

GST

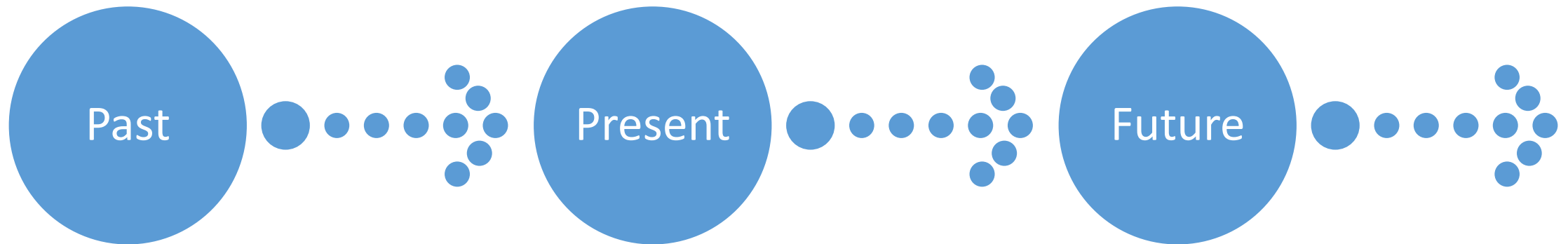
'Intermediary' services

[To watch video click here]

[July 2020]

CA Pritam Mahure and Associates

# Path to tread today!



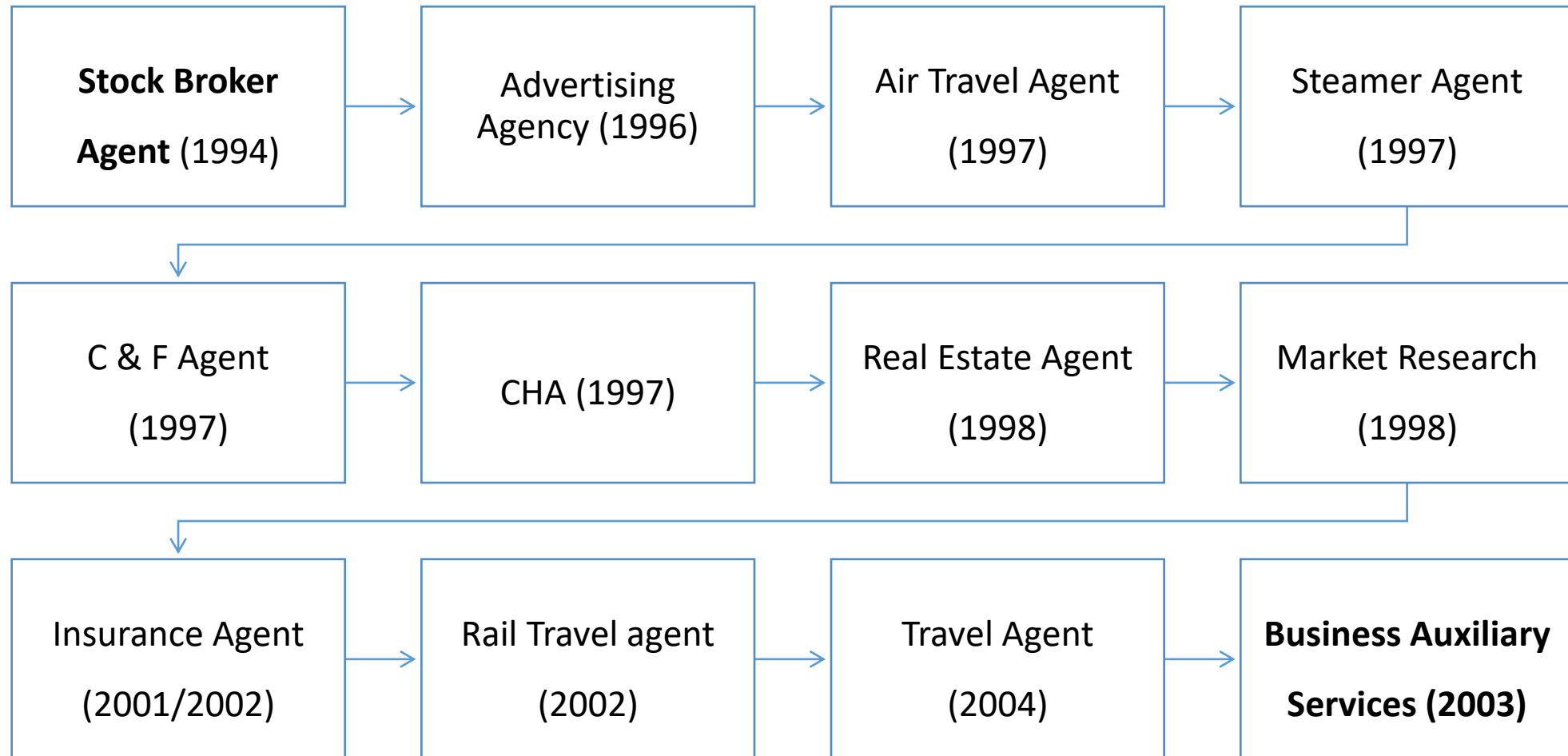
Agent!



Agent –

Positive List regime

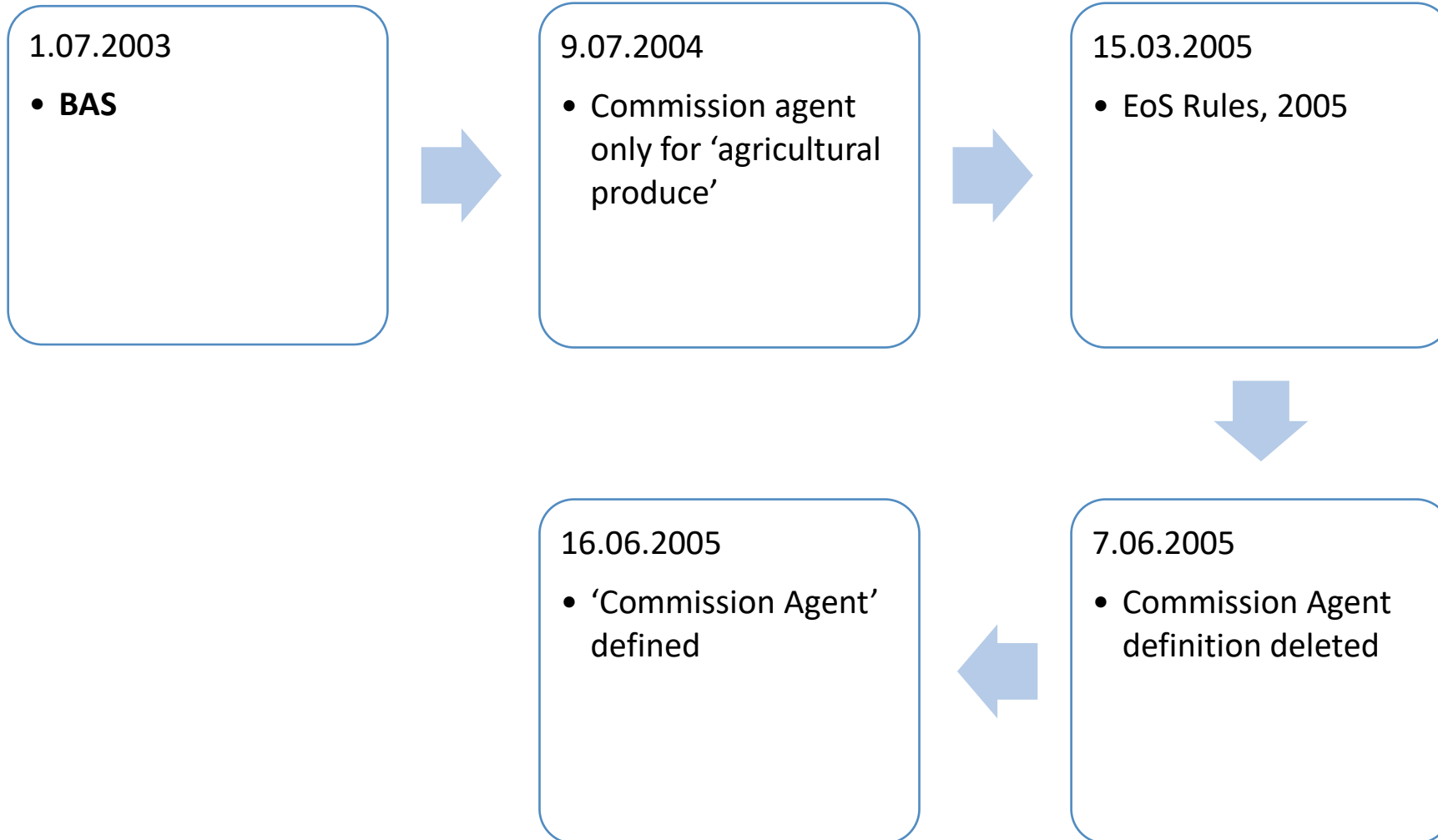
# Agent - Evolution!



# “Commission Agent”

- Not. No. 13/2003 dated 20.06.2003 to exempt ‘Commission Agent’ services
  - **Explanation.**- For the purposes of this notification, “**commission agent**” means a person **who** **causes sale** or purchase of **goods**, on behalf of another person for a consideration which is based on the **quantum of such sale** or purchase.
- JUBILANT ENPRO (P) LTD 2015 (38) S.T.R. 625 (Tri. - Del.)
  - As is evident from the “**sales representative** agreements” the appellants’ role includes **promotion** of the services recipients’ goods/services and is thus **clearly different** from that of a commission agent’s as defined above.

# Evolution of + List



# BAS - “Commission Agent”

Section 65(19) “business auxiliary service” means any service in relation to -

- (i) **promotion or marketing** or sale of goods produced or provided by or belonging to the client; or
- (ii) promotion or marketing of service provided by the client;
- (iii) any customer care service provided on behalf of the client; or
- (iv) procurement of goods or services, which are inputs for the client; or
- ...
- ... and includes services as a commission agent,

**Explanation.** - For the removal of doubts, it is hereby declared that for the purposes of this clause, -

- (a) **“commission agent” means** any person who acts **on behalf of another** person and **causes sale** or purchase of goods, or provision or receipt of services, **for a consideration**, and **includes** any person who, while acting **on behalf of** another person -
  - (i) deals with goods or services or documents of title to such goods or services; or
  - (ii) collects payment of sale price of such goods or services; or
  - (iii) guarantees for collection or payment for such goods or services; or
  - (iv) undertakes any activities relating to such sale or purchase of such goods or services;



Three people - Supplier, Agent and Customer!



## Two parallel developments!

Agent



Activities



Amount

Export

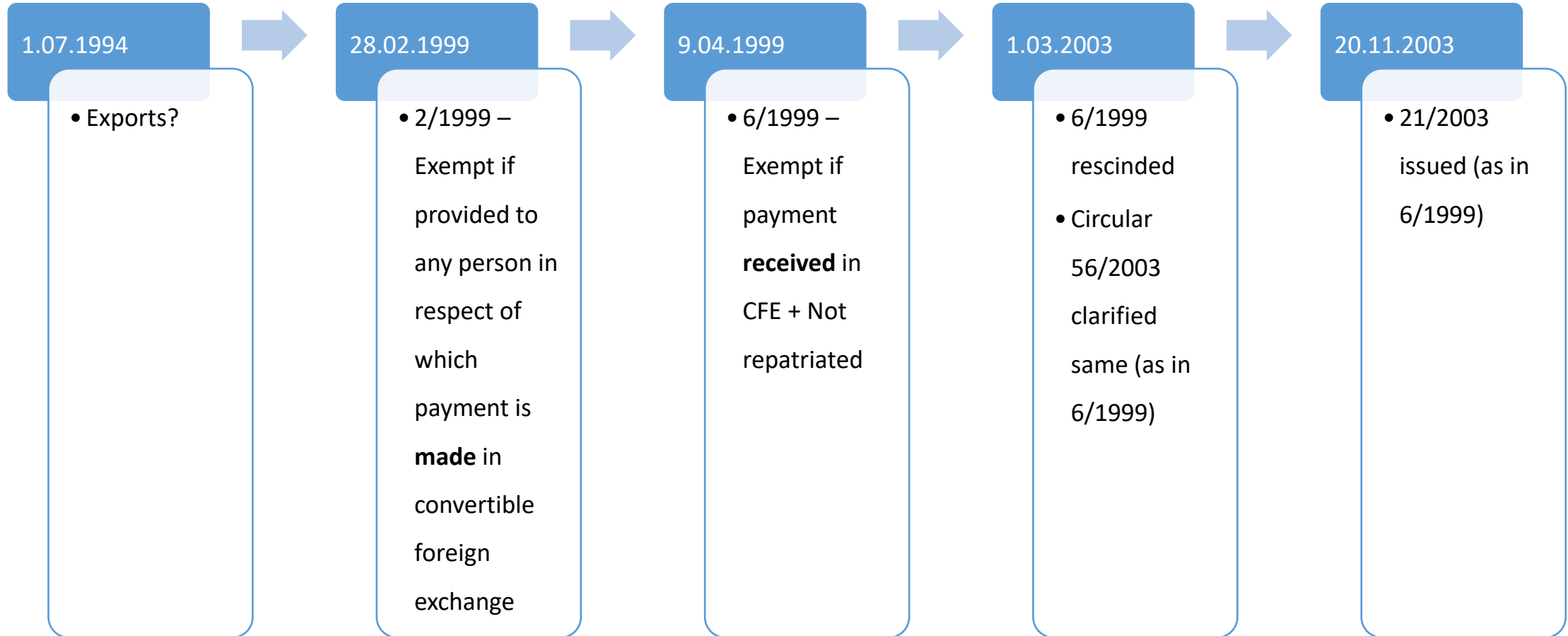


Recipient



Use

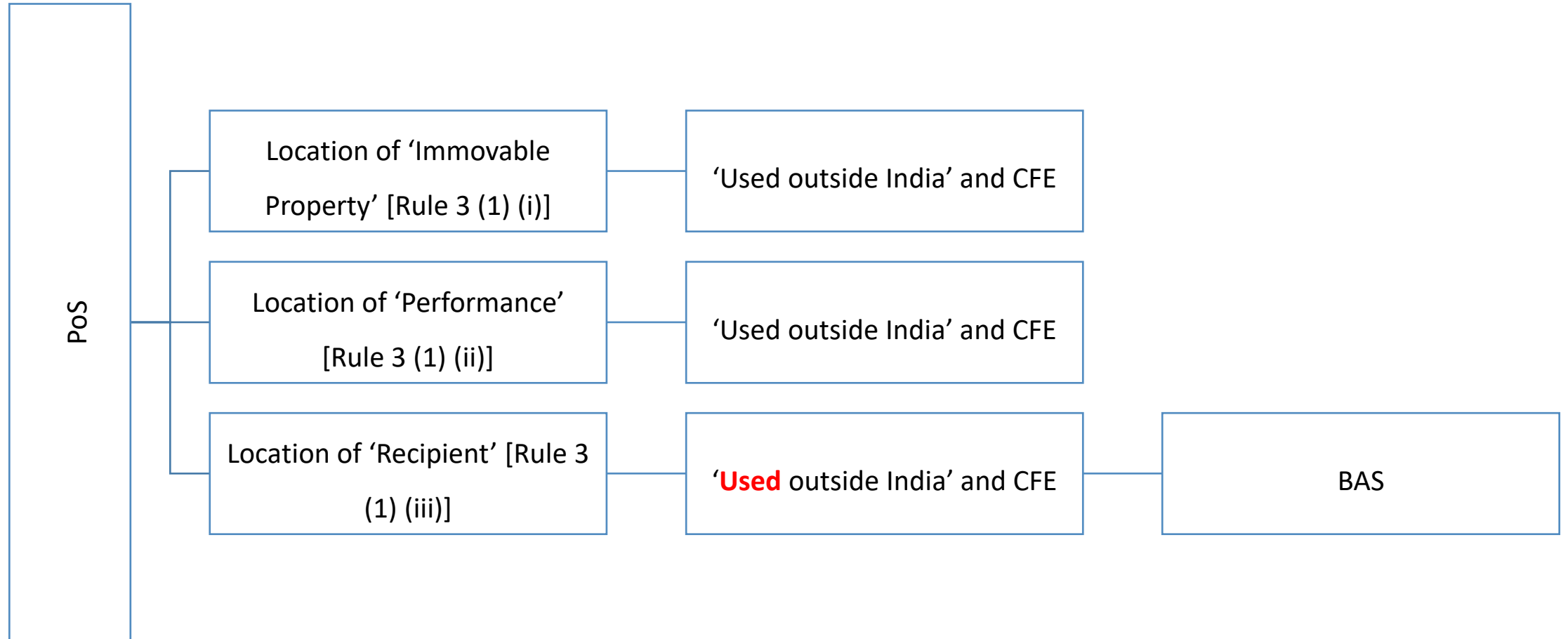
# Export - Evolution!



## Circular 56/2003 dated 25.04.2003

- I am directed to clarify that the **Service Tax is *destination-based consumption tax*** and it is **not applicable on export of services.**
- Another question raised is about the taxability of secondary services which are used by the primary service provider for the export of services, Since the secondary services ultimately gets consumed/merged with the services that are being exported no service tax would be leviable on such secondary services. However in case where the **secondary service gets consumed in part or toto for providing service in India**, the **service tax would be leviable** on the secondary service provider.

# Export of Services Rules, 2005



# Intermediary

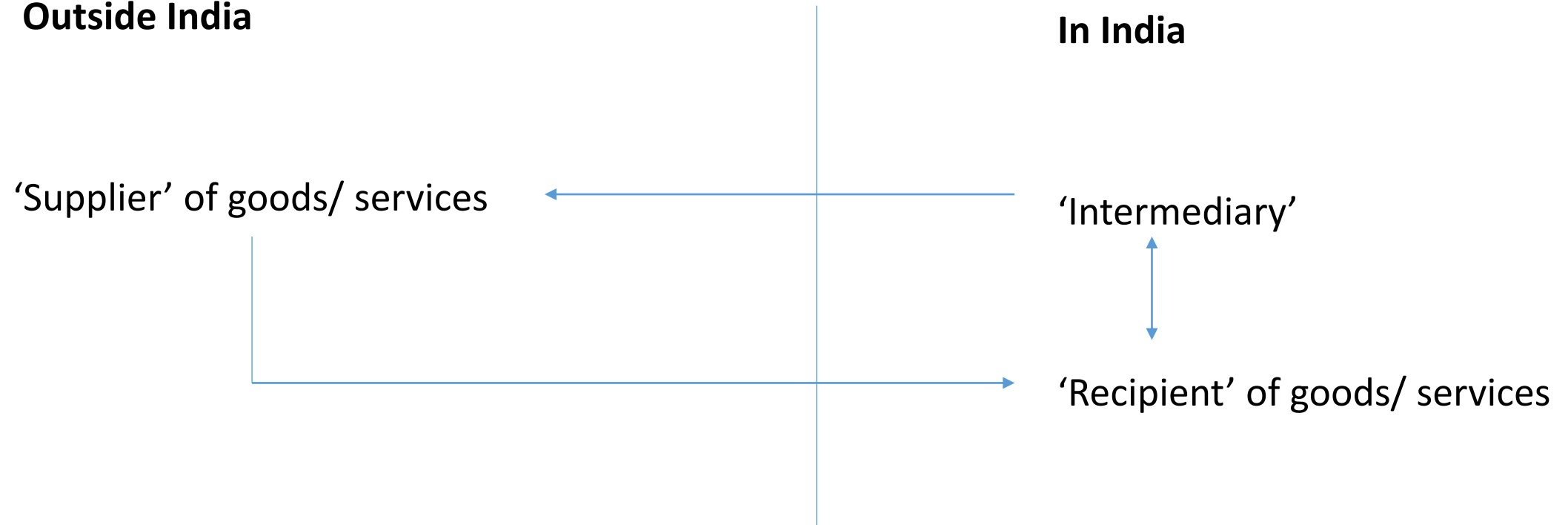
**Outside India**

**In India**

'Supplier' of goods/ services

'Intermediary'

'Recipient' of goods/ services



## ALL INDIA FEDN. OF TAX PRACTITIONERS [2007 (7) S.T.R. 625 (S.C.)]

7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is **destination based consumption tax** in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable **only on services provided within the country.**

# Evolution of Intermediary

2008

- Blue Star
- *“According to the learned Departmental Representative, one cannot say that the services have been **exported**. He stated that the service is **provided in India**.”*

2009

- ABS
- *“Both the Original Authority and Appellate Authority have held that the service has been **rendered in India** and it has been utilized, delivered in India and it is also **used in India**”*



## BLUE STAR LTD. 2008 (11) S.T.R. 23 (Tri. - Bang.)

- I find that the appellants have produced documentary evidence to show that they had **rendered the services to their foreign principals by booking orders in India** for their goods. I have also perused the details of the refund application. They all relate to the goods supplied by the foreign principals based on the orders booked by the appellant.... On the basis of the records, I am convinced that the services rendered have been **exported in terms of Rule 3(2)** of the Export of Services Rules, 2005. Hence, the appellants are entitled for the refund of the Service Tax already paid
- \*Rule 3 (2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely: -
  - '(a) ... used outside India*
  - (b) payment for such service is received by the service provider in convertible foreign exchange'*

## Circular 115/2009 (Dated 31.07.2009)

(iii) Category (III) [Rule 3(1)(iii)] : For the remaining services (that would not fall under category I or II), which would generally include knowledge or technique based services, which are not linked to an identifiable immovable property or whose location of performance cannot be readily identifiable (such as, Banking and Other Financial services, **Business Auxiliary services** and Telecom services), it has been specified that they would be 'export',-

- (a) If they are provided in relation to business or commerce **to a recipient located outside** India; and
- (b) If they are provided in relation to activities other than business or commerce to a recipient located outside India at the time when such services are provided.

## Circular 115/2009 (Dated 31.07.2009)

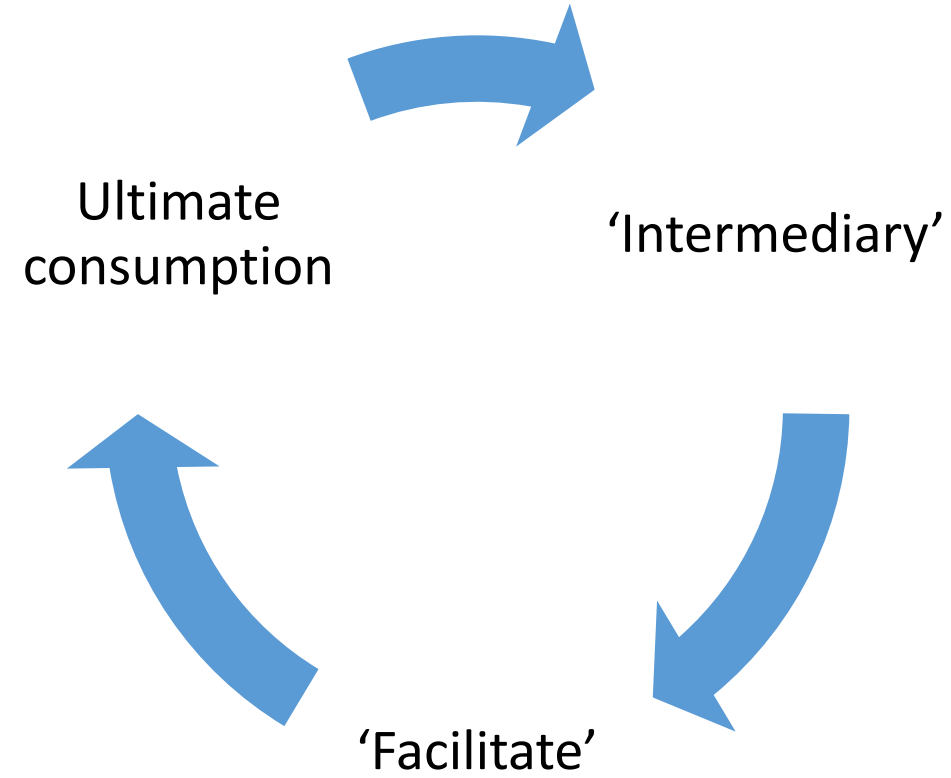
- For the services that fall under Category III [Rule 3(1)(iii)], the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category III services [Rule 3(1)(iii)], it is possible that export of service may take place even when all the relevant activities take place in India so long as the **benefits** of these services **accrue outside India**. In all the illustrations mentioned in the opening paragraph, **what is accruing outside India is the benefit in terms of promotion of business of a foreign company.**

# Microsoft Corpn. (I) (Pvt) Ltd.

[2009 (15) S.T.R. 680 (Tri. - Del.) \*Affirmed in 2009 (16) STR 545 (Delhi HC)

- 15. ...Therefore, in no uncertain terms “export of service” shall mean that out come of service should have been consumed outside India. But the present case of the appellant does not seem to be so when the consumers of services provided were in India only and even the contents of sample agreement dated 1-7-2005 establishes in substance that **ultimate consumption** of service was in India and the appellant was an **intermediary** to connect its foreign principal to the end user of service who are consumers in India.
- 22. ...all along, and the Appellant **facilitated**
- 23. ...**Prima facie**, it appears that the **ultimate outcome of provision of services reached to the consumers in India** and that were ultimately meant to be consumed in India. Accordingly destination based consumption of service ended with performance of service in India and that satisfies the performance based service tax concept as held by Apex Court in *All India Fedn. of Tax Practitioners* - [2007 \(7\) S.T.R. 625](#) (S.C.). Thus the beneficiaries of services were located in India for ultimate consumption of the service provided in India. Accordingly, *prima facie* it appears that interpretation of law by the CBEC in its **circulares** dated 24-2-2009 **runs counter to the ratio** laid down by Apex Court in *All India Fedn. of Tax Practitioners* - [2007 \(7\) S.T.R. 625](#) (S.C.).
- 25. **Ultimate** outcome of service having been exhausted in India, there appears to be no export of such services
- 27. ...The appellant is an **intermediary** meant to provide well defined services to clients/customers in India

# Microsoft



## Circular 141/10/2011 – TRU (Dated 13.05.2011)

- In the stated Circular it was *inter alia*, clarified that the words, “used outside India” should be interpreted to mean that “the benefit of the service should accrue outside India”.
- In other words these words may be interpreted in the context where the effective use and enjoyment of the service has been obtained. The effective use and enjoyment of the service will of course **depend on the nature** of the service. For example effective use of advertising services shall be the place where the advertising material is disseminated to the audience though actually the benefit may finally accrue to the buyer who is located at another place.
- In order to establish that the services have not been used outside India the facts available should *inter alia*, clearly indicate that only the payment has been received from abroad and the **service has been used in India**. It has already been clarified that in case of **call centres** and similar businesses which serve the customers located outside India for their clients who are also located outside India, the service is used outside India.

# Negative List regime

# Evolution of Intermediary

1.07.2012

- Term 'Intermediary' used
- 'Intermediary' for 'services'



## 66B. Charge of service tax on and after Finance Act, 2012

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of Fourteen per cent. on the value of all services, other than those services specified in the negative list, provided or agreed to be **provided in the taxable territory** by one person to another and collected in such manner as may be prescribed.

# PoPSR, 2012

- **9. Place of provision of specified services**

*The place of provision of following services shall be the **location of the service provider**:-*

...

*(b) Online information and database access or retrieval services;*

*(c) Intermediary services;*

...

# Export of services

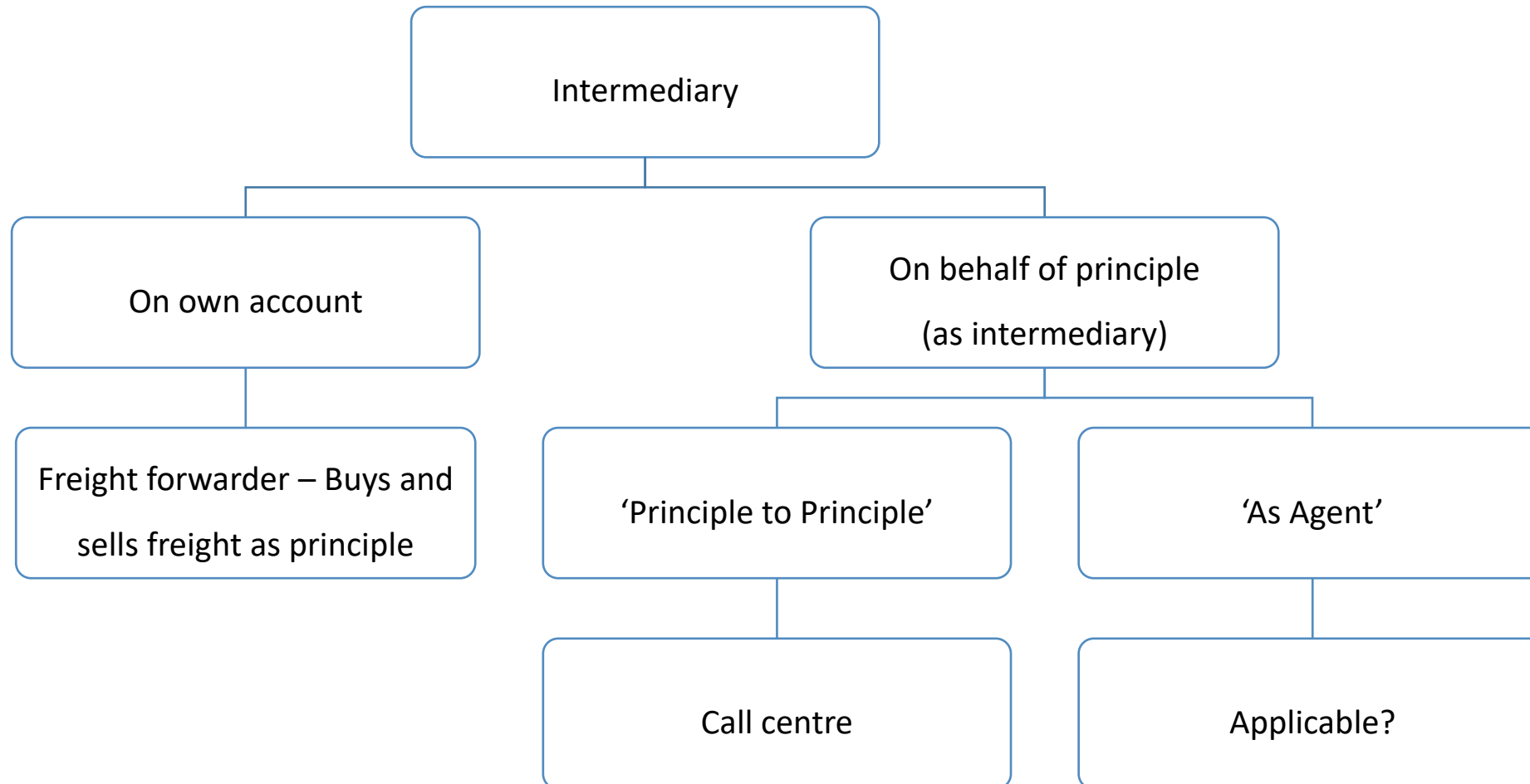
## Rule 6A - Export of services

- a. Provider of service is located in the taxable territory,
- b. Recipient of service is located outside India,
- c. Service is not a service specified in the section 66D of the Act,
- d. Place of provision of the service is outside India,**
- e. Payment for such service has been received by the provider of service in convertible foreign exchange, and
- f. Provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 2 of clause (44) of section 65B of the Act

## Rule 2 (f) of PoPSR, 2012

- “**Intermediary**” means a broker, an agent or any other person, by whatever name called, who **arranges or facilitates** a provision of a **service** (hereinafter called the “main” service) or a supply of goods, between two or more persons, but does not include a person who provides the **main** service or supplies the goods **on his account**.
- Key terms
  - Means
  - Broker, agent or any other person, by whatever name called
  - Who arranges or facilitates the provision of a service or supply of goods
  - Between two or more persons,
  - But does not include a person who provides the **main** service or supplies the **goods on his account**

# Intermediary



## 5.9.6 What are “Intermediary Services”?

- A freight forwarder arranges for export and import shipments. There could be two possible situations here- one when he acts on his own account, and the other, when he acts as an intermediary.

**When the freight forwarder acts on his own account (say, for an export shipment)**

...

**When the freight forwarder acts as an intermediary**

- Where the freight forwarder acts as an intermediary, the place of provision will be his location. Service tax will be payable on the services provided by him. However, when he provides a service to an exporter of goods, the exporter can claim refund of service tax paid under notification for this purpose.

Similarly, persons such as **call centres**, who provide services to their clients by dealing with the customers of the client on the client’s behalf, but actually provided these services **on their own account**, will not be categorized as intermediaries.

## 5.9.6 What are “Intermediary Services”?

- In accordance with the above guiding principles, services provided by the following persons will qualify as ‘intermediary services’:- i) Travel Agent (any mode of travel) ii) Tour Operator iii) **Commission agent** for a service ~~[an agent for buying or selling of goods is excluded]~~ iv) Recovery Agent
- Even in other cases, **wherever** a provider of any service **acts as an intermediary** for another person, as identified by the guiding principles outlined above, this rule will apply. Normally, it is expected that the intermediary or agent would have **documentary evidence authorizing him to act on behalf** of the provider of the ‘main service’.

## ST – ‘On his own account’

Citation	Facts	Observations
GODADDY INDIA WEB 2016 (46) S.T.R. 806 (A.A.R.)	Applicant proposes to provide support services in relation to marketing, branding, offline marketing, <b>on principal to principal</b> basis.	In the present case, applicant is providing <b>main service</b> , i.e., “ <b>business support services</b> ” to WWD US and <b><u>on his own account</u></b> . Therefore, applicant is not an “intermediary” and the service provided by him is not intermediary service
UNIVERSAL SERVICES 2016 (42) S.T.R. 585 (A.A.R.)	Applicant not concerned with services provided by foreign entity to its customers but independently providing services of payment processing to said foreign entity for a fee	Since applicant providing main service <b><u>on its own account</u></b> directly to foreign entity and not to its customers in India, services provided are not intermediary services

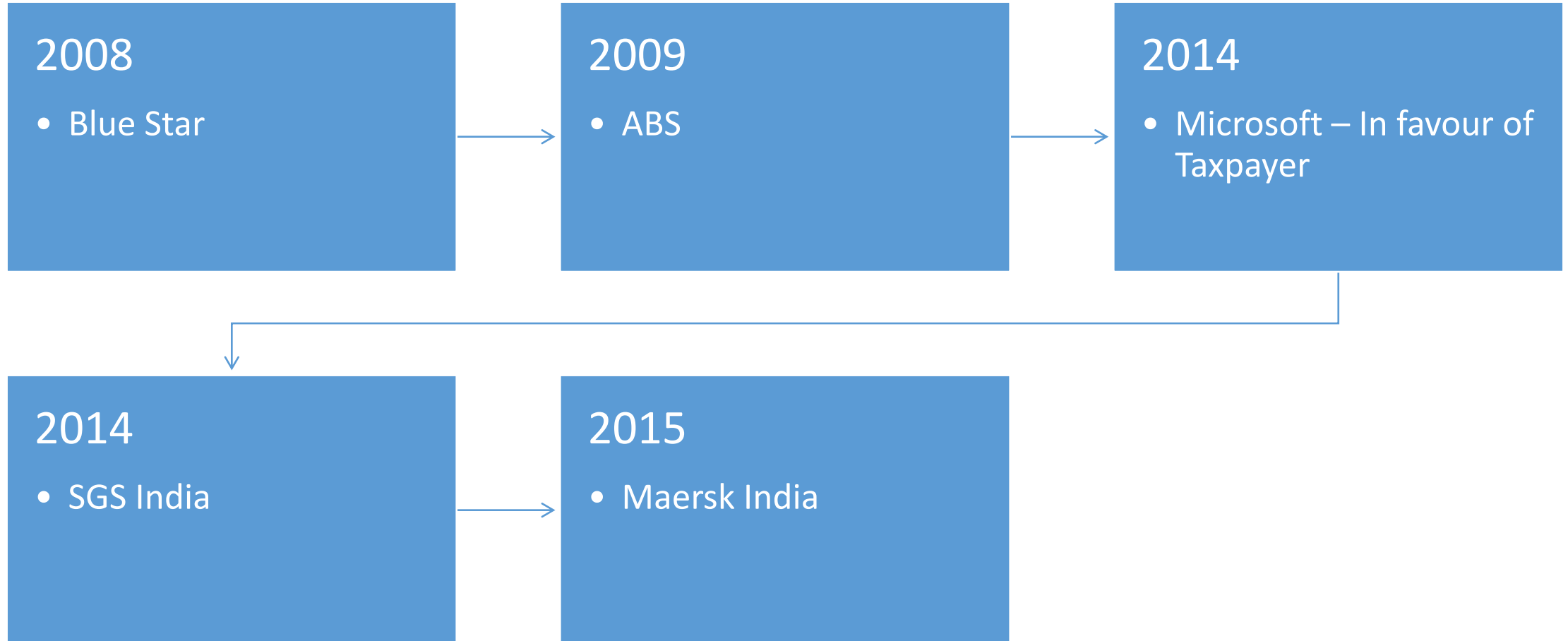


## Intermediary for 'Goods'

1.10.2014

- 'Intermediary' for goods also covered
- 'Intermediary' for 'both' or 'securities'?

# Evolution of Intermediary



# GST regime

## SECTION 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 8. Intra-State supply

(1) Subject to the provisions of section 10, supply of **goods** where the **location of the supplier** and the **place of supply** of goods are in the same State or same Union territory shall be treated as 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

## Sec. 13 - Place of supply of services where location of supplier or location of recipient is outside India

- **Section 13 (8)**

The place of supply of the following services shall be the location of the supplier of services, namely :-

(a) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;

**(b) intermediary services;**

(c) services consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month

# Export of services

## Sec. 2 (6) - Export of services

- i. Supplier of service is located in India;
- ii. Recipient of service is located outside India;
- iii. Place of supply of service is outside India;**
- iv. Payment for such service has been received by the supplier of service in convertible foreign exchange or in Indian Rupees where permitted by the Reserve Bank of India; and
- v. Supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8.

## Rule 6A - Export of services

- a. Provider of service is located in the taxable territory,
- b. Recipient of service is located outside India,
- c. Service is not a service specified in the section 66D of the Act,
- d. Place of provision of the service is outside India,**
- e. Payment for such service has been received by the provider of service in convertible foreign exchange, and
- f. Provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 2 of clause (44) of section 65B of the Act

# IGST Act

- Section 2 (13) of IGST Act
  - **“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
- Key terms
  - Means
    - Broker, 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



# Intermediary – ST and GST

## GST

(Sec. 2 (13) IGST Act)

- “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

## Service Tax

(Rule 2 (f) of PoPSR, 2012)

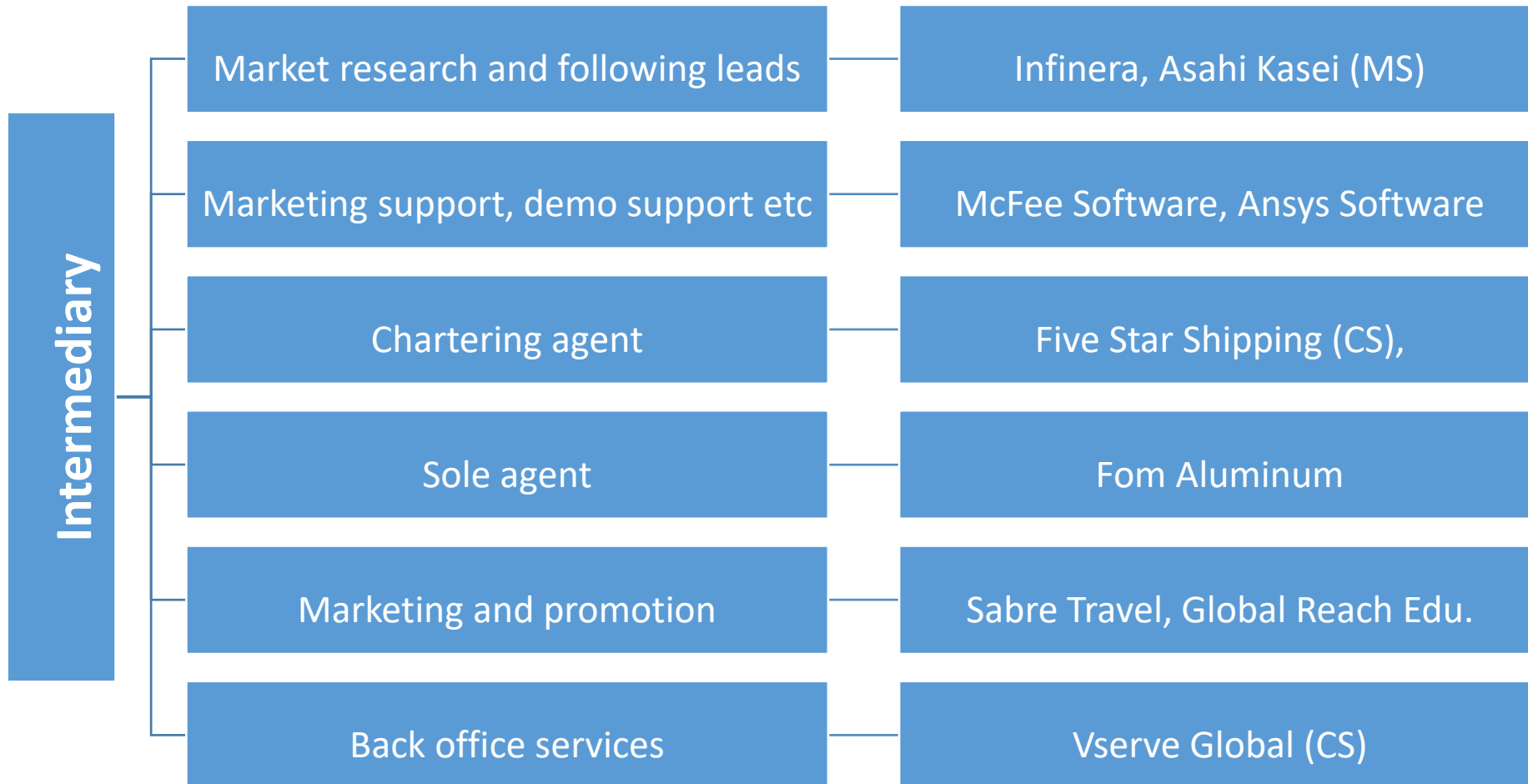
- “Intermediary” means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a **provision** of a service (hereinafter called the “main” service) or a supply of goods, between two or more persons, but does not include a person who **provides** the main service or supplies the goods on his account.

# Key terms

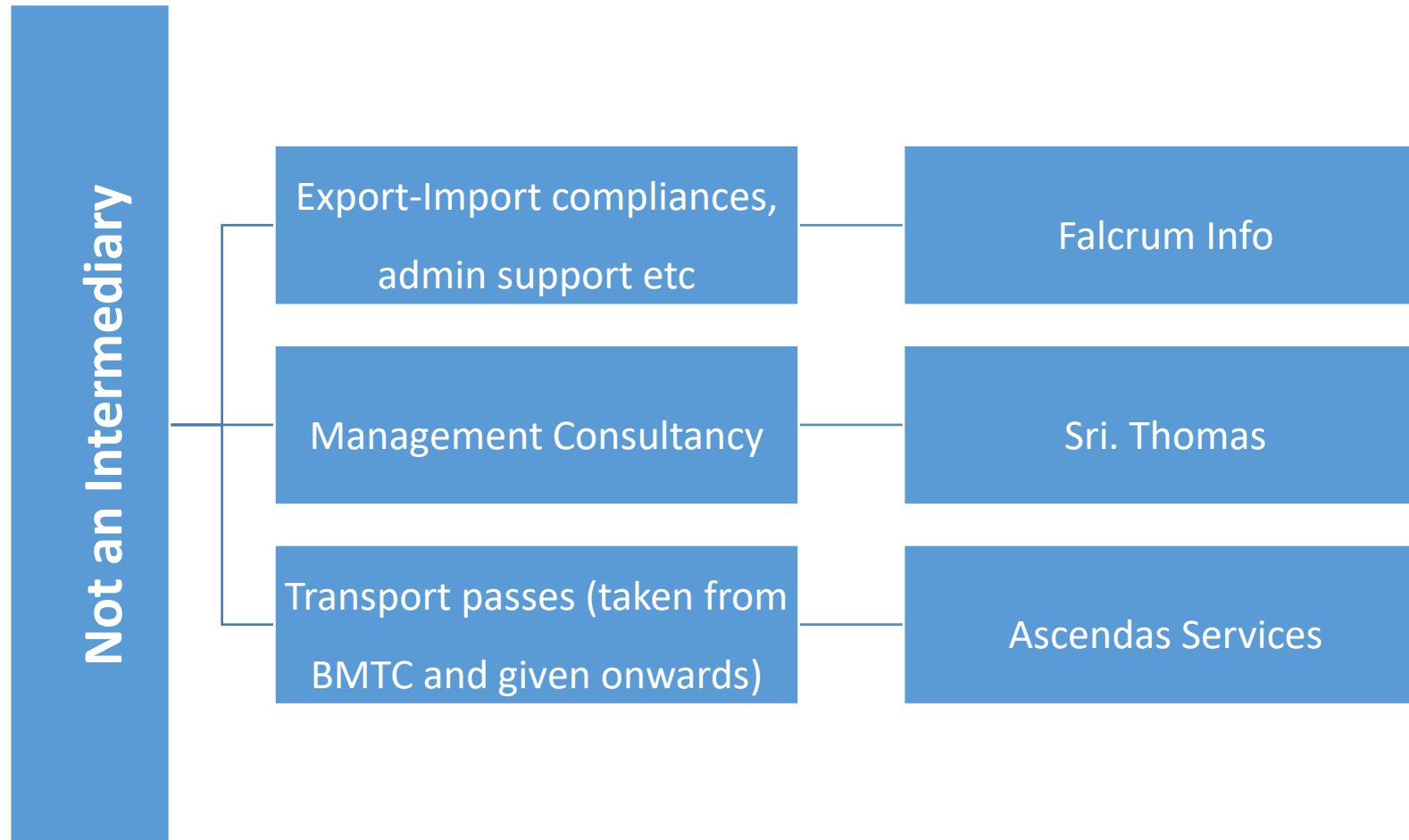
- Broker, agent or ‘any other person’, by whatever name called
  - Section 2 (5) - *“Agent” means a person, including a factor, **broker**, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;*
- ‘Arranges’ or ‘facilitates’ the supply
- ‘On his own account’

AAAR Ya (p)AAR

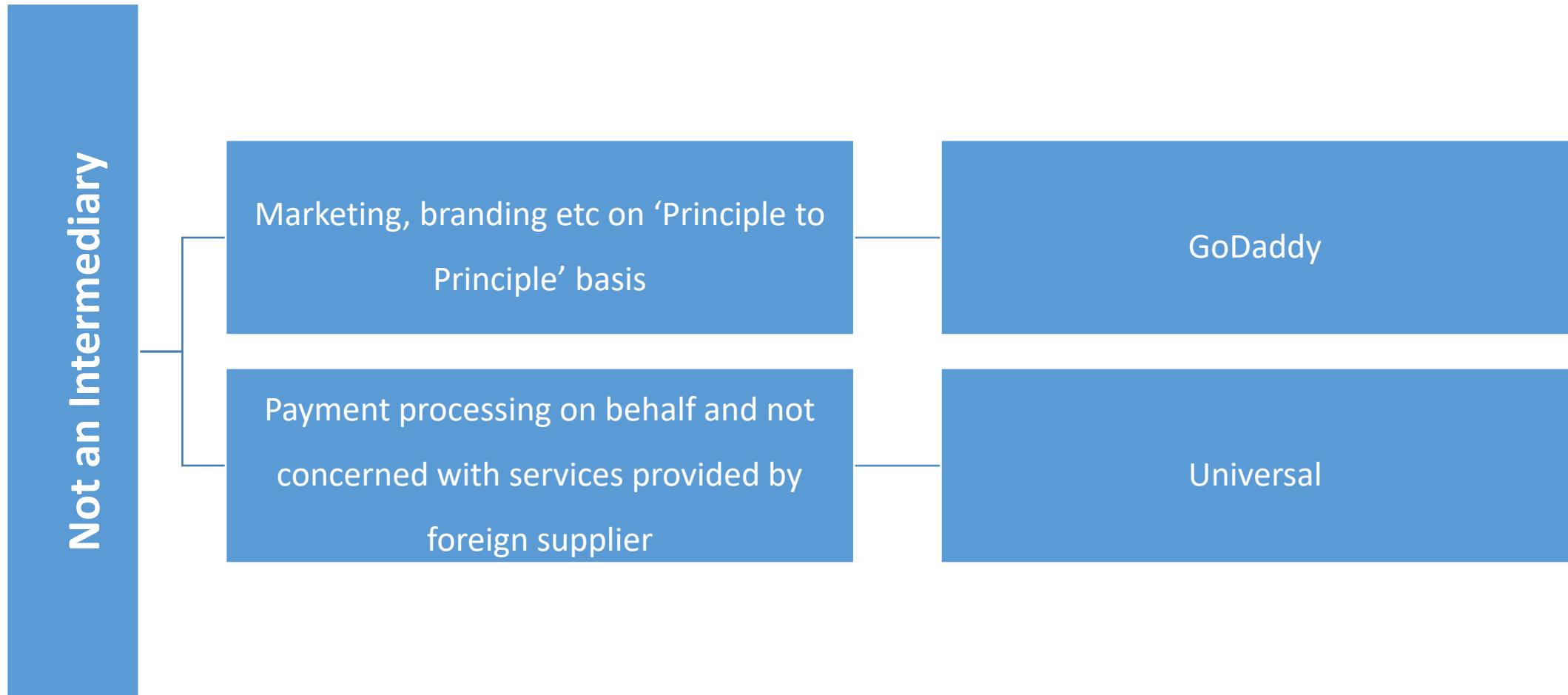
# GST – AAAR and AAR



# GST – AAAR and AAR



# ST –AAR



Refer ST cases?

# AAR

## Infinera India

2020-TIOL-08-AAAR-GST

- **No difference** between the meaning of the term "intermediary" under the GST regime and the pre-GST regime

## Global Reach Ed.

2018-TIOL-02-AAAR-GST

- Definition of "intermediary" under Section 2(13) of IGST Act, **is not the same** as that under Rule 2(f) of the POPS Rules, 2012

## Mcafee Software

2019 (31) G.S.T.L. 662

- **Judgments related to the service tax** era and has **no applicability** during the GST regime



# Classification?

# 'Intermediary'?

- Classification in itself?
  - Call centre
  - Marketing research
  - Back office
  - Accounting
  - ITeS etc
  
- Residual or applicable for all services?

# GST Applicability

# GST Applicability

Transaction	Supplier ('A')	Customer ('C')	Intermediary ('B')	GST
Case I	In India	In India	In India	
Case II	Outside India	In India	In India	
Case III	Outside India	Outside India	In India	IGST - 20/2019 (R)
Case IV	Outside India	Outside India	Outside India	
Case V	In India	Outside India	Outside India	

# Intermediary

**Outside India**

'Supplier' of goods/ services



'Recipient' of goods/ services

**In India**

'Intermediary'



# IGST - Not. No. 20/2019 – (R) (dated 30.09.2019)

- Sr. No. 12AA

- Services provided by an intermediary when location of **both** supplier and recipient of **goods** is outside the taxable territory
- Following documents shall be maintained for a minimum duration of five years:
  - 1) Copy of Bill of Lading
  - 2) Copy of executed contract between Supplier/Seller and Receiver/Buyer of goods
  - 3) Copy of commission debit note raised by an intermediary service provider in taxable territory from service recipient located in nontaxable territory
  - 4) Copy of certificate of origin issued by service recipient located in nontaxable territory
  - 5) Declaration letter from an intermediary service provider in taxable territory on company letter head confirming that commission debit note raised relates to contract when both supplier and receiver of goods are outside the taxable territory”;

# Fundamental Question!

## 269A. Levy and collection of goods and services tax in course of inter-State trade or commerce

- (1) Goods and services tax on supplies **in the course of inter-State trade or commerce shall be levied and collected** by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

***Explanation.***—For the purposes of this clause, supply of goods, or of services, or both **in the course of import** into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

- (2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.
- (3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under article 246A, such amount shall not form part of the Consolidated Fund of India.



## 269A. Levy and collection of goods and services tax in course of inter-State trade or commerce

- (4) Where an amount collected as tax levied by a State under article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.
- (5) Parliament may, by law, **formulate the principles for determining the place of supply**, and when a supply of goods, or of services, or both takes place in the course of **inter-State** trade or commerce.]

## Article 269A

### Article 366 (26B)

- *“State” with reference to articles 246A, 268, 269, 269A and article 279A includes a Union territory with Legislature*

# Article 245

**245. Extent of laws made by Parliament and by the Legislatures of States.—**

*(1) Subject to the provisions of this Constitution, Parliament may make laws **for the whole or any part of the territory of India**, and the Legislature of a State may make laws for the whole or any part of the State.*

*(2) **No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.***

## SECTION 1. Short title, extent and commencement

(1) This Act may be called the Integrated Goods and Services Tax Act, 2017.

(2) It shall **extend to the whole of India**.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

## SECTION 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. Inter-State supply

(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.

# Col – Schedule VII

## List I

- 82. Taxes on income other than agricultural income
- 83. Duties of customs including **export** duties
- 84. Duties of excise on the following goods manufactured or produced **in India**, namely ...
- 97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.
  - Finance Act '*...provided in the taxable territory*'

## List II

- ~~52.~~ Taxes on the entry of goods into a local area for **consumption**, use or sale therein
- 53. Taxes on the **consumption** or sale of electricity
- 54. Taxes on the sale ...

# Col – Art. 286

- **286. Restrictions as to imposition of tax on the sale or purchase of goods**

(1) **No law of a State** shall impose, or authorise the imposition of, a tax on the supply of goods or of services or both, where such supply takes place

(a) outside the State; or

(b) in the course of the import of the goods or services or both into, or **export** of the goods or services or both out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (1).



## Power to tax exports?

### **GVK Industries**

(2011) 332 ITR 130

*Situs* of the tax would be **where the taxable event occurs** and not where the effect or the consequence thereof is felt.

### ***All India Fedn. of Tax Practitioners***

2007 (7) S.T.R. 625 (S.C.)

*On the basis of the above discussion, it is clear that service tax is VAT which in turn is both a general tax as well as **destination based consumption tax** leviable on **services provided within the country.***

Circular,  
which was never issued!

# Circular No. 107/26/2019-GST, dated 18-7-2019

- Subject : Clarification on doubts related to supply of Information Technology enabled Services (ITeS services) - Regarding.
  - 3.1 The definition of intermediary *inter alia* provides specific exclusion of a person i.e. that of *a person who supplies such goods or services or both or securities on his own account*. Therefore, the supplier of services would **not be treated as 'intermediary' even where** the supplier of services **qualifies to be 'an agent/broker** or any other person' **if** he is involved in the supply of services **on his own account**.
  4. Information Technology enabled Services (ITeS services), though not defined under the GST law, have been defined under the sub-rule (e) of rule 10TA of the Income-tax Rules, 1962 which pertains to Safe Harbour Rules for international transactions. It defines ITeS services as -

# Circular No. 107/26/2019-GST, dated 18-7-2019

- i. Back office operations
- ii. Call centres or contact centre services;
- iii. Data processing and data mining;
- iv. Insurance claim processing;
- v. Legal databases;
- vi. Creation and maintenance of medical transcription excluding medical advice;
- vii. Translation services;
- viii. Payroll;
- ix. Remote maintenance;
- x. Revenue accounting;
- xi. Support centres;
- xii. Website services;
- xiii. Data search integration and analysis;
- xiv. Remote education excluding education content development; or
- xv. Clinical database management services excluding clinical trials, but does not include any research and development services whether or not in the nature of contract research and development services ”.

## Circular No. 107/26/2019-GST, dated 18-7-2019

Particulars	Scenario I	Scenario II	Scenario III
Activity	Supplies back end services as listed in para 4 above	Support services, during pre-delivery, delivery and post-delivery of supply etc	I + II
Clarification	Not an intermediary (Even where a supplier supplies ITeS services to customers of his clients on clients' behalf, but actually supplies these services on his own account, the supplier will not be categorized as intermediary)	Intermediary	Will depend on the facts and circumstances

# Circular

- Circular No. 107 **Withdrawn** vide Circular No. 127/46/2019-GST, dated 4-12-2019
- Press Release No. 32/2019, dated 20-9-2019

The GST Council, in its 37th meeting held today at Goa, recommended the following :

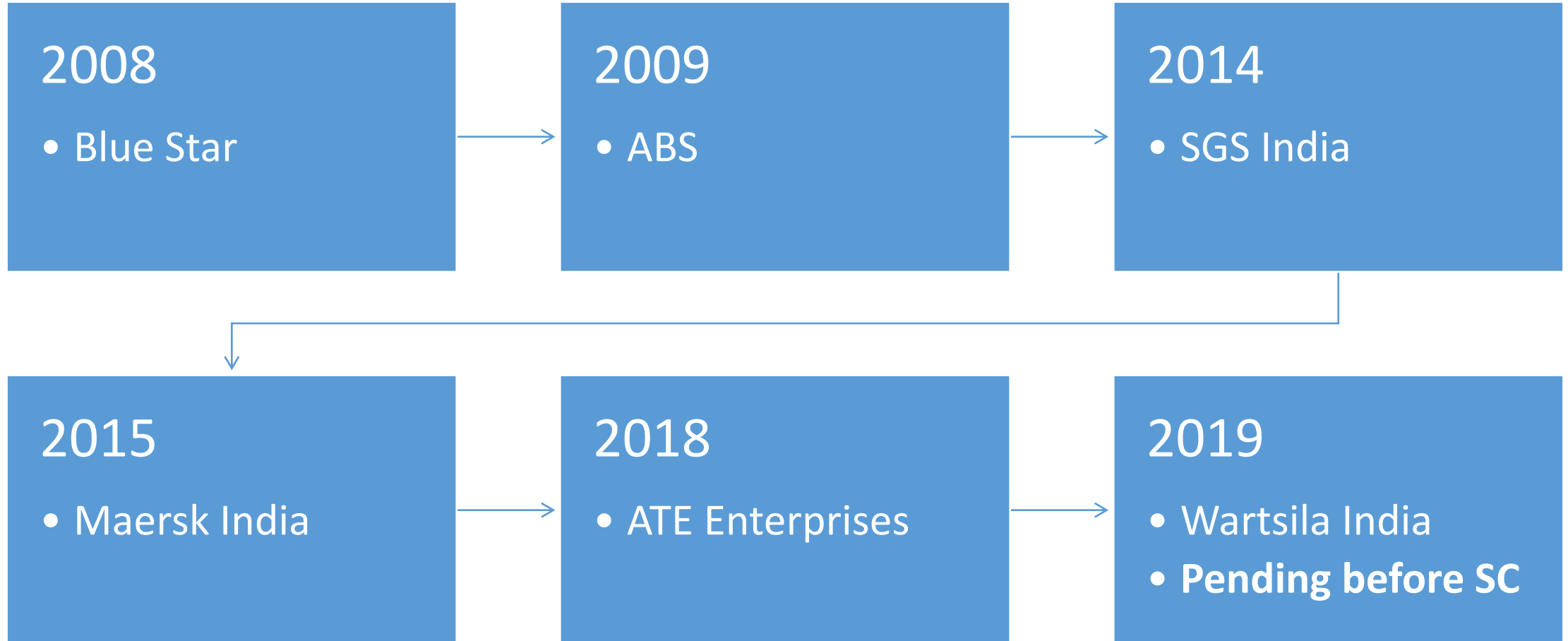
...

6. Issuance of circulars for **uniformity** in application of law across all jurisdictions:

...

- c. Clarification regarding supply of Information Technology enabled Services (ITeS services) (in supersession of Circular No. 107/26/2019-GST, dated 18-7-2019) [2019 (26) G.S.T.L. C61] being made on own account or as intermediary.

# Evolution of Intermediary



# Apex Court!

- Microsoft Corporation 2014 (36) S.T.R. 766 (Tri. - Del.)
  - 51. ... The marketing operations done by the appellant in India **cannot be said to be at the behest of any Indian customer**. ...activities. As such, the services are being provided by the appellant to Singapore Recipient company and to be used by them at Singapore, may be for the purpose of the sale of their product in India, have to be held as **export** of services.
  - Appealed to Supreme Court - Appeal **Admitted** in 2015 (39) STR J310 (Supreme Court)
- SUMITOMO CORPORATION 2017 (50) S.T.R. 299 (Tri. - Del.)
  - It is the person who requested for the said service and is **liable to make payment** for the same, who has to be treated as **recipient** of service and not the person affected by the performance of the service. The destination has to be decided based on **place of consumption** not the place of performance of service in the case of Category III, Business Auxiliary Service.
  - Notice **issued** in 2020 (34) GSTL J21 (Supreme Court)



Thank you!

**CA Pritam Mahure and Associates**

**Happy to Discuss**

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9920644648/ +91 95610 05039/ +91 90988 90333/ 020-27293425

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# Annexure A

## GST – Rulings

# AAAR – Intermediary

Citation	Facts	Observations
<p><b>Infinera</b> <b>India</b> <a href="#">2020-TIOL-08-AAAR-GST</a></p>	<p>Conducting <b>marketing research</b> in order to keep Infinera USA advised and informed and <b>following up</b> with customer <b>leads</b> provided by Infinera USA would render the applicant to qualify as an 'intermediary' and consequently be subject to levy of GST</p>	<p>He is <b><u>not</u></b> supplying the products of Infinera <b><u>on behalf</u></b> of the Principal - He is <b><u>only arranging</u></b> the contact the actual supply of the products is <b><u>done by the Principal directly</u></b> to the customer - Service of <b>facilitating</b> a supply of goods between the Principal and the customers is provided by the appellant to the overseas client and the appellant is <b>not supplying such goods <u>on his own account</u></b> - appellant is <b>correctly held as 'intermediary'</b></p> <p><b>No difference</b> between the meaning of the term "intermediary" under the GST regime and the pre-GST regime</p>

# AAAR – Intermediary

Citation	Facts	Observations
<b>Sabre Travel Network</b> <a href="#">India 2019-TIOL-58-AAAR-GST</a>	<b>Marketing</b> , promotion and distribution services provided by the applicant to Sabre APAC is	<b>Intermediary</b> - Subject to tax under the provisions of the GST Act  Whether the same is export or otherwise – OOS
<b>Asahi Kasei</b> <a href="#">India 2019-TIOL-52-AAAR-GST</a>	Services in the nature of information on market would fall under SAC 99837 as ' <b>Market Research</b> services'; research on the matter related to functioning of the holding company would fall under SAC 99859 as ' <b>Other support</b> services'	<b>All the essential ingredients of intermediary have been fulfilled by respondent</b> , the entire gamut of supply is a <b>mixed supply</b> and not composite supply as these services are not naturally bundled

# AAAR – Intermediary

Citation	Facts	Observations
<b>Vservgloba I Pvt Ltd</b> <a href="#">2019-TIOL-37-AAAR-GST</a>	<b>Back office support</b> services to overseas companies- Applicant comes into picture only after finalization of purchase/sale order by a client	Services being offered in one package is nothing but the <b>composite</b> supply of which the <b>intermediary</b> service' is the main supply. Claim of appellant that principal supply is 'back office support' and accounting' is not tenable. AAR upheld
<b>Global Reach Ed.</b> <a href="#">2018-TIOL-02-AAAR-GST</a>	Appellant <b>promotes</b> courses of Foreign University, finds suitable prospective students to undertake the courses	Appellant is to be considered as an <b>intermediary</b>  Definition of “intermediary” under Section 2(13) of IGST Act, <b>is not the same</b> as that under Rule 2(f) of the POPS Rules, 2012

# AAAR – Intermediary

Citation	Facts	Observations
<b>Micro Instruments</b> <a href="#">2020-TIOL-22-AAAR-GST</a>	-	OOS
Five Star Shipping <a href="#">2018-TIOL-21-AAAR-GST</a>	Appellant is actually <b>facilitating</b> the supply of the main services i.e. chartering of the vessels by the FSO to their clients	Entire gamut of services performed by appellant are of the " <b>composite</b> supply" of the ' <b>Intermediary</b> services'

# AAR – Intermediary

Citation	Facts	Observations
<b>Fom Aluminium Machines</b> 2020 (35) G.S.T.L. 420 (A.A.R. - GST - Kar.)	Agency agreement, it is evident that the applicant is the sole <b>agent</b> of their parent company for the SAARC area and gets commission	Squarely covered under the <b>Intermediary</b> Services
<b>Wise Design 2020 (34)</b> <b>G.S.T.L. 329 (Mah.)</b>	A Website for placing order - The desired product/goods is shipped directly from the supplier to the buyer. Applicant is not directly supplying goods to the buyers	Since we observe that in the subject case there is no supply of goods undertaken by the applicant the provisions of Section 95 of the CGST Act will be applicable, in view of which the application is <b>non-maintainable</b> and liable for rejection.

# AAR – Intermediary

Citation	Facts	Observations
<p><b>Mcafee Software</b> 2019 (31) G.S.T.L. 662</p>	<p>Applicant has accepted a non-exclusive right to provide <b>Marketing Support</b> Services in the territory</p> <p>Identifying potential business and contacts; Liaising with current and prospective; demonstration of the Products; serving existing and prospective</p> <p>Provider at all times shall act as its own <b>principal in its own name</b>, and as an <b>independent contractor</b></p>	<p><b>10.5</b> The words “any other person” are to be analyzed and this inclusion of word “any other person” exclude all persons other than broker and agent and hence a broker or an agent or any person (other than a broker or agent) can be an intermediary. This means that any other person would naturally exclude a broker or an agent. Hence the contention of the applicant that he is not an intermediary just because he is in a <b>principal to principal relationship</b> is not acceptable as the words in the definition state very clearly that any person other than a broker or an agent can also be an intermediary, if he is involved in arranging or facilitating the supply of goods or services or both or securities.</p>



# AAR – Intermediary

Citation	Facts	Observations
<p><b>Mcafee Software</b> 2019 (31) G.S.T.L. 662</p>	<p>-</p>	<p><b>No qualification</b> is made in the definition stating that persons having <b>principal to principal</b> relationship <b>are excluded</b> from the definition of “intermediary”. What is important in this definition is the question whether the service provided by the service provider <b>amounts to arranging or facilitating</b> the supply of goods or services and not the nature of the service provider and service recipient.</p> <p>The reliance placed by the assessee on the judgments based on <i>ejusdem generis</i> is not applicable in the present case as the judgments are related to “other names” and not “other persons”.</p>

# AAR – Intermediary

Citation	Facts	Observations
<p><b>Mcafee Software</b> 2019 (31) G.S.T.L. 662</p>	<p>-</p>	<p><b>Consideration</b> may be based on the <b>turnover</b> of supply made on behalf of the supplier or any other method and this does not have bearing on the nature of supply.</p> <p>The applicant is not supplying the goods or services on his own account and the ultimate supply of goods or services is made by the parent company directly and hence the applicant is not covered under the exception clause as well. It is pertinent to note the use of word <b>“such”</b> and this relates to the supply of such goods or services which is facilitated by the applicant and not the services provided by him. ... <b>Judgments related to the service tax</b> era and has <b>no applicability</b> during the GST regime... <b>Liable</b></p>

# AAR – Intermediary

Citation	Facts	Observations
<p><b>Fulcrum Info 2019</b> (30) G.S.T.L. 261 (A.A.R. - GST)</p>	<p>Export-Import Compliance Support; Manual Documentation Support; other admin support</p> <p>Applicant is and shall remain an independent contractor and not an employee</p>	<p>The back-end support services provided by the applicant to the Juniper Inc. under the agreement is classifiable as “<b>Support Services</b>” under the Tariff Heading 9985</p>
<p><b>Ansys Software</b> <u>2019-TIOL-321-AAR</u></p>	<p>The <b>marketing</b> and pre-sales technical support services</p>	<p>Classifiable as <b>intermediary</b></p>

# AAR – Intermediary

Citation	Facts	Observations
<b>Sri Thomas Joseph</b> <a href="#">2019-TIOL-103-AAR-GST</a>	The <b>consultancy</b> service also includes the techniques of growth in sales, improvement of gross margin, controlling of operational expenses, reduction in stock ageing, training and monitoring of the team etc	The services provided by the applicant falls under SAC code 998311 " <b>Management Consultancy Services</b> ". The service provided by the applicant to his clients does not, in any way, facilitate or arrange the supply of goods or services or both between two or more persons
<b>Sadashiv Shete</b> <a href="#">2018-TIOL-310-AAR-GST</a>	Applicant is engaged in the business of assisting believers, followers and devotees to book Pundits/Brahmins online for viz. pujas etc through applicant's own <b>website</b>	Applicant is acting as an ' <b>intermediary</b> ' person  Applicant is covered under section 2(44) and 2(45) of GST Act as an 'Electronic Commerce operator'

# AAR – Intermediary (India)

Citation	Facts	Observations
<b>Infobase Services</b> 2020 (32) GSTL 570	Company <b>Prints dictionary</b> for members of a private club – Can recover printing cost from advertising	Mixed supply of printing (physical inputs liable for 12%) and <b>intermediary</b> services. Intermediary service liable for 18%
ASCENDAS SERVICES 2019 (30) G.S.T.L. 322	The commuters or the companies are <b>not party to the contract</b> between the applicant and BMTC and the applicant is providing the services after obtaining the same from BMTC.	To be covered under the definition of “intermediary” the applicant must facilitate the supply of services by the BMTC to the commuters and in the pertinent case, it is the applicant who is receiving services from BMTC and providing services to the commuters and all are <b>principal to principal</b> in nature and the applicant is neither the agent of BMTC or the commuter.

# Annexure B

## FAQs

# ITeS Flyer

- **Question 11 :** I am an Indian Company who makes software and sells it outside the country. I have hired a firm (not a related party) 'C' located abroad to facilitate the supply of software in Europe and the USA; would I be liable to pay GST on the payments that I make to this entity abroad?
- **Answer :** No. In this case, 'C' is covered by the definition of 'intermediary' [section 2(13) of the IGST Act, 2017]. The place of supply of such intermediary service is location of the supplier in terms of section 13(8) of the IGST Act, 2017. As 'C' is located outside India, GST is **not payable** in this case.
- **Question 13 :** I am an agent in India of a foreign IT/ITES provider (principal located outside India). For agency services, I bill the principal in convertible foreign exchange. Whether GST liability arises in this case?
- **Answer :** **You are an intermediary** and the place of supply of the service provided by you to the principal is in India irrespective of the mode of payment. Hence, GST is payable on the services provided by you as an intermediary to the principal

# What to pay – IGST or CGST + SGST?

- Banking FAQs
  - 25. *Would intermediary services provided to an off-shore client and services provided by a banking company to its offshore account holders be treated as an intra-State supply or an inter-State supply for payment of GST?*
  - Under clause (b) of Section 13(8) of the IGST Act, 2017 the place of supply of such services is the location of the provider of services. As the location of supplier and place of supply are in same State, such supplies will be treated as **intra-State supply** and Central tax and State tax or Union territory tax, as the case may be, will be payable.



# What to pay – IGST or CGST + SGST?

- **82. Do stock brokers fall in the definition of “intermediary” under Section 2(13) of the IGST Act, 2017?**
- **Yes. Since stock brokers arrange the supply of securities between two or more persons, stock brokers would be covered by the definition of “intermediary”.**
  
- 85. Stock Brokers deal with clients who are not residents of India like Foreign Portfolio Investors, Non-Resident Indians, Persons of Indian Origin, etc. Will brokerage earned from such clients who are not resident in India qualify as “export of service” under Section 2(6) of the IGST Act, 2017?
  
- The stock broker being an intermediary, this situation shall be covered under the provisions of Section 13(8)(b) of the IGST Act, 2017 which provides that the place of supply shall be the location of the supplier of services. Thus such a supply will be treated as an **intra-State supply** and would be subject to Central tax and State tax/Union territory tax, as the case may be.

# Annexure C

## Classification

# Explanatory Notes to the Scheme of Classification of Services

- The Scheme of Classification of Services adopted for the purposes of GST is a modified version of the United Nations Central Product Classification.
2. The Explanatory notes for the said Scheme of Classification of Services is based on the explanatory notes to the UN CPC, and as recommended by the committee constituted for the purpose, is annexed.
3. The explanatory notes indicate the scope and coverage of the heading, groups and service codes of the Scheme of Classification of Services. These may be used by the assessee and the tax administration **as a guiding tool** for classification of services. However, it may be noted that where a service is capable of differential treatment for any purpose based on its description, the **most specific description** shall be preferred over a more general description.

## 998599 Other support services n.e.c.

- This service code includes **business brokerage** and appraisal services other than for real estate; business services of **intermediaries and brokers**; specialist advice other than for real estate, insurance and engineering (specialist services in art, specialist services for courts of law, etc.); services by agencies and agents on behalf of individuals seeking engagements in motion pictures, theatrical productions, modelling or other entertainment or sports attractions; placement of books, plays, artwork, photographs, etc., with publishers, producers, etc.; issue of reduced-price coupons and gift stamps; management services for copyrights and their revenues (except from films); management services for rights to industrial property (patents, licences, trademarks, franchises, etc.); auctioning services other than in connection with legal procedures; reading of electric, gas and water meters; data preparation services; specialized stenotype services such as court reporting; public stenography services; other business support services not elsewhere classified

## 998599 Other support services n.e.c.

- This service code **does not include**:
  - maintenance of electricity, gas and water meters, cf. 996911, 996912, 996921
  - **services related to advertising and sales promotion, cf. 99836**
  - management services for motion picture rights, cf. 999614
  - art facilities operation services, cf. 999623
  - management services for artistic rights, cf. 999629
  - sports events organization services, cf. 999651

## 998361 Advertising services

- This service code includes planning, concept development and execution of the full range of services for an advertising campaign ... aerial advertising services; delivery services of free samples and other advertising material; **demonstration and presentation of advertising services at point of sale; sales promotion (if no orders are received)**

# 997152 Brokerage and related securities and commodities services including commodity exchange services

This service code includes:

- **brokerage** services (that is bringing together purchasers and sellers of the same instrument) for securities
- services of acting as a selling **agent** of units, shares or other interests in a mutual (investment) fund
- sales, delivery and redemption services of government bonds
- **brokerage** of options
- **brokerage** services for commodities and commodity futures, including financial futures
- **brokerage** services for financial derivatives
- computer-based clearing and settlement for interchange of debits, credits and transfer of ownership of securities

## 998311 Management consulting and management services including financial, strategic, human resources, marketing, operations and supply chain management

- This service code also includes providing advice, guidance and operational assistance concerning the marketing strategy and marketing operation of an organization. **Marketing** management consulting assignments may deal with one or a combination of the following:
  - i. analysis and formulation of a **marketing strategy**;
  - ii. formulation of customer service programmes, pricing, advertising and distribution channels;
  - iii. sales management and sales staff training;
  - iv. organization of marketing channels (sale to wholesalers or directly to retailers, direct mail, franchise, etc.), package design and other matters related to the marketing strategy and operations of an organization



# 998596 Events, Exhibitions, Conventions and trade show organisation and assistance services

- This service code **includes**

...

- ii. assistance in choosing and locating space, venue research, feasibility and negotiation; **marketing and public relations for the convention** or congress, speaker liaison

This service code also includes:

- ii. assistance in choosing and locating space, venue research, feasibility and negotiation; **marketing and public relations for the trade show or trade fair**; organization or provision of secretariat and office facilities and staff for trade show or trade fair registration, administration, documentation handling, translation of documents etc

# 998396 Trademarks and franchises

- This service code does **not include**:

...

- advisory services for the organization of marketing channels (including franchises), cf. **998311**

## 996792 Goods transport agency services for other modes of transport

This service code includes **ship broker services**; aircraft space brokerage services; freight brokerage services; freight forwarding services (primarily transport organization or arrangement services on behalf of the shipper or consignee); freight consolidation and break-bulk services

# 999613 Audiovisual post-production services

This service code includes:

...

xiv. licensing and/or agent services for licensing of music and sound bundled with mixing or integration services

# Annexure D

## Education Guide!

## 5.9.6 What are “Intermediary Services”?

Generally, an “intermediary” is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time:

- the supply between the principal and the third party; and
- the supply of his own service (agency service) to his principal, for which a **fee or commission** is usually charged.

~~For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition.~~

## 5.9.6 What are “Intermediary Services”?

Also excluded from this sub-rule is a person who arranges or facilitates a provision of a service (referred to in the rules as “the main service”), but provides the main service on his own account.

In order to determine whether a person is acting as an intermediary or not, the following factors need to be considered:-

**Nature and value:** An intermediary **cannot alter the nature or value of the service**, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price. Also, the principal must know the exact value at which the service is supplied (or obtained) on his behalf, and any discounts that the intermediary obtains must be passed back to the principal.

**Separation of value:** The value of an intermediary’s service is **invariably identifiable from the main supply** of service that he is arranging. It can be based on an agreed **percentage of the sale** or purchase price. Generally, the amount charged by an agent from his principal is referred to as **“commission”**.

**Identity and title:** The service provided by the intermediary on behalf of the principal is clearly identifiable.

Thank you!

**CA Pritam Mahure and Associates**

**Happy to Discuss**

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