Gujarat HC upholds constitutionality of provisions relating to place of supply in case of intermediary services

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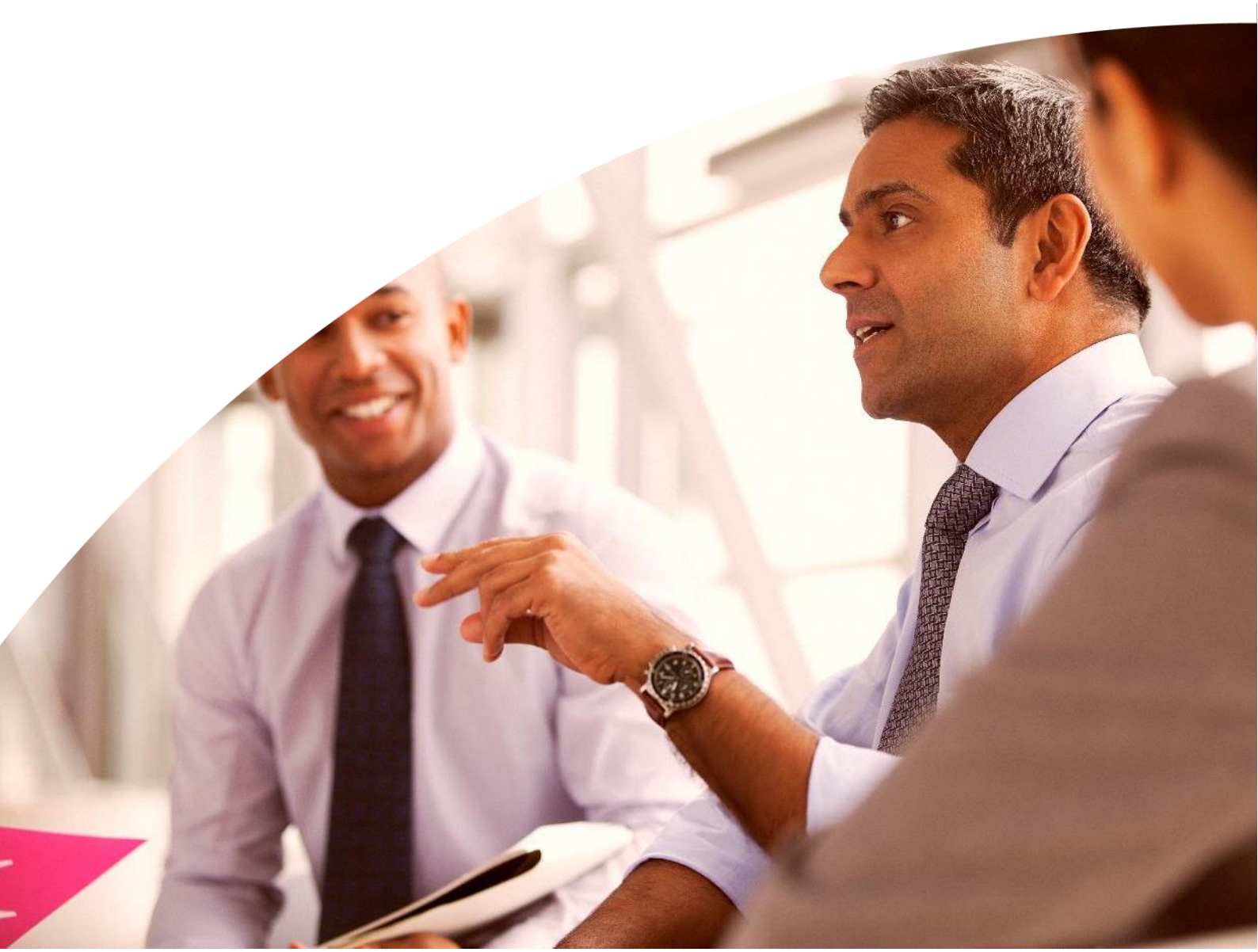

Summary

The Gujarat High Court (HC) in a recent case held that the relevant provisions under the GST law determining the place of supply in case of intermediary services are constitutional. Further, the HC stated that the services would not qualify to be export of services merely because:

- commission invoices are raised on a person outside India and
- the commission is received in foreign exchange in India

Facts of the case

- The petitioner[1] is an association engaged in manufacture of metals and castings for various upstream industries in India.
- The members of the association act as **agents to facilitate** sale of recycled scrap goods for their foreign principals in India as well as outside India. They have no role in the sale/purchase. The agents receive commission income upon receipt of sale proceeds by the foreign principals in foreign exchange.
- The petitioner challenged the constitutional validity of the provisions[2] under the GST law determining the place of supply and prayed to hold the same as ultra vires[3] to the Constitution of India.
- Further, the petitioner prayed that the tax department be directed to allow refund of Integrated Goods and Services Tax (IGST) paid on services provided by the members of the Petitioner to their clients located outside India.

Gujarat HC's observations and ruling[4]

- **Mere receipt of commission in foreign exchange does not qualify to be export:** The HC stated that merely because the invoices are raised on the person outside India with regard to the commission and foreign exchange is received in India, it would not qualify to be export of services.
- **Place of supply shall be location of 'intermediary':** There is no deeming provision as tried to be canvassed by the petitioner, but there is legal stipulation to consider the location of the service provider of 'intermediary' to be place of supply. Similar situation was also existing under the service tax regime as well.

[1] Material Recycling Association of India
[2] Section 13(8)(b) of the Integrated Goods Service Tax Act, 2017 (IGST Act)
[3] under Articles 14, 19, 265 and 286
[4] C/SCA/13238/2018 dated 24 July 2020

- **No double taxation:** The petitioner's contention that said transaction would lead to 'double taxation' stands non-tenable, as intermediary service would not be taxable in the hands of the recipient, however commission paid by recipient outside India would be deducted from such payment of commission by way of expenses.

- **No unconstitutionality in the provisions:** The HC held that the supply of services by 'intermediaries' to recipients outside India is not export of service and there is no unconstitutionality in the relevant provisions determining the place of supply in case of intermediary services under GST law.

- **Respondents may consider Petitioner's grievances:** The HC stated that it would be open for the respondents to consider the representation made by the petitioner to redress its grievance in suitable manner and inconsonance with the GST law.

Our comments

Taxability of 'intermediary services' has been a matter of extensive litigation under the GST regime. Divergent rulings have been pronounced by various advance rulings authorities.

- The West Bengal Appellate Authority for Advance Ruling (AAAR) had held that the marketing and promotion of foreign university's courses and assistance in enrolment/recruitment of students in India shall be treated as intermediary services. Similar ruling was also given by the Maharashtra AAR, which held that marketing and promotion of Computer Reservation System (CRS) software for foreign clients is intermediary services.
- Contrary to this, the Maharashtra AAR, had held that market research and support services provided by an Indian entity to its overseas parent company and other overseas group companies shall not be classified as intermediary services and shall qualify as 'export of services'.

Even under the service tax regime, the authorities had held that the services of marketing and branding provided by India entity to its parent company in the USA shall be regarded as 'export' as provision of services was on a principal-to-principal basis. The government had also issued a clarification in this regard, which was withdrawn subsequently and a revised clarification is still awaited.

Though the Gujarat HC has held that the relevant provisions determining the place of supply in case of intermediary services are constitutional, there exists anomaly in the said provisions. For example, in a transaction where both the buyer and seller of the goods is outside India, but the agent is in India receiving commission in foreign exchange, such commission shall be leviable to GST even if there is no movement of goods involved from India. The basic intention of the GST law was to tax goods and services, which are consumed in India. Thus, levying transactions undertaken outside India cannot be the intention of the legislature. Therefore, the government should amend the provisions appropriately to remove the anomaly and avoid future litigation on this account.

It is pertinent to note here that the authorities are misinterpreting the said provisions and as a result genuine exporters, such as Business Process Outsourcing units, other businesses engaged in providing administrative and support services, etc., are being termed as 'intermediary' thereby, effecting their competitiveness. Similar provisions existed under the erstwhile regime and such businesses were treated as exports. The government should accordingly issue a due clarification because levying GST on such services will affect the competitiveness of the Indian exporters.

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