply of the following services shall be the location of the supplier of services, namely:—

(a) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) intermediary services;

(c) services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month.

Relevant Provisions under GST Laws

- **Section 13 — Place of supply of services where location of supplier or location of recipient is outside India.**

(13) In order to prevent double taxation or non-taxation of the supply of a service, or for the uniform application of rules, the Government shall have the power to notify any description of services or circumstances in which the place of supply shall be the place of effective use and enjoyment of a service.

Relevant Provisions under GST Laws

- **Section 2(13)— ‘Intermediary’ means**

“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;

Relevant Provisions under GST Laws

- **Section 2(6)— ‘Export of Services’ means the supply of services 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 or in Indian rupees wherever permitted by the Reserve Bank of India; 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;

Relevant Provisions under GST Laws

- **Section 2(6)— “import of services” means the supply of any service, where—**
 - (i) the supplier of service is located outside India;
 - (ii) the recipient of service is located in India; and
 - (iii) the place of supply of service is in India;

Understanding Implications of Intermediary Services

Examples of Intermediary Services

- X Ltd, Hyd is appointed as an agent to ABC Inc of USA to procure orders in India for the goods of ABC Inc. In consideration for this, ABC Inc is paying commission in USD as a percentage of the value of the orders procured by X Ltd.
- GST Implications are as under:
 - X Ltd is located in India
 - ABC Inc is located in USA
 - X Ltd is procuring orders in India from various customers in order to supply goods by ABC Inc to such customers.
 - Services of X Ltd are in the nature of intermediary.
 - In terms of section 13(8)(b), POS is the location of supplier of service i.e. location of X Ltd (India).
 - Supplier and POS are in India. Therefore, the service is not exported and the supplier is liable to pay tax in India

Examples of Intermediary Services

- X Ltd, Hyd appointed ABC Inc of USA as their agent in USA to procure orders for goods of X Ltd from customers in USA. In consideration for this, X Ltd is paying commission in USD as a percentage of the value of the orders procured by ABC Inc.
- GST Implications are as under:
 - ABC Inc the supplier of service is located in USA.
 - X Ltd the recipient of service is located in India.
 - ABC Inc is procuring orders from USA for various customers in order to supply goods by X Ltd to such customers.
 - Services of ABC Inc are in the nature of intermediary.
 - In terms of section 13(8)(b), POS is the location of supplier of service i.e. location of ABC Inc (USA).
 - Location of Supplier and POS are outside India. Therefore, service is not imported into India though the benefit of service is accrued to Indian exporter.

PSC Recommendations on 'Intermediary Services'

- Para 15.2: In view of the fact that GST is a destination based consumption tax, the Committee is of the view that following steps may be taken:
 - Provide that Place of Supply of Indian Intermediaries of Goods will be the location of service recipient i.e. customers located abroad (and not the location of such intermediaries as is currently provided), so that Intermediary Services will be treated as 'Exports'; or
 - Providing an exemption to Indian Intermediaries of Goods from levy of IGST, exercising the powers vested under Section 6(1) of IGST Act; or
 - Notify such services under Section 13(13) of the IGST Act to prevent double taxation (tax in India as well as in the importing country) by treating place of effective use (foreign country) as place of supply.
- Para 15.3: The Government may also cause amendment to section 13(8) of the IGST Act to exclude 'intermediary' services and make it subject to the default section 13(2) so that the benefit of export of services would be available.

Constitutional Validity of the provisions of Section 13(8)(b)

Dharmendra M Jani vs. UOI

Grounds of Challenge:

- GST is a destination based tax on consumption and section 13(8)(b) of IGST Act is contrary to the said principle.
- Section 13(8)(b) read with Section 8(2) of the IGST Act is ultra vires Article 246A read with Article 269A, Article 286 as well as Article 245 of the Constitution of India as the section results in levy on export of services as intra-State supply;
- Section 13(8)(b) is ultra vires the charging sections 5 of IGST Act and section 9 of CGST/MGST Act.
- Section 13(8)(b) results in violation of Article 14 of the Constitution being arbitrary, unreasonable and discriminatory
- Section 13(8)(b) results in violation of right to carry on business viz. Article 19(1)(g) of the Constitution;
- No Double Taxation is Permitted

Dharmendra M Jani vs. UOI (Views of First Judge)

Understanding of Article 269A

- Para 47: We have already referred to and analyzed Articles 246A and 269A of the Constitution of India. Both were inserted into the Constitution by way of the Constitution (101st Amendment) Act, 2016. While Article 246A deals with special provision with respect to GST, Article 269A provides for levy and collection of GST in the course of inter-state trade or commerce. *From a careful and conjoint reading of the two Articles it is quite evident that the Constitution has only empowered Parliament to frame law for levy and collection of GST in the course of inter-state trade or commerce, besides laying down principles for determining place of supply and when such supply of goods or services or both takes place in the course of inter-state trade or commerce. Thus the Constitution does not empower imposition of tax on export of services out of the territory of India by treating the same as a local supply.*

Key Findings:

- ✓ Acknowledged that Parliament has power to frame law for determining Place of Supply and when the supply of goods or services are to be treated in the course of inter-state trade or commerce.
- ✓ Constitution does not empower Parliament for the imposition of tax on exported services by treating them as local supply

Dharmendra M Jani vs. UOI (Views of First Judge)

Understanding of Article 286:

- Para 48.1: Though the expressions “import” and “export” have not been defined in the Constitution which would mean that we would have to fall back upon usage of the said expressions in the ordinary common parlance, nonetheless there is an express bar under clause (1) of Article 286 that no law of a state shall impose or authorize imposition of a tax on the supply of goods or services or both where such supply takes place in the course of import into or export out of the territory of India. **While clause (2) empowers the Parliament to make laws formulating principles for determining supply of goods or of services or both certainly the same cannot be used to foil or thwart the scheme of clause (1).** Both have to be read together

Key Findings:

- ✓ Opined that the terms ‘import’ and ‘export’ are to be given meaning of ordinary common parlance.
- ✓ Article 286(1) provides that no law of state shall impose tax on supply of goods or services in the course of import or export out of the territory of India.
- ✓ Article 286(2) empowers Parliament to lay down principles for determining supplies in the course of import or export out of the territory of India
- ✓ Article 286(2) cannot be used to frustrate general understanding of ‘import’ and ‘export’

Dharmendra M Jani vs. UOI (Views of First Judge)

Deeming Fiction on 'Place of Supply' — Contrary to the Scheme of CGST and IGST Acts:

- Para 49:Evidently and there is no dispute that the supply takes place outside the State of Maharashtra and outside India in the course of export. However, what we notice is that section 13(8)(b) of the IGST Act read with section 8(2) of the said Act has created a fiction deeming export of service by an intermediary to be a local supply i.e., an inter-state supply. This is definitely an artificial device created to overcome a constitutional embargo. **Question for consideration is whether creation of such a deeming provision is permissible or should receive the imprimatur of a constitutional court**

Dharmendra M Jani vs. UOI (Views of First Judge)

Deeming Fiction on 'Place of Supply' — Contrary to the Scheme of CGST and IGST Acts:

- Para 54: Import and export of services have been treated as inter-state supplies in terms of section 7(1) and section 7(5) of the IGST Act. On the other hand sub-section (2) of section 8 of the IGST Act provides that where location of the supplier and place of supply of service is in the same state or union territory, the said supply shall be treated as intra-state supply. However, by artificially creating a deeming provision in the form of section 13(8)(b) of the IGST Act, where the location of the recipient of service provided by an intermediary is outside India, the place of supply has been treated as the location of the supplier i.e., in India. This runs contrary to the scheme of the CGST Act as well as the IGST Act besides being beyond the charging sections of both the Acts.

Dharmendra M Jani vs. UOI (Views of Second Judge)

Views on Articles 269A

- Para 103: *A conjoint reading of Article 269A(1) with Article 269A(5) and Article 246A exclusively empowers the Parliament to make law on what is inter-state supply and what is not which obviously includes what is intra-state in contradistinction to what is inter-state and that power is exclusively with the Parliament.* In my considered opinion, the power to enact provisions determining the nature of supplies (as inter state supply in section 7 of IGST Act or intra state supply in section 8 of IGST Act) or place of supply (as contained in sections 10 to 14 of the IGST Act including section 13(8)(b) where in the case of intermediary services, where supplier or the service recipient is located outside India, the place of supply has been stipulated to be the location of supplier) originates from these Articles. *The power of the Parliament to stipulate principles on place of supply or to legislate on the same as contained in the IGST Act is empowered by the Constitution Amendment Act, 2016. Therefore, there is no doubt that the power to stipulate the place of supply as contained in Sections 13 (8)(b) of the IGST Act is pursuant to the provisions of Article 269A (5) read with Article 246A and Article 286 of the Constitution. The impugned provisions are in my view constitutional and are not in any way ultra vires the Constitution.*

Parliament power to legislate on POS under IGST Act is empowered by CA Act, 2016

Dharmendra M Jani vs. UOI (Views of Second Judge)

Views on Articles 286:

- 106.4. In fact it is in view of the language of newly amended Article 286 (2) pursuant to the Constitution (101st) Amendment Act, 2016 that the Parliament can formulate principles for determining when a supply of goods or services or both have taken place either outside the State or in the course of import into or export out of the territory of India.
- 106.6. The whole purpose of Article 286(2) is to empower the Parliament to formulate principles to determine the situs of supply. This is also stated in Article 269A(5).
- ***106.7. It is in furtherance of the powers under Article 246A, 269A and 286 of the Constitution of India, the Parliament by legislation, in Sections 7 (inter-State supply) and 8 (Intra-State supply) of the IGST Act has provided for determination of the nature of supply and in Sections 10 to 14 for place of supply.***
- 106.8. The impugned provision does not in any manner deem an export of service to be a local supply whereas Section 13 pertains to place of supply and Section 7 pertains to the nature of inter-state supply as enacted by the Parliament pursuant to Article 246A read with Article 269A of the Constitution. Both the Sections as discussed have different purposes.

Dharmendra M Jani vs. UOI (Views of Second Judge)

Views on Articles 286:

- 106.9. The submission by Petitioner that in terms of Section 13(2), Petitioner's service is an export of service appears to be misplaced as Section 13(2) clearly stipulates that except for the services specified in sub-sections (3) to (13), the place of supply to be the location of the recipient of services. And one of such exception in Section 13(8)(b) clearly stipulates that the place of supply for "intermediary services" shall be the location of the supplier of services. Therefore this submission appears to be misplaced.
- 106.10. **The argument that a central legislation cannot authorize the State to collect tax which is prohibited by the Constitution or that the provisions are a colorable legislation is without any legs to stand in view of provisions under Articles 245, 246A, 269A of the Constitution of India.**
- 106.11. Therefore, the argument of Petitioner that the impugned provisions are violative of Article 286(1) do not hold any water.

Dharmendra M Jani vs. UOI (Views of Second Judge)

Views on Article 14:

- 110.1. Petitioner's grievance of violation of Article 14 of the Constitution of India is on two counts:

(1) One is despite having purportedly satisfied the definition of export of services as defined in Section 2(6) of the IGST Act, by virtue of Section 13(8)(b), **the intermediary services provided by the Petitioner to its overseas customer are not being treated as export of service thereby discriminating against Petitioner and other exporters of service;**

(2) secondly the intermediary services provided by Petitioner in India are subject to GST, whereas that is not the case with other service providers like **marketing agents, management consultants, market research agents, professional advisers as such services are not subject to GST pursuant to Section 13(2) of the IGST Act.**

Dharmendra M Jani vs. UOI (Views of Second Judge)

Views on Article 14:

- Para 110.9: There is no discrimination between Petitioner's case and other exporter of services. The intermediary services rendered by Petitioner are specifically provided as one of the services in addition to banking services and transport hiring services where the place of supply has been provided as the location of the supplier of services as per Section 13(8)(b) of the IGST Act. Intermediary has been specifically defined and which as discussed earlier does not include a person who renders the services for himself. Here, because of the intermediary, the export of goods is taking place from the overseas customer to the Indian importer, which is the transaction of import of goods for which the intermediary services have been provided by Petitioner. Therefore, between Petitioner and others there is no discrimination. Section 13(8)(b) would not be hit by Article 14 on this ground.

For the same reason the second ground of discrimination, is also not tenable in as much as the Act has specifically provided for such intermediaries. Petitioner who is providing Intermediary Service to recipient outside India is on a different footing, the objective in my view would be to prevent revenue from escaping.

Dharmendra M Jani vs. UOI (Views of Second Judge)

Views on Article 19(1)(g):

- 111.3. At the outset, we are unable to appreciate as to how by virtue of Section 13(8)(b) of the IGST Act, Petitioner would be restricted to carry on its business or for that matter result in closure of business of Petitioner. As has been discussed earlier, Petitioner is a marketing/sales agent for overseas exporters of products imported by customers in India, for which he earns commission. All that Section 13(8)(b) seeks to do is to impose a levy on Petitioner by stipulating that in respect of Intermediary Services, where the recipient is outside the country, in those cases, the place of supply shall be the location of the supplier. As to how that would result in a restriction or closure of business of the Petitioner is unfathomable particularly when the submission is devoid of my details. There is no restriction imposed on the intermediary services of a person like Petitioner. It is a legitimate power of the parliament, as discussed earlier, to enact IGST Act including Section 13 (8)(b). If the submission of Petitioner was to be considered, then any tax levied by the Central or State Government would be a restriction to carry on trade under Article 19(1)(g) of the Constitution of India.

Dharmendra M Jani vs. UOI (Views of Second Judge)

Views on Double Taxation:

- 115.1. Coming to the Petitioner's grievance on double taxation; On behalf of Petitioner it has been firstly asserted that GST is being levied twice on the same commission, once on the Petitioner and then on the Indian purchaser of goods. Secondly the same supply would be taxed in the hands of Petitioner and on the basis of the destination based principle would also be taxed in the hands of the service recipient in the importing country.
- ✓ **Tax is levied twice on commission:** Once on petitioner on value of such commission and secondly on Indian Importer by including the commission paid in the value of imported goods.
- ✓ **Tax is levied in India and in the country of recipient:** In India on the supplier of Intermediary service and on recipient of such service in his country by considering the said service as imported.

Dharmendra M Jani vs. UOI (Views of Second Judge)

Views on Double Taxation:

- 115.2. I am unable to appreciate any of these arguments. As far as the first argument is concerned, there are, in my view, two distinctly identifiable supplies involved, i.e., (i) supply of services by the intermediary to the overseas supplier of goods and (ii) supply of goods by overseas supplier to the Indian importer. The first supply attracts Section 13 (8)(b) of the IGST Act. The second supply is liable to tax under the Customs Act, 1962 and the incidence of customs duty would be on the importer of goods and not on the intermediary service provider. Moreover, the principle is well settled that two taxes which are separate and distinct imposts on two different transactions/supplies is permissible as in law there is no overlapping.

Dharmendra M Jani vs. UOI (Views of Second Judge)

Views of Double Taxation:

- 115.3. With respect to the second assertion that the same supply would be taxed by foreign service recipient in his hands in the importing country, that in my view is also not really tenable in the eyes of law as IGST is not extra-territorial and generally speaking a commission paid by the recipient of service outside India would be entitled to get deduction of such payment of commission by way of expenses and therefore, it would not be a case of double taxation. Moreover, that would depend on the laws of that country. It is also pertinent to refer to the earlier discussion that Petitioner is providing intermediary services as an intermediary as defined in the IGST Act to the overseas customer and not as an exporter of service

Dharmendra M Jani vs. UOI

Points of Disagreement

First Judge	Second Judge
On Article 269A	
Acknowledged Parliament's power to frame law for determining POS and nature of supply but held that Constitution does not empower Parliament for imposing tax on exported services by treating them as local supply.	On reading Article 269A(1) with Article 269A(5), Parliament has power to determine what is inter-state and what is intra-state supplies. Power to legislate on principles for determining place of supply is conferred on Parliament under Article 269A(5) which is inserted by CA Act 2016
On Article 286	
Article 286(1) provides that no law of state shall impose tax on supplies in the course of import or export. Article 286(2) empowers Parliament to lay down principles for determining the nature of supplies. Article 286(2) cannot be used to frustrate general understanding of the terms 'import' and 'export'.	Article 286(2) is inserted in Constitution vide CA Act, 2016. The whole purpose is to empower Parliament to formulate the principles for determining when a supply is in course of import or export.

Position under EU/UK VAT laws

Position under EU/UK VAT laws

B2B Supplies

- B2B intermediary services fall under the B2B general rule and are supplied where the customer belongs.

B2C Supplies

- The place of supply of your intermediary services is where the underlying arranged supply is made.

For example: Travel Agent in India arranged accommodation services in London to a customer travelling London. The underlying supply is hotel accommodation service. The POS for accommodation service is the location of hotel i.e. London. Therefore, the POS of air travel agent will be outside India and not based on location of supplier.

Distortion in case of Intermediary in India

- X Ltd, Hyd is appointed as an agent to ABC LLC of UK to procure orders in India for the goods of ABC LLC. In consideration for this, ABC LLC is paying commission in GBP as a percentage of the value of the orders procured by X Ltd.
- GST Implications on X Ltd in India and ABC LLC in UK are as under:

Implications on X Ltd in India	Implications on ABC LLC in UK
<ul style="list-style-type: none">• POS is the location of supplier i.e. India• X Ltd is required to pay tax in India for the supply though CFE is earned.	<ul style="list-style-type: none">• POS is the location of recipient i.e. UK• ABC LLC in UK is required to pay tax under reverse charge as the service of X Ltd gets imported into UK.• Since X Ltd is also charging Indian GST for the same service, ABC LLC in UK is bearing the tax burden twice.• Tax paid(Indian GST) by ABC LLC to X Ltd is not available as credit to ABC LLC.

Distortion in case of Intermediary outside India

- X Ltd, Hyd appointed ABC LLC of UK as their agent in UK to procure orders for goods of X Ltd from customers in UK. In consideration for this, X Ltd is paying commission in GBP as a percentage of the value of the orders procured by ABC LLC.
- GST Implications on X Ltd in India and ABC LLC in UK are as under:

Implications on X Ltd in India	Implications on ABC LLC in UK
<ul style="list-style-type: none">• POS is the location of supplier i.e. UK• As POS is outside India, the service is not imported into India.• X Ltd is not required to pay tax in India for the services ABC LLC.	<ul style="list-style-type: none">• POS is the location of recipient i.e. India• As POS is considered to be outside UK, no tax is payable by ABC LLC for their services in UK• No tax is collected in India and in UK for the service of ABC LLC. Completely tax free.

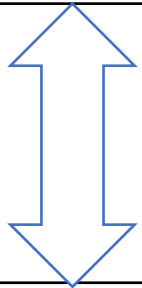
Understanding the meaning & scope of 'Intermediary Services' with reference to various judgments

Intermediary— Meaning & Scope

Section 2(13) of the IGST Act

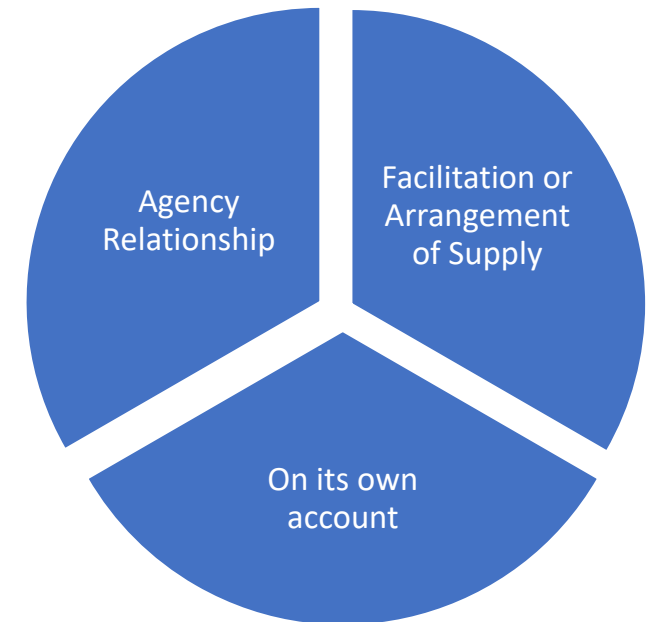
- “intermediary” means a **broker, an agent or any other person**, by whatever name called, who **arranges or facilitates the supply of goods or services** or both, or securities, **between two or more persons**, but **does not include a person** who **supplies such goods or services** or both or securities **on his own account**;

“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



Meaning of 'Arrange & Facilitate'

Arrange

- to plan, prepare for or organize something (Cambridge English Dictionary)
- to make plans for something to happen for example by agreeing to time and place (Macmillan Dictionary)
- to set in a rank or row, to put in order, to settle or work out ... to come to an agreement.... to make plan... (Chambers Dictionary)

Facilitate

- To make easy or easier (Chambers Dictionary)
- Make something possible or easier (Cambridge/English Dictionary)
- to help people deal with a process or reach an agreement or solution without getting directly involved in the process, discussion etc. yourself (Cambridge Business English/Dictionary)

The terms 'Arrange' & 'Facilitate' signify agent's involvement in striking the deal.

Emphasis on 'On its own Account'

- Emphasis on existence of three or more parties in contract.
- Principal to Principal Contract Vs Principal to Agent Contract.
- Thus, an intermediary is involved with two supplies at the same time:
 - the supply between the principal and the third party; and
 - the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.
- An intermediary cannot alter the nature of services/goods supplied by the Principal

Sales Promotion/Marketing Arrangements

- Example- I: PQR is appointed as agent to ABC of Japan who manufacture and trade various chemicals. PQR will promote and market the chemicals manufactured by ABC of Japan. It will negotiate with customers and take orders based on general pricing instructions given by ABC of Japan from time to time. ABC agreed to pay commission to PQR as a percentage of the orders received.
- Example-II: PQR is appointed as marketing agent to ABC of Japan who manufacture and trade various chemicals. The leads received by PQR will be forwarded to the marketing team of ABC of Japan. PQR will be paid commission on as a percentage of the orders received out of lead forwarded by them.

Sales Promotion/Marketing Arrangements

Chevron Phillips Chemicals India Pvt. Ltd vs Com.CGST, 2019 (12) TMI 1066 - CESTAT MUMBAI

- Para 17: *“the appellant cannot be called as an ‘intermediary’. On a simple reading of the agreement analyzed as above, it is clear that the appellants are appointed by their overseas counterpart CPC Global for sales promotion of the goods for their client in the defined territory. The appellant has no role in fixation of price nor they negotiate in any manner between CPC Global and their clients relating to sales promotion of the goods sold. Therefore, in my view, the appellant cannot be called as an intermediary. consequently, fall outside the amended definition of ‘intermediary’ under Rule 2(f) and Rule 9 of the POPS Rules, 2012.”*

Similar views were also taken in the following judgments:

- Lubrizol Advanced Materials India Pvt. Ltd. Vs CCE, 2019(1)TMI-720-CESTAT Mumbai
- R.S. Granite Machine Tools Pvt. Ltd vs. CGST&CE, 2019 (1) TMI 1179-CESTAT CHENNAI.

Services on Own Account

- Example: BMR LLC of Germany manufactures and supplies advance machinery for use by entities offering digital printing solutions. BMR LLC appointed MNR Engineers of Hyderabad to undertake installation and commissioning activities after they have supplied the machinery to customers in India. Whether the services of MNR Engineers qualify as intermediary?

Services on Own Account

M/s Universal Services India Private Limited vs CST, 2016(5)TMI750-AAR

- Para 7: *“In all these situations i.e. whether the payment is made by the Indian customers for the services provided by WWD US, directly or through the applicant, applicant would charge a fee equal to the operating cost incurred by the applicant plus mark up of 13% on such costs. **Therefore, it transpires that the main service provided by WWD US to the customers in India is domain name registration, web hosting services etc. Applicant is not at all concerned with respect to this service. However, service provided by the applicant to WWD US is processing of payments, which is the main service.** Further, the definition of “intermediary” as envisaged under Rule 2 (f) of POPS does not include a person who provides the main service on his own account. In the present case, applicant is providing main service i.e. “business support services” to WWD US and on his own account. Therefore, applicant is not an “intermediary” and the service provided by him is not intermediary service.”*

Backoffice Support Services

- Example: ABC Inc of USA appointed ABC Private Limited in India for promotion and marketing of their products and services. As per the scope of agreement, ABC Private Limited is undertaking the following services to ABC Inc.
 - Digital Marketing
 - Direct Marketing
 - Branding Activities
 - Payments Processing
 - Customer Relationship
 - Accounts

In consideration for these services, ABC Private Limited is charging consideration equivalent to their operational cost plus 15% markup on periodic basis.

Backoffice Support Services

M/s GoDaddy India Web Services Private Limited vs CST, 2016 (3) TMI 355- AAR

- **Para 11:** Applicant proposes to provide support services in relation to marketing, branding, offline marketing, oversight of quality of third party customer care centre and payment processing, on principal to principal basis. These services are proposed to be provided with the sole intention of promoting the brand GoDaddy US in India and thus augmenting its business in India. Therefore, these services proposed to be provided by the applicant, would support the business interests of GoDaddy US in India.
- **Para 14:** It has been ruled by us that in the present case, proposed service to be provided by the applicant to GoDaddy US is business support service and not intermediary service in terms of Rule 2 (f) of POPS. It is observed that said proposed service does not fall under any of the Rules of POPS but for Rule 3. Rule 3 of POPS inter-alia envisages that the place of provision of a service shall be the location of the recipient of service.

Closing Remarks

- Challenge on Constitutional Validity is very much dicey and unpredictable. It will take more time for the outcome of Supreme Court views on this.
- As PSC already recommended for amendment to section 13(8)(b) of the IGST Act, representations can be made for due consideration of Government.
- Sensitizing that the likely impact on revenue due to non-taxation of services of intermediaries located outside India and providing services to clients in India may catch the attention of policy makers.

Thank
you

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