INTERMEDIARY SERVICES OR EXPORT OF SERVICES?: AN EXPLORATION OFVERIZON AND GENPACT JUDGMENTS IN THE LIGHT OF CONSTITUTION (ONE HUNDRED AND FIRST AMENDMENT) ACT, 2016

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Abstract

The litigation revolving around the interpretation of intermediary services vis-à-vis the export of services began during the erstwhile indirect taxation regime. The interpretation adopted by the Revenue resulted in exporting of taxes which in turn, defied the Constitutional spirit. The issue was thereafter settled by the Hon'ble Delhi High Court in the case of Verizon Communication India Pvt. Ltd. vs. Assistant Commissioner, Service Tax in favour of taxpayers. It was held that the recipient of service was determined on basis of the fact that who made the payment for the service. With the introduction of goods and services tax regime in India, the issue was brought into litigation again on the premise that the scope of intermediary services is different under the two tax regimes. The Adjudicating and Appellate Authorities decided the issue against the taxpayers and raised the demand of taxes. The matter travelled upto the Hon'ble Punjab & Haryana High Court in the case of Genpact India Pvt. Ltd. vs. Union of India wherein, it was held that sub-contracting was excluded from the scope of intermediary services and that the scope of intermediary services under the goods and services tax regime is the same as was under the erstwhile service tax regime. Thus, the issue has been settled by the Hon'ble Court in the favour of the taxpayers.

Keywords: *Export of services, Intermediary, Interpretation, Sub-contracting.*

I. Introduction

The indirect taxation regime in India has been completely overhauled by way of the introduction of goods and services tax in India. With effect from 1st July, 2017, the Central Government brought the *Central Goods and Services Tax Act, 2017*[1] and the *Integrated Goods and Services Tax, Act, 2017*[2] into force. The State Governments/ Union Territories introduced their respective *State/Union Territory Goods and Services Tax Act, 2017*. The said enactments collectively subsumed the earlier indirect tax laws which *inter-alia* includes the *Central Excise Act, 1944*[3], the *Finance Act, 1994*[4], the *Central Sales Tax Act, 1956*[5], respective *State Value Added Tax Acts*.

The goods and services tax regime was brought in with the objective of "One Nation, One Tax". This means that the Governments intended to levy the same tax on supplies of all goods or services or both making the entire country a

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1 Central Goods and Services Tax Act, 2017, No. 12, Acts of Parliament, 2017 (India).
2 Integrated Goods and Services Tax Act, 2017, No. 13, Acts of Parliament, 2017 (India).
3 Central Excise Act, 1944, No. 1, Acts of Parliament, 1944 (India).
4 Finance Act, 1994, No. 32, Acts of Parliament, 1994 (India).
5 Central Sales Tax Act, 1956, No. 74, Acts of Parliament, 1956 (India).

common national market. This was in stark contrast to the erstwhile indirect taxation regime where, the taxable events were different for levy of different types of taxes and duties. For instance, the central excise duty was levied on the manufacture of goods, service tax was levied on the provision of services, value added tax was levied on intra-state sales and central sales tax was levied on inter-state sales.

The goods and services tax is a destination-based consumption tax. The mandate for apportioning the goods and services tax levied and collected by the Government on inter-state supplies is provided by virtue of Section 9 of the *Constitution (One Hundred and First Amendment) Act, 2016*. As per Section 9, the tax shall be apportioned between the Centre and the States[6]. Further, Section 17 of the *Integrated Goods and Services Tax Act, 2017* lays down the manner of apportionment of taxes. This strengthens the principle of goods and services tax being a destination-based consumption tax. Further, Section 16 defines a "zero-rated supply" to *inter-alia* mean an export of goods or services or both since the destination or consumption of supply is outside India.

Owing to the world becoming a global village where the nations are interdependent on each other and considering the fact that India is a young nation, India is increasingly becoming a very popular centre for providing outsourcing services. Many multinational corporations are setting up their offshore centres or back-end offices in India. This helps them to cater to the demands of their customers in other foreign countries. The arrangements are executed between the Indian and foreign entity in order to export services to the foreign entity.

The Legislature has always levied the taxes and duties on domestic transactions. The intent has been to ensure that the taxes are not exported. This ensures that the goods and services of domestic manufacturers/traders remain competitive in the international market. This is also in line with the underlying principle of the Constitution of India. Keeping in view the said objective, the levy of taxes on the export transactions has always been exempted by the Central Government.

In the above background, it becomes imperative to understand the present discussion on export of services and intermediary services. Here, a faulty interpretation of the latter concept has resulted in defying the Constitutional spirit of not exporting the taxes. The concept of intermediary services was introduced to tax a transaction of a very different nature where, a person acts as a bridge or a facilitator between at least two parties. However, by adopting an incorrect interpretation of the said concept, the department has resorted to

6 INDIA CONST. art. 269A, cl. 1.

taxing those transactions of export which are performed by an Indian entity on principal to principal basis.

An intermediary transaction attracts the levy of taxes in India while that of an export does not. The litigation pertaining to intermediary services started in the erstwhile service tax regime. The same continued even under the current goods and services tax regime since the concept has not undergone any change under the goods and services tax regime. The issue was discussed at length in a number of judicial pronouncements in the erstwhile taxation regime. The same has finally been settled by the Hon'ble Punjab & Haryana High Court in the favour of assessees under the current regime thereby, upholding the Constitutional spirit.

II. Interpretation of Intermediary Services under The Erstwhile Service Tax Regime

The erstwhile service tax regime defined the concept of intermediary vide clause (f) of Rule 2 of the Place of Provision of Services Rules, 2012. The provision was worded in a manner that the term "intermediary" was defined to mean any person, like a broker, an agent. Such person is tasked with the responsibility of arranging or facilitating the supply of goods or provision of main service, between at least two persons. But the term does not include a person who provides the main services or supplies the goods himself.

The service provided by an intermediary is separate or distinct from the provision of main service to the service recipient. Where a person is engaged for providing the main service or supplying the goods himself or on his own account, then such a person falls out of the scope of intermediary services. Thus, it is essential that there must be two or more transactions of provision of services or supply of goods. Only a transaction where a person acts as a mere facilitator or arranges the provision of services/supply of goods falls within the ambit of intermediary services.

The concept of intermediary can be explained with the help of an example. Where a consultant acts as a facilitator and refers a client to a law firm for provision of legal services, then he acts as an intermediary as he is not providing the main services to the client on his account. On the contrary, where a consultant avails the legal services himself in his own name and then provides the services independently to the client basis the services availed by him from the law firm, then he does not act as an intermediary. In fact, provides the main services on his account.

The Service Tax Education Guide was released by Central Board of Indirect Taxes & Customs (Central Board of Excise & Customs, earlier) on 20.06.2012[7].

[7] CENTRAL BOARD OF EXCISE & CUSTOMS, SERVICE TAX EDUCATION GUIDE, Para 5.9.6.

It further clarified that generally a person who undertakes the task of arranging or facilitating a provision of service, or a supply of goods, or both, between at least two persons, qualifies as an 'intermediary'. However, it is essential to note that an intermediary does not undertake any material alteration or further processing.

The Education Guide also laid down certain factors to aid in determining as to when a person will be said to be an intermediary in a particular transaction. The factors are listed below:

- Value and nature: An intermediary is not authorised to alter the nature and value of the main service. He is only responsible for facilitating the provision of a service by a principal. However, the intermediary may be permitted to negotiate a different price, by the principal himself. If the intermediary is not sanctioned with said authority, he cannot assume the same and act on behalf of the principal.
- Separate commission: The intermediary charges a commission for providing his services. The value of such commission is separate and identifiable from the main supply that he is facilitating or arranging.
- Title and identity: It is essential that while acting on behalf of the principal, the service provided by the intermediary is visibly distinguishable.

The above requirements of the Education Guide were discussed in the case of ***Commissioner of GST, Gurgaon-II vs. Orange Business Solutions Pvt. Ltd.***[8] Here, the Hon'ble Customs, Excise & Service Tax Appellate Tribunal laid down the essentials of intermediary services.

The litigation pertaining to this ambiguous concept always revolved around the fact as to whether a particular transaction qualifies as an intermediary service or export of service. The former attracts the levy of taxes hence, the Revenue has always been inclined towards treating a transaction of provision of services to overseas entity as an intermediary service. On the other hand, the assessees/service providers have always taken the stand that the transaction qualifies as an export of services which is exempted from the levy of service tax.

In order to understand the issue in detail, it is important to refer to the relevant provisions of the Place of Provision of Services Rules, 2012. These Rules determine the place where the services have been provided and accordingly determine the levy of service tax.

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[8] Commissioner of GST, Gurgaon-II v. Orange Business Solutions Pvt. Ltd., 2019 (27) G.S.T.L. 523 (Tri. - Chan.) (India).

In order to ascertain the place of provision of services, the general rule is laid down in Rule 3 of the Place of Provision of Services Rules, 2012. In terms of the general rule, the service shall be deemed to be provided at the place where the recipient of services is located. The proviso caters to an eventuality where the location of recipient of service is not ascertainable. In such an eventuality, the service shall be deemed to be provided at the place where the provider of services is located. The exclusion contained in the proviso is not applicable in case of online information and database access or retrieval services.

Rule 9 of the Place of Provision of Services Rules, 2012 is an exception to the general rule contained in Rule 3. It is an exception because it provides that in case of certain specified services, the place where the provider of services is located shall be the place of provision of services. Clause (c) of said Rule 9 refers to intermediary services being one of those services where the place where the provider of services is located shall be the place of provision of services. Meaning thereby that irrespective of the place where the recipient of service is located, if the location of an intermediary service provider is in India, then the place of provision of services shall be in India. Then, the transaction will be subject to the levy of service tax.

The issue of leviability of service tax arose in respect of such transactions where the recipient of services was located outside India while the location of provider of services was located in India. While the taxpayers treated such transactions as export of services, the Revenue entertained a view that such transactions were in the nature of intermediary services. In such a case, Rule 9 of the Place of Provision of Services Rules, 2012 would apply. Hence, the services will be deemed to be provided at the place where the provider of services is located.

Analysis Of Decision Of The Delhi High Court In The Case Of *Verizon Communication India Pvt. Ltd. vs. Assistant Commissioner, Service Tax*

In the case of ***Verizon Communication India Pvt. Ltd. vs. Assistant Commissioner, Service Tax***[9], the issue raised before the Hon'ble Delhi High Court was whether the services provided by Verizon India under a Master Supply Agreement with MCI International Inc. (hereinafter referred to as "**Verizon US**"), for rendering connectivity services for the purpose of data transfer, constituted export of telecommunication services under the *Finance Act, 1994*. The Hon'ble High Court held that although the subscribers to the services of Verizon US were 'users' of the services provided by Verizon India but Verizon US was the 'recipient' of such service under the Master Supply Agreement and it was Verizon US that paid for such service. Thus, for the

[9] Verizon Communication India Pvt. Ltd. v. Assistant Commissioner, Service Tax, 2018 (8) G. S. T. L. 32 (Del.) (India).

period post 2012, the place of provision of services was required to be determined under Rule 3 of the Place of Provision of Services Rules, 2012. Hence, the telecommunication service was deemed to be provided at the location of the recipient of service, which was outside India. In turn, it was concluded that the Assessee was engaged in export of services.

The above decision of Hon'ble Delhi High Court was followed by the Principal Bench of Hon'ble Customs, Excise & Service Tax Appellate Tribunal at New Delhi in the case of ***Verizon India Pvt. Ltd. vs. Commissioner of Service Tax***[10]. The Revenue contended that the appellant was providing intermediary services. Thus, the place of provision of services would be the place where the provider of services was located in line with Rule 9 of the Place of Provision of Services Rules, 2012. The Hon'ble Tribunal held that the appellant provided output services and raised invoices on Verizon US on principal to principal basis. That the appellant was not acting as intermediary between another service provider and Verizon US.

The above decision rendered by the Hon'ble Delhi High Court was followed in a very recent decision passed by Hon'ble Customs, Excise and Service Tax Appellate Tribunal, New Delhi[11].

The above decision passed by the Hon'ble Delhi High Court settled the issue pertaining to levy of service tax on such transactions. However, the issue remains a widely litigated one with cases of many assessees pending decision till date.

III. Interpretation of Intermediary Services under The Goods And Services Tax Regime

The definition of intermediary given under the current goods and service tax regime is similar to what existed during the erstwhile indirect taxation regime.

The scope and interpretation of the term 'intermediary' has been elucidated in the current taxation regime under the *Integrated Goods and Services Tax Act, 2017*[12]. The meaning of the term is the same as that contained in the erstwhile service tax regime.

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[10] Verizon India Pvt. Ltd. v. Commissioner of Service Tax, 2021 (45) G. S. T. L. 275 (Tri. - Del.) (India).

[11] Commissioner of Central Tax, CE & ST v. Singtel Global India Pvt. Ltd., 2022 (12) TMI 469 - CESTAT New Delhi (India).

[12] Section 2 (13)- "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 term ‘intermediary’ means a person who facilitates or arranges the supply of goods or services or both, between at least two persons. A clear exclusion from the definition of term ‘intermediary’ is a person who provides such goods or services or both himself. Therefore, where a person is providing the services on his own as a principal and he is not acting as an agent/facilitator between at least two persons for supply of goods or service, then such service cannot be classified as an intermediary service. Thus, it is clear that for a registered person to be considered as an intermediary, there are two essentials which can be inferred from the definition of intermediary:

- Firstly, an intermediary is a person who facilitates or arranges a provision of services or supply of goods.
- Secondly, he is considered to be a link or a bridge between two parties.

In other words, there has to be a defined supplier of goods or services vis-à-vis a service receiver/customer for which the role of facilitator is to be played by a third party, i.e., the intermediary. In the absence of a tripartite arrangement, intermediary cannot be said to have been involved in the transaction.

The Revenue started raising the demand of goods and services tax by attempting to treat the services as intermediary services under the current goods and services tax regime as well. The issue raised by the Revenue rested primarily on the premise that the judicial pronouncements laid down under the service tax regime were not applicable. This is because the ambit and scope of intermediary services were wider under the current indirect taxation regime.

The statutory provisions were unambiguous and the intent of the Constitution was clear to not levy taxes on the export transactions. To further this, the Department of Revenue, through the Central Board of Indirect Taxes and Customs, recognised the difficulty faced by assessees engaged in export of services. Thus, the Central Board of Indirect Taxes and Customs issued a clarification in the form of the Circular No. 159/15/2021-GST dated 20.09.2021 to clear the air over the issue. In the said Circular, it was clarified that the concept of intermediary under the goods and services tax regime was in fact borrowed from the erstwhile service tax regime. Thus, there was, in essence, no alteration in the realm of intermediary services in both the indirect taxation regimes, but for the inclusion of supply of securities in the goods and services tax law.

The Circular proceeded to lay down the following primary requirements of intermediary services:

- There should be a minimum of three parties. Out of these, two are involved in the main supply and third party undertakes the ancillary supply, or arranges or facilitates the main supply.
- There should be two separate and distinct supplies. One of the supplies is the main supply and the other is an ancillary supply. Where a person undertakes the main supply of goods or services or both, on a principal to principal basis, for another person, he cannot be said to be a supplier of intermediary services.
- An intermediary does not supply the main service and only plays a subsidiary or supportive role. Thus, an intermediary acts in the nature of an agent, broker or any other similar person.
- Any person, who undertakes the main supply, whether fully or partially, on a principal to principal basis, is specifically excluded from the scope of an intermediary. The use of word 'such' in the definition of the term 'intermediary' under the goods and services tax regime means the main supply itself, which could be of goods or services or both, or securities.
- Where the supplier of main supply outsources the supply, either fully or partly, to a sub-contractor, the transaction is excluded from the ambit of intermediary services. In other words, sub-contracting is an important exclusion.
- The applicability of clause (b) of sub-section (8) of Section 13 is not attracted when the location of both supplier and recipient of supply is in India. The said provision is applicable only when the location of either the supplier of intermediary services or that of the recipient is outside India.

The taxable event for the levy of goods and services tax in India is the supply. Section 13 of the *Integrated Goods and Services Tax Act, 2017* is the relevant provision, which comes into play where the location of either the supplier of services or that of the recipient is outside India. In such a case, the place of supply of services is required to be ascertained as per Section 13.

The general rule for determining the place of provision is contained under sub-section (2) of Section 13 of the *Integrated Goods and Services Tax Act, 2017*. According to the said sub-section, the place of supply of service shall be the place location of the recipient of service. However, in a situation where the recipient of service cannot be located ordinarily, then the place where the supplier of service is located shall be kept as the basis for determining the place of provision of service. Further, sub-sections (3) to (13) thereof contain specific provisions in respect of specified services. Accordingly, in case of services specified in sub-sections (3) to (13) contained in Section 13, the place of supply shall be determined as per the respective principle given in each of the sub-sections. In case of other services, sub-section (2), being the general principle,

shall be applicable. The same is accordingly applied to determine the place where the services have been supplied.

Clause (b) of sub-section (8) of Section 13 provides that in respect of intermediary services, the place where the provider of service is located shall be the place of supply of service.

It is imperative to mention here that a transaction of export of services is a zero-rated supply as provided under the *Integrated Goods and Services Tax Act, 2017* in the form of Section 16. The definition of "export of services" is contained in sub-section (6) of Section 2 of the *Integrated Goods and Services Tax Act, 2017* to mean the supply of any service where the following conditions are satisfied:

- The location of the supplier of service is in India;
- The location of the recipient of service is outside India;
- In terms of the statutory provisions discussed above, the place of supply of services is outside India;
- The payment is made to the supplier of service in convertible foreign exchange or in Indian Rupees, in such situations as permitted by the Reserve Bank of India;
- The recipient and the supplier of service are not merely establishments of a distinct person.

Despite the issuance of clarification in the nature of Circular dated 20.09.2021, the issue remained litigious. This is because the Revenue continued to treat the export of services as supply of intermediary services by contending that the third condition enumerated above was not satisfied in such transactions. In turn, the denial of refund claims caused hardship to the entire service industry.

Reference here can be made to the ruling given by the AAAR, Karnataka in the case of ***Infinera India Pvt. Ltd.***[13] The Authority relied on the general meanings of the terms 'arranging' and 'facilitation', which are used in the definition of intermediary. It held that the said terms would generally cover a broad range of activities in the nature of sales promotion or marketing of the services or goods of the client, identifying prospective buyers for the products of the clients or identifying the sources of supply of the goods or services which are required by the client, negotiating the prices with a potential buyer or a potential supplier, acquiring sales orders in respect of the goods or services of the client and similar transactions. Since the appellant was providing pre-sale and marketing service of the products of the overseas client, the said service was in the nature

[13] In Re: Infinera India Pvt. Ltd., 2020 (33) G. S. T. L. 491 (App. A. A. R. - GST - Kar.) (India).

of facilitating the supply of the products of the overseas client. Hence, the appellant was correctly classified as an intermediary as provided under the *Integrated Goods and Services Tax Act, 2017*.

Similarly, in the ruling of ***Vservglobal Private Limited***[14], the Ld. Appellate Authority for Advance Ruling, Maharashtra held that the appellant was providing services in the nature of an intermediary. This is because the appellant was providing back office support services in relation to the goods in question which belonged to either the overseas client of the appellant or the client's supplier. The Authority rejected the claim of the appellant about principal supply being 'Back office Support' and 'Accounting' and other services being ancillary.

It is evident that the definition of intermediary was wildly misinterpreted by the Authorities under the goods and services tax regime. This resulted in a plethora of litigation on the issue.

IV. *Genpact India Pvt. Ltd. v. Union of India*: An Analysis

The issue pertaining to the dispute between intermediary services and export of services reached the Hon'ble Punjab & Haryana High Court. In the case of ***Genpact India Pvt. Ltd. vs. Union of India***[15], the assessee invoked the writ jurisdiction of the Hon'ble High Court. The writ petition was entertained since the case involved a substantial question of law.

Brief Facts of The Case

It is pertinent to note that the said Petitioner had earlier approached the Hon'ble High Court by filing a writ petition[16]. However, vide the Order dated 29.01.2021, the Hon'ble High Court remanded the matter to the First Appellate Authority in that stage. It was held that the Authority passed a cryptic and non-speaking order. It was also held that the reasons assigned for classifying the Petitioner as an intermediary were not sustainable as the test of law laid down in the judgements passed in erstwhile service tax regime was not satisfied.

Pursuant to the remand proceedings, the First Appellate Authority again passed an order classifying the services as intermediary services. Consequently, the Petitioner challenged the said order by way of filing another writ petition before the Hon'ble Punjab & Haryana High Court.

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[14] In Re: Vservglobal Private Limited, 2019 (26) G. S. T. L. 127 (App. A. A. R. - GST) (India).

[15] Genpact India Pvt. Ltd. v. Union of India, 2022 (11) TMI 743 - Punjab and Haryana High Court (India).

[16] Genpact India Pvt. Ltd. v. Union of India, 2021 (2) TMI 816 - Punjab and Haryana High Court (India).

The factual matrix of the case was that the Petitioner was a Business Process Outsourcing (hereinafter referred to as "**BPO**") service provider located in India. The Petitioner executed an agreement dated 01.01.2013 (hereinafter referred to as "**MSA**"), with an entity called, Genpact International Incorporated (hereinafter referred to as "**GI**"). GI was located outside India. GI engaged the Petitioner to undertake the actual performance of BPO services to the foreign clients of GI or such clients, which were located outside India. The services *inter-alia* included maintenance of vendor/customer master data, scanning and processing of vendor invoices, book keeping, preparation/ finalization of books of account, generating ledger reconciliations, managing customer receivables; technical IT support; data analysis; development, licensing and maintenance of software as per clients' needs. The Petitioner filed an application claiming the refund of unutilised input tax credit which accumulated as a result of the supplies of such services. The services were zero rated and on which, the Integrated Goods and Service Tax was not paid, under the Letter of Undertaking.

Submissions Made By The Petitioner

It was contended that where a person is engaged in supplying the main services, he was excluded from the definition of "intermediary". The Petitioner contended that it was engaged in supplying the services "on its own account" and was not acting as a facilitator of any supply. The Petitioner was in fact, tasked with the responsibility of providing all services on its own. It was also responsible for all the risks concerning the performance of services and the pricing of such services. It was also contended that in terms of the MSA, the petitioner was engaged by GI to supply services to it on a "principal to principal" basis. The petitioner was not acting on behalf of GI, as an agent. In the absence of a separate agreement between the petitioner and the customers of GI, the petitioner could not be compared to that of an agent or a broker in any manner. Further, the petitioner was performing the actual services under the sub-contracting arrangement executed by GI. It was not "arranging" or "facilitating" the service, which is essential to qualify as an "intermediary". Thus, the petitioner could not be regarded as an "intermediary".

The petitioner also pointed out the difference between the charges given to an intermediary and a main supplier of services. While in the case of an "intermediary", the turnover was in the nature of a mere commission or a facilitation fee, the Petitioner received the entire charge for the main service itself. The same also comprised its turnover. The Petitioner referred to the fact that the BPO services have been provided by the petitioner since a long time. Such services were in fact classified as "export of services" under the previous indirect taxation regime. The tax authorities were also sanctioning the refund claims to the petitioner on a regular basis. The petitioner argued that there was

no material change in the transactions undertaken by the petitioner. Further, the scope and ambit of "intermediary services" under both the indirect taxation regimes have remained largely identical as a result of similarly-worded statutory provisions. Thus, the authorities did not have the liberty to entertain a different view for the same assessee in respect of a different period.

The petitioner's case was also strongly furthered by the Circular dated 20.09.2021. The Circular clarified that sub-contracting arrangements fall outside the ambit of "intermediary services".

Submissions Made by the Respondent

The Revenue, in turn, referred to several clauses of the MSA and submitted that largely two types of services were performed.

The Revenue furthered its submissions that the petitioner facilitated the supply of main services by GI and was only supplying support services. It was also contended that the petitioner was, in turn, acting on behalf of GI where, GI was engaged in the supply of services. That the petitioner was acting in a supporting capacity and the relationship between GI and petitioner was that of a principal and agent.

Insofar as the submission pertaining to sanction of refund for the previous tax period was concerned, the Revenue argued that the doctrine of res-judicata was not relevant in respect of issues arising under tax regime for different assessment years.

Findings of The Hon'ble High Court

The Hon'ble High Court analyzed the clauses of MSA and reached a conclusion that there was a sub-contracting arrangement between GI and the petitioner for providing the services to the customers of GI. That the MSA was entered into between GI and petitioner for provision of such services which GI was contractually required to perform for its customers. Thus, the petitioner was sub-contracted such services and was responsible for actually performing the BPO services and information technology services for the customers of GI. The fact that the petitioner was responsible for all risk related to performance of services evidences that the petitioner was in fact providing services on its own account.

The Hon'ble High Court further held that the following ingredients must be satisfied by the Revenue to classify a person as an intermediary:

- The presence of a principal-agent relationship must be established.
- The person must act as a facilitator between at least two parties. He must arrange or facilitate the supply of the service.
- The main service, which is intended to be supplied to the service recipient, must not be actually performed by the intermediary.

Basis the relevant clauses of the MSA, it has been held that the petitioner was not acting as an intermediary in any sense where the petitioner was not facilitating any services.
The Hon'ble High Court laid down another important ratio. A comparison of the definition of "intermediary" under the service tax regime and the goods and services tax regime reveals that the scope of the term is similar. This has also been clarified vide the Circular dated 20.09.2021. Since the scope and ambit of provision has not changed, it has been held that the department cannot be permitted to take contradictory stands for different periods. The principle of consistency ought to be followed. The Hon'ble Court also relied on the decision of ***Radhasoami Satsang Soami Bagh, Agra vs. Commissioner of Income Tax***[17]. Here, the Hon'ble Supreme Court held that the department cannot be permitted to take different stands without there being any change in the factual scenario.

Even in the decision of the Hon'ble Apex Court in the case of ***Bharat Sanchar Nigam Ltd. vs. Union of India***[18], the ratio was repeated. It was held that in the event of no change in the facts and law in a subsequent assessment year, the quasi-judicial as well as the judicial authority are not generally permitted to take a contradictory stand.

It has also been held that in the absence of an agreement between the petitioner and the customers of GI, the petitioner cannot be equated to be an agent or broker in any manner. The petitioner was given its fees or relevant charges by GI for its services, which was the main contractor. The main services were although supplied by the petitioner under the arrangement of sub-contracting, the commission for such main services was received by GI from its clients since it was the main contractor. The petitioner does not have any direct contact with the customers of GI. It does not get any remuneration from them for providing the main services directly to the foreign customers of GI. Further, the Revenue had failed to furnish any evidence or proof to substantiate the allegation that the petitioner was liaisoning or acting as an "intermediary" between GI and the foreign customers of GI as required by the statutory provisions. Vide the circular dated 20.09.2021, it has already been clarified that sub-contracting is excluded from the ambit of intermediary services.

In view of the above decision, the Hon'ble High Court has settled the issue in favour of assessees especially in respect of business process outsourcing services. At the same time, it is important to understand that the ratio laid down

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[17] Radhasoami Satsang Soami Bagh, Agra v. Commissioner of Income Tax, (1992) 1 SCC 659 (India).

[18] Bharat Sanchar Nigam Ltd. v. Union of India, (2006) 3 SCC 1 (India).

in the above decision will apply with equal force to other assessees placed in similar industries where a part or whole transaction is sub-contracted to the parties operating in India. Hence, the decision rendered by the Hon'ble High Court will go a long way. It will ease the burden cast on High Courts and prejudice caused to assessees as a result of unnecessary litigation, especially where the issue was already settled in their favour in the erstwhile service tax regime.

V. Conclusion

It is clear that the issue pertaining to interpretation of intermediary services is highly contentious and the litigation has been continuing since the erstwhile service tax regime. However, the ratio laid down by the Hon'ble Punjab & Haryana High Court will aid in reduction of litigation in respect of intermediary services. It will also assist in other issues where the scope and ambit of statutory provisions under the erstwhile indirect taxation regime and current goods and services tax regime has remained identical. Further, the decision has brought a sigh of relief for the entire service industry which is functioning on the model of business process outsourcing or knowledge process outsourcing. The decision of the Hon'ble Court has also resulted in setting right the spirit of the Constitution of India, which suffered at the hands of the implementing authorities.

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