



# 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 3<sup>rd</sup> Judge.



## Final verdict by 3<sup>rd</sup> Judge of Bombay HC (April 2023)

- Answering a reference arising from differing opinions of Division Bench Judges, 3<sup>rd</sup> 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 3<sup>rd</sup> 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 that IGST is payable on such overseas transaction and not CGST + SGST.





## Open Issues post Final HC verdict

- Whether IGST should be paid on transactions of foreign commission/ indenting commission earned by registered person in India?
- Final Bombay HC states that IGST is payable on transactions of foreign commission. What would happen to cases wherein registered person has paid CGST+SGST on such transactions.
- Registered persons having annual turnover upto Rs 50 Lakhs may have opted for Service Composition scheme and paid reduced GST of 6% GST (3% CGST & 3% SGST) on such overseas commission earned.
- It would be worth noting that IGST transactions are not allowed under composition scheme. Will this ruling make the registered person ineligible for the composition scheme for all the past years?
- Should one wait if the petitioner prefers appeal to Supreme Court over the Final Bombay HC verdict?

# THANK YOU

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