



Dharmendra Jani- Final Bombay HC verdict GST on Intermediary services



Facts of the case:

- The petitioner, a proprietary firm, is engaged in providing marketing and promotion services to its customers located outside India.
- The overseas customers to whom services are provided by the petitioner are inter alia engaged in the manufacturing and/or sale of goods. The petitioner identifies customers for such foreign principal in India and facilitates supply of goods between the both.
- The foreign principal pays a commission to the petitioner against an invoice issued by the petitioner. The entire payment is received by the petitioner in India in convertible foreign exchange.
- Such transactions are popularly known as indenting commission/ foreign commission/ intermediary services.
- Issue was brought to Division bench of Bom HC- whether GST is payable on such foreign commission income earned in India?

Split verdict by Bombay HC (July 2021)

Favorable verdict by Justice Ujjal Bhuyan :

- Section 13(8)(b) of IGST Act, 2017 is ultra vires the said Act besides being unconstitutional.
- The extra-territorial effect given by way of section 13(8)(b) of the IGST Act has no real connection or nexus with the taxing regime in India introduced by the GST system.
- Dismisses Revenue's stance that levy of IGST on supply of services by Intermediaries to foreign customers would strengthen the 'Make in India' program by encouraging foreign investment

Adverse Verdict by Justice Abhay Ahuja

- Unable to be persuaded by Justice Bhuyan's opinion and therefore would like to record separate opinion in the matter.
- In view of the conflicting judgement, matter referred to 3rd Judge.



Verdict by 3rd Judge of Bombay HC (April 2023)

- Answering a reference arising from differing opinions of Division Bench Judges, 3rd Judge remarks that
“the view I have taken is distinct from the view taken by the Hon’ble members of the Division Bench. As a referral Judge, there would be no bar in expressing an independent opinion while deciding the reference by assigning reasons which would support such opinion”
- The 3rd Judge refuses to strike down provisions of Section 13(8)(b) and Section 8(2) of IGST Act as unconstitutional. Hence, the levy of GST on indenting commission/intermediary services is totally legal and valid in Law.
- Further, the ruling also states that the fiction which is created by Section 13(8)(b) would be required to be confined only to the IGST Act and there is no scope for the fiction to travel to the CGST and the MGST Acts.
- The judge therefore opines CGST + SGST is not payable.



Final verdict by Div Bench (June 2023)

- Earlier, due to the divergent opinion in order dated **June 9, 2021**, the matter was placed before the third judge, who vide order dated **April 18, 2023** upheld the provisions of Section 13(8)(b) and Section 8(2).
- The 3rd judge had held that the said provisions are confined in their operation to the provisions of IGST Act only and the same cannot be made applicable for levy of tax on services under the CGST and MGST Acts
- Accordingly, the division bench in its final judgement dt. 06.06.2023 considered the opinion of 3rd judge and has finally upheld the provisions of Section 13(8)(b) and Section 8(2) of the IGST Act to be legal, valid and constitutional.

THANK YOU



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