

Divergent opinion on constitutional validity of Section 13(8)(b) IGST Act pertaining to intermediary services

The Hon'ble Bombay HC in *Dharmendra M. Jani v. Union of India [W.P. No. 2031 of 2018 dated June 09, 2021]* Justice Ujjal Bhuyan held that Section 13(8)(b) of the Integrated Goods and Service Act, 2017 ("**IGST Act**") is ultra vires of Articles 14, 19, 245, 246, 246A, 269A and 286 of the Constitution of India and also ultra vires the provision of Central Goods and Service Tax Act, 2017 ("**CGST Act**"), IGST Act and Maharashtra Goods and Service Tax Act, 2017 ("**MGST Act**"). Justice Abhay Ahuja disagreed with the Justice Ujjal Bhuyan, now the matter is to be placed before Hon'ble the Chief Justice on the administrative side for doing the needful.

Facts:

Mr. Dharmendra M Jani ("**the Petitioner**") is a proprietor of M/s. Dynatex International. The Petitioner is engaged in providing marketing and promotion service to overseas customers.

The overseas customers are engaged in manufacture and sale of goods. As per the agreement the Petitioner solicits purchase orders for these overseas customers. The Indian purchaser i.e. importer directly gives order to the overseas customer. The sale invoice is raised in the name of the Indian purchaser and direct payment is made to overseas customer. The overseas customer pays commission to the Petitioner against the invoice issued by the Petitioner. This payment is received by the Petitioner in India in convertible foreign exchange.

The Petitioner stated that the transaction undertaken by the Petitioner is an export of service within the meaning of Section 2(6) of IGST Act. Further, the Petitioner is also an intermediary as per Section 2(13) of IGST Act. As per conjoint reading of Section 13(8)(b) and 8(2) of IGST Act a deeming fiction has been created for the intermediary, where the location of recipient is outside of India, the place of supply shall be location of recipient which is in India. Due to this the export of service by the Petitioner being an intermediary will amount to intra-state supply of service and the Petitioner will be liable to pay CGST and SGST.

The present writ petition has been filed to challenge the constitutional validity of Section 13(8)(b) read with Section 8(2) of the IGST Act.

Issue:

Whether Section 13(8)(b) read with Section 8(2) of the IGST Act is constitutionally valid.

Held:

The Hon'ble Bombay HC in ***W.P. No. 2031 of 2018 dated June 09, 2021*** held as under:

Justice Ujjal Bhuyan:

- Analyzed that, under Article 245 of the Constitution of India parliament may make laws for the whole or any part of India, the legislature of state may make laws for the whole or any part of the state. No law made by the parliament will be invalid on the ground that it would have extra territorial operations. In ***GVK Industries Limited v. The Income Tax Officer [2011 (4) SCC 36]*** and ***Sondur Gopal v. Sondur Rajini [AIR 2013 SC 2678]*** the apex Court held that a law which has extra territorial operation cannot directly be enforced in another state but such a law is not invalid and thus saved under Article 245(2) of the Constitution of India. Further, Article 245(2) ibid does not allow to have any extra territorial operation when there is no nexus at all with India.
- Further, Article 246A of the Constitution of India deals with special provision of GST. It is pertinent to note that only parliament can frame law for levy and collection of GST in the course of inter- state supply. Also, it can lay down principles for determining place of supply and when such supply of goods or service or both takes place in the course of inter-state supply. Thus it cannot impose tax on export of service out of territory of India by considering the same as a local supply.
- Noted that a co-joint reading of Article 246A and 269A of the Constitution of India it is evident that the Constitution has only empowered Parliament to frame law for levy and collection of GST in the course of inter-state trade or commerce, besides laying down principles for determining place of supply and when such supply of goods or services or both takes place in the course of inter-state trade or commerce. Thus, the Constitution does not empower imposition of tax on export of services out of the territory of India by treating the same as a local supply.
- Further, in Article 286(1) of the Constitution of India that is a bar 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 Article 286(2) of the Constitution of India

empowers the Parliament to make laws formulating principles for determining supply of goods or of services or both certainly the same cannot be used to foil or thwart the scheme of Article 286(1) *ibid*.

- Observed that, Section 9 of the CGST Act/ Section 5 of the IGST Act is a charging section which provides for levy and collection of CGST on all intra-state/ inter-state supplies of goods or service except on supply of alcoholic liquor for human consumption Thus it can be categorically stated that Section 9 of the CGST Act cannot be invoked to levy tax on cross border transaction. Further, Section 5 of the IGST Act will be applicable on inter-state supplies only. Import and export of service falls under the ambit of inter-state supplies as per Section 7(1) and 7(5) of the IGST Act. On the other hand, Section 8(2) of the IGST Act deals with intra-state supply where the location of supplier and place of supply of service is in the same state or union territory. Nevertheless Section 13(8)(b) of the IGST Act has created the deeming fiction where the location of recipient of service provided by an intermediary is outside India, the place of supply will be location of supplier. This is contrary to the scheme of the CGST Act and IGST Act.
- Held that, Section 13(8)(b) of the IGST Act is not only against the scheme of the CGST Act and IGST Act but it also violate Articles 245, 246A, 269A and 286(1)(b) of the Constitution of India. The deeming fiction created under Section 13(8)(b) of the IGST Act does not establish any nexus with the taxing regime in India. Hence, the Section 13(8)(b) of the IGST Act is ultra vires of the said act apart from being unconstitutional.

Justice Abhay Ahuja

- He disagreed with the Justice Ujjal Bhuyan, now the matter is to be placed before Hon'ble the Chief Justice on the administrative side for doing the needful.

Our comments:

Similar petition had been filed in Hon'ble Bombay HC in in ***ATE Enterprises Pvt. Ltd. v. Union of India [W.P.(L) No. 639/2020 dated June 9, 2021]*** challenging the legality and constitutionality of Section 13(8)(b) of the IGST Act which was tagged with the above case and disposed off in light of the above judgement.

It is to be noted that the Hon'ble Gujarat HC took contrary stand in case of ***Material Recycling Association of India v. Union of India [R/Special Civil Application No. 13238 of***

2018 dated July 24, 2020] to hold that *there is no deeming provision created instead it is contemplated by the IGST Act to consider the location of the service provider of intermediary to be place of supply.* Thus, Section 13(8)(b) of the IGST Act cannot be said to be ultra vires or unconstitutional in any manner.

Relevant Provisions:

Section 5(1) of the IGST Act

“5. Levy and collection.

(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person..”

Section 7(1) and (5) of the IGST Act

“7. Inter-State supply

(1) Subject to the provisions of section 10, supply of goods, where the location of the supplier and the place of supply are in—

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory,

...

(5) Supply of goods or services or both,—

(a) when the supplier is located in India and the place of supply is outside India;

(b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or

(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.”

Section 8(2) of the IGST Act

“8. Intra-State supply

(2) 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:

Provided that the intra-State supply of services shall not include supply of services to or by a Special Economic Zone developer or a Special Economic Zone unit.”

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

“13. Place of supply of services where location of supplier or location of recipient is outside India.

(8) The place of supply of the following services shall be the location of the supplier of services, namely:—

(b) intermediary services;”

Section 9(1) of the CGST Act

“9. Levy and collection.

(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.”

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