

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

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

Facts

Petitioner provides marketing and sales promotion services to customers/principals located outside India who in turn export goods to importers in India on the basis of agreements

Overseas customer pays commission to Petitioner against invoice raised by Petitioner, upon his overseas customer, which it is submitted is received by Petitioner in India in convertible foreign exchange.

Petitioner is of the view that transaction entered into by Petitioner with the foreign customer is one of export of service from India.

Hon'ble Court Observation

Para 80- Whether a law or a provision is unconstitutional or not, has to be decided by the Court on the touch-stone of the Constitution

Judicial Principles as laid down by Apex Court has been considered

- ✓ *State of Madhya Pradesh v/s. Rakesh Kohli & Another* (2012) 6 SCC 312
- ✓ *Government of Andhra Pradesh & Ors Vs. P. Laxmi Devi* AIR 2008 SC 1640
- ✓ *Supreme Court in Hamdard Dawakhana & Another v/s. Union of India* (1960) Cri LJ 671,
- ✓ *Supreme Court in Union of India v. Exide Industries Ltd.* (2020) 5 SCC 274

Hon'ble Court consideration on Constitution and IGST Act

- Scenario before Implementation of GST
- The Statement of Objects and Reasons of the 122nd Constitutional Amendment Bill, 2014
- The Statement of Objects and Reasons of the IGST Act
- Article 246A, 269A, 286, 366(12A), 366(26A), 265, 246, 245
- Provisions of IGST Act taken into consideration

- ✓ Section 2(6) defines “export of services”
- ✓ Section 2(13) defines “intermediary”
- ✓ Section 2 (21) of IGST Act defines “ supply”
- ✓ Section 5 of the IGST Act is the charging section
- ✓ Section 7- *“Inter-State supply.*
- ✓ Section 8 of the IGST Act- *Intra-State supply*
- ✓ Section 10 of the Act deals with place of supply of goods other than supply of goods imported into, or exported from India
- ✓ Section 11 of the Act deals with place of supply of goods imported into, or exported from India
- ✓ Section 12 deals with place of supply of services where location of supplier and recipient is in India
- ✓ Section 13 deals with place of supply of services where location of supplier or location of recipient is outside India
- ✓ Section 16 deals with Zero rated supply

Article 269A(5) gives the Power to Parliament to enact provisions relating to Place of Supply

Article 269A empowers the Parliament to levy and collect GST on supplies in the course of inter-state trade or commerce

Secondly clause (5) (which not being bound by the Explanation to clause (1) of Article 269A), empowers the Parliament to legislate on principles for determining the place of supply and when the supply would be in the course of inter-state trade or commerce

A conjoint reading of Article 269A(1) with Article 269A(5) and Article 246A exclusively empowers the Parliament to make law on what is inter-state supply and what is not which obviously includes what is intra-state in contradistinction to what is inter-state and that power is exclusively with the Parliament.

Section 13(8)(b) invoking Section 8(2) to deem inter-state supply as intra-state supply

Para 105- Section 8 deals with nature of supply and Section 13 deals with place of supply. Both the provisions have different purposes

Once the Parliament has in its wisdom stipulated the place of supply in case of Intermediary Services be the location of the supplier of service, no fault can be found with the provision by artificially attempting to link it with another provision to demonstrate constitutional or legislative infraction.

When there is a specific provision defining Intermediary as contained in section 2(13) of the IGST Act and Intermediary Services are specifically dealt with in section 13(8)(b), the question

of application of a general provision would not arise, particularly when the constitutionality of both the above provisions has been upheld.

Article 286- Central legislation cannot authorize the State to collect tax- State has no authority to levy tax on export of services

Newly amended Article 286 (2) pursuant to the Constitution (101st) Amendment Act, 2016 that the Parliament can formulate principles for determining when a supply of goods or services or both have taken place either outside the State or in the course of import into or export out of the territory of India.

The whole purpose of Article 286(2) is to empower the Parliament to formulate principles to determine the situs of supply. This is also stated in Article 269A(5)

Powers under Article 246A, 269A and 286 of the Constitution of India, the Parliament by legislation, in Sections 7 (inter-State supply) and 8 (Intra-State supply) of the IGST Act has provided for determination of the nature of supply and in Sections 10 to 14 for place of supply

Central legislation cannot authorize the State to collect tax which is prohibited by the Constitution or that the provisions are a colorable legislation is without any legs to stand in view of provisions under Articles 245, 246A, 269A of the Constitution of India.

Whether the Parliament is empowered to enact laws in respect of extra-territorial aspects or causes that have no nexus with India.

Hypothetical situation in respect of which this new challenge seems to be taken up is not the case of petitioner. It has been clearly stated in paragraph 4.6 of the petition that Indian purchaser i.e. the importer directly places a purchase order on the overseas customer for supply of the goods and the goods are directly shipped by the overseas customer to the Indian purchaser. There is no discussion or factual submission that Indian intermediary i.e. Petitioner is purportedly a commission agent to a supplier in Germany who is exporting goods to an importer in Singapore. In fact the agreements, illustrative copy whereof has been annexed to the petition are only in respect of counterparty from Japan

It would, therefore, not be necessary for us to deal with this hypothetical situation to consider the challenge under Article 245 of the Constitution of India.

Constitutional Validity of Section 13(8)(b) in context of Article 245 – Extra Territorial Legislation

Para 107- Even if the supplier of services was located outside India in which case as per this provision the place of supply would be the location of the supplier i.e. outside India and would not be taxable in India; and there would be no question of extra territorial legislation.

Article 245(1) begins with the language, subject to the provisions of this Constitution; which means that Article 245 is subject to the other provisions of the Constitution such as Article 246A, Article 269A, the bringing in of the new GST law as well or legislations on interstate supply of goods and services as well as on principles regarding place of supply.

107.7. We are in complete agreement with the principles laid down by the Hon'ble Supreme Court in the case of **GVK Industries (supra)**. However, having observed that this is not a case of extra territorial legislation

Whether the levy of GST on intermediary services has resulted in violation of Article 14?

Para 110- The intermediary services rendered by Petitioner are specifically provided as one of the services in addition to banking services and transport hiring services where the place of supply has been provided as the location of the supplier of services as per Section 13(8)(b) of the IGST Act.

Here, because of the intermediary, the export of goods is taking place from the overseas customer to the Indian importer, which is the transaction of import of goods for which the intermediary services have been provided by Petitioner. Therefore, between Petitioner and others there is no discrimination. Section 13(8)(b) would not be hit by Article 14 on this ground

- ✓ R.K. Garg Vs. Union of India and Ors. AIR 1981 Supreme Court 2138
- ✓ Shri Ram Krishna Dalmia v/s. Shri Justice S. R. Tendolkar & Others AIR 1958 SC 538
- ✓ V.S. Rice and Oil Mills and Others Vs. State of Andhra Pradesh etc. AIR 1964 Supreme Court 1781
- ✓ G.K. Krishnan etc. Vs. State of Tamil Nadu and Anr. etc. AIR 1975 Supreme Court 583
- ✓ **Union of India v. Exide Industries Ltd. (2020) 5 SCC 274**, the Supreme Court,

Whether the levy of GST on intermediary services has resulted in restriction in Right to Carry Business under Article 19(1)(g)?

Para 111- If the submission of Petitioner was to be considered, then any tax levied by the Central or State Government would be a restriction to carry on trade under Article 19(1)(g) of the Constitution of India.

A foreign exporter would set up a liaison office in India is a matter which is in the individual freedom of such an exporter subject of course to the other applicable laws.

Parliament has power to legislate on place of supply and on inter-state supply of goods and services pursuant to Article 269A read with Article 246A and Article 286 of the Constitution of India, by virtue of which the IGST Act and Section 13(8)(b) have been enacted.

Whether the levy of GST on intermediary services by Petitioner is contrary to fundamental concept of GST as a destination based consumption tax.

Para 112- Scheme of the GST law in India is taxation on supply. Concepts cannot be imposed upon clear, unambiguous Articles of the Constitution of India as well as the language in the provisions of the statute.

There are three methods of calculation of indirect taxes viz. specific duty, ad valorem tax and value added tax (VAT). GST uses the method of value added tax of calculation which removes the cascading effect. GST is calculated on “value added” and not the value of the goods or services; value addition is the value added to the raw materials and other things purchased by the producer which means that the cost of purchase inputs would be excluded. This method of levy of tax is intended to remove the cascading effect of tax on tax and profit on tax. **Therefore the IGST Act in my view is not VAT but only calculated as VAT.**

GST is a tax on supply and not on the sale. One of the elements of GST as mentioned is that the calculation of GST is like VAT, which is on the value addition to reduce the cascading effect of the various taxes thereby reducing the effective rate of indirect taxes. This is one of the three methods of calculation of indirect taxes, viz., specific duty, ad valorem tax and value added tax.

Petitioner relied on the decisions All ***India Federation of Tax Practitioners v. Union of India 2007 (7) STR 625- Held*** constitutional amendments introducing special provisions of Article 246A, Article 269A and Article 279A, have brought in the new GST regime. It is also observed that the Constitutional Amendment bringing an end to the service tax regime has omitted Article 268A and Entry 92C (though the same was not notified).

Petitioner relied on ***Commissioner of Service Tax v. SGS India Pvt. Ltd. 2016 (34) STR 554 (Bom. Held*** that was also a decision under the service tax regime and would be distinguishable in view of the amendment to the Constitution bringing in the GST law. Also it is observed that an appeal in the said matter is pending final adjudication before the Hon’ble Supreme Court.

Whether Section 13(8)(b) seeks to runs contrary to the scheme of the Act and deems an inter-State supply as intra-State supply

Section 5 of IGST Act, 2017 clearly states that all that on inter-State supplies of goods and services, there shall be levied a tax called the Integrated Goods and Service Tax, which shall be paid by the taxable person. There is no divergence of view that the scheme, scope and object of the IGST Act is a levy on inter-State supplies and the supply in this case is an inter-State supply.

When the Constitution has empowered the Parliament to formulate principles determining the place of supply, in my view, Section 13(8)(b) cannot be said to be ultra vires the charging section as Section 13(8)(b) does not violate the levy on the supply made by the intermediary, particularly in view of Section 7, which designates such supplies to be inter-State supplies. And which power to designate inter-State supply also comes from Articles 246A, 269A(1) read with 269A(5) as discussed earlier. In my view, Section 13(8)(b) does not and cannot deem an inter-State supply to be an intra-State supply. When there is a specific provision for levy and collection of IGST, then, in my view, referring to the charging section of another Act is not called for or rather it would be irrelevant. Section 13(8)(b) of the IGST Act has been enacted pursuant to the powers under Article 269A(5) of the Constitution of India and in accordance with the scheme of the IGST Act by which IGST is levied on all inter-State supplies of goods and services.

While deciding on legislative competence or that under Article 265 no tax can be levied without authority of law

Having already held that Section 13(8)(b) has been enacted pursuant to the authority of law and that the said Section 13(8)(b) cannot be linked with Section 8(2) of the IGST Act to deem an inter-state supply as an intra-state supply, the said concerns are unfounded.

Whether Section 13(8)(b) of the IGST Act is in breach of Section 9 of the CGST Act

There is a specific provision dealing with the case of Petitioner viz. Section 13 (8)(b) of the IGST Act, which has been enacted pursuant to the powers under Article 269A (5) of the Constitution of India, then also in my view the challenge appears to be without substance.

Section 8(2) to submit that Section 13(8)(b) - Both the provisions have different purposes. As stated earlier Section 8 deals with nature of supply whereas Section 13 deals with place of supply and the attempt to artificially link Section 8(2) with Section 13(8)(b) is misplaced and unfounded

Whether the levy of GST on intermediary services leads to Double Taxation once on the Petitioner and then on the Indian purchaser of goods.

The first supply attracts Section 13 (8)(b) of the IGST Act. The second supply is liable to tax under the Customs Act, 1962 and the incidence of customs duty would be on the importer of goods and not on the intermediary service provider. Moreover, the principle is well settled that two taxes which are separate and distinct imposts on two different transactions/supplies is permissible as in law there is no overlapping.

Significance of Report of 139th Department related Parliamentary Standing Committee on Commerce

Parliamentary Committees are external aids to construction to be used only when there is ambiguity in the statute. The law relating to reliance upon Reports of Parliamentary Standing Committees has been once again reiterated in the decision of the Constitution Bench of the Supreme Court in the case of ***Kalpna Mehta v. Union of India (2018) 7 SCC 1***.

Hon'ble Court Verdict

I am of the view that neither Section 13(8)(b) nor Section 8 (2) of the IGST Act are unconstitutional. Also neither Section 13 (8) (b) nor Section 8 (2) of the IGST Act are ultra vires the IGST Act. Section 13 (8) (b) is also not ultra vires Section 9 of the CGST Act, 2017 or the MGST Act, 2017. Section 13(8)(b) as well as Section 8(2) of the IGST Act are constitutionally valid and operative for all purposes