

Recent Rulings by Courts and Authorities

High Court

Services performed under a sub-contracting arrangement are not intermediary services

In the case of *Genpact India Private Limited vs. Union of India*¹, the petitioner was engaged in providing services in the nature of maintenance of vendor/ customer master data, book-keeping, finalization of accounts, managing customer receivables, developing, licensing and maintaining software as per clients' needs, technical IT support services, data analysis etc., to the clients of the overseas group company located outside India under a master services agreement (“MSA”). The petitioner was claiming refund of unutilized ITC² of goods and services used for such export of services. While the adjudicating authority allowed refund to the petitioner, the appellate authority held that such services are in the nature of ‘intermediary services’ and hence do not qualify as ‘export of services’ (“**Impugned Order**”). The petitioner challenged the Impugned Order by way of a writ petition before the Hon’ble High Court.

The Punjab and Haryana High Court (“**P&B High Court**”) delved into the definition of ‘intermediary’, as defined under Section 2(13) of the IGST Act³ and observed that the scope of ‘intermediary’ is to mediate between 2 (two) parties, i.e., the principal service provider (third party) and the beneficiary (the agent’s principal) who receives the main service and expressly excludes any person who provides such main service on ‘his own account’. Further, the following 3 (three) conditions need to be satisfied for a person to qualify as an ‘intermediary’:

1. The relationship between parties must be of principal-agent;
2. The person must be involved in arrangement/ facilitation of provision of services provided to the principal by the third party; and
3. The person must not actually perform the services intended to be received by the recipient of service itself.

Upon perusal of the MSA, the P&B High Court noted that there is no separate agreement entered into between the petitioner and the overseas group company’s customers. In fact, a sub-contracting arrangement (and not principal-agency relationship) exists between the petitioner and the overseas group company. The services provided by the petitioner to overseas customers are the same services which the group company was contractually supposed to provide to these customers. Pursuant to the sub-contracting arrangement, the petitioner had undertaken to serve the overseas customers of the group company on its own account. By doing this, the petitioner did not facilitate the provision of services. The overseas group company remains responsible for obtaining new customers, negotiating and maintaining relationships with them, raising invoices for services provided, and resolving their disputes directly. For executing such a sub-contracting arrangement, the petitioner

¹ Genpact India Private Limited v. Union of India, 2022 (11) TMI 743 - Punjab and Haryana High Court.

² Input Tax Credit

³ Integrated Goods and Services Tax Act, 2017.

raises invoices upon the overseas group company and receives money. Therefore, the petitioner cannot be termed as an 'intermediary'.

The P&B High Court further noted that the respondents in the petitioner's own case during the erstwhile Service tax regime concluded that the petitioner cannot be treated as an intermediary. Considering that the definition and scope of 'intermediary' is clarified to be similar under the erstwhile Service tax and the present GST regime *vide* Circular⁴ and that sub-contracting of a service is not an 'intermediary' service, the P&B High Court held that if there is no change in any facts and/ or law, it is not open for revenue authorities to deviate from the views expressed previously and the principle of consistency should apply.

Basis the above, the services supplied by the petitioner were held to qualify as 'export of services' and not 'intermediary' services. Accordingly, the Revenue authorities were directed to grant refund of accumulated ITC to the petitioner.

JSA Comments

The ruling is based on a detailed analysis of the specific terms and conditions provided in the MSA executed by the petitioner and brings out important principles to determine the specific situation under which a transaction may be classified as 'intermediary services'. Placing emphasis on the importance of principle of consistency, the ruling highlights that the revenue authorities cannot adopt divergent views when facts and/ or law are same on a particular matter.

This ruling may help in resolving the ambiguity on this matter and settle the existing disputes which have been raised by the GST authorities in this regard.

Amendment in Form GSTR-1/ Form GSTR-3B allowed to rectify incorrect GSTIN⁵ and avail ITC⁶

In the case of *Mahalaxmi Infra Contract Limited vs. GST Council and Others*⁷, the petitioner was engaged in the business of mining and transportation of goods for Central Government undertakings. While filing Form GSTR-1 for the month of January in 2019, the petitioner committed an inadvertent error by mentioning incorrect GSTIN of the concerned recipient. Consequently, the invoice did not reflect in the auto-generated Form GSTR-2A of the recipient and hence, they were not able to avail ITC in respect of GST charged on such invoice by the petitioner. The petitioner realized this error only at the time of finalization of accounts with the recipient in June 2021. However, the error could not be rectified due to non-availability of the functionality on GSTN portal. Accordingly, the petitioner filed the Writ Petition before the Hon'ble High Court of Jharkhand ("**Jharkhand HC**") to allow the rectification.

The Jharkhand HC observed that the online mechanism for discovery and rectification of mistakes by way of filing suitable Forms, i.e., Form GSTR-2/ Form GSTR-1A/ GST-MIS 1/ GST MIS-2, as applicable, have not yet been activated. This has led to the unintended failure of the petitioner to discover its error and rectify it on its own. It was also observed that the present case was revenue neutral and did not present any additional tax impact, or loss of revenue for the State exchequer (as both the correct and incorrect GSTIN of the recipients fall within the jurisdiction of the State of Jharkhand). Therefore, in the interest of justice, the Jharkhand HC allowed the petitioner to make necessary corrections in its Form GSTR-1 for January 2019, either online or manually.

⁴ Circular No. 159/15/2021-GST dated September 20, 2021.

⁵ Goods and Services Tax Identification Number

⁶ Input Tax Credit

⁷ Mahalaxmi Infra Contract Limited v. Goods And Services Tax Council and Others – 2022 (11) TMI 323 – Jharkhand High Court.

Appellate Authority for Advance Ruling (AAAR)/ Authority for Advance Ruling (AAR)

Amount granted by Government for undertaking charitable activities, beneficial to public, construed as 'subsidy'

In the case of *Jayshankar Gramin and Adivasi Vikas Sanstha*⁸, the applicant was a charitable trust, which among other activities, rendered services under "One stop crises centre" scheme introduced by the Ministry of Women and Child Development to destitute women who are litigating divorce, or are homeless, or victim of domestic violence. The Central Government granted an amount of INR 200,000 (Indian Rupees two lakh) per month to the applicant to act as an implementing agency for the said scheme and for meeting the expenses involved. The amount of grant was subject to presentation of actual list of expenses incurred. The issue before the AAAR was whether by acting as an implementation agency, the applicant is 'supplying' 'services' to the government and whether the amount of grant received is towards 'consideration' for such supply.

Based on the analysis of the definition of 'services' under the CGST Act, the AAAR observed that the GST laws⁹ provide a wide connotation to the term 'services' to include within its ambit any activity other than goods, money and securities. Applying the above to the present case, the AAAR held that the activities undertaken by the applicant while acting as an implementation agency to be construed as 'services'.

Further, with regard to whether rendition of such 'services' amounts to 'supply' under GST laws, the AAAR observed that for an activity to qualify as supply, it must be made by a person for 'consideration' in the course or furtherance of business, where the term 'consideration' includes any payment made or agreed to be made, in money or otherwise, by the recipient of supply but excludes 'subsidy' given by the government. Interpreting the meaning of the term 'subsidy' to be any amount granted by the Government to any individual or company for undertaking charitable activities beneficial to the public, the AAAR observed in the present case that the activities carried out by the applicant were for welfare of the destitute women and served the mankind in general. Therefore, grant received from the government in this regard is to be construed as subsidy. It was held that as subsidy was specifically excluded from the purview of the term 'consideration', no supply could be said to take place between the applicant and the government. Accordingly, it was held that GST is not applicable.

ITC admissible on expenditure towards corporate social responsibility ("CSR")

In the case of *Bambino Pasta Food Industries Private Limited*¹⁰, the applicant purchased oxygen plant along with its spare parts and donated the same to AIIMS during the pandemic. The said expenditure is mandated to be incurred as per Section 135 of the Companies Act, 2013 ("**Companies Act**"). The issue before the Telangana AAR was whether ITC is admissible in respect of GST paid on procurements made for incurring CSR expenditure or not.

The applicant contended that the expenditure incurred by them is mandated under the Companies Act and it is the applicant's obligation to incur such expenses in order to be compliant with the law. Therefore, the same is in the course of furtherance of business. Further, such expenses cannot be said to be made in the form of 'gifts', as, these are mandatory in nature and do not involve voluntary transfer of property without any consideration. Therefore, ITC cannot be said to be blocked under Section 17(5) of the CGST Act.

The AAR concurred with the contentions of the applicant and held that expenditure made towards CSR under Section 135 of the Companies Act is in furtherance of the business and hence, ITC in respect of GST paid on procurements made for incurring CSR expenditure will be eligible under GST laws.

⁸ Jayshankar Gramin and Adivasi Vikas Sanstha, 2022 (10) TMI 309 – Appellate Authority for Advance Ruling, Maharashtra.

⁹ GST laws collectively refer Central Goods and Services Tax Act, 2017 ("**CGST Act**") and Integrated Goods and Services Tax Act, 2017 ("**IGST Act**").

¹⁰ Bambino Pasta Food Industries Private Limited, 2022 (11) TMI 482 - Authority for Advance Ruling, Telangana

Notifications/Instructions/ Circulars etc.

Competition Commission of India to replace National Anti-Profiteering Authority (NAA) for GST anti-profiteering complaints

Notification No. 23/2022-Central Tax and Notification No. 24/2022-Central Tax both dated November 23, 2022

The Competition Commission of India (“CCI”) will replace the National Anti-Profiteering Authority (NAA) for GST anti-profiteering complaints. Central Goods and Services Tax Rules, 2017 are amended to include the said changes. These changes will come into effect from December 1, 2022.

Clarification on inverted duty refund related issues

Circular No. 181/13/2022-GST dated November 10, 2022

CBIC has released a clarification on issues related to the formula prescribed under sub-rule (5) of Rule 89 of CGST Rules for refund of unutilized ITC on account of inverted duty structure, which was amended *vide* Notification No. 14/2022- Central Tax dated July 5, 2022¹¹.

Further, *vide* Notification No. 09/2022-Central Tax (Rate) dated July 13, 2022, restrictions have been placed, with effect from July 18, 2022, on refund of unutilised ITC on account of inverted duty structure in case of supply of certain goods falling under chapter 15 (related to animal, vegetable or microbial fats and oils) and 27 (related to mineral fuels, oils, bituminous substances, mineral waxes) (“**Restricted Goods**”).

In relation to the above amendments, following clarifications have been issued:

1. Amended formula will only apply to refund applications filed on or after July 5, 2022. The refund applications filed before July 5, 2022, will be dealt as per the existing formula.
2. Restrictions imposed on Restricted Goods will apply to refund applications filed on after July 18, 2022 and would not apply to refund applications filed before July 18, 2022.

Amendments under FTP¹² to extend export benefits/ fulfillment of export obligations for invoicing, payment and settlement of exports and imports in INR¹³

Notification No. 43/2015-2020 dated November 9, 2022 and Public Notice No. 35/2015-20 dated November 9, 2022

In accordance with RBI's A.P. (DIR Series) Circular No.10 dated July 11, 2022, the DGFT¹⁴ has made suitable amendments in FTP to allow for International Trade Settlement in INR for invoicing, payment, and settlement of exports and imports, including fulfillment of export obligation for Advanced Authorization and Duty-Free Import Authorization, EPCG Scheme¹⁵. Settlement of trade transactions would take place through Special Rupee Vostro Accounts opened by AD¹⁶ banks in India.

¹¹ Formula for calculating refund of unutilized ITC on account of inverted duty structure was amended to allow utilization of proportionate ITC on input services for payment of output tax liability.

¹² Foreign Trade Policy 2015-2020 read with Handbook of Procedures 2015-2020

¹³ Indian Rupees

¹⁴ Directorate General of Foreign Trade

¹⁵ Export Promotion Capital Goods Scheme

¹⁶ Authorised Dealer

Relief in annual Average Export Obligation for EPCG Scheme in respect of specified sectors

Policy Circular No. 44/2015-20 dated November 17, 2022

The government has observed decline in exports of particular sectors by more than 5 % as compared to the previous year. In order to grant relief to such sectors, the DGFT has allowed proportionate reduction in their annual Average Export Obligation for FY 2021-22 to be fulfilled under EPCG authorizations.

Tax Practice

JSA offers a broad range of tax services, both direct and indirect, in which it combines insight and innovation with industry knowledge to help businesses remain compliant as well as competitive. The Tax practice offers the entire range of services to multinationals, domestic corporations, and individuals in designing, implementing and defending their overall tax strategy. Direct Tax services include (a) structuring of foreign investment in India, grant of stock options to employees, structuring of domestic and cross-border transactions, advising on off-shore structures for India focused funds and advise on contentious tax issues under domestic tax laws such as succession planning for individuals and family settlements, (b) review of transfer pricing issues in intra-group services and various agreements, risk assessment and mitigation of exposure in existing structures and compliances and review of Advance Pricing Agreements and (c) litigation and representation support before the concerned authorities and before the Income Tax Appellate Tribunal, various High Courts and Supreme Court of India. Under the Indirect Tax, JSA provides services such as (a) advisory services under the Goods and Services Tax laws and other indirect taxes laws (VAT/ CST/ Excise duty etc.), and includes review of the business model and supply chain, providing tax implications on various transactions, determination of tax benefits/exemptions, analysis of applicability of schemes under the Foreign Trade Policy (b) transaction support such as tax diligence (c) assistance in tax proceedings and investigations and (d) litigation and representation support before the concerned authorities, the Appellate Tribunals, various High Courts and Supreme Court of India. The team has the experience in handling multitude of assignments in the manufacturing, pharma, FMCG, e-commerce, banking, construction & engineering, and various other sectors and have dealt with issues pertaining to valuation, GST implementation, technology, processes and related functions, litigation, GST, DRI investigations etc. for large corporates.

This Newsletter has been prepared by:



Manish Mishra

Partner & Head of
Practice - Indirect Tax



Shareen Gupta

Partner



Shikha Parmar

Senior Associate



Meghna Mittal

Associate



14 Practices and
23 Ranked Lawyers



15 Practices and
18 Ranked Lawyers



7 Practices and
2 Ranked Lawyers



11 Practices and
39 Ranked Partners
IFLR1000 APAC Rankings 2022

Banking & Finance Team
of the Year

Fintech Team of the Year

Restructuring & Insolvency
Team of the Year



Among Top 7 Best Overall
Law Firms in India and
10 Ranked Practices

13 winning Deals in
IBLJ Deals of the Year

6 A List Lawyers in
IBLJ Top 100 Lawyer List



Banking & Financial Services
Law Firm of the Year 2022

Dispute Resolution Law
Firm of the Year 2022

Equity Market Deal of the
Year (Premium) 2022

Energy Law Firm of the Year 2021



Ranked #1
The Vahura Best Law Firms to
Work Report, 2022

Top 10 Best Law Firms for
Women in 2022

For more details, please contact km@jsalaw.com

www.jsalaw.com



Ahmedabad | Bengaluru | Chennai | Gurugram | Hyderabad | Mumbai | New Delhi



This newsletter is not an advertisement or any form of solicitation and should not be construed as such. This newsletter has been prepared for general information purposes only. Nothing in this newsletter constitutes professional advice or a legal opinion. You should obtain appropriate professional advice before making any business, legal or other decisions. JSA and the authors of this newsletter disclaim all and any liability to any person who takes any decision based on this publication.