

# Intermediary services under Goods and Services Tax Act

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The concept of Intermediary services was embodied in Goods and Services Tax Act from the Service Tax regime. "Intermediary" has been defined under section 2(13) of Integrated Goods and Services Tax Act, 2017 (hereinafter referred as the Act) as under-

*"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 own account."*

The words "arranges or facilitates" the supply of goods or services or both, between two or more persons, is the crux of the definition of intermediary. The Central Board of Indirect Taxes and Customs has clarified on scope of intermediary services via its circular no. 159/2021 published on 20.09.2021. The circular has provided for some pre requisites for scope of intermediary services,

1. Minimum of Three Parties- Intermediary does not carry out the main supply himself but arranges or facilitates the main supply of goods and services between two or more persons. The arrangement requires a minimum of three parties, two of them transacting in the main supply of goods and services and one arranging or facilitating the main supply.
2. Two distinct supplies- As discussed above, there are two set of supplies-
  - a. Main supply, of goods or services, between two principals.
  - b. Ancillary supply, is the service of facilitating or arranging the main supply of goods or services between the two principals. This supply is identifiable and distinguished from the main supply and is supply of intermediary service.
3. Intermediary service provider to have the character of an agent, broker or any other similar person- The Act itself defines intermediary as a broker, agent or any other person facilitating or arranging the services. The word 'means' in the definition is not inclusive and does not expand the definition to include any other person. The phrase "arranges or facilitates" indicates that intermediary services are only supportive services.
4. Does not include a person who supplies such goods and services or both or securities on his own account- The definition of intermediary services specifically excludes a person who supplies such goods or services, or both or securities on his own account. The person supplying services, fully or partly, on principal to principal basis, cannot be covered under the scope of "intermediary".
5. Sub-contracting for a service is not an intermediary service- The main supplier of goods or services or both can outsource the main service, fully or partly, to sub-contractor. Such sub-contractors are carrying out the main supply of goods or services and provides the main service on his own account to the buyer on behalf of main supplier. Such services are not intermediary and part of main supply only.
6. When location of either of supplier or recipient of intermediary services is outside India, specific provision of Section 13 of the Act, relating to provision of place of supply of intermediary service, shall be invoked.

To create a level playing field for domestic suppliers in international market, India is persistent on its approach of not taxing exports or providing concession on profits derived from export business. However, export of intermediary services is precluded from this benefit and intermediary service providers are still getting taxed. The scope of intermediary services has been under the scanner since the commencement of the Act.



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Export of services" has been defined under section 2(6) of the Act as, supply of any service when,—

- (i) the supplier of service is located in India;
- (ii) the recipient of service is located outside India;
- (iii) the place of supply of service is outside India;
- (iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and
- (v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8.

The general rule of the Act is destination based tax which means place of supply is the location of the recipient of goods or services. Section 13 of the Act provides for location of recipient of service as place of supply of services, where the location of supplier or recipient of services is outside India. Subsection (3) to (13) of this section carves out exceptions which create an effect that although the recipient of services is located outside India but the place of supply will be the location of supplier. Section 13(8) provides that where location of recipient of intermediary services is outside India, the place of supply for taxation purpose will be the place of supplier. As a result, if supplier of intermediary service is located in India, place of supply will be India. Resultantly, these services will not qualify as export of services and are not able to enjoy the zero tax liability given to pure export services. Business Process Outsourcing and Knowledge Process Outsourcing companies engaged in providing services like back office support, accounting, legal support etc. to foreign companies were severely hit by the ambiguity of interpretation of "Intermediary".

The differential treatment accorded to intermediary services under the Act as compared to other export services, has been the subject of controversy. High Courts in India has been under disagreement over nature of services provided under the umbrella of intermediary services.

In the case of *V Serve Global Private Limited*<sup>1</sup>, the Maharashtra Authority for Advance Ruling has held that back office support services provided to overseas clients are intermediary services as the applicant is only arranging or facilitating the main supply and not providing goods and services to clients buyer's or client's suppliers on its own account. Thus, these services are taxable in India.

In a similar case of *Go Daddy India Web Service Private Limited*<sup>2</sup>, the Delhi Authority for Advance Ruling held that the support services provided to the parent company (Go Daddy US) are not intermediary services. Applicant here was engaged for advising marketing situation prevalent in India, advising marketing staff of Go Daddy US regarding events, advertisement displays, supervision of third party customer care services, seminars etc.

In both the cases, the nature of services provided were different. In the first case, the scope included arranging or liaising of support services but in the second case the applicant only provided support services relating to marketing like brand promotion etc. Under the current GST regime, the agreements between parties have paramount importance with respect to payment of taxes. It is now essential for industry members, providing services to their parent companies or overseas clients on principal to principal basis, to ensure that the agreements or contracts entered clearly describe the nature and scope of service from their perspective,

The constitutionality of provisions of section 13(8)(b) of the Act was also challenged recently in *Dharmendra M. Jani v. Union of India*<sup>3</sup>. In this case, the petitioner was engaged to provide marketing and promotion services to solicit purchase orders in India, to the principal recipient located outside India.

The division bench of the Hon'ble Mumbai High Court comprising of Justice Bhuyan and Justice Ahuja expressed different opinions over the constitutional validity of the said provision of the Act.

Justice Bhuyan noted that the GST provision under question provides for a differential treatment of intermediary services leading to imposition of GST outside India. He held that levy of indirect tax on intermediary services is against the fundamental concept of GST as a destination based tax. But by taxing such services, received by overseas client in India, the concept of GST as destination tax is defeated as the services are not getting taxed at their destination but at their origin.

On the other hand, Justice Ahuja opined that provisions of Section 13(8)(b) of the Act does not offend Article 245 or 286 of the Constitution and Parliament is well within its powers in drafting such legislation. He stated that when there is specific provision defining "Intermediary" as in section 2(13) of the Act and Intermediary Services specifically dealt with in section 13(8)(b) of the Act, question of application of general provision of section 2(6) of export of services would not arise. A conjoint reading of Article 269A(1) with Article 269A(5) and Article 246A exclusively empowers the Parliament to make law

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<sup>1</sup> MAH/AAAR/SS-RJ/22/2018-19

<sup>2</sup> AAR/ST/08 /2016

<sup>3</sup> (WP No. 2013 of 2018)



on what is inter-state supply and what is not which obviously includes what is intra-state in contradistinction to what is inter-state and that power is exclusively with the Parliament. The power to enact provisions determining the nature of supplies (as inter-state supply in section 7 of IGST Act or intra-state supply in section 8 of IGST Act) or place of supply (as contained in sections 10 to 14 of the IGST Act including section 13(8)(b) where in the case of intermediary services, where supplier or the service recipient is located outside India, the place of supply has been stipulated to be the location of supplier) originates from these Articles. The power of the Parliament to stipulate principles on place of supply or to legislate on the same as contained in the IGST Act is empowered by the Constitution Amendment Act, 2016. Therefore, there is no doubt that the power to stipulate the place of supply as contained in Sections 13(8)(b) of the IGST Act is pursuant to the provisions of Article 269A (5) read with Article 246A and Article 286 of the Constitution. Therefore, the challenge with reference to the charging sections of Acts which operate in different fields in respect of supplies of different natures appears to be unnecessary. Hence, section 13(8)(b) is not ultra vires Section 9 of CGST Act.

It remains to be seen as to what is ultimately concluded by the Bombay High Court as the case is still pending before higher bench.

The GST regime is evolving and issues may continue to arise. The CBIC circular is expected to settle the anomalies that are occurring in the interpretation of intermediary services and reduce litigation and providing the suppliers of service the benefit of export of services where eligible. One will have to be careful in drafting of contracts regarding the relationship between parties and nature of services to be provided, to avail the benefit of export of services where eligible.

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