GST on ‘Intermediary’ Services: Need for More Mediation

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In the terms of section 2(13) of Integrated Goods and Services Tax (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/her own account.

The words “arranges or facilitates’ the supply of goods or services or both, between two or more persons, is the significant portion of the definition of intermediary.

Intermediary services by Indian suppliers to their foreign principals are subjected to tax under GST. In simple terms, any person who facilitates the supply of goods/services between two persons, is considered as an intermediary. There has been a lot of confusion regarding tax implications on intermediary services done by Indian suppliers to foreign customers.

Taxability of Intermediary services has been a constant source of controversy since the erstwhile Service Tax regime. It began with notification of the ‘Place of Provision of Service Rules, 2012’. The notification provided that the place of provision of service in case of an Intermediary, is the location of the service provider, as against the general rule where place of provision is based on the location of service recipient. Accordingly, the Indian Intermediary service providers were denied the benefit of ‘Export of Service’, since in such cases the place of provision is in India, instead of location of the overseas recipient. Similar provisions were enacted under the GST regime and therefore the conundrum continues.

More than two dozen assessees have sought different judicial remedies including moving the High Court or seeking an Advance Ruling, however the Courts were divided in their views.

Recently, the Hon’ble Bombay High Court[1], in a writ initially gave a split verdict on the issue of constitutional validity of place of supply for Intermediary services and the vires of Integrated Goods and Services Tax Act (IGST Act) to levy and collect State Goods and Services Tax (SGST) / Central Goods and Services Tax (CGST). While, one judge held that the provisions are unconstitutional, the other held that provisions are constitutional and valid. Consequently, the matter was referred to a third Judge for his views.

The third Judge held that the provisions are legal, valid and constitutional, provided that the provisions

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 CGST and SGST Acts.

Therefore, while the place of supply of Intermediary services was ultimately held constitutionally valid, this ruling brought out a new dimension to this controversy. It is not in dispute that, the place of supply in the case of Intermediary is the 'location of supplier of service'. Now, as the location of the supplier of service and place of supply (being the location of the service provider) are in the same state, therefore, ideally CGST/SGST is leviable on such transactions.

However, the judgement (especially the view of the third judge) implies that CGST/SGST cannot be made applicable to intermediary services. Similarly, one can argue that IGST also cannot be levied, because, to levy IGST on a transaction - location of supplier and place of supply should be in two different states, which is not met in this case. If one has to take this interpretation, then no GST can be charged on Intermediary service, as the machinery provision for levy fails.

However, this may not reflect the true intent of the legislature and may alternatively be viewed as a legal anomaly which, nevertheless needs to be corrected by the GST Council / Central Board of Indirect Taxes and Customs (CBIC) without much ado. Another, issue which needs to be considered before making any amendments, is that most intermediary service providers would have discharged CGST / SGST over the past six years and any change in nomenclature of applicable tax now, could lead to huge working capital blockages and unnecessary disruptions / litigations. Therefore, a *status-quo* on the type of tax paid (at least for past period) is warranted.

The present situation exhibits a lot of uncertainty in the matter and therefore in the interest of the businesses who are engaged in providing these Intermediary services, the GST Council / CBIC needs to mediate and clarify the right approach, to resolve the confusion created.

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[1] Source Link