

## ELP Update on Integrated Goods and Services Tax Act, 2017

### ***Constitutional validity of section 13(8)(b) and section 8(2) of Integrated Goods and Services Tax Act, 2017 dealing with place of supply in case of 'intermediary service'***

The Hon'ble Bombay High Court's Division Bench comprising of Hon'ble Mr. Justice Ujjal Bhuyan and Hon'ble Mr. Justice Abhay Ahuja has given divergent opinions as regards the constitutional validity of section 13(8)(b) and section 8(2) of Integrated Goods and Services Tax Act, 2017 (IGST Act) dealing with place of supply in case of '*intermediary service in Dharmendra M. Jani vs. Union of India and Others*'.

Hon'ble Justice Ujjal Bhuyan has opined that section 13(8)(b) of IGST Act, 2017 is ultra vires the IGST Act and the Constitution of India. However, Hon'ble Justice Abhay Ahuja has expressed his inability to be persuaded by Justice Bhuyan's opinion and therefore recorded a separate opinion in this matter.

#### **Background**

- The petitioner was engaged in providing marketing and promotion services to customers located outside India while receiving foreign currency. Since the assessee qualified as an "intermediary" as defined in section 2(13) of IGST Act, his place of supply as determined under section 13(8)(b) of the IGST Act, was considered as the location of supplier of service i.e. in India.
- Such a supply was further classified as intra-state supply in terms of section 8(b) of the IGST Act and Goods and Service Tax (GST) was sought to be levied on this basis. The petitioner contended that the powers invoked by the Parliament in charging such transactions which was consumed beyond the territory of India, was *ultra vires* the charging scheme under the Central Goods and Services Tax Act, 2017 (CGST Act), IGST Act and Maharashtra Goods and Services Tax Act, 2017 and accordingly and violative of Articles 14, 19, 245, 246, 246A, 269A and 286 of the Constitution of India.

The key basis of the opinions by Hon'ble Justice Ujjal Bhuyan and Hon'ble Justice Abhay Ahuja as expressed in their orders dated June 9, 2021 and June 16, 2021 respectively are covered below:

#### **Hon'ble Justice Ujjal Bhuyan's opinion**

- In terms of Article 246A and 269A of the Constitution, the scope of GST is limited to the supply of goods or services in the course of inter-state/intra-state supply within India. It does not empower imposition of tax on export of services out of the territory of India.
- Further, clause (1) of Article 286 of the Constitution states that no law of a state shall impose or authorize imposition of a tax on the supply of goods or services or both where such supply "*takes place in the course of import into or export out of the territory of India*". While clause (2) empowers the Parliament to make laws formulating principles for determining supply of goods or services or both, the same cannot be used to foil or thwart the scheme of clause (1). Both have to be read together.
- The scope of section 9 of the CGST Act is only for intra-state supply. Thus, it is apparent that section 9 of the CGST Act cannot be invoked to levy tax on cross-border transactions i.e. export of services.
- Section 13(8)(b) of the IGST Act read with section 8(2) of the said Act has created a deeming fiction on export of service by an intermediary to be a local supply i.e. an intra-state supply. Thus, by artificially creating this deeming provision, in cases where the location of the recipient of service, provided by an intermediary, is outside India, the place of supply has been treated as the location of the supplier i.e. in India. This runs contrary to the scheme of the CGST Act as well as the IGST Act besides being beyond the charging sections of both the Acts.
- While the Hon'ble Gujarat High Court in *Material Recycling Association of India v/s. Union of India [2020] 118 taxmann.com 75 (Gujarat)* has upheld the validity of the said Section 13(8)(b), Hon'ble Mr. Justice Ujjal Bhuyan was unable to be agree with the same, while holding that though the decision of one High Court has a high persuasive value, it is ultimately not binding on another High Court.

- Thus, section 13(8)(b) read with section 8(2) of the IGST Act was held to be unconstitutional and *ultra vires* the scheme of GST which is destination-based consumption tax.

#### Hon'ble Justice Abhay Ahuja's opinion

- Article 246A begins with a non-obstante-clause overriding Article 246 and 254 of the Constitution and prescribes for wide powers of legislation with respect to charging GST. Also, the power under Article 286 to determine when shall a supply be treated as outside the state and in course of import or export lies with Parliament.
- Further, a conjoint reading of Article 269A(1) with Article 269A(5) and Article 246A exclusively empowers the Parliament to make law on determining what is an inter-state supply. In view of the language Article 286(2) [as amended pursuant to the Constitution (101st) Amendment Act, 2016] the Parliament can formulate principles for determining when a supply of goods or services or both have taken place either outside the State or in the course of import into or export out of the territory of India.
- As for the section 8(2) of the IGST Act, it was held that "*in any event, section 8(2) is not applicable to the case of petitioner as location of supplier and place of supply is not within same state (in India) but in taxable territory viz. India.*"
- As regards the challenge in terms of Article 14 of the Constitution of India, it was held that section 13(8) is not discriminatory, but is rather a reasonable classification founded on intelligible differentia, which has a rational relation or nexus to the object sought to be achieved. As regards the challenge under Article 19 of the Constitution, it was held that there is no restriction on trade for the assessee, as GST merely imposes a charge or tax and is valid.
- Regarding the judgement by the Hon'ble Gujarat High Court in *Material Recycling Association of India* (supra) Hon'ble Mr. Justice Abhay Ahuja has agreed to the decision rendered therein though for different reasons.
- Thus, section 13(8)(b) of the IGST Act cannot be said to be *ultra vires* Articles 245, 246, 246A, 269A, 286 of the Constitution of India and the levy is on account of section 13(8)(b) of the IGST Act. It is therefore, neither arbitrary nor unreasonable nor discriminatory.

#### ELP Comment

- In the present matter, in view of such a difference in opinion, the registry has placed this matter before the Hon'ble Chief Justice of the Hon'ble Bombay High Court on the administrative side for doing the needful.
- It is noteworthy how Hon'ble Justice Ujjal Bhuyan has considered the transaction in the present case (of intermediary service) to be an "intra-state supply" as per section 8(2) of the IGST Act, while on the other hand, Hon'ble Justice Abhay Ahuja has considered this supply to be an "inter-state supply" pursuant to section 7(5)(c) of the IGST Act.
- Since its introduction under the Service tax era and now continued under the GST regime, the concept of "intermediary" has been a constant bone of contention between the assessee and the tax department, with more uncertainty arising on account of contradictory rulings by Authority for Advanced Rulings (AAR) and Tribunal on whether services of similar nature qualify within the ambit of "intermediary" service. The earlier challenge to the *vires* of the said rule before the Hon'ble Gujarat High Court was nullified in *Material Recycling Association of India vs. Union of India* (supra) (though a review petition against the said judgement is pending before the Hon'ble Gujarat High Court).
- In this background, the above divergence of opinions of the judges of the Hon'ble Bombay High Court unsettles the position further. The assessee in the State of Maharashtra would ultimately be bound by the final verdict of the Hon'ble Bombay High Court once the Hon'ble Chief Justice decides the matter. As regards other jurisdictions, it is well settled *inter alia* by the Hon'ble Bombay High Court in *Commissioner Of Income-Tax vs Thana Electricity Supply Ltd. [1994 206 ITR 727 Bom]* that the decision of a High Court is neither binding precedent for another High Court nor for courts or Tribunals outside its own territorial jurisdiction and thus, it remains to be seen how the issue evolves across various jurisdictions in the country.

We hope you have found this information useful. For any queries/clarifications please write to us at [insights@elp-in.com](mailto:insights@elp-in.com) or write to our authors:

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