BPO SERVICE PROVIDER NOT BE CONSIDERED AS AN "INTERMEDIARY" FOR THE PURPOSES OF IGST ACT

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ABSTRACT: *The recent ruling of the Punjab and Haryana High Court in Genpact India Pvt. Ltd. v. Union of India and others, which pertains to the eligibility of Business Process Outsourcing (BPO) services providers to claim the unused Input Tax Credit (ITC) on zero-rated supplies. The article provides an in-depth understanding of the definitions of "intermediary" and "export of service" under Section 2(13) and Section 2(6) of the Indian Goods and Services Tax (IGST) Act, respectively. The case concerned Genpact, a BPO service provider, and Genpact International Inc. (GI), where Genpact provided BPO services to GI's customers on its own account, rather than acting as a mediator between GI and its customers. The Joint Commissioner of CGST (Appeals) rejected Genpact's application for a refund, stating that the services provided by Genpact were "intermediary services," which the court overruled. The article sheds light on the conditions that fall within the scope of "intermediary service" and explains why subcontracting services are not eligible for intermediary services. Furthermore, it provides clarity on how the Court's ruling allows BPO service providers to benefit from the provisions of the IGST Act and claim refunds for the unused Input Tax Credit (ITC) on zero-rated supplies.*

KEYWORDS: *Business Process Outsourcing (BPO), Input Tax Credit (ITC), Intermediary Service, Export of Service, Indian Goods and Services Tax (IGST) Act, Subcontracting Services.*

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I. INTRODUCTION

In the recent judgement of *Genpact India Pvt. Ltd. v. Union of India and others*, [CWP-6048-2021 (O&M)][1], the Punjab and Haryana High Court (**'P&H High Court'**), while quashing the order of the Joint Commissioner CGST ('**Appeals**'), clarified the proposition that the services, rendered by the Business Process Outsourcing ('**BPO**') providers, fall within the definition of "export of service" and maintained the eligibility of a registered person to claim the unused Input Tax Credit ('**ITC**') on zero-rated supply of such services. The court also stipulated the criteria for services covered under the ambit of "intermediary service."

Under the Indian Goods and Services Tax ('**IGST'**) Act, the terms "Intermediary" and "Export of Service" have the been defined.

Section 2(13) of the IGST Act[2] defines an intermediary to mean,

> "*a broker, an agent, or any other person who arranges or facilitates the supply of goods or services or both, between two or more persons, but does not include a person who supplies such goods or services or both on his account.*"

In essence, the term "intermediary" pertains to a tripartite relationship involving the supplier of goods or services, the principal on whose behalf the supply is made, and the person who ultimately receives the supply (i.e., the principal's customer). However, the classification of an individual as an intermediary under Section 2(13) of the IGST Act is contingent upon the existence of an arrangement or facilitation of the supply of goods, services, or securities. Notably, the provision expressly excludes persons supplying goods or services on their own account from the purview of the term "intermediary".

It follows that for an individual to be deemed an intermediary, two supplies must occur simultaneously: the supply of goods or services between the principal and the third party, and the supply of the intermediary's own services (typically for a fee or commission) to the principal. This formulation accords with the ordinary meaning and intent of the term "intermediary", which implies a mediating role in facilitating the supply chain.

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[1] *Genpact India Pvt. Ltd. v. Union of India and others*, [CWP-6048-2021 (O&M)]
[2] The Integrated Goods and Services Tax Act, 2017, § 2(13), No. 13, Acts of Parliament, 2017 (India).

Export of Service is defined in Section 2(6) of the IGST Act.[3] It means the supply of any service when:

> *"(a) the supplier of service is located in India,*
>
> *(b) the recipient of service is located outside India,*
>
> *(c) the place of supply of service is outside India,*
>
> *(d) the payment for such service has been received by the supplier of service in convertible foreign exchange, and*
>
> *(e) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in Section 8 of the IGST Act."*

Fundamentally, export of services entails the provision of services by an Indian service provider to a recipient situated beyond the geographical boundaries of India. To merit the nomenclature of export of service, the place of supply of such service must fall outside the territorial confines of India, and the consideration for the same must be received in a foreign currency.

II. FACTS OF THE CASE

In the instant case, Genpact India Pvt. Ltd., (**'Genpact'**), a BPO, entered a contract with Genpact International Inc., (**'GI'**) in the form of a Master Service Agreement (**'MSA'**), wherein, Genpact was engaged by GI, for the actual performance of BPO services and IT services to GI customers, as well as for acquiring new clients and maintaining relationships with current clients. The provisions of the MSA largely provided for the sub-contracting of services, wherein the arrangement was made on a principal-to-principal basis. Further, The BPO services were provided by Genpact directly to the customers of GI, on Genpact's own account, and not as a facilitator between GI and its customers. The agreement also provided for Genpact's responsibility in providing the services, including any risk or reward that arises from the same.

[3] *Id*, § 2(8).

Genpact sought to claim a refund of the unutilized ITC on the zero-rated supply of services as they asserted that the BPO services are an "export of services" in terms of Section 16(1) of the IGST Act.[4] The Joint Commissioner of CGST (Appeals), however, rejected the petitioner's application for a refund, on the ground that the services rendered by the petitioner are "intermediary services," in terms of Section 2(13) of the IGST Act.

Aggrieved by the commissioner's order, Genpact filed a writ petition in the Punjab and Haryana High Court.

III. PETITIONER'S CONTENTION IN THE HIGH COURT

Genpact, as the Petitioner, argued that the services rendered by them would not be covered under the ambit of "intermediary services" as it did not facilitate any supply of service between GI and its customers, but provided the same "on their own account." The Petitioner also argued that the MSA is a subcontracting agreement and in terms of CBIC circular dated 21.09.2021,[5] "subcontracting services" do not qualify as "intermediary services".

The Petitioner also argued that they had been availing the refund of unutilized ITC during the pre-GST, wherein the definition of "intermediary service" is largely similar to that provided in the IGST Act. Therefore, the authority's view of the assessee in different periods, in terms of the definition of "intermediary services" under the Service Tax regime and the GST regime, should be consistent when the facts and circumstances are the same.

IV. REVENUE'S CONTENTION IN THE HC

The Union of India (Department) argued that the petitioner satisfies every requirement for an "intermediary," as the services rendered by the petitioner are on behalf of the GI, as specified in the MSA. The department also argued that the relationship between GI and the petitioner is that of a principal-agent since one of them has authority over the other in terms of decision-making capacity. Further, in terms of the applicability of the pre-GST law related to availing of the ITC, the department argued that the principle of res judicata does not apply to tax-related matters, each assessment year is distinct from the last, whether the assessee was allowed to avail the unutilized ITC does not set a precedent for the similar matters post-GST.

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[4] Id § 16(1).

[5] CBIC *vide* Circular No. 159/15/2021-GST

V. OBSERVATIONS AND RULING OF THE PUNJAB AND HARYANA HIGH COURT

The P&H High Court made two key observations regarding the main issue: first, any person providing service on his "own account" is not considered an "intermediary" because there must be a “principal-agent relationship”, “facilitation of service”, and “mediation between the principal and the third party”. Second, the court noted that the definition of "intermediary" in the GST law is borrowed from the Service Tax regime and is broadly similar in scope, and as a result, the department cannot take different views in different periods. The Court upheld the consistency principle relying on the rulings of *M/s Radhasoami Satsang Soami Bagh, Agra v. Commissioner of Income Tax*[6] and *Bharat Sanchar Nigam Ltd. v. Union of India***.**[7]

In respect of the observations made, the court ruled that the petitioner's BPO services are outside the ambit of “intermediary services” and rather constitute an “export of services” under section 16(1) of the IGST Act. The court also made reliance on the CBIC circular and upheld the petitioner’s contention that the master-supply agreement was indeed in nature of a ‘sub-contract’ and therefore not an intermediary service.

VI. CONCLUSION

The Punjab and Haryana High Court's decision has opened a window of opportunities, for India has become a major international market for BPO service providers. The court eliminated any uncertainty regarding the definition of “intermediary” and “intermediary services”. The recent judgement is good not only in terms of law but also in terms of business.

However, the applicability of the legal principle is conditional on the fact, that there aren’t any expressed or implied provisions establishing a principal-agent relationship. The agreement should also include a subcontract-like structure. It is also very crucial that, the services are rendered on the service provider's “own account”.

[6] M/s Radhasoami Satsang Soami Bagh, Agra v. Commissioner of Income Tax, (1992), 1 SCC 659.
[7] Bharat Sanchar Nigam Ltd. v. Union of India, (2006) 3 SCC 1.