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Analysing developments impacting business

THIRD JUDGE OF BOMBAY HIGH COURT PRONOUNCES VERDICT ON POWERS OF STATE TO LEVY GST ON INTERMEDIARY SERVICES TO FOREIGN CUSTOMERS

20 April 2023 Taxation of intermediary services to offshore customers / clients has been one of the most contentious topics of the GST regime. An “intermediary service” has been defined as an activity of facilitating provision of goods or services between two or more persons. As per Section 13(8)(b) of the IGST Act, the “place of supply” for intermediary services, is deemed to be the location of the “supplier” of services.

Therefore an intermediary service provided to a foreign client is treated as a domestic, ‘intra-State supply’ which is subjected to levy of GST under Section 9 of the Central Goods and Services Tax Act (‘CGST Act’) and (‘SGST Act’) and the place of supply of intermediary is deemed to be the location service provider, instead of location of service recipient. This is an exception to the general rule that militates against the basic principles of destination-based consumption tax, which forms the bedrock of GST and vitiates established constitutional provisions.

The Firm represented the Petitioner *A.T.E. Enterprises Private Limited vs Union of India and Ors.* [WP (L) No. 639 of 2020] in a writ petition challenging the constitutional validity of levy of GST on intermediary service under Section 13(8)(b) of the IGST Act and the powers of the State to levy GST on intermediary services rendered to clients/customers located outside India.

The division bench of the Bombay High Court gave a divided verdict. One of the judges, Ujjal Bhuyan J. declared Section 13(8)(b) of the IGST Act as *ultra vires* and unconstitutional whereas Abhay Ahuja J. upheld the validity and *vires* of Section 13(8)(b) of IGST Act. In view of the difference of opinion among the judges of the Division Bench, a reference was made to the third judge of the Hon’ble Bombay High Court.

The reference has been decided by Justice, G.S. Kulkarni who upheld the validity of the Section 13(8)(b) of the IGST Act provided Section 13(8)(b) and Section 8(2) of the IGST Act are confined to the operation of the IGST Act. However, this is not the case in view of Section 9(1) of the CGST and SGST Acts which presently enable levy of CGST and SGST on intermediary services, to foreign customers, by operation of Section 13(8)(b) and Section 8(2) of the IGST Act. Therefore, under the present structure of the GST legislation, Section 13(8)(b) and Section 8(2) of the IGST Act are not confined to the operation of IGST Act alone. It is held that State Government and Central Government cannot levy State GST or Central GST in terms of the CGST and the SGST Acts. It was also held that the State is not constitutionally empowered to levy IGST on export of service.

Comments:

Given the structure of the GST law as it stands today, Section 13(8)(b) read with Section 8(2) of the IGST Act are not confined to IGST Act only, but by operation, transgresses into the

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CGST and the SGST Acts. Therefore, it can be interpreted, that by inserting a proviso to the operative part of the order in para 113(i) of the IGST Act, the third judge has declared Section 13(8)(b) read with Section 8(2) of the IGST Act (as they stand today), to be unconstitutional. The third judge therefore holds that CGST and SGST cannot be levied on intermediary services rendered to foreign customers under Section 13(8)(b) of the IGST Act. Basis this order, a view can be taken that CGST and SGST paid on intermediary services has been collected in violation of Article 265 of the Constitution of India and becomes refundable under section 54 of the CGST Act / SGST Act. The provisions have not been read down qua the petitioners and the order has universal application.

- Dinesh Agrawal (Executive Director) & Pratyushprava Saha (Principal Associate)

Copy of the judgment (in reference) is available [here](#).

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