**Intermediary Services remain in limbo**

***Introduction***

The taxability of Intermediary services has always had conflicting views. The point of taxation for intermediary services was the default – recipient based in service tax as is the common practice across the world in place of supply. In 2014 the CBEC took a “U-turn” based on some overzealous officer which was not having tax neutrality with other countries. GST continued the confusion in the place of supply provisions. In this article we understand the implications of the larger bench decision of Dharmendra M. Jani in the Hon’ble Bombay High Court and the way forward for such service providers.

***Provisions under focus***

1. *Section 13(8)(b) IGST Act – Place of supply is location of supplier of service.*
2. *Section 7(5)(a) IGST Act – Inter-State Supply transaction - when the supplier is located in India and the place of supply is outside India.*
3. *Section 8(2) IGST Act - Intra-State Supply transaction - Subject to the provisions of section 12, supply of services where the location of the supplier and the place of supply of services are in the same State or same Union territory shall be treated as intra-State supply.*
4. *Section 2(6) – ‘Export of Service’ definition – Supplier being within India, Recipient being outside India and the place of supply of service is outside India, etc.*

The issue is raised on the fact that by way of reading Section 2(6) & 7 of IGST Act the transaction is an inter-State supply, but due to section 13(8)(b) it is being colored as an intra-State supply thereby attracting tax.

In 2021 one Judge held the provisions to be ultra-vires, however another Judge dissented which led to this larger bench decision.

***Findings on recent HC ruling***

* The High Court is inclined to read the provisions harmoniously so that they work. They acknowledge there is a dichotomy. The intention of the provisions cannot be to generate disputes and litigation but to have a smooth and definite flow under a robust taxing system. They finally consider the transaction to be an inter-State supply.
* Petitioner prays that sec 13(8)(b) of IGST Act cannot be read into CGST Act or State GST Act by implicitly making export of services taxable. The High Court finds that section 13(8)(b) and Section 8(2) of IGST Act are constitutionally valid.
* The taxation of intermediary services is extra-territorial in nature is unacceptable due to Article 245(2) of the Constitution of India considering sec 13(8)(b) is an inter-State supply.
* Section 13(8)(b) and 8(2) of IGST Act are not violative of Article 14, 19(1)(g), 245, 246, 246A, 265, 269A and 286 of the Constitution of India. Section 13(8)(b) must operate in the confines of the IGST Act only and must not be deemed to have an application under CGST & State GST law.
* “Department-Related Parliamentary Standing Committee On Commerce” in its 139th Report on GST made an observation that place of supply against intermediary services must be under residuary clause of section 13(2) of IGST Act to enable export of services and bring about global parity. The High Court observed that this would have been considered by the Parliament.
* Material Recycling Associations of India – Guj HC decided intermediary services to attract CGST & SGST. This decision was concluded to not being identical and would not support the Revenue’s stand.

***Difference in Opinion***

The Hon’ble High Court considers the transaction to be an export of service which is a supply in the course of inter-State trade or commerce. This is not in line with the provision of export of service which requires the place of supply to be outside India, wherein, under Sec 13(8)(b) the place of supply is the location of the service provider.

Several countries such as Thailand, Sri Lanka, European Union have given effect to the destination-based taxation leading to an export of service and avoiding double taxation.

Many businesses have shifted base out of India to avoid additional taxes which is in-turn impacting our international competitiveness & CFE.

***Way Forward – Intermediary services***

The issue on validity is more or less argued and dealt with.

Although, for those persons who were paying taxes under CGST & SGST need not pay IGST against their past transactions.

Section 77(1) of CGST Act read with Section 19(2) of IGST Act, informs that where CGST & SGST has been paid inadvertently on a transaction considered to be an intra-State supply, but was an inter-State supply attracting IGST, the refund of tax wrongly paid will be provided once correct IGST taxes are paid. Interest would not apply in such scenarios.

It can further be interpreted that only once it is held (by way of notice/dept. audit) to fall into such a scenario by the department does the payment and refund need to be processed.

Considering that this would now move into the domain of the Supreme Court, and there is no interest cost implication, taxpayers may await such final decision before taking action.

Those who have not paid on intermediary service may do so under protest after consulting with an expert providing specific details.

Anticipated changes in the GST law (author’s view):

* Omit section 13(8)(b) and link it to residuary provision, i.e. section 13(2) of IGST Act
* Provide a notification under section 13(13) of IGST Act to prevent double taxation (tax in India as well as in the foreign country) by treating place of supply to be recipient location.

***Principal-to-Principal basis services***

Services provided on a principal basis and not as an intermediary would not fall under such category of services and are export of services covered under section 13(2) of the IGST Act and not section 13(8)(b).

CBIC Circular 159/15/2021-GST dated 20th September 2021 also provides clarification on the characteristics of intermediary services and the differences when services are supplied on own account or on sub-contract basis.

Some useful case laws for such scenarios:

* McDonald's India Pvt Ltd – Delhi HC - W.P.(C) 11430/2022
* Ernst and Young Ltd – Delhi HC - W.P.(C) 8600/2022
* Universal Services India Pvt Ltd 2016 (42) STR 585
* GoDaddy India Web Services Pvt Ltd 2016 (46) STR 806

***Conclusion***

The High Court decision appears to have got some confusion based on the manner in which the conclusion was drawn. Although, it would be pre-mature to make any business decisions based on the same and one may await the Supreme Court ruling and follow best practices as mentioned in paragraphs (above).

Also, classification of services is key and contract structuring vis-à-vis actual service must be appropriately done keeping in mind tax provisions.

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**This article was first published in KSCAA journal July 2023.**