



NITYA
tax associates



**Intermediary services:
The puzzle complicates further!!**

“Mediocrity is a norm and world is scared of excellence”

Introduction

Taxability of intermediary services has been a vexed issue under Indirect Tax laws since inception. This is one area which remained marred with constitutional challenges, in particular to Section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 ('IGST Act') delineating the place of supply of 'intermediary services' to be location of supplier. Whilst constitutionality of said provision was upheld by the Division Bench of Gujarat High Court¹, a split verdict was rendered by the Bombay High Court² wherein the matter was referred to the Larger Bench. These High Court decisions caused lack of clarity for Indian intermediaries who faced with a dilemma regarding the road to be taken for future. Many such intermediaries continued to deposit GST in fear of being marred with interest liabilities for non-payment of taxes.

Much-awaited decision of the Larger Bench of Bombay High Court³ was recently pronounced wherein Constitutionality of the provision treating place of supply of intermediary services as location of supplier was upheld. However, the applicability of the provisions were held to be restricted to the IGST Act and not otherwise. While the entire industry expected the third member of the Larger Bench subscribing to one of the views taken by the Division Bench of the High Court, the third member has taken an independent and a third view which has added to the confusion that persisted in the industry. The decision has added to the ambiguities into the concept which brings the entire scenario back to square one, or if one may say, even created new complexities that never existed.

In [Part-1](#) and [Part-2](#) of our Article, we had respectively analyzed Constitutional Validity of Section 13(8)(b) of the IGST Act and key tests for qualifying as an intermediary. Vide this Article, the Authors shall critically analyze and examine the recent Larger Bench decision of Bombay High Court on the subject matter.

Analysis of decision rendered by the Larger Bench

The Larger Bench of the Bombay High Court was concerned with the Constitutional Validity of Section 13(8)(b) of the IGST Act in so far as it prescribes place of supply of intermediary services to be location of supplier of services. It was urged on behalf of Petitioners that by way of deeming fiction created vide various provisions, supply of services by an Indian intermediary to a foreign recipient against convertible foreign exchange does not qualify as export of service within the meaning of Section 2(6), since place of supply of such services is location of supplier of services i.e. India. To such extent, the Petitioners contended that the provision is unconstitutional and should be struck down.

The High Court adopted a strange approach. Instead of acknowledging whether place of supply is in India or outside India, it directly relied upon the age-old jurisprudence⁴ to hold that services provided by Indian intermediaries to foreign recipient against convertible foreign exchange shall qualify as export since GST is a destination-based tax wherein tax is ultimately levied only upon final consumption that accrues within the taxing jurisdiction. It was noted that consumption / destination of services provided by Petitioners takes place outside India hence, services qualify as exports under Section 2(6) of the IGST Act. The High Court observed that Section 13(8)(b) has deemed an export of service (an inter-state supply) to be an intra-state supply thereby levying State GST on the said transaction, which is against the Constitutional Provisions of Article 246A, 269A, 286 to the effect that State Legislatures do not have legislative competence to levy tax on transactions of exports. With this conclusion, the High Court also held that exports by the intermediaries are inter-state supply.

¹*Material Recycling Association v. Union of India*, TS-586-HC-2020(GUJ)-NT

²*Dharmendra M. Jani v. Union of India*, TS-272-HC(BOM)-2021-GST

³*Dharmendra M. Jani v. Union of India*, TS-138-HC(BOM)-2023-GST

⁴*All India Federation of Tax Practitioners v. Union of India*, 2007 (7) STR 625

The High Court also distinguished the judgment of Gujarat High Court⁵ by holding that said judgment was on a different footing vis-à-vis the present proceedings. Accordingly, it was observed that Section 13(8)(b) of the IGST Act must be confined to the IGST Act and must not extend to the CGST Act by deeming an export transaction an intra-state supply and levying GST thereon. However, the High Court strangely then proceeded to analyze Section 13(8)(b) independent of this observation that transaction in question is export and is held that it is Constitutionally Valid, provided the same is confined to the IGST Act.

Author's take

On a profound reading of the above, the Authors are unable to agree with the reasoning adopted by the Larger Bench in coming to its conclusion. The Larger Bench has deemed the transaction as export of service by merely relying on the destination-based tax principles and without appreciating the basic tenets enshrined in provisions under Section 2(6) of the IGST Act. Transaction in question would never qualify as export of service since place of supply of such services is in India.

Surprisingly, the High Court deemed that place of supply of such export transaction is outside India [without appreciating Section 13(8)(b)] and treated it is an inter-state supply basis Section 7(5)(a) of the IGST Act. Hence, the entire judgment has been pronounced on the surmise that services by Indian intermediaries qualify as export of service and the same creates a circular loop around place of supply and export of services.

Notably, if Section 13(8)(b) is Constitutionally Valid, then place of supply is in India and hence tax will be leviable. Such transaction cannot be export of service. On the other hand, if transaction in question is export of service, Section 13(8)(b) will be unconstitutional. The decision has thus created unreconcilable anomaly. In this regard, the High Court also has made a passing observation that it is not practicable to visualize a situation wherein IGST shall be levied on such a transaction.

Further, the Authors feel that Larger Bench has not appropriately addressed the decision of Gujarat High Court on the subject matter and has hastily concluded that same is not applicable whilst the same holds utmost importance. In the said decision, the High Court held that intermediary services to foreign recipients were also taxed in the erstwhile Service Tax regime and the same has continued in the GST regime.

Therefore, no deeming fiction has been canvassed by the Parliament in form of Section 13(8)(b) and accordingly, the same was held to be Constitutionally Valid.

Parting Thoughts and way forward

In the considered view of Authors, supply of intermediary services is an inter-state supply basis residuary provision of Section 7(5)(c) of the IGST Act, since it neither find its place in Section 8 of the IGST Act nor in any other provisions of Section 7. Further, the Parliament is well within its powers to frame principles for place of supply of any transaction and hence Section 13(8)(b) is Constitutionally valid. Accordingly, such service can never qualify as export of service.

The High Court in the aforesaid decision has given preference to destination-based tax principles over the principles of place of supply. An implication can likely be traced in the research and development sector in respect of testing activities or repairing services performed on goods made physically available to Indian suppliers by foreign recipients. Place of supply of such services as per Section 13(3)(a) of the IGST Act is location where such services are performed i.e. India. Hence, once can argue that basis destination-based tax principles, such transaction shall also qualify as export of services.

⁵ *Material Recycling Association v. Union of India*, TS-586-HC-2020(GUJ)-NT

The decision has further created apprehensions on the position that a taxpayer needs to adopt and seek refund of GST already paid / stop paying GST. The judgment will have ripple effects on various other provisions under GST law which deems place of supply and makes a transaction qualify as inter or intra supply. Given the repercussions, the department is likely to knock the doors of the Supreme Court.



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