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GST Charcha: Whether Intermediary Services are export of Services?

Though, it has been a year since the implementation of GST, yet there are some problems which require immediate attention of the government to clarify, one of such dubious issue is 'place of supply' of intermediary services for the chargeability of GST.

It is a general trade practice for the Indian entities to provide intermediary services to the recipient located outside the Indian territory. This GST Charcha aims to determine whether the 'supply of services' by the intermediaries to the recipients located outside India amounts to **export of services** or not?

Intermediary services

Before proceeding with the issue at hand, it is important to understand the meaning of 'intermediary' first. Under Section 2(13) of IGST Act, 2017 (**"IGST Act"**), 'intermediary' has been defined to mean 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.

Certain ingredients that have been observed in the definition are:

1. An intermediary is only a facilitator of the goods and services; it can be a broker or agent or any other person.
2. The act of facilitation gives rise to two supplies:
    - Supply between the principal and the third party.
    - Supply of the intermediaries' services for a commission/fee (this transaction is under debate)
3. If the intermediary is supplying the goods/services in his own name/title, then the status of 'intermediary' cannot be accrued to the agent.

Though the term 'broker' and 'agent' are fundamentally different; broker being a middleman whose job is only to facilitate whereas agent acts on behalf of the principal; yet under the Act these terms have been put together under one umbrella of 'intermediary'.

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Diagnosis of Section 13(8)(b) of the IGST Act

At the start, it must be clarified that the services provided by intermediaries located in India to the recipient located outside India in lieu of fee/commission charged for the said services amounts to 'supply' of services. Now, in order to determine whether the said transaction will be Export of Services and/ or an intra-state supply or inter-state supply, the 'place of supply' of such services must be determined.

Section 13 of IGST Act determines the place of supply of services where either the location of supplier **or** the location of recipient is outside India. Here, default Section 13(2) provides that the 'place of supply' shall be the 'location of the recipient' unless the services falls within the ambit of specified sections from 13(3) to 13(13) of the IGST Act.

In pursuance of Section 13(8)(b) of the IGST Act, the place of supply in case of the 'Intermediary services' shall be the 'location of the supplier of services'.

Example: If XYZ is a company registered in UAE and taking services of finding prospective customers in India by an Indian ABC company registered at Delhi. ABC co. is providing intermediary services to this UAE co. and charging commission for the same.

As per Section 13(8)(b), the location of supplier shall be the place of supply in case of intermediary services. Since, the location of the supplier is Delhi and place of supply is also Delhi in given case, therefore this transaction will not be covered within the definition of export of services (as provided in Section 2(6) of IGST Act) as it is not satisfying one of the conditions of **place of supply being outside India**, which are reproduced herein below:

(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

Therefore, going by the strict interpretation of Section 13(8) of IGST Act, the supply of services by the Intermediaries to the recipients outside India are **not export of services**.

Recent Judicial Advance Ruling:

Global Reach Education Services Pvt. Ltd:[1] In this case, the applicant was promoting the foreign university and was helping them in enrolling Indian students. In providing the promotional services, the promotional company was charging commission/fee from the foreign university. In this very case, the authorities found that the Indian representative was an intermediary acting as an independent representative. Citing Section 13(8)(b) of the IGST Act, the Hon'ble West Bengal Advance Ruling Authority ruled that the place of supply shall be the place of supplier of service and such intermediary services would not be termed as export of services.

Intermediary services: Whether intra-state supply or inter-state supply?

Having understood that intermediary services are not export of services, now, we have to determine whether the said transaction would be termed as an intra-state supply or inter-state supply in GST.

Section 13(8) states that the **place of supply** in case of intermediary services becomes the **location of the supplier**. Therefore, in the above discussed example, the place of supply of intermediary services provided by company ABC located in India becomes the place of the supply of Intermediary service. This leads to the location of supplier and the place of supply being in same state, which means that the transaction between the intermediary service provider to a recipient outside India becomes **intra-state supply**.

FAQ on Banking, Insurance and Stock Brokers Sector:

In Entry No. 25 of the FAQ on Banking, Insurance and Stock Brokers Sector released by the Central Board of Indirect taxes and Customs, the query before department was whether the intermediary services provided by a banking company to its offshore account holders be treated as an intra-State supply or an inter-State supply for payment of GST?

The department answered citing Section 13(8)(b) of IGST Act and responded that "*the **place of supply** of such services is the **location of the provider of services**. As the*

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*location of supplier and place of supply are in same State, such supplies will be **treated as intra-State supply** and Central tax and State tax or Union territory tax, as the case may be, will be payable."*

The clarification of the department makes it amply clear that the intermediary services provided to an offshore account holder shall be treated to be intra-state supply where the place of supply shall be location of the service provider. Now, the question is whether the said answer as given for this FAQ is correct?

Diagnosis of Section 8(2) and Section 7(5)(c) of the IGST Act:

A contrasting and opposite view is reflected for the determination of place of supply whether intra-state or inter-state when Section 7(5)(c) and Section 8(2) of the IGST Act are interpreted together.

- **Section 8(2)** of IGST Act, *inter alia*, while defining intra-state supply of services states that:

  *"**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"*

  Now, for Section 12 to be applicable, location of supplier as well recipient must be in India.

  This means that Section 8(2) cannot be applied to the supply of intermediary services as the recipient is situated outside the taxable territory of India, hence, taking the transaction of providing intermediary services outside the purview of intra-state supply or services.

- Further, application of **Section 7(5)(c)** of IGST Act, 2017 shall make the said transaction as inter-state supply, which states that

  "Supply of goods or services or both, -

  …….

  *c) In the taxable territory**, not being an intra-State** supply and **not covered elsewhere in this section**,*

shall be treated to be a supply of goods or services or both in the course of ***inter-State trade or commerce****".*

Therefore, it may be safely concluded with conjoint reading of Sections 8(2) and 7(5)(c) of the IGST Act that intermediary services given to the recipient outside India by an intermediary in India is an **Inter-State Supply**.

Economics behind why intermediary services should be termed as export of services:

India has already established its name as one of the leaders in providing intermediary services to foreign recipients of prospective Indian customers. So, it is the responsibility of the government to encourage this major forex earning sector by making the international supply of the Indian intermediary services highly rewarding and internationally competitive. This can only happen when supply of such services is brought within the ambit of export of services i.e. when the place of supply of such intermediary services becomes location of the recipient as the benefit of said services ultimately goes to the foreign recipient only, which is the fundamental reason behind giving the status of 'exports' to these services.

Further, Section 16 of the IGST Act makes the export of services as zero rated supplies. This will provide benefit of exports to the registered intermediary service providers providing services to recipient outside India. This will further reduce the cost of Intermediary service providers and make the Indian services highly competitive in International market, which in turn will become a fertile ground for earning foreign exchange.

Why place of supply for intermediary services should be changed to location of recipient:

As discussed above, we have another angle to look at this transaction. When an Indian recipient imports services from the foreign intermediary service providers, then, this transaction would fall outside the GST ambit as location of supplier and place of supply i.e. location of supplier, both are outside India. Hence, no reverse charge will be applicable in hands of the Indian recipient of intermediary services. This logic also supports the contention of changing place of supply provisions for intermediary services from location of supplier to location of recipient.

Application of Section 13(8) of IGST Act is reducing the Indian forex reserves by making the imports tax free and exports taxable. For instance, when the supplier is in the foreign territory and the intermediary is also located in the foreign territory, but the location of the recipient is in the Indian Territory. Now, if the location of foreign intermediary service provider is made the place of supply, then this transaction will be kept outside the ambit of GST and the consequent transaction shall be tax-free for the Indian recipient making the import of service much more convenient and feasible for Indian recipient as compared to Indian intermediary service provider providing services to the foreign recipient. Therefore, in order to deal with this problem, the government should make the location of recipient as the place of supply. This will make the import of services by the Indian recipient taxable at par with exporter of intermediary services in India.

Therefore, in order to resolve the above predicament, it is advisable that the Govt. should immediately amend the provisions for place of supply of intermediary services to the location of the recipient outside India and should be treated as export of services which will be in the interest of India.

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