

Tax Flash News

28 April 2023

Provisions on the place of supply of intermediary services are held to be constitutionally valid

The Integrated Goods and Services Tax Act, 2017 (IGST Act) states that place of supply for an intermediary service where the location of the supplier or location of the recipient is outside India, shall be the location of the supplier of such services. This provision was challenged in the Bombay High Court and was placed before the Division Bench. The Division Bench gave a split verdict and hence the issue was referred to a referral judge by the Hon'ble Chief Justice to arrive at the majority view. The referred Judge held¹ that the relevant sections i.e., section 13(8)(b) and section 8(2) are constitutionally valid and intra-vires the IGST Act. The matter will now be placed before the Division Bench to pass the final verdict.

Facts of the case

- Petitioner(s) entered into an agreement with a foreign principal to get buyers for its goods in India or elsewhere. The activities undertaken by the Petitioner are marketing and sales promotion services. These activities were considered as intermediary services by the Petitioner. The foreign principal pays commission to the Petitioner once it receives payment from the Indian customer of the foreign principal. The Petitioner receives the entire commission amount in India in convertible foreign exchange.
- Petitioner has deposited CGST at the rate of 9% and SGST at the rate of 9% under protest, contending that the provisions of Section 13(8)(b) and Section 8(2) of the IGST Act are unconstitutional.

- The Division Bench of the Bombay High Court gave a split verdict wherein one Judge held that Section 13(8)(b) of the IGST Act, 2017 is ultra-vires the said Act besides being unconstitutional, while the other Judge held that Section 13(8)(b), as well as section 8(2) of the IGST Act, are constitutionally valid and operative for all purposes.

Petitioner(s) contentions

A. On the transaction

- Impugned levy leads to triple taxation. Applying the destination-based principle, it would be an import of service from India and would be taxed in the hands of the foreign principal outside India. Further, the landed cost of imports for payment of customs duty and IGST by the Indian purchaser (importer) would include the commission paid.

B. On relevant provisions

- There is a supply of service from India to outside India. It is an export of service in terms of Section 13(2). The IGST Act, by virtue of section 13(8)(b) read with section 7(5), has deemed the export of service to be a local supply. This is a violation of Article 286(1), as Central legislation cannot authorise the State to collect the tax on exports, which itself is prohibited by the Constitution.

¹ Dharmendra M. Jani v. Union of India and Others [[2023] 149 taxmann.com 317 (Bombay)]

- Section 13(8)(b) is ultra vires the charging section 5 of the IGST Act. Import and export of services have been treated as inter-State supplies in terms of Section 7(5) of the IGST Act. However, section 13(8)(b) seeks to run contrary to the scheme of the Act and deem an "inter-State" supply as an "intra-State" supply.

C. On constitutional validity of Section 13(8)(b)

- Despite having satisfied all the conditions of Section 13(2) read with Section 2(6) of the IGST Act, by virtue of exception under Section 13(8)(b), the services provided by the Petitioner are subjected to GST. The levy is arbitrary, unreasonable and discriminative and, hence, violative of Article 14 of the Constitution.
- Section 13(8)(b) is ultra vires Articles 246A (Special provision with respect to goods and services tax) and Article 269A (Levy and collection of goods and services tax in course of inter-State trade or commerce) of the Constitution since these Articles do not permit Parliament to impose a tax on export of services out of the territory of India by treating the same as a local supply.

Revenue's contentions

A. On the transaction

- Three services, i.e., soliciting purchase orders, promotion and marketing are all conducted within India though the recipient of the service may be outside India. Therefore, the contention of the Petitioners that the services rendered by them amount to "export of services" is not tenable.
- Constitutional validity is being challenged on the plea that Petitioner is an intermediary. In effect, the Petitioner is an agent simplicitor since it renders services only to the foreign principal.

B. On relevant provisions

- One of the conditions in the definition of "export of services" is that place of supply of services is outside India. In terms of Section 13 (8)(b) of the IGST Act, since the place of supply is India considering the location of the supplier, there is no export of service.

C. On constitutional validity of Section 13(8)(b)

- Article 269A(5) specifically provides that 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."
- Article 248 provides for the residuary powers of legislation wherein Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.
- Parliament has the power to make a law to determine the principles of what constitutes sale or purchase of goods outside the States and also what are imports and exports in terms of Article 286.

High Court's decision

The Bombay High Court held that the provisions of Section 13(8)(b) and Section 8(2) of the IGST Act are legal, valid and constitutional, provided that the provisions of Section 13(8)(b) and Section 8(2) are confined in their operation to the provisions of IGST Act only and the same cannot be made applicable for levy of tax on services under the Central and State GST Acts. The matter will now be placed before the Division Bench to pass the final verdict.

Our comments

The view of the referral judge affirms the constitutional validity of the provisions relating to place of supply of intermediary services when its operation is confined to IGST Act. Pursuant to this judgement, it is important to review the characterisation of intermediary services as to intra-State or inter-State supply.

KPMG in India addresses:

Ahmedabad

Commerce House V, 9th Floor,
902, Near Vodafone House, Corporate Road,
Prahlad Nagar,
Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Bengaluru

Embassy Golf Links Business Park,
Pebble Beach, 'B' Block,
1st & 2nd Floor,
Off Intermediate Ring Road, Bengaluru – 560071
Tel: +91 80 6833 5000

Chandigarh

SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai

KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Gurugram

Building No.10, 8th Floor,
DLF Cyber City, Phase II,
Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

Hyderabad

Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2, Serilingampally
Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur

Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road,
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi

Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682 019.
Tel: +91 484 302 5600

Kolkata

Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai

2nd Floor, Block T2 (B Wing),
Lodha Excelus, Apollo Mills Compound, N M
Joshi Marg, Mahalaxmi, Mumbai- 400011
Tel: +91 22 3989 6000

Noida

Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune

9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara

Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada

Door No. 54-15-18E,
Sai Odyssey,
Gurunak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000



<https://kpmg.com/in/en/home/social>

kpmg.com/in/en/home/social



The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

KPMG Assurance and Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Mahalaxmi, Mumbai - 400 011 Phone: +91 22 3989 6000, Fax: +91 22 3983 6000

© 2023 KPMG Assurance and Consulting Services LLP, an Indian Limited Liability Partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organization.

This document is meant for e-communication only.