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# Central and state GST not applicable on intermediary services provided to an overseas recipient; upholds validity of intermediary-related provisions under IGST Act – Bombay HC

20 April 2023

**Summary**

The Bombay High Court (HC) has upheld the validity of provisions about the place of supply (PoS) in the case of the intermediary under the Integrated Goods and Services Tax Act, 2017 (IGST Act). Accordingly, it has held that the state cannot impose GST (central and state GST) on services rendered by Indian intermediaries to the recipient outside India. The transaction would be liable to IGST.

## Facts of the case

- Dharmendra M Jani (the petitioner) is engaged in providing marketing and promotion services to his customers located outside India. To provide such services, the petitioner enters into an agreement with his overseas customers. Under such an agreement, the petitioner provides services to enable his foreign principal to get purchasers for its goods in India.
- The petitioner has treated the said services as export of services, as the same are consumed outside India and are outside the purview of the CGST Act whereas the department considered it under intermediary services.
- The petitioner contended that levy of tax on export of services by way of treating it as intermediary services is *ultra vires* of Article 246A read with Article 269 and Article 286 of the Constitution, since the Constitution only grants power to the parliament to frame laws for interstate trade or commerce.
- The petitioner alleged that the parliament is not empowered to enact laws in respect of extra-territorial transactions. Therefore, levy is *ultra vires* of Article 286(1) of the Constitution.
- The petitioner has also contended that Section 13(8) (b) of the IGST Act is *ultra vires* of charging section of the CGST Act, as a provision of Section 13(8)(b) cannot be read/utilised under the provision of the CGST/MGST Act.
- The issue before the HC is whether a transaction in an instant case is a transaction of 'export of services', falling within the meaning of Section 2(6) of the IGST Act, and it is being treated as an 'intra-state trade or commerce' under the CGST Act and the MGST Act.

## Bombay HC observations and ruling [Writ Petition No. 2031 of 2018 order dated 18 April 2023]

- **The inter-state supply of services cannot be treated as intra-state supply:** The HC observed that one of the key principles of GST is that as a general rule, the place of taxation of goods and services is based on the destination principle. However, in the instant matter, merely by the virtue of friction of law, the character of a transaction from export of services is being altered into a transaction of intra-state supply of services. Therefore, the friction, which is created by Section 13(8)(b), would be required to be confined only to the provisions of the IGST Act, as there is no scope for the friction travelling beyond the provisions of the IGST Act to the CGST and the MGST Acts, as neither the Constitution would permit taxing of an export of service under the said enactments, nor these legislations would accept taxing such a transaction.
- **State does not have jurisdictional power to levy tax on inter-state supply of services:** The HC held that by virtue of Article 286, the state cannot impose tax in case the supply takes place outside the state or in case of import or export. Therefore, the transaction of marketing and promotion services being undertaken by the petitioner cannot amount to an intra-state trade. Thus, the petitioner cannot be taxed under the CGST Act and MGST Act. The HC has emphasised on the report by the 'Department-related Parliamentary Standing Committee on Commerce', wherein the committee has recommended an amendment to Section 13(8) of the IGST Act. The committee has deliberated that intermediary services should be made subjected to the default Section 13(2) of the IGST Act, so as to extend the benefit of export to the intermediaries.

- **Double taxation:** If an analogy is derived from the cumulative reading of Section 13(8)(b) r/w Section 8(2) of the IGST Act, so as to be read and applied under the provisions of the CGST and the MGST Act, it would lead not only to a consequence of double taxation but also to an implausible and illogical effect, in recognising two independent transactions to be one transaction for the purpose of levy of CGST and MGST as intra-state trade and commerce.

- **Provisions of IGST should not be read under into the provision of CGST/MGST**: The HC noted that the transaction of export of services as that of the petitioners on the one hand is treated as inter-state supply by virtue of Section 7(5) IGST Act and is subsequently treated as an intra-state supply by virtue of Section 13(8)(b) of the IGST Act. The cumulative effect of the provisions of Section 13(8)(b), read with Section 8(2) and Section 12 of the IGST Act, can neither be read nor can be said to be of any relevance for the purpose of the CGST and MGST Acts when it comes to any levy of GST under the said acts on intermediary services, of the nature of export of services falling within the meaning of Section 2(6) of the IGST Act.

- **Validity of Section 13(8)(b) and Section 8(2) of the IGST Act upheld:** The HC held that the provisions of Section 13(8)(b) and Section 8(2) of the IGST Act are legal, valid and constitutional. Further, these are confined in their operation to the provisions of the IGST Act only and the same cannot be made applicable for levy of tax on services under the CGST and MGST Acts.

## Our comments

This is an important judgement by the Bombay High Court wherein it has held that the services provided by intermediaries to persons abroad will not attract Central GST and State GST. However, it has upheld the legality of the provisions related to an intermediary under the IGST Act.

On a similar issue earlier, even the Gujarat HC, in the case of the Material Recycling Association, had held that the provision of Section 13(8)(b) read with Section 2(13) of the IGST Act is not ultra vires or unconstitutional in any manner.

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