

Tax alert: Supply of marketing and promotion services to foreign parent a composite supply of ‘intermediary’ service

Issued on: 12 August 2019



Summary

The Maharashtra Appellate Authority for Advance Ruling (AAAR) in a recent case has upheld the order of the Maharashtra Advance Ruling Authority (AAR) wherein the Applicant's bundle of services provided to a foreign group company in relation to marketing and promotion of Computer Reservation System (CRS) software within the territory in India are in the nature of 'composite supply' with 'intermediary services' being the principal supply. The AAAR has also opined that the Applicant's contention that the fee is received at a cost plus agreed mark-up and not as commission is devoid of any merit or rationale. However, the AAAR has refrained from delving into the determination of the aspect of 'export of services'.

Facts of the case

- The Applicant¹ is a subsidiary of Sabre Asia Pacific Pte. Ltd., Singapore (Sabre APAC), a leading provider of travel solutions and services across the globe.
- The Applicant has vide a marketing agreement² obtained a non-exclusive royalty-free right and licence from Sabre APAC to conduct marketing and promotion of access of the Computer Reservation System Software (CRS Software) to end use subscribers, ie travel agents in India.
- The scope of services provided by the Applicant under the said agreement is as under:
 - Marketing services including advertising, identifying potential customers, identifying business opportunities, demonstrating offerings
 - Consultancy and provision of information services
 - Marketing support services including public relations, promotions, sponsorship, and special events and trade shows
 - Any other services necessary or advisable to perform its obligations under the said marketing agreement
- The Applicant raises a consolidated invoice on Sabre APAC for fees to be received in convertible foreign exchange calculated on a cost plus markup basis.
- The Applicant had sought an advance ruling from the Maharashtra AAR to determine whether the marketing, promotion and distribution services provided by the Applicant to Sabre APAC would be subject to GST or would qualify as export of services³.
- The AAR held that the services provided by the Applicant are in the nature of intermediary services leviable to GST⁴.
- Aggrieved by the said order, the Applicant filed the present appeal.

1 Sabre Travel Network India Private Limited
2 Dated 31 October 2016 with effect from 1 April 2016
3 Section 2(6) of the IGST Act

4 Vide its order GST ARA 08/2018-19/B-76 Mumbai dated 26 July 2018

Applicant's contentions

- **Principal-to-principal basis:** The Applicant submitted that the learned authority has completely ignored the fact that the marketing agreement has clearly stated that the relationship between the Applicant and Sabre APAC is on a principal-to-principal basis.
- **Cost plus markup model:** The Applicant further submitted that the consideration received by the Applicant is fixed and calculated on the basis of cost plus markup and is not linked to or dependent on any sale⁵.
- **No facilitation for supply:** The marketing agreement does not have any clause that requires any facilitation or any similar arrangement with respect to services to subscribers in India, ie travel agents, nor does the said agreement create an obligation on the Applicant's part to facilitate or arrange any supply of goods or services by Sabre APAC to the subscribers.
- **No partnership or joint venture:** Further, the marketing agreement does not intend to operate so as to create a partnership or a joint venture between the Applicant and Sabre APAC. It is a contractual relationship between two distinct entities for supply of services from India and receipt of the same in Singapore.
- **No role in negotiations:** The Applicant has no role in negotiations between Sabre APAC and final subscribers and the Applicant only acts as a channel between them as required by Sabre APAC. Sabre

⁵ Referring to the tests laid down under the advance rulings in the case of Global Reach Education Services Pvt Ltd and Five Star Shipping

APAC directly rejects or accepts the subscriber's applications.

- **No intermediary services:** The Applicant further submitted that the services provided are only in the nature of marketing, promotion and distribution activities. The fact that the Applicant interacts with the subscribers cannot take away the relationship of principal-to-principal basis and bring them within the scope of intermediary⁶.
- **Not an agent/representative:** Accordingly, the Applicant cannot be treated as an agent or representative of Sabre APAC and the services provided by the Applicant are on its own account. Therefore, the same cannot qualify as intermediary services⁷. Rather, the services are covered under export of services⁸ as the Applicant satisfies the prescribed conditions.

Maharashtra AAAR's observations and ruling

- The Maharashtra AAAR observed that the activities carried out by the Applicant are in the nature of facilitation of supply of 'Online Information and Database Access or Retrieval (OIDAR)' services between Sabre APAC and the subscribers located in India as the activities of installation of CRS Software, consultancy and provision of information are actually performed by the Applicant on behalf of Sabre APAC.
- The activities of the Applicant are carried out in conjunction with each other and can be naturally bundled in the ordinary course of business as all the activities performed, ie advertising, public relations,

⁶ Referring to advance ruling in the case of Godaddy India Web Services Pvt Ltd

⁷ Section 2(13) of the IGST Act

⁸ Section 2(6) of the IGST Act

promotional activities, sponsorship, trade shows, demonstrating offerings, etc., are intended to identify the potential subscribers of Sabre APAC.

- The AAAR opined that the Applicant is not being held as an ‘intermediary’ on account of use of technology and hardware connectivity and other digital infrastructure, for any interaction with the principal. Rather, the Applicant is established as an intermediary in view of the nature of activities undertaken by them.
- The Applicant’s contentions that the relationship with Sabre APAC is on a principal-to-principal basis was rejected with the observation that the marketing agreement has been intentionally entered into in such manner to escape creating a principal-agent relationship and thereby refraining from liability to pay GST. The AAAR also opined that the Applicant’s contention that it is receiving fee at cost plus agreed mark-up and not as any commission is devoid of any merit or rationale.
- Thus, the Maharashtra AAAR upheld the AAR’s decision stating that the Applicant’s bundle of services in relation to marketing and promotion of CRS Software within the territory in India are in the nature of ‘composite supply’, with ‘intermediary services’ being the principal supply.
- The AAAR has, however, refrained from delving into the determination of the aspect of ‘export of services’ citing the same as being outside their jurisdiction.

Our comments

The Central Board of Indirect Tax and Customs has recently issued an important clarification on taxability/export eligibility of Information Technology Enabled Services (ITeS) such as backoffice operations, call centre services, support services, payroll, data processing, revenue accounting, etc., provided by an Indian entity to an overseas entity. The clarification provides that when such services are provided on its own account by an Indian entity even to the customers of an overseas entity, they shall qualify as export. However, when the Indian entity arranges or facilitates the supply of backend support services during pre-delivery, delivery and post-delivery of supply, they shall be treated as intermediary services.

Accordingly, it is imperative that a detailed analysis/re-examination of contracts entered into with overseas entities is carried out by the business concerns to avoid future litigations.

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