

## **Professional consultancy services provided by an Indian entity to overseas entities do not qualify as intermediary services - Delhi HC**

29 March 2023



## Summary

The Delhi High Court (HC) has held that professional consultancy services provided by an Indian branch office of M/s Ernst & Young Limited (the petitioner) to E&Y overseas entities would qualify as an export of services under the Goods and Services Tax (GST) law. The HC has stated that even if it is agreed that the petitioner provided services on behalf of a third party, the provision of such services by the petitioner on behalf of its head office (HO) would not be tantamount to intermediary services. The HC has further ruled that the petitioner is the actual supplier of the professional services and has not arranged or facilitated the supply from any third party. Therefore, the HC has concluded the services rendered by the petitioner as an export of services and, accordingly, directed the adjudicating authority to process the refund.

### Facts of the case

- The petitioner is an Indian branch office of M/s Ernst & Young Limited, a company incorporated under the laws of the United Kingdom (E&Y Limited).
- The petitioner, on behalf of E&Y Limited, is providing professional consultancy services to various entities of the E&Y group on an arm's length basis and raising invoices to the respective group entities for such services.
- The petitioner applied for a refund claim of input tax credit (ITC) of taxes paid in respect of export of services for the period from December 2017 to March 2020.
- In this respect, the Adjudicating Authority (AA) issued a show cause notice (SCN), rejecting the refund claim and asking an explanation as how the services would qualify as an export of services.
- The AA acknowledged that the service recipients were located outside India, but it rejected the refund, contending that the services provided are intermediary services. The Appellate Authority also confirmed the decision passed by AA.
- Therefore, the petitioner has filed the present writ petition, impugning the order-in-appeal and orders-in-original.

### Delhi HC observations and ruling [W.P.(C) 8600/2022, judgement dated 23 March 2023]

- **A person who provides services is not an intermediary:** The HC noted that there is no doubt that the petitioner does not arrange or facilitate services from third parties for E&Y Limited group entities, rather it renders services to them. Further, AA's reasoning for rejecting the refund claim is fundamentally flawed. Therefore, the HC ruled that

a person who provides services, as opposed to arranging or facilitating of goods from another supplier, is not an intermediary.

- **Interpretation of definition of 'intermediary':** The HC is of the view that the last limb of the definition of 'intermediary' merely clarifies that the definition is not to be read in an expansive manner and does not include a person who supplies goods, services, or securities on his own account. The HC further ruled that even if it is accepted that the petitioner has rendered services on behalf of a third party, it does not make the petitioner an 'intermediary', as it is the actual supplier of the professional services and has not arranged or facilitated the supply from any third party.
- **No change in the scope of intermediary services:** The Delhi HC observed that the definition of the term 'intermediary' under the Finance Act, 1994, is identical to the definition of the term 'intermediary' under Section 2(13) of the Integrated GST Act, 2017 (IGST Act). Further, the Central Board of Indirect Taxes and Customs (CBIC) also acknowledged in Circular No. 159/15/2021-GST that there is broadly no change in the scope of intermediary services in the GST regime vis-à-vis the service tax regime.
- **Services covered under the definition of 'export of services':** The HC held that the services rendered by the petitioner does not fall under intermediary services. Accordingly, the place of supply of such services is required to be determined based on the location of the recipient of services, i.e., outside India. Therefore, the professional services rendered by the petitioner would fall within the scope of definition of 'export of services' in terms of Section 2(6) of the IGST Act.

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## Our comments

The taxation of intermediary services was one of the complex and contentious issues under the service tax regime, which also continued under GST. Under GST, various refund claims filed for the export of services are being denied by tax authorities on the basis that the underlying supply is an intermediary service, which is taxable in India. To remove the ambiguity and resolve legal disputes in this regard, the CBIC issued a circular dated 20 September 2021 w.r.t. interpretation of the scope of intermediary services. The circular clarified that the concept of an 'intermediary' in GST was borrowed from the service tax regime. Furthermore, the circular acknowledged that there is broadly no change in the scope of intermediary services in the GST regime vis-à-vis the service tax regime, except the addition of supply of securities in the definition of an 'intermediary' in the GST law.

Even in the case of Genpact India Private Limited, the Punjab and Haryana HC held that the laws related to an intermediary remained unchanged in the pre-GST and GST era. The present ruling passed by the Bombay HC is also on similar lines. This positive and welcoming ruling would resolve pending litigations on this issue under GST and the service tax regime.

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