IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 13238 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 13243 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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MATERIAL RECYCLING ASSOCIATION OF INDIA
Versus
UNOIN OF INDIA & 2 other(s)

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Appearance:
MR ABHISHEK RASTOGI WITH MR NACHIKET A DAVE(5308) for the Petitioner(s) No. 1
MR DEVANG VYAS(2794) for the Respondent(s) No. 1
MR PY DIVYESHWAR for the Respondent(s) No. 3
VIRAL K SHAH(5210) for the Respondent(s) No. 2

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 24/07/2020

CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Rule returnable forthwith. Mr. Viral K. Shah, learned advocate waives service of notice of rule on behalf of the respondent nos.1 and 2. Mr. P. Y. Divyeshwar, learned advocate waives service of notice of rule on behalf of the respondent no.3.

2. By this petition under Article 226 of the Constitution of India, the petitioner has challenged the constitutional validity of Section 13(8)(b) of the Integrated Goods Service Tax Act, 2017 (for short "the IGST Act, 2017") and to hold the same as ultra vires under Articles 14, 19, 265 and 286 of the Constitution of India with a direction to the respondent to refund of IGST paid on services provided by the members of the petitioner association and to their clients located outside India.

3. The petitioner is an association comprising of recycling industry engaged in manufacture of metals and casting etc., for various upstream industries in India. The members of the petitioner also act as an agents for scrape, recycling companies based outside India engaged in providing business promotion and marketing services for principals located outside

India. The members of the petitioner also facilitate sale of recycled scrap goods for their foreign principals in India and other countries. Thus, the members of the petitioner association not only deal with goods sold by foreign principals to customers in India but also facilitate sale of goods by foreign principals in non-taxable territory to their customers, who are also located in non-taxable territories. The members of the petitioner association are registered as "Taxable Person" under the provisions of the Central Goods & Service Tax Act, 2017 (for short "CGST Act").

3.1 It is the case of the petitioner that the members of the petitioner association have no role to play in the actual sale and purchase of recycled scrap as the goods supplied by foreign clients to its purchasers are directly shipped by the foreign client to the Indian or overseas purchaser and thereafter, such goods are cleared by the purchaser from the Customs authorities on its own account. The foreign members of the petitioner association raises sales invoice in the name of the purchaser and the purchaser who may be either Indian or overseas directly remits the sale proceeds to the foreign client.

3.2 According to the petitioner, member of the petitioner association receives only the

commission upon receipt of sale proceeds by its foreign client in convertible foreign exchange. The members of the petitioner association raise invoices upon its foreign client for such commission received by them. Thus, according to the petitioner, the transaction entered into by the members of the petitioner association is one of export of service from India and earning valuable convertible foreign exchange for the same.

3.3 According to the petitioner, IGST cannot be levied on the members of the petitioner association, who are engaged in the transaction of export of service as stated above as the petitioner members' export of services is covered by the Section 16(1) of the IGST Act, 2017 which provides for "zero rated supply" .

3.4 The export of services as defined under sub-section-6 of Section-2 of the IGST Act,2017 reads thus:-

> *"6. Export of service means the supply of any service when,---*
> *(i) the supplier service is located in India;*
> *(ii)the recipient of service is located outside India;*
> *(iii) the place of supply of service is outside India;*

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and

(v) 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;

3.5 The definition of intermediary is provided in sub-section 13 of Section-2 of the IGST Act,2017 reads thus:

2(13) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account;"

3.6 It is the case of the petitioner that Section-13 of the IGST Act,2017 deals with situations where location of the supplier or location of the recipient is outside India.

Relevant extract of Section 13 of the IGST Act,2017 relied upon by the petitioner reads as under:-

> *"13. (1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.*
>
> *(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:*
>
> ********
>
> *(8) The place of supply of the following services shall be the location of the supplier of services,-- namely:*
>
> *(a) services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders:*
>
> *(b) intermediary services;*
>
> *(c) services consisting of hiring of means of transport, including yachts but excluding*

aircrafts and vessels, up to a period of one month."

3.7 The petitioner has thereafter, referred to the Section 2(93) of the CGST Act which stipulates who could be considered as recipient of goods or service. Section 2(93) of the CGST Act reads as under:

2(93) "recipient" of supply of goods or services or both, means —

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and

(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered, and any reference to a person to whom a

supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;

In a contract of supply of goods and/or services, there are two parties, one is known as supplier of goods and/or services and other is called recipient of goods and/or services.

In the supply contract involving the payment of consideration, the person who is liable for payment of such consideration will be considered recipient. It is important to note that consideration could be paid by recipient or any third person. The determination will not depend on the fact who makes the payment but the person who is liable to make the payment will be considered recipient.

In the contract for supply of

goods, where no consideration is payable, recipient would mean a person to whom goods have been delivered or possession or use of the goods is given or made available.

In respect of contract of supply of services, where no consideration is payable, recipient would mean the person to whom service has been rendered."

3.8 Chapter (iv) of the IGST Act,2017 provides for determination of the nature of supply. Under Section 8 of the IGST Act,2017 when the location of supplier and the place of supply happens to be in the same State, such supplies are deemed to be inter-State supply subject to levy of both CGST and SGST. Section 8(2) of the IGST Act,2017 reads as under:-

"8. Intra-State supply

(1) ….

(2) Subject to the provisions of section 12, supply of services where the location of the supplier and the place of supply of services are in the same

State or same Union territory shall be treated as intra-State supply."

3.9 Chapter VII of the IGST Act,2017 specifies the conditions for supply to qualify as a "zero rated supply" and provides for service providers to claim refund of IGST with respect o the "zero rated supplies". Section 16(1) of the IGST Act,2017 reads as under :-

16(1) "Zero-rated supply" means any of the following supplies of goods or services or both, namely :--

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic zone unit."

3.10 Section 16(2) of the IGST Act,2017 provides for refund of input tax credit against zero rated supplies, which reads as under :-

"(3)A registered person making zero rated supply shall be eligible to claim refund under either of the following options,

namely:--

> *(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilized input tax credit;*
> *Or*
> *(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied"*

SUBMISSIONS OF THE PETITIONER

4. Mr. Abhishek A. Rastogi, learned advocate assisted by Mr. Nachiket Dave, learned advocate for the petitioner submitted that Section 13(8)(b) of the IGST Act,2017 provides that in case of supply of intermediary service, the services are deemed to have been supplied at

the location of the supplier. Therefore, the question which arises for consideration is whether the service rendered by the members of the petitioner association is an intermediary service or export of service. Learned advocate for the petitioner thereafter, referred to Article 286 of the Constitution of India which after amendment by the Constitution (One Hundred and First Amendment) Act, 2016 provides for restriction as to imposition of tax on the sale or purchase of the goods and services. Article 286 reads thus:-

> **" 286. Restrictions as to imposition of tax on the sale or purchase of goods.—**
>
> (*1*) No law of a State shall impose, or authorise the imposition of, a tax on the supply of goods or of services or both, where such supply takes place —
>
> (a) outside the State; or
>
> (*b*) in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India.
>
> (*2*) Parliament may by law formulate principles for determining when a supply of goods or of services or both in any of the ways mentioned in clause (*1*)."

5. Relying upon the above provision of Article 286, it was canvassed that parliament has been authorized to formulate the principles for determining when a supply is deemed to have been

undertaken outside the territory of the State or when it has been undertaken in the course of import/export of such goods for services and has not been empowered to determine the "place of supply". It was therefore, submitted that the power vested with the parliament is confined by the scope of clause 1 of Article 286 and the parliament is not authorized to legislate and artificially assign the place of supply to be within India when clearly the services are being exported out of India.

6. It was further submitted that as per Section 13(8)(b) of the IGST Act,2017 if the supplier, who is providing intermediary services to a person situated outside India, the place where the services are deemed to have been supplied is the place where the supplier is located. Accordingly, such a transaction will be treated as intra-State supply as per Section 8 (1) of the IGST Act,2017 and the supplier is required to pay CGST and SGST.

7. Learned advocate for the petitioner relied upon the following illustration to explain the alleged anomaly of Section 13(8)(b) of the IGST Act,2017 by the following illustration.

> *"A is situated in Ahmedabad and is engaged in providing intermediary services to B situated in Hong Kong. A*

receives a commission of 5 percent on sales concluded by B based on A's services. A connects B at Hong Kong with C at Mumbai and they conclude a sale of goods worth 100 USD. B pays 5 USD to A as commission. A will be required to pay 9% SGST and 9% CGST on services provided to B situated at Hong Kong for which it receives 5 USD."

Referring to the above illustration, it was pointed-out that though the services are rendered outside India, the member of the petitioner association is subjected to make the payment of CGST and SGST in view of the provision of Section 13(8)(b) of the IGST Act,2017 as the services would not be considered as export of services, but same would be considered as intermediary services.

8. Learned advocate for the petitioner thereafter, submitted that the State has no jurisdiction to impose tax when the supply takes place outside the State. In order to explain this contention, learned advocate for the petitioner submitted that by virtue of Section 13(8)(b) read with Section 8(1) of the IGST Act,2017 when services are provided by a resident supplier to a non-resident recipient, such services will still be deemed to have been

rendered within the State in spite of the recipient of services being situated outside India. Thereafter, the comparison between the provisions under the Service Tax Act prevailing prior to coming in force of IGST Act was made. In order to submit that under the GST regime "recipient" has been defined under Section 2(92)(a) of the CGST Act which was not the situation in the erstwhile service tax regime where the understanding of who was the recipient of service was not clearly defined. Section 2(92)(a) of the CGST Act provides that recipient means the person who is liable to pay the consideration for supply of goods/services. It was therefore, submitted that the provision under Section 13(8)(b) of the IGST Act,2017 is ultra vires to Article 286(1) and is therefore, liable to be struck down.

9. Learned advocate for the petitioner submitted that when the members of the petitioner association provide service to a non-resident service recipient such services is clearly for the benefit of recipient located outside India and therefore, such transaction can be said to have been executed in the course of export and would fall within the exemption of Article 286(1)(b)of the Constitution Of India. In such circumstances, it was submitted that Section 13(8)(b) read with Section 8(1) of the IGST Act,2017 is violative of Article 286(1) of the

Constitution of India as the service provider would be liable to the SGST and CGST on the commission received from the service recipient.

10. Learned advocate for the petitioner further submitted that Section 13(8)(b) of the IGST,2017 is violative of Article 14 of the Constitution of India as it renders differential treatment when services supplied within territory of India and when supplied outside the territory of India. It was submitted that if the supplier and recipient of intermediary services are located in the territory of India, then as per Section 12 of the IGST Act,2017 there is no separate provision carved out which prescribes a special treatment for intermediary services. Under Section 12 (2)(a) of the IGST Act,2017 the place of supply of intermediary services shall be location of the recipient. However, Under Section 13 (8)(b) of the IGST Act,2017 when either the supplier or the recipient is situated outside the territory of India, the place of supply shall be deemed to be where the supplier is located. It was therefore, pointed-out that there are different yardsticks prescribed for the same set of services when both parties are situated within and outside India.

11. It was also submitted that Section 13 of

the IGST Act,2017 prescribes special rules for determining the place of supply when the nature of services is peculiar i.e. the services can only be rendered in the physical presence of goods, then it shall be deemed to have been rendered where the goods are located.

12. It was submitted that it is settled law that the test prescribed by Article 14 of the Constitution of India has to be satisfied for any class of legislation (delegated or otherwise) to survive. It was submitted that there should be intelligible differentia and such intelligible differentia shall have a rational nexus with the object sought to be achieved. However, in view of the Section 13(8)(b) of the IGST Act,2017 which provides the deeming scenario to treat locations of the supplier of services vis-à-vis when a supplier provides intermediary service to recipient located outside India then, the same is required to be treated differently as per provision of Section-12(2)(a) which provides that the place of supply of service, except the services specified in sub-section (3) to (14) - made to a registered person shall be the location of such person. It was therefore, submitted that when the nature of intermediary services compared with the other advisory services that are provided by management consultants, lawyers or

portfolio managers, they substantially remain the same except that these service providers are required to perform different functions. It was therefore, pointed-out that when the services remained the same there does not appear to be any reason as to why intermediary services should be treated differently from the other advisory services.

13. Learned advocate for the petitioner therefore, submitted that even if it is assumed that the location of the recipient of services or the nature of intermediary services mandates a differential treatment for the purposes of ascertaining the place of supply, it does not have any nexus with the object sought to be achieved which are rendered within India and to exclude those where the services are clearly exported. It was submitted that when the benefit is to the account of the non-resident recipient and is not physically or integrally connected to any asset located in India, there appears to be no explanation as to how the differential treatment accorded to the intermediary services can help achieve the object of taxing services which are rendered within India and to exclude those that are clearly exported.

14. In order to explain, learned advocate for the petitioner gave following illustrations.

(i) A person based in Mumbai provides management consultancy service on a remote basis to B located in New York. The place of supply shall be New York and tax implication shall be Nil as the same would be treated as export of service.

(ii) However, when person C in Ahmedabad provides intermediary services on a remote basis to person D in London to procure an order from person E based in Chennai, the place of supply shall be Ahmedabad and he would be liable to pay CGST and SGST in Gujarat.

(iii) On the other hand if the person C in Ahmedabad provides intermediary services to person F based in Delhi to procure an order from person D in London the place of supply shall be Delhi where the recipient is located and the only tax implication would be IGST and person C in Ahmedabad would not be liable to pay CGST and SGST as the person F would be liable to pay the tax as the place of supply would be Delhi.

15. In view of the aforesaid illustration, it was submitted that treating the intermediary services provided by the members of the petitioner association to be the place of supply at India according to Section 13(8)(b) of the IGST Act,2017 would result into violation of Article-14 of the Constitution.

16. Learned advocate for the petitioner submitted that the definition of intermediary provided under Section 2(13) of the IGST Act,2017 provides that -- “intermediary” means a broker,

an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account. It was therefore, submitted that when a person, who supplies goods or services or both or securities on his own account, then such person would not be covered within the meaning of intermediary as what is to be construed as trading on one's account requires a clear explanation in order to determine what is specifically included within the domain of an intermediary. It was therefore, submitted that such definition of intermediary is vague.

17. Learned advocate in support of his submissions, relied upon the decision of Apex Court in case of *Kartar Singh Vs. State of Punjab, reported in (1994) 3 SCC 569*, wherein it is held that the vague laws offend several important values. It was held that it is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. It was submitted that the Apex Court also held that the vague laws may trap the innocent by not providing fair warning, that such a law impermissibly delegates basic policy

matters to policemen and to judges for resolution on an ad hoc and subjective basis, with the attendant, dangers of arbitrary and discriminatory application as under:

> *"77.It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone….. than if the*

boundaries of the forbidden areas were clearly marked."

18. Learned advocate for the petitioner also relied upon the decision of Apex Court by which Section 66A of the Information Technology Act, 2000 was struck down in the case of Shreya Singhal vs. Union of India (2015) 5 SCC 1. It was submitted that the Apex Court has explained the concept of "vagueness" at length and held that the Section 66A of the Information Technology Act, 2000 suffers from the vice of vagueness and is liable to be struck down. It was therefore, contended that applying the same yardstick in the present case, Section (13)(8)(b) of the IGST Act,2017 suffers from incurable defect of vagueness and is therefore, liable to be struck down.

19. Thereafter, referring to the scheme of the Goods and Service Tax, which has come into effect from 2017, it was submitted that the GST is a destination based tax system whereas, Section 13(8)(b) of the IGST Act,2017 which prescribes the place of supply for intermediary service is nothing but aberration and therefore, in order to preserve the basic foundation of scheme of GST as a levy as emphasized in para-2.51 of the Rajya Sabha Select Committee Report

on the Constitution (One Hundred and Twenty Second) Amendment Bill, 2014 presented on 22nd July 2015 was relied upon which reads as under :-

> *"2.51. In respect of this clause some Members proposed amendment that while discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the destination based taxation principle and need for a harmonized structure of goods and services tax and for the development of a harmonized national market for goods and services."*

20. Learned advocate for the petitioner further relied upon the Circular No.90/09/2019-GST dated 18th January 2019, wherein the aforesaid report in the context of issue of invoices in the case of inter-state supplies was explained. Para-3 of the Circular, which is relevant, reads as under :-

> *"3. After introduction of GST, which is a destination-based consumption tax, it is essential to ensure that the tax paid by a registered person accrues to the*

State in which the consumption of goods or services or both takes place. In case of inter-State supply of goods or services or both, this is ensured by capturing the details of the place of supply along with the name of the State in the tax invoice. On the basis of these extracts it is clear that the fundamental principle which the Parliament and all the functionaries allied to GST have to follow on an unconditional basis is that GST is a destination based tax and accordingly any transaction which terminates outside the territory of India should not be taxed."

21. It was submitted that Section 13(8)(b) of the IGST Act, 2017 contributes to tax cascading and double taxation contrary to the objectives of the GST. It was submitted that transaction of providing intermediary services would be subject to tax in the country where the recipient is located as it would be an import of service for such recipient. It was therefore, submitted that the transaction would suffer GST in India and tax in the country outside India

where the recipient of service is located which would result in transaction being subjected to double taxation and would affect the margin or commission earned by the members of the petitioner association, who are working as intermediaries.

22. Learned advocate for the petitioner relied upon para 1.9 of Rajya Sabha Select Committee Report (supra), wherein the rationale behind introduction of GST explained and reads thus :

> *"1.9 Secondly, to do away with the cascading effect of taxes due to 'tax on tax' and to allow seamless flow of credit across goods and services as under the erstwhile indirect tax regime no credit of excise duty and service tax paid at the stage of manufacture was available to the traders while paying the State level tax or VAT, and vice-versa. Further, no credit of State taxes paid in one State could be availed in other States. Hence, the prices of goods and services got artificially inflated to the extent of this 'tax on tax'."*

Referring to the above it was submitted that rationale behind the Introduction of the GST Law is well understood in the GST council in order to effectively implement the same in various meetings, the issue with regard to which are arising out of implementation of GST have been addressed. However, issue concerning the Section 13(8)(b) of the IGST has continued remained unsolved.

23. Thereafter, learned advocate for the petitioner submitted that Section 13(8)(b) of the IGST Act,2017 suffers from the defect of unreasonableness as it creates a deeming fiction by which the place of supply for a transaction involving a resident supplier of services providing advisory like services to a non-resident shall be deemed to be India, which is a clear export of service, which is contrary to the object of GST law.

24. Reliance was placed on the decision of Bombay High Court in case of Repro India Ltd. reported in 2009 (235) ELT 614 in relation to a dispute pertaining to rejection of refund claim, wherein the Bombay High Court has observed as under :-

"The Cenvat credit is allowed n

(sic) the duty paid on inputs to mitigate the effect of double taxation of levying duty on inputs as also on the final product. If, however, the exempted final product is exported it calls for a special relaxation/dispensation to make the goods of the country internationally competitive. As an illustration suppose a final product like tractor is otherwise exempted from excise duty even for domestic consumption and such tractors are exported. The various inputs like engines, etc., used in the tractor may have suffered excise duty. The intention is not to export taxes but only to export the goods. If the inputs like engine going into the manufacture of export commodity namely tractors are subject to excise duty, the Indian manufacturer of tractors becomes internationally uncompetitive. This appears to be the object behind the Government enacting

special scheme to ensure that the duty is not levied even on inputs going to the export products. Rule 6(6)(v) has been consciously and expressly enacted with the specific objective to ensure that duty is not levied even on inputs going to the export products."

25. Learned advocate for the petitioner thereafter relied upon the Notification no.20/2019 - IGST dated 9th September 2019, which provides that in case of services provided by an intermediary when location of both supplier and the recipient outside the taxable territory and such services should be taxed at Nil rate. The relevant entry no.12AA in the Notification No.9/2017 - Integrated Tax (Rate), dated 28th June 2017 was made as under :-

"G.S.R…….(E).—In exercise of the powers conferred by sub-section(1) of Section 6 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the

Council, hereby makes the following further amendments in the notification of the Government of India, in the Ministry of Finance (Department of Revenue) No.9/2017 - Integrated Tax (Rate), dated 28th June, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 684 (E), dated the 28th June, 2017, namely:-"

(c) *after serial number 12A and the entries relating thereto, the following serial number and entries shall be inserted, namely:-*

(1)	*(2)*	*(3)*	*(4)*	*(5)*
"12A	*Heading 9961*	*Services provided by an intermediary when location of both supplier and recipient of goods is outside the taxable territory.*	*Nil*	*Following documents shall be maintained for a minimum duration of five years: 1) Copy of Bill of Lading 2) Copy of executed contract between Supplier/Selle*

				r and Receiver/Buyer of goods 3) Copy of commission debit note raised by an intermediary service provider in taxable territory from service recipient located in non-taxable territory 4) Copy of certificate of origin issued by service recipient located in non-taxable territory 5) Declaration letter from an intermediary service provider in taxable territory on company letter head confirming that commission debit note raised relates to contract when both supplier and receiver of

				goods are outside the taxable territory";

26. Referring to the above Notification granting exemption for intermediary services when recipient of such service and also the seller of goods and recipient of goods are located outside, the rate of IGST is provided as Nil, therefore, the results in distinction between services being rendered on the basis of movement of goods and service transactions. It was therefore, submitted that when there is no movement of goods, then, the service provider would be liable to pay CGST and SGST, which is discriminatory. Learned advocate for the petitioner thereafter relied upon the recommendation of the Parliamentary Standing Committee to remove GST liability in an export of intermediary services as per the 139th Parliamentary Standing Committee Report, which was tabled on 19th December 2017, wherein it is discussed that the supply of intermediary service resulting in earnings in foreign exchange would be hit by Section 13(8)(b) of the IGST Act,2017. Reliance was placed on the following paragraphs of the standing committee report as under:-

> *"15.2 In view of the fact that GST is a destination-based consumption tax, the Committee*

is of the view that following steps may be taken:

- *Provide that Place of Supply of Indian Intermediaries of Goods will be the location of service recipient i.e. customers located abroad (and not the location of such intermediaries as is currently provided), so that Intermediary Services will be treated as 'Exports'; or*
- *Provide an exemption to Indian Intermediaries of Goods from levy of IGST, exercising the powers vested under Section 6(1) of IGST Act; or*
- *Notify such services under Section 13(13) of the IGST Act to prevent double taxation (tax in India as well as in the importing country) by treating place of effective use (foreign country) as place of supply.*

15.3The Government may also cause amendment to section 13(8) of the IGST Act to exclude 'intermediary' services and made

it subject to the default section 13(2) so that the benefit of export of services would be available."

27. Referring to the above recommendation, it was submitted that the petitioner also wishes no levy of IGST on intermediary services when the recipient is located outside the India which results in double taxation and is not in line with the destination based principle as was intended by the GST legislation.

28. Learned advocate for the petitioner also relied upon the recommendation of the Tax Research Unit of Central Board of Indirect Taxes & Customs as per the TRU Office Memorandum dated 17th July 2019 acknowledging the representation made by the petitioner. In the said Memorandum the following recommendations are made.

"8.1Based on revenue consideration and international practice of taxation of such supplies and also on the basis that the place of use & effective enjoyment of service in B2B supplies is location of recipient in non-taxable territory, Option 2 in para 5

may be considered for suitable amendments in law by Law Committee as below:-

In case of B2B intermediary service, the place of supply where location of supplier or location of recipient of services is outside India is presently governed by Section 13(8) of IGST Act may be changed to location of the service recipient. However, in case of B2C intermediary service, the place of supply in such cases may be changed from location of intermediary to the place of supply of the underlying supply. Section 13 of the IGST may be amended accordingly."

29. It was submitted that though the recommendations were made by the Central Board of Indirect Taxes and Custom, Notification no.20/2019 - IGST (Rate) dated 9th September 2019 only takes care of the transaction of

intermediary service provided by a resident supplier to an overseas recipient shall be exempt when the resultant purchaser of goods is located outside India. Thus, the intermediary service is granted exemption only for the supply of goods and not otherwise.

30. Learned advocate for the petitioner thereafter referred to Circular No.107/26/2019 - GST dated 18th July 2019, which was issued to clarify the position of intermediaries who were providing Information Technology enabled Services. The said Circular according to the petitioner has created further confusion because what was to be pursued as “on one’s own account” was not clear. According to the learned advocate for the petitioner in the said Circular different scenarios were described where the service providers would not be treated as intermediaries when providing services, which were “on their account” and where they would be treated as intermediaries. It was submitted that the circular did not clarify the meaning of the phrase “on his own account” as appears in the definition of intermediary in Section 2(13) of IGST Act,2017. It was therefore, submitted that the circular only give hypothetical situations where services were being provided through various modes for Information Technology enabled

Services.

31. Reference was also made to the discussion in 37th GST Council Meeting held in September 2019 and reliance was placed on the following minutes of the meeting with regard to definition of 'intermediary' as per the Section 2(13) of the IGST Act. The relevant extract of minutes reads as under :-

> *"Agenda Item 22(ii) Circular on treatment if IT/ITES Services (1/2)*
>
> - *Several representations have been received from NASSCOM and ASSOCHAM citing confusion on classification of IT / ITS Services as intermediary services in Circular No. 107 / 26 /2019. GST dated 18.07.2019 leading to denial of export benefits on such services.*
>
> - *Intermediary' has been defined in the sub-section (13) of Section 2 of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as*

"IGST Act) as under—

> *"intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account;"*

- *The definition of intermediary inter alia provides specific exclusion of a person who supplies such goods or services or both or securities on his own account*

- *The key representation received from the trade has been that the Circular does not provide clear criteria features for a particular services to be classified as intermediary*

service

- *It has been represented that these features were available in the erstwhile service tax regime. It is felt that the same features may help ascertain whether a services is an intermediary services or not*

- *Number of parties: Intermediary services involves minimum three parties and the service provider providing intermediary service involved with two supplies at any one time*

- *Nature and value: An intermediary cannot alter the nature or value of the services or goods, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price*

- *Separation of value: The*

value of an intermediary's service is invariably identifiable from the main supply of service or goods that he is arranging. Generally, the amount charged by an agent from his principal is referred to as "commission"

- *Identity and title: The service provided by the intermediary on behalf of the principal is clearly identifiable*

- *A new Circular based on the key features above is proposed. The same has been recommended by the Law Committee"*

32. Learned advocate for the petitioner submitted that by way of Circular No.127/46/2019-GST dated 4th December 2019, the Circular No.107/26/2019 dated 18th July 2019 was withdrawn, which has created a confusion not only in the case of the petitioners dealing in goods but it extends to all sectors where there is an element of facilitation. It was therefore, submitted that due to confusion reigning in this

regard, it would not be right to deny the export benefits to persons like members of the petitioner association engaged in providing intermediary services.

33. Learned advocate for the petitioner submitted that entry no.12AA introduced by the Notification No.20/2019-Integrated Tax (Rate) provides exemption to 'intermediary services' provided by a resident service to a non-resident recipient when the person who receives goods from such person is located outside India. The exemption is only in respect of the location of the recipient of the goods with whom the intermediary has no privity of contract. In such circumstances, when the recipient of service provides goods outside India, then it would be exempt and no GST is payable, but the goods supplied by the recipient of service who is located outside India to the buyer in India, then the intermediary would be subjected to CGST and SGST. It was therefore, submitted that in such circumstances, the members of the petitioner association are subject to discrimination.

34. Reliance was also placed on the recommendation of the Fitment Committee, which are placed before the GST Council in its 37th Meeting held on 20th September 2019, which reads

as under :-

> *"7. Recommendation: IGST exemption may be provided for GST on the supply of intermediary services when location of supplier of goods and location of recipient of goods is outside the taxable territory subject to conditions and safeguards prescribed in this regard*
>
> *Analysis: Supply of goods from a place in non-taxable territory to another place in the non-taxable territory without such goods entering into India is neither a supply of goods nor a supply of services [Entry No. 7 of Schedule III of CGST Act w.e.f. 01.02.2019 refers). However, intermediary services provided in such supply are still taxable in India as place of supply is in India as per Section 13(8)(b) of IGST Act. The request from IGST exemption on such intermediary services was taken to Fitment Committee*

meeting held on 14.12.2018. Fitcom deferred the matter for want of safeguards to ensure exemption is not misused by the trade. As directed by FITCOM, discussions were held with the trade and suggestions on safeguards/conditions required for granting exemption (when both the supplier and receiver of goods are outside India) and measures to avoid any potential misuse were deliberated and the suggestions on same are as below."

35. Referring to the above recommendations, it was submitted that the exemption that has been carved out by virtue of notification no.20/2019 - Integrated Tax (Rate) dated 30th September 2019 is baseless and calls for differential treatment between the service providers basis of the location of the ultimate recipients of the goods. If such ultimate recipient is based outside India, there shall be no GST implication and if such ultimate recipient is based within India, then provision of intermediary services would attract GST. It was thus submitted that the object sought to be achieved by such differential

treatment is not clear and Notification no.20/2019 also suffers from effect from being violative of Article 14 of the Constitution of India.

36. Learned advocate further submitted that by granting an exemption for intermediary services, the service providers are denied from availing input tax credit and claiming refund of the same which would have been the case if such provision of intermediary service to a non-resident recipient would have been treated as an export of services.

37. Learned advocate for the petitioner further submitted that in view of the peculiar provision of Section 13(8)(b) of the IGST Act,2017, there is a possibility that intermediaries could shift base of their providing services to a location outside India for the purpose of billing the service recipient and/or close their Indian office so as to escape tax implication. It is also possible that intermediary services would term the service as management consultancy service by realigning the services so as to get out of the rigors of Section 13(8)(b) of the IGST Act.

38. At last it was submitted that as per

Section 13(13) of the IGST Act,2017, the Central Government has been authorized to notify specific set of services where the place of supply shall be the place where the service is effectively used or enjoyed. It was therefore, submitted that it would be in the larger interest that Section 13(8)(b) be declared as ultra vires and unconstitutional as there is a clear case of double taxation as intermediary services would be subject to GST when the service provider is situated in India and the same service shall be subject to tax in the country where service recipient is located. It was therefore, prayed that the necessary direction be issued to the respondents to issue necessary notification and consider the representation made by the petitioner from time to time.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

39. On the other hand, learned advocates appearing for the respondents submitted that the contention of the petitioner that the petitioner is forced to pay CGST/IGST on Services exported out of India, therefore the petitioner has challenged the legislative competence of Union Of India, and the services provided by the petitioner is export of services and is zero rated supply and thus IGST cannot be levied thereon is not tenable in law as the petitioner

is providing intermediary services to the recipient located outside the Indian Territory and under Section 2(13) of IGST Act, 2017 ‘intermediary’ has been defined to mean a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both or securities, between two or more persons, but does not include a person who supplies such goods or services on both or securities on his own account. It was submitted that the services provided by intermediaries located in India to the recipient located outside India in lieu of fee or commission charged for the said services, amounts to 'supply’ of services whereas Section 13 of IGST Act, 2017 determines the place of supply of services in those cases where either the location of supplier or the location of recipient is outside India, however, Section 13(2) provides that the place of supply shall be the 'location of the recipient unless the services falls within the ambit of specified sections from 13(3) to 13(13) of the CGST Act, 2017. Therefore, as per Section 13(8)(b) of the IGST Act, 2017, the place of supply in case of the Intermediary services shall be the ‘location of the supplier of services’. Since, the location of the supplier is in the taxable territorial of India, the place of supply of service would be considered as provided

in India in view of Section 13(8)(b) of the IGST Act, 2017, and therefore this transaction will not be covered within the definition of export of services, as provided in Section 2(6) of GST Act, 2017, as it is not satisfying one of the conditions of place of supply being outside India, as enumerated in Section 2(6)(iii) of IGST Act, 2017. Accordingly, it cannot be termed as "zero rated supply" as per Section 16(1) of IGST Act, 2017.

40. It was submitted that going by the strict interpretation of Section 13(8) of IGST Act, 2017, the supply of services by the Intermediaries to the recipients outside India are not export of services irrespective of the mode of payment.

41. It was submitted that in the following cases, services provided on commission basis by Indian entity as an intermediary to the recipient located outside the Indian territory have not been held as export of service:-

(i) M/s. Global Reach Education Services Pvt Ltd. {2018 (15) G.S.T.L. 618 (App. A.A.R.-GST, Kolkata)}

(ii) Sabre Travel Network India Pvt. Ltd. -{2019

(21) G.S.T.L. 87 (A.A.R.-GST. Maharashtra)}

(iii) Vishakhar Prashant Bhave - {2019 (20) G.S.T.L. 494 (A.A.R.-GST Maharashtra)}

(iv) Vservglobal Pvt. Ltd. - {2018 (19) G.S.T.L. 173 (A.A.R. - GST, Maharashtra)}

42. It was submitted that the contention of the petitioner that the services provided by the petitioner are classified as "Intermediary" and taxed under a deeming fiction and migration of Indian exporters because of unfair provisions is without any basis as the place of provision of service of an intermediary being the location of the service provider is purposeful and considered policy decision of the Government of India. The existing provisions are in consonance with pre-GST era i.e. Service Tax provisions because till 01.10.2014 Place of Supply (POS) of intermediary services in relation to goods was the location of recipient (default rule, rule 3 of Place of Provision of Services Rules, POPSR) and in relation to services, it was the location of service provider, i.e. the location of the intermediary (rule 9(c) of POPSR). In terms of Section 66B of the Finance Act, 1994, such services were subject to service tax irrespective of the fact that the services were consumed in India or otherwise. It was therefore, submitted that being a policy decision of the Government,

the levy cannot be said to be unlawful or violating the tenets of the Constitution of India.

43. It was further submitted that the Parliament has got wide amplitude to create deeming fiction/s under taxation matters and to levy tax thereon. In this regard changes have been brought in the Constitution by way of The Constitution (One Hundred and First Amendment) Act, 2016 and reliance was placed on provision of Article 246A of the Constitution Of India which reads thus:

> ***"246A. Special provision with respect to goods and services tax.—***
>
> *(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.*
> *(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.*
> *Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council."*

44. It was submitted that Article 246A gives

Parliament exclusive power to make laws with respect to goods and services tax. In this regard, the following judgments are relied upon

(i) Supreme Court in case of Ms. Gujarat Ambuja Cements Vs UOI {2005 (182) ELT 33 (SC)} has held that, - "the point at which the collection of the tax is to be made is a question of legislative convenience and part of the machinery for realization and recovery of the tax. Subject to the legislative competence of the Taxing Authority a duty can be imposed at the stage which the authority finds to be convenient and the most effective whatever stages it may be. The Central Government is therefore legally competent to evolve suitable machinery for collection of the service tax subject to the maintenance of a rational connection between the tax subject to the maintenance of a rational connection between the tax and the person on whom it is imposed. It is outside the Judicial ken to determine whether the Parliament should have specified a common mode for recovery of the tax as a convenient administrative measure in respect of a particular class. That is ultimately a question of policy, which

must be left lo legislative wisdom."

Supreme Court has also held in the aforesaid judgment that. - "Legislative competence is to be determined with reference to the object of the levy and not with reference to its Incidence or machinery and that there is a distinction between the object of fox, the incidence of tax and the machinery for the collection of the tax."

(ii) In A.H. Wadia v. CIT (AIR 1949 FC 18), the Apex Court stated that "In the case of a sovereign Legislature, the question of extra-territoriality of any enactment can never be raised in the municipal Courts as a ground for challenging its validity."

(iii) In GVK Industries Ltd. V. Income Tax Officer [(2011) 4 SCC 36], the Apex Court examined the limitation of Parliament in enacting legislations with respect to extraterritorial aspects as under:

*" **124.** We now turn to answering the two questions that we set out with:*

(1) Is Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for:

(a) the territory of India, or any part of India; or

(b) the interests of, welfare of, well-being of, or security of inhabitants of India, and Indians?

The answer to the above would be yes. However, Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes—events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like—that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, well-being of, or security of inhabitants of India, and Indians.

***125**. It is important for us to state and hold here that the powers of legislation of Parliament with regard to all aspects or causes that are within the purview of its competence, including with respect to extra-territorial aspects or causes*

as delineated above, and as specified by the Constitution, or implied by its essential role in the constitutional scheme, ought not to be subjected to some a priori quantitative tests, such as "sufficiency" or "significance" or in any other manner requiring a predetermined degree of strength. All that would be required would be that the connection to India be real or expected to be real, and not illusory or fanciful.

***126**. Whether a particular law enacted by Parliament does show such a real connection, or expected real connection, between the extra-territorial aspect or cause and something in India or related to India and Indians, in terms of impact, effect or consequence, would be a mixed matter of facts and of law. Obviously, where Parliament itself posits a degree of such relationship, beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a requirement in the operation of the law as a matter of that law itself, and not of the Constitution:*

***127**. (2) Does Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?*

The answer to the above would be no. It is obvious that Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that have an impact on or nexus with India as explained above in the answer to Question 1 above. Such laws would fall within the meaning, purport and ambit of the grant of powers to Par-

> *liament to make laws "for the whole or any part of the territory of India", and they may not be invalidated on the ground that they may require extra-territorial operation. Any laws enacted by Parliament with respect to extra-territorial aspects or causes that have no impact on or nexus with India would be ultra vires, as answered in response to Question 1 above, and would be laws made "for" a foreign territory."*

45. It was submitted that the contention of the petitioner that the services provided by the petitioner are classified as "Intermediary and taxed under a deeming fiction and migration of Indian exporters because of unfair provisions is concerned, the place of provision of service of an intermediary being the location of the service provider is a purposeful and considered as policy decision of the Government of India as the same situation has existed in the erstwhile service tax regime where with effect from 01.10.2014, the place of provision of services of an intermediary, such as the petitioner, was considered to be the location of the service provider. It was therefore, submitted that being a policy decision of the Government the levy cannot be said to be unlawful or violating the tenets of the Constitution of India.

46. With respect to contentions of the petitioner that exporting taxes is against principles of VAT

under international best practices, it was submitted that when the service is not considered as export of service, the contention of the petitioner that exporting taxes is against principles of VAT under international best practices is not tenable. It was further submitted that the benefits accruing to exporters of services are meant for those who actually export services and not to every other entity which is directly or indirectly associated with the exporter because an intermediary is one who by definition does not provide the service himself and extension of export benefits to intermediaries and other entities in the value and supply chain will result in non exporters being treated at par with exporters which would end up negating the benefits to exporters.

47. It was pointed out that contention of the petitioner that differential treatment is accorded to intermediary service, which is violative to Article 14 of the Constitution is also not tenable because one service cannot be compared with other service so as to justify the violation of Article 14 of the Constitution It was further submitted that the illustration given by the petitioner is factually incorrect inasmuch as the intermediary service provided by C (in Ahmedabad) to F based in Delhi to procure a order

from D (London), IGST is not payable, instead CGST + SGST (Gujarat) is payable and no differential treatment is accorded to intermediary service which was explained through an illustration below giving just opposite situation:-

> *A (Supplier of Service) based in New York provides management consultancy services to B located in Mumbai (Recipient of service), the place of supply shall be Mumbai (location of recipient of service) in view of Section 13(2) of IGST Act, 2017 and IGST is payable.*
>
> *Whereas the same supplier provides intermediary Service to the same recipient, the place of supply shall be New York and Location of supplier of service in view of Section 13(8) of IGST Act, 2017 would be outside India and no tax is payable.*

Accordingly, it reveals that no tax is payable for Management Consultancy Service and tax is payable for Intermediary Service in respect of the illustration given by the petitioner, whereas tax is payable for Management Consultancy Service and No tax is payable for Intermediary Service

Both the Illustrations shows that equal treatment is given to intermediary service and there is no violation of Article 14 of the Constitution.

48. It was submitted that with regard to reliance placed by the petitioner upon the Office Memorandum F. No 354/352/2018- TRU dated 17.07.2019, is based on the suggestions/preliminary views given by TRU and it was not the final decision taken by the Government as it is clearly mentioned in Para 9 of the said memorandum that

> *"The above views are preliminary views of TRU and in the internet meetings, final views would need to be made for the CBIC."*

It was therefore, contended that in view of the above, the said Office Memorandum has no legal force as the members of the petitioner is providing Intermediary Service and there is no change in the definition as provided in sub-section (13) of Section 2 of the IGST Act, 2017 and provisions related to place of supply as provided under Section 13 of IGST Act, 2017 since enactment of GST Act, 2017.

49. With respect to the contention of the petitioner that there is conflict between Section 13 (2) and 13(8) (b) of IGST Act, 2017 resulting

in absurdity in the law, it was submitted that there is no conflict between section 13(2) and 13(8)(B) IGST Act, 2017 inasmuch as Section 13(2) provides that the place of supply shall be the location of the recipient unless the services falls within the ambit of specific sections from 13(3) to 13(13) of the IGST Act, 2017. However, in pursuance of Section 13(8)(b) of the IGST Act, 2017, the place of supply in case of the Intermediary services shall be the location of the supplier of services and on bare reading, it reveals that both the Sub Sections are clear in nature.

50. With respect to contentions of the petitioner that Section 13(8) of IGST Act, 2017 lacks intelligible differentia and is violative of article 14 of the constitution, it was submitted that Article 14 of the constitution deals with equality before law and states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India and it is very much within the powers of the Government to categorize goods and services for the purpose of taxation in such manner as meets the policies and objectives of the Government. It was submitted that such categorization for the purpose of taxation may be entirely different from the categorization

adopted by any other laws which may govern production, distribution, usage or any other aspect of those goods, for example, Motor Vehicle Act categorizes passenger transport vehicles according to number of passengers they may carry, however, the Central Excise Tariff Act has for years categorized cars according to their length and levied differential duties accordingly.

51. In this regard reliance was placed up on the decision of the Hon'ble Supreme Court in case of East India Tobacco Co. v. State of Andhra Pradesh (1982 AIR 1733, 1963 SCR (1) 404) wherein the Apex Court has held that in tax matters, "the State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably. Reliance was also placed upon the decision in case of Raja Jagannath Baksh Singh v. The State of UP. (1962 AIR 1563, 1963 SCR (1) 220) wherein the Apex Court has held that the legislature which is competent to levy a tax must inevitably be given full freedom to determine which articles should be faxed, in what manner and at what rate.

52. It was submitted that GST is a destination-based tax and in case of inter-state transaction where supplier or recipient of service is located in taxable and non-taxable territory, by default

rule under section 13(2) of the IGST Act, 2017, the place of supply is the location of the service recipient. However, there are exceptions to this rule and sub-section 13(3) to 13(12) deals with such exceptions in different situations covered under each of these sub-sections, exceptions have been provided to this default place of supply such as place of supply could be the location of the supplier of service, place of performance etc. and these exceptions are governed by the revenue considerations and based on catena of Judgments of the Apex Court, are within the legislative competence as the legislature is free to pick and choose the supply that it intends to tax and the manner in which it intends to tax. It was therefore submitted that there is no violation of Article 14 of the Constitution Further departure from default rule is also legally permissible and tenable.

53. With respect to contentions of the petitioner that parliamentary report on export highlights the intent not to tax members of the petitioner, it was submitted that the 139th report on the impact of GST Act on exports presented before the Parliament on 19 December 2017 noted that service providers rendering services to overseas suppliers of goods earn commission in convertible foreign exchange, IGST is levied on such

commission because the Government does not recognize their services as "exports" and such report of the Parliamentary Committee is an advisory in nature. It was further submitted that the GST Council is a constitutional body with the representation of Union and State Governments and the GST Council alone has the power to consider such views of the trade/commerce/parliamentary committees and recommend changes.

54. With respect to contentions of the petitioner that it violates the right to carry on business viz. article 19(1)(g) of the constitution, it was submitted that the services provided by the members of the Petitioner are not in the nature of export of services as per Section 2(6) of the IGST Act, 2017 as the place of supply of intermediary service is the location of the service recipient who normally resides in India, therefore, levy of tax on such intermediary service does not infringe the right of the members of the petitioner from practicing any profession or carrying out any occupation or trade or business and as such does not violate Article 19(1)(g) of the Constitution.

55. With respect to contentions of the petitioner that the levy of tax on export of service is ultra vires Article 265 and 286 of the

constitution of India, it was submitted that in pursuance of Section 13(8)(b) of the IGST Act, 2017, the place of supply in case of the Intermediary services shall be the location of the supplier of services and since the location of the supplier is in the taxable territory of India, therefore this transaction will not be covered within the definition of export of services as provided in Section 2(6) of IGST Act, 2017 as it is not satisfying one of the conditions of place of supply being outside India, as enumerated in Section 2(6)(iii) of IGST Act, 2017. It was therefore submitted that going by the strict interpretation of Section 13(8)(b) of IGST Act, 2017, the supply of services by the Intermediaries to the recipients outside India are not export of services irrespective of the mode of payment since the service provided by the members of the petitioner is not export of service, the question of Violation of Article 265 and 286 of the Constitution of India does not arise.

56. In this regard reliance was placed up on the decision of the Hon'ble Supreme Court in the case of M/s.Jindal Stainless Ltd. V. State of Haryana, vide Order dated 11.11.2016 in CA No.3453/2002 wherein it is held that, the power of taxation is controlled under Article 265 of the Constitution

and that, no tax can be levied, except by authority of law. It was therefore submitted that IGST Act, 2017 cannot be held to be unconstitutional as taxability of intermediary services comes within the scope and ambit of IGST Act, 2017 and accordingly, intermediary services can be taxed under the IGST Act, 2017.It was further submitted that the provisions of intermediary service as per section 13(8)(b) of the IGST Act, 2017 are not violative of Article 286 of the Constitution of India because, there is no tax if place of supply of Intermediary service is outside the taxable territory, however, since the place of supply of intermediary is the location of service provider, such Services are taxed if the intermediary service provider is located within the taxable territory.

57. With respect to contentions of the petitioner that pith and substance of the law is to tax supplies made in India and not to tax supplies made outside India, it was submitted that in pursuance of Section 13(8)(b) of the IGST Act, 2017, the place of supply in case of the intermediary Services shall be the location of the supplier of services and since, the location of the supplier is in the taxable territorial of India, therefore in view of said provisions,

supplies are made in India, hence, said contention of the petitioner is not tenable.

58. With respect to contentions of the petitioner that GST is a destination based consumption tax, accordingly applicability of GST should be determined based on the country of consumption of service and not on the country of provision of service, it was submitted that in case of inter-state transaction where supplier or recipient of service is located in taxable and non taxable territory, by default rule under section 13(2) of the IGST Act, 2017, the place of supply is the location of the service recipient, however, there are exception to this rule and sub-section 13(3) to 13(13) deals with such exceptions because in different situation covered under each of these sub-sections exceptions have been provided to this default place of supply such as place of supply could be the location of the supplier of service, place of performance etc. and such decisions are governed by the revenue considerations and based on catena of judgments of the Apex Court are within the legislative competence as the legislature is free to pick and choose the supply that it intends to tax and the manner in which it intends to tax.

59. It was submitted that the reasoning for

prescribing distinct treatment for an intermediary is that an intermediary is a go-between two persons, i.e. main service provider and the service recipient. An intermediary provides service to both the persons, though he may have contractual agreement with only one or both of them, hence, it may not be feasible to prescribe one person as the recipient of intermediary service, thus general rule cannot be applied, further, intermediary acts as an agent of the principal and in that sense, he may be providing a service to the principal and the place of effective use and enjoyment of such service is in the territory where the agent is representing the principal. It was therefore, submitted that general rule is not an appropriate proxy for determining the place of supply of service of an agent/intermediary, for example, if an Indian exporter hires a service of an agent located overseas for export of service, such service should not be subject to tax in India as effective use and enjoyment of service would be outside India and relatable to export of service from India but if general rule is applied to such service, the intermediary services availed for the purposes of exports would be taxed whereas any intermediary service used for imports of services into India would be outside the tax net which would bring distortion in the

tax regime and therefore, intermediary services are to be accorded distinctive treatment.

60. It was submitted that internationally also the intermediary services are treated distinctly from other services in approach as suggested by OECD for taxation of services, it recommends a distinct approach for taxation of intermediary services. An intermediary is a go-between the two persons and helps in providing or acquiring, or both of a service or goods, in another words an intermediary comes into picture when there is a possibility of flow of service or goods from one person to another.

61. With respect to contentions of the petitioner that GST is an indirect tax, therefore, the ultimate impact of GST should be borne by the end customers, it was submitted that the commission income received by the intermediary facilitating import of goods/ services of a foreign exporter, the importer is liable to pay IGST as such commission amount is includible in the cost of goods/ services invoiced to the importer in India, however, such IGST paid at the time of import is eligible as ITC to the importers / exporters making further supplies within or outside India and the liability to pay tax on such commission is on the importer and not on the

intermediary, further, commission income earned by the intermediary is taxable in the hands of intermediary and ITC of same is also eligible to the intermediary and thus no double taxation is involved as internationally in many tax jurisdictions such as Australia, the services of such intermediary to business recipient is taxable on reverse charge basis and ITC of taxes paid is available to the business to off-set their tax liability on further supplies.

62. With respect to contentions of the petitioner is that policy decisions are subject to judicial review, it was submitted that the petitioner relied upon the judgment of the Supreme Court in the case of Delhi Development Authority & Anr {2008(2)SCC672) and in Para 65 of the said order, the Hon'ble Supreme Court held that a policy decision is subject to judicial review on the the grounds that:(a) If it is unconstitutional, or (b)If it is dehors the provisions of the Act and the regulations; or (c) If the delegate has acted beyond its powers of delegations; or (d) If the executive policy is contrary to the statutory or a larger policy. It was submitted that in the facts of the present case, none of the aforesaid conditions is applicable in the present case. Hence, the case citation is not relevant with the present case and the argument, put forth by the

petitioner, is not tenable.

ANALYSIS

63. Having heard learned advocates for the respective parties and having considered the provisions of CGST and IGST Act,2017, the only question which arise whether the provisions of Section 13(8)(b) r.w.s. 2(13) and 8(1) of the IGST Act,2017 are ultra vires and unconstitutional or not.

64. The introduction of Goods and Service Tax in India in the year 2017 is with an object of providing one tax for one nation so as to harmonize the indirect tax structure in the country. For the said purpose, the Constitution is amended by the Constitution (One Hundred First Amendment) Act, 2016 to bring on to introduce Article 246A which provides for special provision with respect to Goods and Service Tax. Article 246A begins with non-obstante clause stipulating that notwithstanding anything contained in Articles 246 and 254, the parliament subject to Clause-2, Legislature of every State, have power to make laws with respect to Goods and Service Tax imposed by the Union or by such State. Clause 2 of Article 246A empowers the parliament, who has exclusive power to make laws with respect to

goods and services tax where the supply of goods or of services or both takes place in the course of inter State trade or commerce. Thus, the parliament has exclusive power under Article 246A to frame laws for inter State supply of goods of services. The basic underlying change brought in by the GST regime is to shift the base of levy of tax from point of sale to the point of supply of goods or service. In that view of the matter, Section 13(8)(b) of the IGST Act,2017 which is framed by the parliament inconsonance with the Article 246(2) of the Constitution of India is required to be considered.

65. Section 8 of the IGST Act, 2017 provides for intra-State supply so as to take care for the supply of goods to or by a special economic zone and the goods imported in the territory of India till they cross the Custom in India. Section 8 is subject to provision of Section 10 of the IGST Act,2017 where as Section 12 of the IGST provides for place of supply of services where the location of supplier and recipient is in India. Section 12(1) and 12(2) o the IGST Act,2017 reads as under :-

> *"12.Place of supply of services where location of supplier and recipient is in India.—(1) The*

provisions of this section shall apply to determine the place of supply of services where the location of supplier of services and the location of the recipient of services is in India.

(2) The place of supply of services, except the services specified in sub-section (3) to (14), --

(a) Made to a registered person shall be the location of such person;

(b) made to any person other than a registered person shall be, --

(i) the location of the recipient where the address on record exists; and

(ii)the location of the supplier of services in other cases."

The aforesaid provision of sub-section

12(2)(b) stipulates that the place of supply of service made to any person other than registered person shall be the location of the recipient where the address on record exists and location of supply of service in other cases. Sub-section 3 to 14 of Section 12 stipulates the place of supply of service in various eventualities. However, the same does not cover the case of intermediary. Section 13 of IGST Act,2017 stipulates that the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India. Sub-section 2 of Section 13 stipulates that the place of supply of service except the services described in sub-section 3 to 13 shall be the location of the recipient of the services and if the location of recipient of service is not available in the ordinary course of business, the place of supply shall be location of supplier of service. Thus, sub-section 3 to 13 carves out an exception to the place of supply of services to be the place of recipient of services where the location of supplier or location of recipient is outside India. On perusal of provision of Section 13 of IGST Act,2017, sub-section 3 to 13 thereof provide different eventualities to determine the place of supply of services. Sub-section 3 describes place of supply of services where the

services are actually performed, Sub-section 4 refers to place of supply of services supplied directly in relation to an immovable property, Sub-section 5 refers to supply of services supplied by way of admission to, or organization of a cultural artistic etc. and Sub-section 6 provides that when services as provided in sub-sections 3, 4 and 5 are at more than one location, the place of supply shall be location of taxable territory, Section 7 refers to the location of supply of service, if it is Union territory or State ,then it would be in proportion to the value for services separately collected or determined as per the contract or agreement. Sub-section 8 of Section 13 refers to place of supply of the services shall be the location of supplier of services in case of banking company, intermediary services and services consisting of hiring of means of transport. Intermediary services is defined in Section 2(13) of IGST Act,2017 which means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account and accordingly, when intermediary services are provided by brokers, the place of supply could be

either the location of service provider or the service recipient. The petitioner has tried to submit that the services provided by a broker outside India by way of intermediary service should be considered as “export of services” but the legislature has thought it fit to consider such intermediary services; the place of supply would be the location of the supplier of the services. In that view of the matter, it would be necessary to refer to the definition of “export of services” as contained in Section 2(6) of the IGST Act, 2017 which provides that export of service means the place of service of supply outside India. Conjoint reading of Section 2(6) and 2(13), which defines export of service and intermediary service respectively, then the person who is intermediary cannot be considered as exporter of services because he is only a broker who arranges and facilitate the supply of goods or services or both. In such circumstances, the respondent no.3 have issued Circular No.20/2019 where exemption is granted in IGST rates from payment of IGST in respect of services provided by intermediary in case the goods are supplied in India.

66. It therefore, appears that the basic logic or inception of section 13(8)(b) of the IGST Act,2017 considering the place of supply in

case of intermediary to be the location of supply of service is in order to levy CGST and SGST and such intermediary service therefore, would be out of the purview of IGST. There is no distinction between the intermediary services provided by a person in India or outside India. Only because, the invoices are raised on the person outside India with regard to the commission and foreign exchange is received in India, it would not qualify to be export of services, more particularly when the legislature has thought it fit to consider the place of supply of services as place of person who provides such service in India.

67. Therefore, there is no deeming provision as tried to be canvassed by the petitioner, but there is stipulation by the Act legislated by the parliament to consider the location of the service provider of intermediary to be place of supply. Similar situation was also existing in service tax regime w.e.f. 1st October 2014 and as such same situation is continued in GST regime also. Therefore, this being a consistent stand of the respondents to tax the service provided by intermediary in India, the same cannot be treated as “export of services” under the IGST Act,2017 and therefore, rightly included in Section 13(8)(b) of the IGST Act to consider the location of

supplier of service as place of supply so as to attract CGST and SGST.

68. The contention of the petitioner that it would amount to double taxation is also not tenable in eyes of law because the services provided by the petitioner as intermediary would not be taxable in the hands of the recipient of such service, but on the contrary a commission paid by the recipient of service outside India would be entitled to get deduction of such payment of commission by way of expenses and therefore, it would not be a case of double taxation. If the services provided by intermediary is not taxed in India, which is a location of supply of service, then, providing such service by the intermediary located in India would be without payment of any tax and such services would not be liable to tax anywhere. In such circumstances, the contentions raised on behalf of the petitioner are not tenable in view of the Notification No.20/2019 issued by the Government of India, Ministry of Finance whereby Entry no.12AA is inserted to provide Nil rate of tax granting exemption from payment of IGST for service provided by an intermediary when location of both supplier and recipient of goods is outside the taxable territory i.e. India. Therefore, the respondents have thought it fit to

consider granting exemption to the intermediary services viz. service provider when the movement of goods is outside India.

69. In view of the foregoing reasons, it cannot be said that the provision of Section 13(8)(b) r.w. Section 2(13) of the IGST Act,2017 are ultra vires or unconstitutional in any manner. It would however, be open for the respondents to consider the representation made by the petitioner so as to redress its grievance in suitable manner and inconsonance with the provisions of CGST and IGST Act. The petition is, therefore, disposed of accordingly. *Rule is discharged* with no order as to costs.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

AMAR RATHOD