

Constitutional Validity of the Provision levying GST on the supply of Business Promotion Services to the Recipient located Outside India- *By Justice Ujjal Bhuyan*

2021 (6) TMI 383 - Bombay High Court in Dharmendra M. Jani Versus Union of India and Others

Question for Consideration before Hon'ble Court

Whether Section 13(8)(b) of IGST Act, 2017 creating the deeming fiction of treating the place of supply as the location of the supplier of the services thereby levying the CGST and SGST for the Intermediary Services is constitutionally valid and whether the Parliament has the Legal Competence?

Petitioner Nature of Business

Petitioner undertakes activities of marketing and promotion of goods sold by its overseas customers in India.

The Indian purchaser i.e., the importer directly places a purchase order on the overseas customer of the petitioner for supply of the goods which are then shipped by the overseas customer to the Indian purchaser. Such goods are cleared by the Indian purchaser from the customs. The overseas customer raises sale invoice in the name of the Indian purchaser who directly remits the sale proceeds to the overseas customer. Upon receipt of such payment, the overseas customer pays commission to the petitioner against invoice issued by the petitioner. The entire payment is received by the petitioner in India in convertible foreign exchange.

Legal Provisions of Place of Supply for Intermediary

Section 13 of the IGST Act deals with situations where the location of the supplier or the location of the recipient is outside India.

While sub-section (2) generally provides that the place of supply of services shall be the location of the recipient of services, exceptions are carved out in sub-sections (3) to (13).

As per sub-section (8), the place of supply of the services mentioned therein shall be the location of the supplier of services which is intermediary services in terms of clause (b).

Impact of Legal Provision on Petitioner

By way of a deeming fiction, in the case of intermediary services where the location of the recipient is outside India, the place of supply shall be the location of the supplier of services which is in India, thus bringing into the tax net what is basically export of services

Export of service by the petitioner as intermediary would be treated as intra-state supply of services under section 13(8)(b) read with section 8(2) of the IGST Act rendering such transaction liable to payment of central goods and services tax (CGST) and state goods and services tax (SGST).

Grounds of Respondent

1. There is always a presumption in favour of constitutionality of a statute. Burden lies heavily on the person who challenges the validity of a statute.
2. Court has to see whether there is legislative competence to enact the statute or not and whether the impugned provision is violative of any of the fundamental rights enshrined in Part III of the Constitution or not
3. No statute can be struck down as arbitrary unless it is unconstitutional. Greater latitude vests with the Parliament in taxing statutes and motive is not a relevant factor
4. Erstwhile service tax regime, the Place of Provision of Service Rules, 2012 contained a similar provision with effect from 01.10.2014.
5. Petitioner had been paying service tax on the service rendered to overseas customer and therefore it is not open to the petitioner to make the impugned challenge now.
6. Central government considered several representations and after examining the issue in detail declared that with effect from 01.10.2014 the place of supply for all intermediaries (goods and services) would be the location of the intermediary.
7. Gujarat High Court in Material Recycling Association of India Vs. Union of India decided on 24.07.2020, wherein identical challenge made to section 13(8)(b) of the IGST Act has been repelled by the Gujarat High Court

Petitioner Reply The challenge to section 13(8)(b) of the IGST Act that it is ultra vires Article 286 read with Article 246A and Article 269A of the Constitution was neither canvassed before nor considered by the Gujarat High Court. There is no discussion on Articles 14 and 19(1)(g) as well.

8. To encourage the Make in India program by encouraging the overseas customers to set up units in India thereby leading to foreign investments giving a boost to Make in India program.

Petitioner Reply levy of GST on export of services by intermediary has created an exodus of intermediaries to places like Singapore, Dubai, Hong Kong etc. thereby depriving the central government not just GST but also income tax, valuable foreign exchange and employment to thousands of people. Such levy of GST is rather against the Make in India program as well as against the age old policy of the Government of India to encourage export of goods and services.

9. In the case of an all India statute a view taken by a High Court as to its constitutionality or otherwise would be applicable throughout the territory of India and therefore, should be followed.

Hon'ble Court Observation

1. **Para 54- Artificial Deeming Provision of Section 13(8)(b) of IGST Act, 2017 is contrary to scheme of CGST Act, and IGST Act being beyond the charging provisions of the relevant Act-**section 9 of the CGST Act which is the charging section we find that it provides for levy and collection of CGST on all intra-state supplies of goods or services and section 5 of the IGST Act which is the charging section provides for levy of IGST on all inter-state supplies of goods or services
2. **Para 45 Parliamentary Standing Committeereport No.139-** The Committee recommended that the government may also cause amendment to section 13(8) of the IGST Act to exclude intermediary services and make it subject to the default section 13(2) so that the benefit of export of services would be available.
3. **Para 53.2 Article 245- Article 245(1) empowers Parliament to enact law for the whole or any part of the territory of India.** The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to subserve the object and that object must be related to something in India. It is inconceivable that a law should be made by Parliament in India which has no relationship with anything in India.
4. **Para 56 Article 245-**The extra-territorial effect given by way of section 13(8)(b) of the IGST Act has no real connection or nexus with the taxing regime in India introduced by the GST system;
5. **Para 47 Article 246A and 269A-** While Article 246A deals with special provision with respect to GST, Article 269A provides for levy and collection of GST in the course of inter-state trade or commerce. From a careful and conjoint reading of the two Articles it is quite 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. 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.
6. **Para 48.1 Article 286-**There is an express bar under clause (1) of Article 286 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.
7. **Para 59 Decision of Hon'bleGujarat High Court in Material Recycling Association of India Vs. Union of India is not a Binding precedent but have persuasive value-**Decision of a High Court will have the force of binding precedent only in the states or territories over which the Court has jurisdiction. In other states or outside the territorial jurisdiction of that High Court it may at best have only persuasive effect. By no amount of stretching of the doctrine of stare decisis, can judgments of one High Court be given the status of a binding precedent so far

other High Courts or courts or tribunals outside the territorial jurisdiction of that High Court are concerned.

8. **Para 60- Decision of one High Court** declaring constitutionality of an all India statute would foreclose adjudication by other High Courts which would neither be in the interest of administration of justice nor in the public interest.
9. **Para 61 Presumption in favour of constitutionality of a statute**-Each case would have to be decided on the facts of that case. There can be no straightjacket formula in applying the above principles. It is also a settled proposition that a statute must pass the test of legislative competence; it must also pass the test of constitutionality in the sense that it cannot violate any provisions of the Constitution.
10. **Para 63 Make in India Program**-Make in India program by encouraging foreign investment can be no answer to challenge to constitutionality of a parliamentary statute. Besides such a statement has been made de-hors any supporting statistics and analysis.

Hon'ble Court Verdict

1. Para 62- Section 13(8)(b) of the IGST Act read with section 8(2) of the said Act have been challenged on the ground that those provisions violate the CGST Act and the IGST Act besides being violative of Articles 245, 246A, 269A and 286(1)(b) of the Constitution of India.
2. Para 65- We have no hesitation in holding that section 13(8)(b) of the Integrated Goods and Services Tax Act, 2017 is ultra vires the said Act besides being unconstitutional.