

**KARNATAKA APPELLATE AUTHORITY FOR ADVANCE RULING  
6<sup>TH</sup> FLOOR, VANIJYA THERIGE KARYALAYA, KALIDASA ROAD,  
GANDHINAGAR, BANGALORE – 560009**

**(Constituted under section 99 of the Karnataka Goods and Services Tax Act, 2017 vide  
Government of Karnataka Order No FD 47 CSL 2017, Bangalore, Dated:25-04-2018)**

**BEFORE THE BENCH OF**

**SHRI. A.K.JYOTISHI, MEMBER  
SHRI. M.S.SRIKAR, MEMBER**

**ORDER NO.KAR/AAAR/06/2018-19**

**DATE: 09/01/2019.**

Name and address of the appellant	M/s. Toshniwal Brothers (SR) Private Limited, No.11, AECS Layout, 4th Main, 3rd Cross, Sanjay Nagar 1st Stage, Geddalahalli, Bengaluru – 560094
GSTIN or User ID	29AAACT2881R1ZJ
Advance Ruling Order against which appeal is filed	KAR/ADRG 23/2018 Dated: 19 <sup>th</sup> Sept 2018
Date of filing appeal	17/10/2018
Represented by	Sri Badarinath, Chartered Accountant
Jurisdictional Authority- Centre	D-Range, Division 6, North Commissionerate, Bengaluru
Jurisdictional Authority- State	LGSTO-150, Bengaluru
Whether payment of fees for filing appeal is discharged. If yes, the amount and challan details	Yes. Payment of Rs.20,000/- made vide CIN No. IOBA18102900073757 Dated10/10/2018

**PROCEEDINGS**

**(Under Section 101 of the CGST Act, 2017 and the KGST Act, 2017)**

At the outset we would like to make it clear that the provisions of CGST, Act 2017 and SGST, Act 2017 are in *pari materia* and have the same provisions in like matter and differ from each other only on a few specific provisions. Therefore unless a mention is particularly made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the KGST Act.

The present appeal has been filed under section 100 of the Central Goods and Service Tax Act 2017 and Karnataka Goods and Service Tax Act 2017 (herein after referred to as CGST Act, 2017 and SGST Act, 2017) by M/s Toshniwal Brothers (SR) Private Limited, (herein



after referred to as 'Appellant') against the advance Ruling No. KAR/ADRG 23/2018 Dated: 19<sup>th</sup> Sept 2018.

**Brief Facts of the case:**

1. M/s Toshniwal Brothers (SR) Private Limited is a company located at, No.11, AECS Layout, 4th Main, 3rd Cross, Sanjay Nagar 1st Stage, Geddalahalli, Bengaluru - 560094, having GSTIN number 29AAACT2881R1ZJ.

2. The Appellant states that he is a supplier of services to overseas clients and is engaged in the business of marketing, sales promotion and post sale support services. Appellant entered into an agreement with their customers (Service Recipients), who are located outside India (which is a non-taxable territory in terms of clause (79) of section 2 of the CGST Act, 2017) for providing marketing, sales promotion and certain post-sales support services. Consideration for these services would be received in convertible foreign exchange.

3. The services are provided in respect of scientific instruments used in research and development / quality control primarily in fields of Nano Science, Material Science, Bio Pharma and Polymer Sciences.

4. The details of the service provided by them are as follows:

**a. Promotion and marketing of the products of the Service Recipients in India:**

The applicant solicits orders for the goods of the overseas customer in India by marketing and promoting the goods in India. The orders for the products are placed directly by the prospective customers on the overseas entity. The applicant is not engaged in trading of such goods, either on his own account or on the account of the overseas client. The promotion and marketing of the products involves the following activities:

- i. Applicant advertises the details of the goods to the prospective customers;
- ii. Provides demonstration of the products to the various prospective customers located in India;
- iii. Communicates and corresponds about all the relevant information to the prospective customers in connection with the goods;
- iv. Communicates with the overseas clients about comments and queries of the prospective customers; and

- v. Reviews the credit rating of the prospective customers of the overseas entity on regular basis;

**b. After sale support services:**

The prospective customers who are desirous of importing the said equipment will issue a purchase order to the overseas supplier and agree on the pricing and supply details. On the basis of the order issued by the prospective customer to the overseas entity, the overseas entity supplies the products to their customer in India. The appellant submits that the company is not involving in any of these processes but will provide the following support services:

- i. Advice and assist the customers of the overseas entity in installation, initial start-up of products and demonstration of its satisfactory operation to such customers;
- ii. For few product lines, provide complete installation services to the customers of the overseas entity along with necessary advisory and assistance to the customers of the overseas entity in initial start up of the products and demonstration of its satisfactory operation to such customers;
- iii. Assistance in operation adjustments, on-site services and general customer assistance including warranty services;

**c. Submission of Reports:**

The Applicant shall prepare and submit regular reports within agreed time on its activities to promote and solicit orders for the products in India, to the overseas entity.

These business reports would normally include:

- i. Short and medium term forecasts detailing prospective customer's name, order value, anticipated placement and expected delivery dates and long term project and prospect lists;
- ii. Results of regular observation of marketing conditions, information in the public domain relating to the activities of competitors; and
- iii. Results of participation in trade fairs.



5. The Appellant filed an application for Advance Ruling under section 98 of the CGST Act, 2017 and KGST Act, 2017 on the questions

- a. Whether pure and mere promotion and marketing services will be “intermediary services” for the purposes of section 12 of the Integrated Goods and Services Tax Act, 2017 for determining the place of supply of such services?
- b. If after sale support services are also provided under a composite contract, would it then be composite supply? What will be the principal supply for such contracts?
- c. Whether the above contracts would qualify as exports if the client is overseas entity, in terms of clause (6) of section 2 of the Integrated Goods and Services Tax Act, 2017 and will be a zero-rated supply as provided in section 16 of IGST Act, 2017?

6. Before the Authority for Advance Ruling, the appellant enumerated the following facts:

6.1. Appellant submits that as envisaged under Rule 2(f) of Place of Provision Rules, 2012, ‘intermediary’ means any person who *arranges or facilitates the supply of goods or services or both, between two or more persons, but does not include a person who supplies such goods or services or both on his own account*. Contrary to this, Appellant submits that he had provided the Services directly to the overseas entity (Service recipients) on principal-to-principal basis. Appellant will not enter into any agreement with the Indian customer for the supply of products of the overseas entity whereas overseas entity himself will directly deal with Indian customer regarding obtaining the purchase order, price negotiations and finally supply the goods. Appellant is involved only in the promotion and marketing of the goods of the overseas entity on his own account. Hence the activity undertaken by the Appellant, by way of promotion and marketing services are not intermediary services. In support of this, Appellant had drawn the attention of the Learned Authority for Advance Ruling (in short LAAR) to the Advance Ruling pronounced under the Service tax provisions in the case of *GoDaddy India Web Services (P.) Ltd.* (Ruling No. AAR/ST/08/2016, dated 4<sup>th</sup> March 2016 Application No. AAR/44/ST/15/2014) wherein the Authority has clearly demarcated the meaning of intermediary services and ruled that pure marketing and promotion services would **not be intermediary services**.

6.2. The appellant also submitted before the Authority that, **Clause 30 of Section 2 of CGST Act, 2017** provides the meaning of composite supply which reads as under:

*“Composite supply” means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.*

Appellant submits that after sale support services are provided by them along with promotion and marketing services under a composite contract, and it will be in the nature of composite supply because two taxable supplies are being made under a single service agreement for a single price and these two different elements of the services are not available separately. These services are naturally bundled and supplied in conjunction with each other in the ordinary course of business. Therefore, after sale support services are provided along with promotion and marketing services and being a composite supply, one should be the principal supply. Appellant submits that the principal supply will be promotion and marketing services.

6.3. Appellant further submits that the services i.e., promotion and marketing services and after sale services as a whole, would be the export of services as provided in clause 6 of section 2 of IGST Act, 2017 because,

- i. The supplier of services, i.e. Appellant, is located in India;
- ii. The recipient of services, i.e. overseas entity, is located outside India;
- iii. The place of supply of service, is outside India;
- iv. The payment for such services will be received by the supplier of services 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 of IGST Act, 2017.

Thus, they submitted that the supply of said services by the company are ‘export of services’ and consequently will become a zero-rated supply as provided in Section 16 of IGST Act, 2017.

7. The Karnataka Authority for Advance Ruling, vide Advance Ruling No. KAR/ADRG 23/ 2018 dated 19<sup>th</sup> Sept, 2018 held that-

7.1. The contract of services supplied are not pure and mere promotion and marketing services and the services provided are of the nature of facilitating the supply of goods, and



hence would amount to “intermediary services” ~~for the reasons enumerated in the ruling~~ for the purposes of determination of place of supply of such services.

7.2. The after-sale services provided are not in the nature of a composite contract and they are independent from the services of promotion and marketing and hence there is no question of determination of what will the principal supply.

7.3. The third question cannot be answered as it is not in the purview of jurisdiction of the Authority as it amounts to determination of the place of supply.

8. Aggrieved by the said Ruling of the Authority (herein after referred to as ‘impugned order’), the appellant has filed an appeal under section 100 of the CGST Act, 2017 and KGST Act, 2017 on the following grounds.

8.1. The Advance Ruling Authority has erred in holding that the services provided is of the nature of facilitating the supply of goods, and would amount to “intermediary services” for the purposes of determination of place of supply of such services. Further, after-sale services provided are not in the nature of a composite contract and they are independent from the services provided and hence there is no question of determination of what will the principal supply is without consideration of the facts of the case and applicant’s interpretation of law.

8.2. Appellant submits that, the LAAR has considered the appellant who acts as an agent and an intermediary to the overseas entities based on the certain interpretations made in the agency contract entered into between Brabender GMBH & Co.KG and the appellant. The interpretations of the authority are- Appellant acts as an ‘intermediary’ on behalf of principal while negotiating business transactions with prospective customers in his territory excluding the right to conclude the contracts on behalf of the principal. Principal shall be free to conclude or to refuse the conclusion of a contract negotiated by the Agent and it is binding on the Principal to inform Appellant who is acting as ‘Agent’ on acceptance, rejection, non-performance or different performance of a contract and shall state decisive reasons underlying his decision, unless prejudicial to his own essential interests”. Appellant should take care of interests of principal by regularly visiting the customers and prospective customers in his territory. On all contracts for the sale of goods which the Principal enters into with customers residing in the Agent’s territory the Agent shall receive a commission of 12% on the value of goods as far as sales contracts are concerned that have been negotiated

by the Agent and a commission of 6% for all other sales contracts. This commission is calculated based on the clause VI of the agency contract. In view of this the LAAR is of view that since the agent is having the right to receive commission from principal for the sales contracts negotiated, Appellant can be termed as playing the role of an agent to the overseas entity.

8.3. Appellant submits that, the usage of the words 'agent' or 'intermediary' in the said agency contract should not be interpreted to mean an 'agent' or 'intermediary' as defined under the CGST Act, 2017 and Integrated Goods and Services Tax (IGST) Act, 2017 respectively.

8.4. Section 2(5) of the CGST Act, 2017: Definition of 'Agent':

*"agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;*

The term 'business of supply or receipt of services' must not be literally interpreted since one has to analyse the nature of the transactions carried out by an agent on a case to case basis. In other words, for a person to qualify as an 'agent' under GST, the person has to render the services on behalf of the principal and not on its own account. If the agent render a service on behalf of the principal it does not require distinguish skill set to render such services, suppose if the agent render service on its own account it require distinguish skill set to render the same since it will be an extension to the activities undertaken by the service recipients. In the instant case, Brabender GMBH & Co. KG is one of the Original Equipment Manufacturer (OEM) of scientific equipment and is engaged in the said services, which as a supply chain process, is nothing but an extension of the manufacturing activity, viz., promotion of goods, sale of goods and finally post-sale support for the goods so sold. It must be noted that Appellant is merely a provider or supplier of said services and is not involved in buying and selling or supplying of such goods. Further, the fact that Appellant is not involved in negotiation of the contract and / or supply of goods clearly and unambiguously means that Appellant is not an 'intermediary'. The activities of Appellant are strictly limited to only promotion and marketing of such goods and providing post-sale support at the instruction of the overseas client. Nevertheless, even if Appellant has participated in the negotiation of the prices, the agreement clearly states that the ultimate right to conclude or call-off the contract



is with the overseas client itself. In other words, the discussions or mere participation of Appellant in such discussions does not bind either of the parties.

8.5. Appellant further submits that the relationship between the overseas entity and the Appellant that of Principal to Principal as it is narrated in paragraph 2 of the Clause II (Duties of Agent) of the said agency contract, it states that the agent shall be informing the principal on the market trends, customer feedback in relation to such equipments. Further in paragraph 4 of the Sales Representation Agreement, the Appellant as a 'Representative' of the 'Manufacturer' has agreed to render Sales promotion, giving technical information, quotation follow-up, technical/ commercial negotiations, Installation and final commissioning and free services to customer during the warranty period.

8.6. Hence, in the instant case, Appellant acts does not qualify as an 'agent' as defined under CGST Act, 2017. The aforesaid services are provided on a Principal to Principal basis by the Appellant to the overseas entities. Further, there does not exist any Principal-Agent relationship during the course of rendering the aforesaid services based on the submissions made above.

8.7. Section 2(13) of the IGST Act, 2017: Definition of 'Intermediary':

*"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.*

On examination of the aforesaid definition of 'Intermediary' to the instant case Appellant submits that is not engaged in arranging or facilitating the supply of equipment but is engaged in promotion and marketing services and post-sale support services to the overseas entities which is part of main services. There exists a direct interaction between the customers and overseas entities with regard to price negotiations and delivery of equipment and Appellant has no role with regard to the same since there is no contractual agreement entered into on behalf of overseas entities. This can be substantiated vide the Para 3- 'Nature of Representative' of the copy of the Sales Representation Agreement (which has been reproduced below: -

*"The MANUFACTURERS intends to direct requests received from the territory to the REPRESENTATIVE for further attention and follow up and keeps the*



*REPRESENTATIVE informed of the orders received directly from the customers in the Territory. .... "*

On successful negotiation of prices with the overseas entities, the customers place the orders directly with the overseas entities which can be substantiated with the sample copies of Purchase orders. Further, majority of the customers of Appellant are research institutes or R&D centres. Under the Customs law, such customers are eligible for exemptions/concessions with respect to customs duties on import of goods. Accordingly, they would always directly import the said goods and would not procure (such imported goods) from any supplier in India (who has imported the same earlier). Such a proposition would disentitle them from availing the customs duty exemptions/concessions. Further, Appellant submits that merely and only for the reason that the consideration is termed a 'commission' in the agreement, the services provided by Appellant takes the colour and characteristics of an 'intermediary'. It is but essential that the actual scope of work and activities of Appellant should be analysed to classify the same.

8.8. Further, appellant drew the attention of this authority to the judgement pronounced by *Authority for Advance Ruling- Maharashtra in the case of IN RE: Five Star Shipping dated 18.04.2018 GST-ARA-18/2017-18/B-26*. Considering the analogy adopted in the said judgement that to qualify as an intermediary, there should be two supplies at any one time: (i) the supply between the principal and the third party; and (ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged. The validity of the definition of intermediary services in the instant case should be analysed as the pre-sale and marketing services precedes the actual supply of goods, viz., the supply of goods from the overseas principal to the Indian customer and the supply of services by Appellant to the overseas supplier do not and never take place at the same point in time, as envisaged and required under the law – as outlined in the education guide. Therefore, one supply of service i.e. promotion and marketing services precedes the other i.e. supply of equipment and at no point of time, the two services are supplied at the same time as explained in the Education Guide.

8.9. Appellant has also drawn the attention of this authority to the Advance ruling pronounced by the Authority of Advance rulings under Service Tax provisions in the case of **GoDaddy India Web Services (P.) Ltd.** *Ruling No. AAR/ST/08/2016, Application No. AAR/44/ST/15/2014*) wherein the Authority has clearly demarcated the meaning of

intermediary services and ruled that pure marketing and promotion services would not be intermediary services.

8.10. The Appellant stated that the LAAR has completely failed to consider the above judgement and submits that the facts and circumstances of the said case and Appellant's business are same and wholly comparable and thus, the ratio of the said Ruling should be squarely applied to Appellant's case.

8.11. Appellant further submits that the words used in the definition of 'intermediary services' viz., 'arranging or facilitating' has apparently not been defined in the GST provisions and there is no reference to these expression in the allied laws, viz., commodity tax laws such as Service Tax, Central Excise or VAT laws. Therefore, the meaning given to such expressions in the legal dictionaries may be relied upon. Arrange, means to make preparation or to place in a desired order and facilitate, means to render easier or absence of difficulty or that which promotes the ease of any action. Thus, only such of the services which will impact as above would qualify as 'services of arranging or facilitating supply of goods'.

8.12. The following factors also help in determination of whether or not; the services provided would be intermediary services:

- Intermediary cannot alter the nature of value of the service, supply of which he facilitates, although he may negotiate on behalf of the principal.
- The value of Intermediary service will be invariably be identifiable from the main supply of service.
- Services provided by intermediary on behalf of principal are clearly identifiable.

8.13. Insofar as it relates to activities of Appellant, Appellant submits that it does not result in 'arranging or facilitating supply of goods' on account of the following reasons:

- the Appellant merely provides marketing and sales promotion activities which may or may not result in a concluded sales for the overseas suppliers;
- The Indian customer directly places an order on the overseas suppliers (recipients of Appellant's services) and the opening of LC and exchange of other documents directly takes place between the overseas supplier and the Indian customer;



- Appellant is not engaged in preparation of any such documentation and/or movement of goods;

Thus, they submitted that the services provided by them cannot be said to be intermediary services, by any stretch of imagination.

8.14. Appellant further submits that not all marketing activities will be 'intermediary services'. Only such of the marketing activities (and non-marketing services) which result in 'arranging or facilitating supply of goods' would be termed as 'intermediary services'. In this regard, Appellant drew the attention to the following provisions under the erstwhile Service tax provisions:

In Explanation to Section 65(19) of the Finance Act, 1994(Service tax provisions), a commission agent was defined to mean 'a person who causes a sale or purchase of goods ... for a consideration'.

It is important to note that this was different, separate and distinct from 'intermediary services', since both co-existed under different provisions. Applying the above to Appellant's case, it becomes important to note that Appellant is merely causing a buying or selling (supplying) of goods from the overseas principal to the customer in India. Appellant is most certainly not engaged in 'arranging or facilitating supply of goods by the overseas principal to the Indian customer', as indicated supra.

8.15. The appellant submits that the analogy adopted in the definition of 'business support services' under Service tax law will be akin to the instant case that the services rendered by him under the ambit of "Business Support Services" under the HSN Code: 9983 based on the analogy adopted in the case of Advance ruling of **GoDaddy India Web Services (P.) Ltd.** *Ruling No. AAR/ST/08/2016, Application No. AAR/44/ST/15/2014*) and the definition of "Support Services of Business or Commerce".

9. In respect of the question No. 2 the appellant submits that the LAAR has completely failed to consider the submissions made by Appellant. In contrary to the above, the LAAR has considered the copy of the agency contract entered into by Appellant with Brabender GMBH & Co. KG which was part of the advance ruling application wherein **clause IV of the agency contract mentioned about Agent's Right to a Commission in which** In sub-clause 6 it is seen that the consideration is payable for the services which include pre-sales,

marketing sales, installation and warranty period services. The agreement quotes the principal as declaring to the agent as under:

“From our experience for business in your territory it would be commensurate to allocate 25% of total commission earned in each fill system case to address installation and warranty period services which are provided by your company on our behalf to the end customers”.

The LAAR has concluded that Appellant has been offered commission on the amount of goods sold and this is the method adopted for calculating consideration. Further, that the incidence of after sales and warranty services is contingent upon the successful supply of materials and is not contingent upon the marketing “intermediary” services provided by Appellant to the overseas entities. In addition to this Appellant submits that the promotion and marketing activities along with the after-sale support qualifies the conditions mentioned in the definition of ‘composite supply’ as mentioned supra, based on the following grounds:

9.1. The two taxable services are naturally bundled:

Appellant submits that in accordance with the E-Flyer published by the CBEC on 15.03.2018 with respect to composite supplies and mixed supplies submits, enlists the indicators based on business practices to ascertain whether the two or more supplies of goods/ services are naturally bundled or not. The relevant extract is as follows:

*"Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators, some of which are listed below:*

- *The perception of the consumer or the service receiver. If large number of service receivers of such bundle of services reasonably expects such services to be provided as a package, then such a package could be treated as naturally bundled in the ordinary course of business.*
- *Majority of service providers in a particular area of business provide similar bundle of services.*
- *The nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of business. If the nature of services is such that one of the services is the main service and the*



*other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service.*

- In other words, in the instant case, the customer being the overseas entity, it is expected that, the person who undertakes marketing and sales promotion also undertake post-sales support; This is for the reason that the person who markets the product is best suited to even assist in post-sales support; This would maintain a connect with the pre-sale discussions and the post-sale situation. In other words, there would be a balance between the expectations of the end customers and the discussions during the sales promotion. This expectation may be viewed and understood from both, the perspective of the overseas manufacturer and the Indian customer. For the reasons indicated supra, specifically in a B2B transaction (unlike a B2C transaction) the expectation that the person who markets the product is the person who assists in the immediately post-sale activities is a normal phenomenon. It is a normal business practice to combine the pre-sale marketing and post-sale support under a single contract as a bundle. Keeping in line with this normal industry practice, even in Appellant's case, the same are bundled as a single contract.

9.2. Supply of services are in conjunction with each other:

- i. In this regard, the Appellant submits that one should not interpret the meaning of 'conjunction' used in the definition of composite supply under GST, as mentioned supra, to the events occurring at the 'same point of time'. The expression conjunction should be understood to mean as offered together as a bundle and not necessarily that they should take place at the same point-in-time.
- ii. In a business sense, the same has to be understood based on the contractual arrangement entered into between service provider and service recipients. In other words, the activities performed in a contractual arrangement comes under the ambit of 'conjunction' as mentioned in the said definition under GST. And has provided an example of supply of washing machine along with other services like transportation, installation, training and warranty services.

9.3. Further, the appellant has stated that In the instant case, the promotion and marketing services and after sale support services are being provided on a single contractual

arrangement entered into with the customer and hence such services are naturally bundled, as mentioned supra, and supplied in the conjunction with each other and thus qualifies the condition of 'Composite supply' under GST.

9.4. The promotion and marketing services can be termed as 'Principal supply'. The Appellant submits that the principal supply will be promotion and marketing services because of the following reasons:

- Marketing activities is the first step in the complete process;
- After sale support services can be given only once product is sold;
- Customer will place order to the service recipients on the basis of promotion and marketing services provided by Appellant – it is only after the products are sold that after sale services arises;
- The supply of the product by the overseas entity to the customer in India embeds within itself, the provision of after sales support;
- Marketing determines the very sale of the product and as a complete offering, post-sales support is ancillary and incidental to the sale;
- The essential characteristic of the services provided by the Appellant are marketing, sales promotion and brand building; coordination and providing all other support once the product is sold are by products of the sale of the product;
- In terms of service agreement, promotion and marketing services is the predominant component while installation and warranty services are ancillary to such promotion and marketing services.

10. In respect of Question 3 Appellant submits that Clause 6 of Section 2 of Integrated Goods and Services Tax (IGST) Act, 2017, defines the meaning of export of services, which reads as under:

“Export of services” means the supply of any service when,-

- i. The supplier of 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 of IGST Act, 2017.

**clause 93 of section 2 of CGST Act, 2017, reads as under:**

*“Recipient” of supply of goods or services or both, means-*

- i. Where a consideration is payable for the supply of goods or services or both, the person **who is liable to pay that consideration;**
- ii. 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
- iii. Where no consideration is payable for the supply of a services, 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.

10.1. In the Appellant case, consideration is payable for the supply of services and the ***overseas entity is liable to pay*** that consideration for both promotion and marketing services & after sale support services. Therefore, the recipient of both the services, under a bundled contract will be the overseas entity, which is located outside India.

10.2. Determination of place of supply of services: The Appellant submits that place of supply shall be determined as provided in Section 13 of IGST Act, 2017 because location of supplier is in India and location of recipient is outside India. As per section 13(2) of IGST Act, 2017, the place of supply of services shall be the location of the recipient of services. Further, the location of the recipient of services is a place outside India. Therefore, the place of supply for promotion and marketing services shall be the place outside India.

10.3. Further the appellant has reiterated the grounds filed before the AAR the provisions of clause 6 of sec 2 of IGST Act, 2017 and stated that, *the supply of said services is 'export of services' and consequently will become a zero-rated supply as provided in Section 16 of IGST Act, 2017.* However, it is to be noted that the LAAR has not commented on the same since it is not in the purview of the jurisdiction of the said Authority as it amounts to determination of place of supply.

## **PERSONAL HEARING**

11. The appellants were called for a personal hearing on 15/11/2018 and they were represented by Sri. Badrinath, Chartered Accountant, who reiterated the arguments in the grounds of appeal. The appellant argued that Appellant's acts do not qualify as an 'agent' as defined under CGST Act, 2017. The services of marketing, sales promotion and post sale support services are provided on a Principal to Principal basis by the Appellant to the overseas entities. Further, there does not exist any Principal-Agent relationship during the course of rendering the aforesaid services.

12. The Appellant further argued that the sales promotion and marketing services and after sale support services are being provided on a single contractual arrangement entered into with the customer and hence such services are naturally bundled and supplied in the conjunction with each other and thus qualifies the condition of 'Composite supply' under GST. The principal supply will be promotion and marketing services.

12.1. The Appellant argued to substantiate that the services provided by the Appellant like sales promotion, marketing and after sales service to the overseas entity is 'export of services' and consequently will become a zero-rated supply as provided in Section 16 of IGST Act, 2017.

## **FINDINGS AND DISCUSSIONS**

13. We have taken into consideration all the submissions made by the Appellant in writing as well as the detailed arguments made by their representative during the personal hearing. Briefly stated the facts are that M/s Toshniwal Brothers (SR) Private Limited, is a company engaged in the business of providing marketing, sales promotion and post sale support services to their clients located outside India. The said services are provided to the foreign client in terms of an agreement and the services are provided to the foreign client in relation to products like scientific instruments used in research and development/quality control primarily in fields of Nano Science, Material Science, Bio Pharma and Polymer Sciences. Consideration for these services would be received by the Appellant in convertible foreign exchange.

14. In this factual background, the Appellant had sought a ruling before the Authority for Advance Ruling, Karnataka as to whether:



- (i) the 'promotion and marketing services' will be termed as 'intermediary service' and;
- (ii) whether the 'after-sale support service' which is provided under a composite contract will be termed as a composite supply. If so, what will be the principal supply?

15. The Authority for Advance Ruling in their order dated 19<sup>th</sup> Sept 2018, held that the 'promotion and marketing services' provided is in the nature of facilitating the supply of goods and hence would amount to 'intermediary service'. Further, the AAR held that the 'after-sale support service' is independent from the promotion and marketing service and is not a composite supply.

16. The Appellant also sought a ruling on a third question i.e whether the contracts in question would qualify as exports in terms of Section 2(6) of the IGST Act and whether they will be treated as 'zero-rated supply' in terms of Section 16 of the said Act. On this question, the AAR refrained from giving a ruling on the grounds that the question warrants determination of place of supply, which aspect is outside the purview of the AAR.

17. Aggrieved by the above ruling of the AAR, the Appellant is before us in appeal on all the three questions. The Appellant has placed before us the Agency Contract entered into with Brabender GmbH & Co.KG, Germany. We have gone through the contract in detail and the discussions made hereunder are keeping the terms of this contract in mind. We find that in terms of the Agency Contract, the Appellant has been accorded exclusive agency in the territory of India and Bangladesh with respect to all measuring and test instruments produced by Brabender GmbH & Co. KG for the food industry business. On going through the Agency contract, it is seen that the Appellant has been appointed as an agent to negotiate business transactions on behalf of the Principal (Brabender, Germany) with prospective customers in the assigned territory. It is the duty of the Appellant as an agent to visit the customers and prospective customers and inform the Principal when he learns of any demand. As part of negotiating business transactions on behalf of the Principal, the Appellant promotes and markets the products of the Principal in India which includes advertising the details of the goods, demonstration of the products to the prospective customers, communicating with the prospective customers about the goods, informing the Principal about the queries and comments of the prospective customers and reviewing the credit rating of the prospective customers. Once the order is finalized between the Principal and the customer and the goods



are imported by the customer, the Appellant provides support services by way of installation, initial start-up of the products and demonstration of its satisfactory performance.

18. In the above scheme of activities, the first point for determination is whether the promotion and marketing activities undertaken by the Appellant for the overseas Principal, are to be classified as 'intermediary services'. Let us look at the definition of 'intermediary service' under GST law. Section 2(13) of the IGST Act defines the term "*intermediary*" as - "*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.*"

18.1. From the above, it is evident that in order to be called an '*intermediary*' as defined under Sec 2(13) of the IGST Act, a person must satisfy the following conditions.

- (i) He must be a 'broker' or an 'agent' or 'any other person by whatever name called', who arranges or facilitates the supply of goods or services or both or securities'.
- (ii) The supply arranged or facilitated must be between two or more persons.
- (iii) He is not the person who supplies such goods or services or securities on his own account.

Though the term 'broker' and 'agent' are fundamentally different, a broker being a middleman whose job is only to facilitate whereas an agent acts on behalf of the Principal, yet, these terms have been put under one umbrella in the definition of intermediary. However, an intermediary would not only be a person who is a broker or an agent but also 'any other person, by whatever name called'. The use of the expression 'or any other person, by whatever name called' tends to delimit the scope of the intermediary to apply only to broker or an agent. The words agent, and broker (used in definition of the word 'intermediary' in the IGST act) are only in the broad construct of being an intermediary or a representative, but are not substitutes for each other. In addition, the third part of the definition expands rather than limits the meaning of who an intermediary is to one who is only an agent or a broker.

18.2. Further, the phrase "*who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons*" in the clause defining 'intermediary' gives a clear indication of intendment in as much as it ascribes a quality to the person who is to be construed as an intermediary. In *Grasim Industries Limited v. Collector of Customs, Bombay*



*[CASE NO.: Appeal (civil) 1951 of 1998, DATE OF JUDGMENT: 04/04/2002], the Supreme Court held that in matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the Court to take upon itself the task of amending or alternating the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used.*

18.3. An intermediary, thus can be a broker or agent or any other person and is only a facilitator for the supply of goods or services or both. The act of arranging or facilitation gives rise to two supplies: (1) Supply between the Principal and the third party (2) Supply by the intermediary to the Principal for a commission/fee. In other words, an intermediary is a person between the supplier and the recipient who arranges or facilitates the supply for a commission. The terms 'arrange' and 'facilitate' have not been defined in the Act. Merriam Webster Dictionary defines the two words as:

**Facilitate:** to make (something) easier; to help cause (something); to help (something) run smoothly and effectively.

**Arrange:** to bring about an agreement or understanding concerning; to make preparations; to move and organise (things) into a particular order or position; to organise the details of something before it happens; to plan (something).

Therefore, a general understanding of the term 'arranging' or 'facilitation' would cover a very wide range of activities ranging from marketing or sales promotion of the goods or services of the client, locating prospective buyers for the client's products or locating sources of supply of the goods or services required by the client, price negotiation with the prospective buyer/ prospective supplier, procuring sales orders in respect of the goods or services of the client and like activities.

18.4. When we apply the general understanding of the term 'arranging' or 'facilitation' to the instant case, we find that the Appellant does in fact 'arranges' or 'facilitates' the supply of goods by Brabender, Germany to the customers in India. It is contained in the Agency contract of Brabender, Germany, that the Appellant is assigned the job of promoting the business of the overseas entity in the assigned territory by visiting the customer or the prospective customer, providing them with technical information of the product, furnishing



the quotation, negotiating the price of the product with the customer either personally or through correspondences. All these activities performed by the Appellant in the assigned territory are to be regularly informed to the Principal along with the documents. Based on this information, the overseas entity will either contact the customer and negotiate the contract with the customer or the Appellant himself can negotiate the contract with the customer on behalf of the Principal, for the sale of the product of the overseas entity. However the Principal shall be free to conclude, or to refuse the conclusion of a contract negotiated by the Appellant and it is binding on the Principal to inform the Appellant about the acceptance, rejection, non-performance or otherwise of a contract, and shall state the decisive reasons underlying his decision unless such statement is prejudicial to his own essential interests. For all contracts of sale of goods which the Principal enters into with customers residing in the Appellant's territory and which have been negotiated by the Appellant, the Appellant shall receive a commission of **twelve percent (12%)** of the value of goods and in respect of contracts which have not been negotiated by the Appellant, the commission of 6% of the value of the goods will be paid.

18.5. The entire gamut of the above activities viz. the act of identifying the prospective customers in India, promoting the products of the Principal to the prospective customers, addressing the queries of the prospective customers with regard to the Principal's products, communicating with the Principal about the comments and queries of the prospective customers and reviewing the credit rating of the prospective customers are all part and parcel of facilitating the supply of products by Brabender, Germany to the customers in India. It is noted that the insistence in the contract is on calling the Appellant as the Agent of the Principal and that the Appellant is expected to perform activities of the nature of advertising, of gathering and conveying business information, of providing product implementation and technical support, of aligning and attuning marketing and other activities related to the products of the Principal located outside India- in its "**liaison capacity**". A person acting in a liaison capacity is the person who has to act as the go between, is the emissary, the interceder, the intercessor, the intermediary, the medium, the representative for all proper purposes. He may be prohibited by the contract from entering into binding contracts but at the same time is authorised by it to act as the go- between the Principal's customers and prospects in India and the Principal itself.



18.6. The Appellant located in India, handles this function- **broadly of marketing/ business development and customer Support for the foreign entity**. Clearly, the engagement of the Appellant in the entire chain of sequence **is with reference to the taxable territory and with reference only to such goods that are intended to be sold in India**. Devoid of the product and the taxable territory, there is no appreciation which can be had of the supply or the engagement which the Appellant creates. In effect, the basic contention of the Appellant is that the services supplied by him in the form of marketing, market penetration, consolidation, market building and support activity for the goods supplied by a foreign entity in the domestic territory (India) should not be levied to tax. However, when a similar activity by a similarly placed entity (in India) acting to fulfill the same function for another Indian entity would normally be exigible to GST, the Appellant's contention goes against the grain of the expressed intention of the legislature. Upholding such a result, will not be tenable. This would happen only when we ignore the fundamental idea of GST being a destination based consumption tax and insist on applying the rule of *Noscitur a sociis* inappropriately to certain words/ phrases used in **Section 2(13) of the IGST Act**. It is an **accepted fact that GST is destination based tax in the sense that it is levied on commercial activities and it is not a charge on the business but on the consumer**.

18.7. The definition of 'intermediary' as given in Section 2(13) of the IGST Act excludes a person who supplies such goods or services or both on his own account. It is the contention of the Appellant that the services of promotion and marketing are being provided to Brabender. Germany on their own account and they are not engaged in buying or selling or supplying goods on behalf of the Principal. It would be worthy to analyze the definition of the term "intermediary services" under the GST regime and pre-GST regime. Both the definitions have been mentioned below:



Under pre-GST regime	Under GST regime
<u><b>Rule 2(f) of the Place of Provision of Services Rules, 2012</b></u>  "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the ' <b>main</b> ' service) between two or more persons, but does not include a person who provides the <b>main</b> service on his account	<u><b>Section 2(13) of Integrated Goods and Services Tax Act, 2017 (IGST Act)</b></u>  "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 <b>such</b> goods or services or both or securities on his own account.

18.8. From the above definitions, in essence, there does not seem to be any difference between the meaning of the term "intermediary" under the GST regime and pre-GST regime. In the pre-GST regime, an intermediary referred to a person who facilitates the provision of a **main** service between two or more person but did not include a person who provided the **main** service on his account. Similarly, in the GST regime, an intermediary refers to a person who facilitates the supply of goods or services or both between two or more persons but excludes a person who supplies **such** goods or services or both on his own account. The phrase 'such goods or services' used in the definition of 'intermediary' implies that the person should not be supplying on his risk and reward entirely, the very goods or services whose supply he is arranging or facilitating. In the instant case, the Appellant is facilitating the supply of the products of Brabender between the Principal in Germany and the Principal's customer in India. He is not supplying the products of Brabender on behalf of the Principal. He is only arranging the contact between the Principal and the Principal's customer and the actual supply of the products is done by the Principal directly to the customer. The service of facilitating a supply of goods between the Principal and the customers is provided by the Appellant to the overseas client. The Appellant is not supplying such goods on his own account.

18.9. The argument of the Appellant that the promotion and marketing services are supplied to the Principal on their own account and hence they fall within the exclusion clause of the definition of intermediary is not a correct interpretation of the law. The language of the exclusion clause is such that it is applicable to those persons who supply **such** goods or



service (or both) on their own account. If a person either 'facilitates' or alternately 'arranges' any supply of goods or service (or both), between two or more persons, and does not supply such goods or service (or both) on his own account, he would be regarded as an 'intermediary'. At the risk of being repetitive, the Appellant is clearly facilitating the supply of the products of the overseas client directly to the client's customers in the territory of India and is not supplying such goods on his own account. Therefore, the Appellant does not fall within the ambit of the exclusion.

18.10. The Appellant in his grounds of appeal has relied heavily on the ruling given by the Authority of Advance Rulings under the Service Tax provisions in the case of GoDaddy India Web Services (P) Ltd Ruling No AAR/ST/08/2016 wherein the Authority has ruled that pure marketing and promotion services would not be intermediary services. We have gone through the said ruling. The facts in the said case are that GoDaddy India provides a gamut of services to its client GoDaddy US and provides support services to assist GoDaddy US to develop its brand in India. A ruling was sought whether the various support services provided by GoDaddy India are naturally bundled as a single service being Business support service. The contention of the Revenue was that the various support services provided by GoDaddy India was not a bundle of services but more appropriately covered under 'intermediary service'. The Authority in the said case, after taking note of the fact that the applicant (GoDaddy India) will not be engaged in arranging or facilitating provision of services by GoDaddy US to customers in India, will not secure orders from customers in India or arrange or facilitate the provision of any service by any third party service provider to GoDaddy US, held that the applicant is providing support services in relation to marketing, branding, offline marketing, etc on principal-to-principal basis to GoDaddy US which are a bundle of services naturally bundled in the ordinary course of business and accordingly is a single service being Business Support Service; that the business support service is the main service provided to GoDaddy US on their own account and hence is not an intermediary service. We find that the facts of the case before the Service Tax Authority for Advance Ruling, which are also briefly brought out above, are patently different from the facts in the case before us. As such the ruling given in the case of GoDaddy India does not buttress the case of the Appellant before us.

18.11. In view of the foregoing discussions, we uphold the decision of the AAR that the service of promotion and marketing of the products of the overseas client is in the nature of facilitating the supply of the products of the overseas client and is appropriately classified as an 'intermediary service' as defined under Section 2(13) of the IGST Act. Having concluded



that the service supplied by the Appellant is classified as an 'intermediary service' as defined under Section 2(13) of the IGST Act, it automatically flows that the place of supply of such service will be in terms of Section 13(8) of the IGST Act.

19. Coming to the second question - whether the after-sales service provided under a composite contract would amount to a composite supply and if so what would be the principal supply? Before proceeding any further, let us understand composite supply as defined in sub section 30 of section 2 of the CGST Act, 2017 which is as under;

**“Composite supply”** means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.

19.1. The following parameters are to be applied to the facts of the case to determine whether the supply is a composite supply or not:

- two or more taxable supplies of goods or services or both, or any combination thereof
- these taxable supplies are naturally bundled
- these taxable supplies are supplied in conjunction with each other in the ordinary course of business
- one of these taxable supplies is a principal supply

19.2. In the instant case there is no dispute that the Agency contract in question involves two taxable supplies of services i.e promotion and marketing service and after-sales support service. However in order for the supply to be termed as a 'composite supply', what is required is that the supply of the said services should at least be bundled, more specifically be 'naturally bundled', and supplied in conjunction with each other. The term 'naturally bundled' has not been defined in the GST Act. We note that the concept of composite supply under the GST law is similar to the concept of naturally bundled services that prevailed under the service tax regime, and the same was understood to refer to those transactions involving an element of provision of service and an element of transfer of title in goods in which various elements are so inextricably linked that they essentially form **one composite transaction**.



19.3. The Appellant has contended that the marketing services and the post sales support services (installation and warranty support) are normally undertaken as a bundle of services; that their principals do not have any presence in India and the Appellant is the sole representative in the Indian territory for the contracted products; that installation and warranty support services are ancillary to the predominant service of promotion and marketing and there is a single price for both the services. We have gone through the Agency contract with Brabender, Germany in detail. We find that the Appellant has been engaged to promote and market the products of Brabender, Germany in India. For this purpose, the Appellant will advertise the Brabender products to the prospective customers, demonstrate the use of the products, address the queries of the prospective customers and communicate with the overseas client regarding the comments of the prospective customers. Based on the inputs supplied by the Appellant, the Principal will decide whether to conclude a contract with the customer in India. The decision of the Principal regarding the conclusion of the contract with a customer or its rejection will be informed to the Appellant. In case the Principal agrees to a contract with a customer, the Appellant gets a commission which is agreed upon as 12% of the value of the goods sold. While the Agency contract states that the commission is for all the services provided by the Appellant which includes pre-sales, marketing, installation and warranty period services, it has been stated therein that 25% of the commission is attributable to the installation and warranty period services. By the Appellant's own admission, the after-sales support installation service is not required in every case of sale since there are equipments which are typically in the nature of plug-and-play. Further, there are equipments which do not require installation but need to be configured remotely and the same is done by the manufacturers themselves. Therefore, the provision of after sales support by way of installation does not arise in each and every case. It is for this reason that the service recipient has earmarked only 25% of the commission payable as being towards the after sales support service since the same does not arise in every sale made to the customer. Therefore the question of being naturally bundled does not arise for the reason that every promotional activity with a prospective customer does not result in a sale. Further, every sale does not necessarily mean that installation support or after sale support is required. Therefore, we are of the view that the after sales support service, although rendered in a composite manner with the promotion and marketing service is not a composite supply. The price for the after sale support service is clearly identifiable and has been so stated in the contract itself. We accordingly uphold the AAR ruling on this question.



20. We now come to the third question i.e whether the above contracts would qualify as exports in terms of Section 2(6) of the IGST Act and will be a zero-rated supply as provided under Section 16 of the said Act. The definition of "export of services" as per Section 2(6) of IGST Act, 2017 is as follows :-

"export of services" means the supply of any service when,

- (i) the supplier of 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;"

20.1. Thus, one of the important requirements for supply of any service to be treated as 'export of service' is that the place of supply of service is outside India. The provisions for determination of place of supply of services where the location of the supplier or the location of the recipient of services is outside India are contained in Section 13 of the IGST Act, 2017. Thus, the entire issue is intrinsically related to determination of 'place of supply' of service by the applicant.

20.2. The CGST Act limits the Advance Ruling Authority to decide the issues earmarked for it under Section 97(2). In terms of sub-section (2) of Section 97 of the CGST/KGST Act, the question on which the advance ruling can be sought shall be in respect of the following:

- (i) Classification of any goods or services or both;
- (ii) Applicability of a notification issued under the provisions of the Act;
- (iii) Determination of time and value of supply of goods or services or both;
- (iv) Admissibility of input tax credit of tax paid or deemed to have been paid;
- (v) Determination of the liability to pay tax on any goods or services or both;
- (vi) Whether the applicant is required to be registered;
- (vii) Whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of the term 'supply'.



It is evident from the above that determination of place of supply is not a question on which an advance ruling can be sought. The Authority for Advance Ruling has been constituted in exercise of the powers conferred by section 96 of the Karnataka Goods and Services Tax Act, 2017, which Act extends to the whole of the state of Karnataka. The AAR is a creature of statute and has to function within the legal boundary mandated by the Act. As the 'place of supply' is not covered by Section 97(2) of the Acts, the AAR was right in refraining from answering this question on the grounds of lack of jurisdiction. We uphold the ruling on this issue.

21. In view of the above discussion, we pass the following order

### ORDER

We uphold the order No.KAR ADRG 23/2018 dated 19/09/2018 passed by the Advance Ruling Authority and the appeal filed by the Appellant M/s. Thoshniwal Brothers (SR) Private Limited, stands dismissed on all accounts.

  
(A.K.JYOTISHI)

Member

Karnataka Appellate Authority  
for Advance Ruling

 9.1.19  
(M.S. SRIKAR)

Member

Karnataka Appellate Authority  
for Advance Ruling