

Back-office and other support services provided on own account would not qualify to be an intermediary. Laws, related to intermediary, remain unchanged in pre-GST and GST era: Punjab and Haryana HC

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Summary

The Punjab and Haryana High Court (HC) ruled that the petitioner engaged in providing, various Business Process Outsourcing (BPO) services, i.e., vendor data management, supply chain management, data analysis, technical IT support, developing, licencing, maintaining software, etc., to an overseas entity, cannot be regarded as an intermediary under the GST law.

On perusal of the master services agreement (MSA), the HC noted that the overseas entity had sub-contracted the petitioner to provide above services on principal-to-principal basis. The MSA made no mention of the petitioner being required to arrange/facilitate the main service, and such services have been provided by the petitioner on its own account. Furthermore, the petitioner would be held liable for any risk associated with the performance of services.

The HC also stated that the MSA could not be treated differently at different times because the legal position regarding the scope and ambit of intermediary services under the GST regime has not changed vis-a-vis the service tax regime. As a result, the HC reversed the impugned order, which denied the petitioner's claim for a refund of unutilised input tax credit (ITC) in connection with the aforementioned services provided to an overseas entity on the ground that it is an intermediary.

Facts of the case

- Genpact India Private Limited ("the petitioner") is a BPO service provider registered in Haryana. The petitioner is engaged in providing various backend and IT services to customers in India as well as outside India. The petitioner renders such services to its clients remotely through the internet using its own infrastructure.
- The petitioner entered an MSA with Genpact International (GI) entity incorporated outside India, for providing BPO services i.e., vendor data management, supply chain management, data analysis, technical IT support, developing, licencing, maintaining software, etc., to clients of GI located outside India on principal-to-principal basis.
- The petitioner applied for a refund of the unutilised ITC on account of export of services under the cover of Letter of Undertaking (LUT) without payment of IGST as per section 16 and 54 of CGST Act 2017.
- The department however partially rejected the refund claim on account of ineligible credit. On further appeal, the Commissioner reviewed the application and held that such intermediary services as per Section 2(13) of the Integrated Goods and Services Tax Act, 2017 (IGST Act), do not qualify to be export of services under Section 2(6) of IGST Act. Thus, the entire refund claim was

rejected. Therefore, the petitioner filed the present writ petition before the HC.

Punjab & Haryana HC observations and ruling [CWP-6048-2021 (O&M dated 11 November 2022)]:

- **Services were provided on own account:** The MSA between the petitioner and GI is on a principal-to-principal basis and there is no separate agreement of the company with any of the customers of the parent entity. Nothing has been brought on record to show that the petitioner has a direct contract with the customers of GI. Further, there is nothing on record to show that petitioner is liaising or acting as an "intermediary" between GI and its customers. Thus, it can be concluded that the services rendered by the petitioner is main service and not of intermediary.
- **No major change in the definition of "intermediary services":** The HC observed that under service tax regime, the intermediary was defined under rule 2(f) of Place of Provision of Service Rules, 2012. Further, under the GST regime the same has been defined under section 2(13) of the IGST Act. Also, it was noted that the Board vide its circular dated 20 September 2021 has clarified that the above definition under GST was borrowed from service tax.

- **Different view for different period is not valid in law:** The HC relied on the judgement of SC in case of Bharat Sanchar Nigam Ltd and M/s Radhasoami Satsang Soami and held that principle of consistency shall be applied and earlier view that petitioner is not an intermediary shall prevail.
- **Sub-contracting for a service in not an "intermediary service":** The petitioner is providing the services which have been sub-contracted to it by GI. As a sub-contractor it is receiving fee/charges from the main contractor, i.e., GI for its services. The main contractor, i.e., GI, is in turn receiving commission from its clients for the main services that are rendered by the petitioner pursuant to the arrangement of sub-contracting. Further, the Board has clarified that sub-contracting in not an intermediary service.
- **Impugned order rejecting refund set aside:** Hence, allowing the writ the HC set aside order holding the petitioner to be an "intermediary" under Section 2 (13) of the IGST Act. Further, the HC restored the order-in-original granting refund in favour of the petitioner and directed that the benefit of this order shall ensure to the petitioner for the grant of subsequent refunds as well.

Our Comments

The taxability of 'intermediary services' has been a matter of extensive litigation since the inception of the GST regime. To mitigate these ambiguities/litigations, the Board had clarified that subcontracting shall be excluded from the scope of intermediary.

The present ruling is in line with the Board's clarification. Further, the HC has stated that there has been no change in the definition of the term intermediary under the GST regime vis-a-vis the service tax regime. Thus, it implies that, all of the previous regime's decisions and clarifications would be squarely applicable under GST regime as well.

Thus, this is a welcome ruling and should settle the issue with respect to taxability of BPO services, back-office operation services, vendor management, technical IT support, supply chain management, data analysis, etc. provided on own account. In addition, the ruling should also help clear working capital blockages due to pendency of huge refund claims for businesses in similar industry.

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