THE MAHARASHTRA APPELLATE AUTHORITY FOR ADVANCE RULING FOR GOODS AND SERVICES TAX

(Constituted under Section 99 of the Maharashtra Goods and Services Tax Act, 2017)

ORDER NO. MAH/AAAR/SS-RJ/17/2019-20 Date- 20.11.2019

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri. Rajiv Jalota, MEMBER

GSTIN Number	Unregistered
Legal Name of Appellant	Mayank Jain
Registered Address	13th Floor, Tower-1, One IndiaBulls Centre, 841, Senapati Bapat Marg, Mumbai-400013
Details of appeal	Appeal No. MAH/GST-AAAR-17/2019-20 dated 22.08.2019 against Advance Ruling No. GST-ARA-103/2018-19/B- 63 Dated 01.06.2019
Jurisdictional Officer	Dy./Asstt. Commissioner CGST & C.Ex., Mumbai Central, Division - III

PROCEEDINGS

(Under Section 101 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the MGST Act.

The present appeal has been filed under Section 100 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by Mayank Jain (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-103/2018-19/B- 63 Dated 01.06.2019.

BRIEF FACTS OF THE CASE

1. Mayank Jain ("the Appellant") is an individual exploring business opportunity in providing marketing and advisory services to the Consultant Managers in relation to the

Employee Based Immigration: 5th Reference Program notified by the United States Citizenship and Immigration Services ("the EB-5 Program"). The EB-5 Program envisages that an investor is eligible to a permanent residence permit in the United State of America subject to an investment of US$ 500,000 and job creation in a commercial entity or investment fund, commonly referred to as a "Regional Centre" or a "Company", which is approved and recognized by the Government of the United States of America. "Consultant Manager" (located outside India) acts for the Regional Centre or Company enabling them to receive investments from the prospective investors.

2. Under the proposed Agreement titled as "Foreign Immigration Advisor Agreement", the Appellant shall provide two distinct services, viz., (i) Marketing services; and (ii) Handholding services, as detailed below:

i. Marketing services:

a. Collecting and analysing information i.e. market analytics, intelligence, preparing and drafting reports, strategy and providing leads to the Consultant Manager;

b. Market the EB-5 Program in India to prospective investors;

c. Address queries of the Consultant Manager as and when required from the Applicant;

d. Marketing support services such as arranging premises for the Consultant Manager and prospective investor to meet and negotiate/ discuss at their discretion and without interference of the Appellant.

ii. Handholding services:

Upon confirmation of a proposed investment from the Consultant Manager and prospective investor, provide hand-holding services thereto.

3. The consideration for both the aforesaid services shall be fixed and contingent upon successful investment / repatriation by the investor. In other words, upon successful investment / repatriation by the investor, the Appellant will get paid separately for each of the Marketing services and Handholding services.

4. The Appellant filed an application before the Maharashtra Authority for Advance Ruling ("AAR"), vide Application No. 103 dated 21 December 2018 ("AAR Application"), wherein it sought the ruling on the following questions:

a. Whether the Marketing services to be supplied by the Appellant under the proposed Agreement would constitute supply of "Support services" classified under SAC 9985 or "Intermediary service" classifiable under SAC 9961 / 9962 or any other heading?

b. Whether the Handholding services to be supplied by the Appellant under the proposed Agreement would constitute supply of "Support services" falling under SAC 9985 or "Intermediary service" classifiable under SAC 9961 / 9962 or any other heading?

c. Whether the Marketing services to be provided by the Appellant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax ("IGST") Act 2017?

d. Whether the Handholding services to be provided by the Appellant will be an export of services as defined under Section 2(6) of the IGST Act, 2017?

5. The Appellant made the following submissions before the AAR with respect to each of the questions referred above:

5.1 (a). Whether the Marketing services to be supplied by the Appellant under the proposed Agreement would constitute supply of "Support services" classified under SAC 9985 or "Intermediary service" classifiable under S SC 9961 / 9962 or any other heading?

i. The Appellant would be providing pure marketing services to the Consultant Manager. The Appellant is an independent service provider and would be providing services at his own risk and cost. It is also expressly provided in the proposed Agreement that neither party would represent itself to be an agent of the other nor shall either party accept service of legal process or create or assume any obligation of any kind or nature whatsoever on behalf of the other party. Further, the Appellant would not have the authority to conclude or negotiate any contracts or secure any orders on behalf of the Consultant Manager.

ii. In fulfilment of its obligation towards Marketing services, the Appellant would undertake the following activities:

a. Planning and conducting market surveys to identify the market and prospective investors;

b. Prepare reports, marketing plans, market intelligence and compile list of prospective investors;

c. Formulate strategy;

d. Address queries of the Consultant Manager in relation to the above; and

e. Conduct sales prospection.

iii. The Appellant would not fall within the ambit of the definition of 'intermediary' on account of the following reasons:

a. Only persons appointed in representative capacities can be covered within the scope of the term 'Intermediary'. However, in the present case the Appellant would not be acting in the representative capacity and hence, cannot be regarded as an intermediary.

b. The Appellant is acting on their volition in providing services to the Consultant Manager; there can be no question of facilitation. Hence, the Appellant is clearly not covered within the definition of intermediary for this bucket of marketing services.

c. Since the services are rendered at Appellant's own risk and reward it does not act in the representative capacity of the Consultant Manager, the services would fall outside the purview of the definition of 'intermediary'.

d. The Appellant merely provides marketing and advertising solutions which include sending out pamphlets, posting banners, and using print and electronic media. Nothing amongst these activities mandates there being a communication or any kind of decision making on behalf of the foreign entity.

iv. The services to be provided by the Appellant would be correctly classified under Entry 9985 as "Business Support Service".

5.2 **(b). Whether the Handholding services to be supplied by the Appellant under the proposed Agreement would constitute a supply of "Support services" falling under SAC 9985 or "Intermediary service" classifiable under SAC 9961 / 9962 or any other heading?**

i. The Appellant will be an independent service provider providing services at his own risk and cost. It is expressly provided in the Agreement that the Appellant would not represent itself to be the agent of the other party or assume any obligation of any kind or nature whatsoever on behalf of Consultant Manager. Neither shall have the authority to conclude or negotiate any contracts or secure any orders on behalf of each other.

ii. The scope of the services to be provided by the Appellant to the Consultant Manager, under the Handholding services would mainly include the following:

a. Identify and report to the Consultant Manager, the prospective investors who qualify the eligibility criteria and are willing to deposit the requisite amount in an escrow account and pay applicable fees for the purpose of EB-5 programme.

b. Assist the Consultant Manager in obtaining personal information of the qualified investor.

c. Assist the qualified investor in coordinating and staffing informational meeting about EB-5 program.

d. Assistance relating to documentation.

e. Provide information collecting documents, filling out forms, addressing any possible issues or difficulties.

f. Communicate immigration status / processing related updated to the qualified investor.

iii. The Appellant would not fall within the ambit of the definition of 'intermediary' on account of the following reasons:

a. The Appellant will never participate in the actual sales negotiation or profess to act on behalf of the Consultant Manager or help in concluding the investment by the prospective investor.

b. The Appellant and the Consultant Manager will have no authority to create, nor will they assume any obligation on behalf of each other. The services rendered by the Appellant will be limited in this respect. Although the Appellant would assist the person of interest in filling of the forms, providing direction to get the necessary security clearances, and getting together all the financial information required as per the Consulting Manager, these duties are purely procedural in nature and do not at any point in time extend to facilitating the investment.

c. The Appellant has no role whatsoever to play in respect of the facilitation, negotiations, manner and mode of investment.

d. The services to be provided by the Appellant will be as an independent contractor. Therefore, the Appellant will fall within the exclusion provided in the third limb of the definition, i.e. providing services on his own account.

iv. The services to be provided by the Appellant would be correctly classified under entry 9985 as "Business Support Service".

5.3 **(c). Whether the Marketing services to be provided by the Appellant will be an export of services as defined under Section 2(6) of the IGST Act?**

i. All conditions for 'export of services' provided under Section 2(6) of the IGST Act are satisfied.

ii. Place of supply of the services, being support services, would be outside India as the recipient of service (i.e. the Consulting Manager) is located outside India.

5.4 **(d). Whether the Handholding services to be provided by the Appellant will be an export of services as defined under Section 2(6) of the IGST Act?**

i. All conditions for 'export of services' provided under Section 2(6) of the IGST Act are satisfied.

ii. Place of supply of the services, being support services, would be outside India as the recipient of service (i.e. the Consulting Manager) is located outside India.

6. In the course of hearing, the Appellant relied on the following judicial precedents in support of its contentions:

a. *Sunrise Immigrations Consultants Private Limited vs. CCE ST, Chandigarh [Order No. 62221/20181]:*

In this case the Appellant was providing services by way of providing referrals, to foreign universities and foreign banks, of students / potential investors who wish to study or settle in Canada. The consideration of the Appellant was based on the on successful admission (of student) or successful investment (by the investor). The question before the Hon. CESTAT was whether the aforesaid activity would be covered within the definition of 'intermediary' under Finance Act, 1994 which has an identical definition of intermediary as Section 2(13) of the IGST Act. In this case, while deciding the matter in favor of the Appellant, Hon. CESTAT made the following key observations:

- The nature of service provided by the Appellant is the promotion of business of their client, in terms, he gets commission which is covered under Business Auxiliary Service which is not the main service provided by the main service providers namely banks / university.

- As the appellant did not arrange or facilitate main service i.e. education or loan rendered by colleges / banks. In those circumstances, the appellant cannot be called as intermediary.

The Appellant stated that there is no change in the definition of the 'intermediary' under the erstwhile service tax regime vis-a-vis GST regime and the services provided by the Appellant is similar to the services referred in the above case. Hence, it cannot be regarded as intermediary.

b. *In addition to the above, the Appellant further placed reliance on the following precedents:*

- Godaddy India web Services Pvt. Ltd. [2016 (46) STR 806 (AAR)];
- Universal Services India Pvt. Ltd. [2016 (42) STR 585 (AAR)];
- Asahi Kasei India Private Limited [GST-ARA-35/2018-19/B-108 dated 5 September 201 81.

7. Without considering the facts of the case and submissions made by the Appellant (referred supra), AAR has passed the impugned Ruling No. GST-ARA-103/2018-19/B-63 dated 1st June 2019 erroneously holding that Marketing services and Handholding services are 'Intermediary'.

8. Being aggrieved by the impugned Ruling passed by the AAR, the Appellant now prefers this appeal on the following grounds, among other grounds, which are in the alternative and without prejudice to each other.

Application for Condonation of Delay

9. The Applicant has filed an appeal against the Advance Authority Ruling No. GST-ARA- 103/2018-19/B-63 dated 1 June 2019 ("Impugned Ruling") passed by the Maharashtra Authority of Advance Ruling ("AAR"), Mumbai wherein it has been held that the activities of the Applicant under marketing and hand holding services would be regarded services of an 'Intermediary' for the purpose of Goods and Services Tax.

10. The Impugned Ruling was received by the Applicant on 20 July 2019 vide an e-mail. Subsequently, the Applicant received the physical copy of the Impugned Ruling on 23 July 2019. The Applicant filed the aforesaid appeal against the Impugned Ruling on 22 August 2019, considering the date of receipt of impugned ruling as 23 July

2019. At the time of filing of the appeal, the Applicant was informed by the registry that date of receipt of impugned order for the purpose of Section 100 of the Central Goods and Service Tax Act, 2017 ("CGST") would be the date of receipt of order vide email and not date of physical copy of the order. Thus, the limitation period of 30 days would start from the date of email received. Consequently, there is a delay of 2 days in filing the aforesaid appeal.

11. Since the abovementioned appeal has been filed with a delay of 2 days, the Applicant is moving the present application for condonation of 2 days in submitting the appeal in respect of the order on the following grounds:

- It is submitted that the Applicant was of the *bona fide* belief that the impugned order would be received by post and did not expected an email. Consequently, the date of receipt of impugned order considered as 23 July 2019, when the Applicant received the physical copy of the impugned order.
- The delay has occurred due to genuine oversight on part of the Applicant due the belief that correspondences from the Government authority is normally received vide postal services and not email.

12. The Applicant humbly submits that there has been plethora of cases wherein the Courts have taken leniency in Condonation of delay beyond 30 days. The Appellate Authority for Advance Ruling (in past) has condoned a delay of 29 days and 26 days in various cases. Reliance in this regard is place on the following decisions:

- In the case of *In Re T.P. Ajmer Distributors Limited [RAJ/AAAR/APP/02/2018- 19]*, the Appellants submitted that there was a delay in filing the appeal because GST was a new law and the Appellant was not aware about the provisions of law and only after the advice of the advocates, the Appellant became aware about the same. Further, the Appellant submitted that the CFO was occupied in handling the queries and requirement of the Auditors for the quarterly Audits of the company which delayed the appeal. The Court condoned the delay of 29 days and accepted the appeal.
- Similarly, in the case of *In Re Kundan Mishthan Bhandar [UK/GSTARA03/08]*, there was a delay in filing the appeal because the accountant of the appellant who

received the copy of Ruling went on leave for a week after receiving the copy of Ruling and kept the same with him during that period and the Partner of the firm was unwell which prevented him from working. The Court in this case condoned the delay of 26 days.

13. The Applicant submits that in the present case there is a delay of 2 days only which should be condonable.

14. The Applicant states and submits that grave harm, loss and prejudice will be caused to the Applicant if the prayers herein are not granted. However, no harm, loss and/or prejudice will be caused to the Revenue if the prayers herein are granted.

Grounds of Appeal

15. At the outset, it is submitted that the Impugned Ruling is grossly erroneous on the facts and bad in law as it disregards judicial precedents, and therefore, the Impugned Ruling is liable to be set aside.

16. The Impugned Ruling w.r.t. marketing services has been passed based on incorrect understanding of the facts

16.1 The Appellant submits that AAR in Para 5 of the Ruling has wrongly observed that once the Indian investor makes a decision to invest in the US, he contacts the Appellant who provides services to the Indian investor and also facilitates meeting/contact between both of them. It is submitted that AAR in the immediately preceding para have succinctly extracted the scope of services provided under the marketing services as given below:

> *"From a perusal of the agreement submitted by the applicant, we find that the scope of the services rendered lo the Consultant Manager includes planning and conducting market surveys lo identify the market and prospective investors in relation to the EB-5 program for the Consultant Manger; Prepare reports, marketing plans, market intelligence and compile list of prospective investors for the Consultant Manager: Formulate a strategy plan for the benefit of the Consultant Manager: Address queries of the Consultant Manager in relation to the above, as and when raised by the Consultant Manager ; and Conduct sales*

prospection through necessary participation in industry events and provide spotlight to the EB-5 program."

16.2 Nowhere, the scope of services narrated above even remotely suggest that the Appellant acts as a middleman. It is submitted that the marketing services provided *in rem* cannot be construed as that of a middleman, and therefore, the observation of the AAR is based on assumptions, presumptions and surmises.

16.3 It is submitted that the as a part of the marketing services, the Appellant arranges the premises for the Consultant Manager and prospective investor to meet and negotiate/ discuss at their discretion and without interference of the Appellant. Thus, the role of the Appellant is limited to arranging meeting venue, and the Appellant does not take part in the discussion between the investor and the Consultant Manager.

17. **The Appellant does not fall within the definition of "intermediary" for Marketing services or for Handholding services**

17.1 The term "intermediary" is defined under Section 2(13) of the IGST Act as under:

"(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;"

17.2 It is clear from the above definition that the definition of "intermediary" has been divided in to three limbs:

a A broker, an agent or any other person, by whatever name called;

b Arranges or facilitates the supply of goods or services or both, or securities between two or more persons;

c But does not include a person supplying such goods or services or both or securities on his own account.

17.3 It is submitted that AAR erred in interpretation each of the aforesaid limbs. The AAR while analyzing first limb i.e. a *broker, an agent or any other person, by whatever name called,* held that the Appellant would be covered under 'any other person, by whatever name called'. In this regard, it is submitted that the phrase "any other person, by whatever name called" should have the characteristics similar to that of an agent/

broker. It is submitted that if the intention of the legislature was to cover persons of all category under the phrase *"any other person"* then words preceding thereto namely *"broker, an agent"* becomes redundant as also the words succeeding thereto namely *"by whatever name called"*. In such case, "intermediary" ought to have been simply 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, but that is not true in the present case.

17.4 It is further submitted that the subsequent words take colour from the preceding terms, i.e., the legal doctrine of *ejusdem generis*. Hence, for a supplier of services to be treated as an intermediary basis "any other person, by whatever name called" should be in a similar status as that of an agent or broker. Same understanding was displayed by the Central Board of Indirect Taxes and Customs in Circular No. 83/1/2006-ST dated 04 July 2006 while interpreting *any other person* in the context of banking or other financial services. The relevant extract is reproduced below for ready reference:

> *"3. Banking and other financial services are defined under section 65 (12). Such services provided to a customer by a banking company or a financial institution including a* non-banking financial *company or any oilier body corporate or any other person to a customer are liable* to *service tax under section 65(105) (zm). The expression* 'any *other person' appearing in section 65(105) (zm) is to be read* ejusdem generis *with the preceding words.* The expression 'other financial services' appearing under section 65(12)(a)(ix) is a residuary entry and includes; those services which are normally rendered by banks or financial institutions.
>
> 4. *Hence, banking and other financial services provided by a banking company or a financial institution or a nonbanking financial company or any other service provider similar to a bank or a financial institution are liable to service tax under section 65(105) (zm) of the Finance Act, 1994. Department of Posts is not similar to a bank or a financial institution and hence does not fall within the category of any other similar service provider* "
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> *(Emphasis supplied)*

17.5 Reliance in this regard is also placed on the Hon'ble Delhi High Court decision in the case of **Areva T & D India Ltd. Vs. DCIT [2012-TIOL-234-HC-DEL-IT]** wherein the Hon. Delhi High Court applied the principle of ejusdem generis to interpret the expression "business or commercial rights of similar nature" referred to in section 32(1)(ii) of the Act and held that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate.

17.6 The principle of ejusdem generis was also upheld by the Apex Court in the case of Assistant Collector of **C. Ex. Vs. Ramdev Tobacco Company [1991 (51) ELT 631 (SC)]** and **CCE Vs. Shital International [MANU/SC/0884/2010)**. Similar view has been affirmed in the following cases:

- **CIT Vs. Rani Tara Devi [2013 (355) ITR 457 (P&H)];**
- **Commissioner of Income tax, Udaipur Vs. Mcdowell & Co. Ltd . [MANU/SC/0964/2009]**

17.7 In view of the above, it is submitted that the scope of the term "any other person, by whatever name called" will include a person in the same genus as that of an agent or a broker. Thus, on a combined reading of the dictionary meaning of the terms, "broker" and "agent" along with the aforementioned judicial precedents, it can be construed that the only persons appointed in representative capacities can be covered within the scope of the first limb of aforesaid definition, Intermediary.

17.8 In the instant case, the Appellant will act as independent service provider in carrying out the Marketing activities. Moreover, the Appellant and the service recipient will have no authority to create, nor will they assume, any obligation on behalf of each other. The services rendered by the Appellant in this bucket of services are limited to the advertising and marketing activities. In other words, the Appellant is not acting in the capacity of a broker or agent or the like and neither is facilitating any supply of goods of services by the Consultant Manager to the Investor.

17.9 In respect of the second limb. *i.e. Arranges or facilitates the supply of goods or*

services or both or securities between two or more persons, the AAR erroneously held that the Appellant facilitates, and investment/ permanent residence advisory services provided by the Consultant Manager to the Indian Investor. The role of the Appellant includes arranging or facilitating meetings between the Consultant Manager and once the investor agrees to invest, the Appellant would help them in completing the formalities in correct manner so that the application is not rejected. Thus, in a way the Appellant arranges and facilitates supply of services between the Consultant Manager and the investor, for which they receive consideration from overseas Consultant Manager.

17.10 The Appellant submits that the dictionary meaning of facilitation is to make easy or easier, make something possible or aiding or helping. Thus, the dictionary meaning of facilitation is very wide and covers processing, storage, transport, advertising, sales promotion etc. all activities as each and every activity aid or smoothens supply of goods. In the instant case, the Appellant will act as independent service provider in carrying out the marketing activities for the Consultant Manager. The Appellant is acting on their volition and simpliciter providing services to the Consultant Manager. Consequently, no question of facilitation arises.

17.11 In respect of the third and last limb, i.e. *but does not include a person supplying such goods or services or both or securities on his own account,* the AAR has erroneously held that the Appellant does not provide services on his own account. He will facilitate the provision of service of the investment/ permanent resident advisory by the Consultant Manager to the investor.

17.12 It is submitted that in case the supplier provides services on his own account, he would not be regarded as an intermediary. In this regard, the Appellant places reliance on **Circular No. 107/26/2019-GST dated 18 July 2019** wherein the CBIC has clarified that the definition of intermediary inter alia provides specific exclusion of a person i.e. that of a person who supplies such goods or services or both or securities on his own account.

17.13 The Appellant also relies on the following judicial precedents rendered under the

erstwhile service tax regime. It is submitted that the definition of 'intermediary' under the erstwhile Finance Act, 1994 as also under the IGST Act has remained identical. For ease of reference, the same is reproduced below:

PLACE OF PROVISION OF SERVICES RULES, 2012	IGST ACT
(f) "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 'main' service) or a supply of goods between two or more persons, but does not include a person who provides the main service on his account.	(13) "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 'main' service) or a supply of goods 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.

As the definition of the intermediary under the erstwhile service tax regime is identical to GST regime, the ratio of following judgments will hold good even under GST regime.

a. M/s Evalueserve.com Pvt. Ltd. v CST, Gurgaon [2018 (3) TMI 1430- CEST AT Chandigarh]

In this case, the appellant was registered under Service Tax under the category of business Auxiliary Services. The appellant filed claim for refund of unutilized CENV AT credit availed on input services used for providing taxable services, inter alia, Business Research (including financial services), Market research and intellectual Property activities, classifiable under the category of Business Auxiliary Services. The Hon. CESTAT examined whether the Appellant would be regarded as an 'intermediary' in providing the aforesaid services. Hon. CESTAT observed that the appellants in the said case were themselves engaged in providing of services to their client. Hon. CESTAT observed that the appellant provided the services to customers of their Client and have no direct nexus with the customers of their client and nowhere has facilitated or arranged for the

services provided to their client by third party. Therefore, the activity undertaken by the appellant do not qualify intermediary.

b. *Mis* Sunrise Immigration Consultants Private Limited v CCE & ST, Chandigarh [2018-TIOL-1849-CESTA T-CHD]

In this case, the facts were that the Appellant provided services to foreign universities by way of preparing cases for students was questioned as not being an export but covered within the definition of intermediary under the erstwhile service tax law which was identical to the intermediary definition under GST. Therein, after a detailed discussion, it was held that the Appellant was not an intermediary but an independent service provider providing services of business support to the foreign universities/ foreign banks for which a commission is paid to the Appellant upon each successful admission. The relevant parts are provided below for ready reference:

> *"2. The facts of the case are that the Appellant is providing various services (A) Visa Facilitation Service and (B) Referral Service .... W.e.f 01.07.2012, the introduction of the negative list, ... but for the referral services which are in the nature of the services rendered to foreign banks and foreign colleges.*
>
> *... students who wish to get admission in foreign based colleges/universities and they approach the appellant who prepare their case and refer to foreign based colleges. In case college admit the student, the said college pays commissioner/fee to the appellant. Further the people wishes to settle in Canada as investors borrow loan from foreign based banks. The appellant refers their case to foreign banks and in return gets commission from bank if money is landed to such investment.*
>
> *8. In these set of facts, following issues emerges:*
>
> *(A) Whether the appellant is intermediary in terms of Rule 2(0*

of POPS Rules, 2012 or not?

.....

10. We find that the appellant is nowhere providing services between two or more persons. In fact, the appellant is providing services to their clients namely banks/colleges/university who are paying commission/fees to the appellant. The appellant is only facilitating the aspirant student and introduced them to the college and if these students gets admission to the college, the appellant gets certain commission which is in nature of promoting the business of the college and for referring investors borrow loan from foreign based bank to the people who wishes settled in Canada on that if the deal matures, the appellant is getting certain commission. So the nature of service provided by the appellant is the promotion of business of their client, in terms, he gets commission which is covered under Business Auxiliary Service which is not the main service provided by the main service providers namely banks/university. As the appellant did not arrange or facilitate main service i.e education or loan rendered by colleges/banks. In that circumstances, the appellant cannot be called as intermediary .... "

(Emphasis supplied)

Aforesaid facts are identical to the present case. In the present case also, the Appellant is nowhere providing services between two or more persons. The Appellant is providing services to Consultants who are paying fees to the Appellant. The Appellant is merely hunting the perspective investors and introduced them to the Consultants and if these perspective investors opts for EB-5 program, the Appellant gets paid which is in nature of promoting the business of the Consultants.

c. Re: GoDaddy India Web Services Pvt. Ltd. [2016 (46) STR 806 (AAR)]:

In this case, in addition to marketing services, the Appellant therein was also providing supervision of customer care service and payment processing services to their parent entity, GoDaddy US, a company registered and incorporated in the United States of America. After due consideration, it was held that the Appellant was not an intermediary under the Finance Act, 1994. The relevant parts are reproduced below for ready reference:

"4. Applicant seeks rulings with regard to the following questions of law.

Question No. 1 : Whether, in the facts and circumstances as explained in Annexure *I, the various support services proposed to be provided by the applicant to GoDaddy US are a "bundle of Services" being naturally bundled in the ordinary course of business and accordingly is a single service, being 'business support service', in terms of Section 66F of the Finance Act?*

10. The definition of "intermediary" as envisaged under Rule 2(0 of POPS does not include a person who provides the main service on his own account. In the present case, applicant is providing main service, i.e., "business support services" to WWD US and on his own account. Therefore, applicant is not an "intermediary" and the service provided by him is not intermediary service. Further, during arguments, applicant drew our attention to one of the illustration given under Paragraph 5. 9. 6 of the Education Guide, 2012 issued by C.B.E. & C. Relevant portion is extracted as under;

Similarly, persons such as call centers, who provide services to their clients by dealing with the customers of the client on the client's behalf,' but actually provided these services on their own account', will not be categorized as intermediaries.

Applicant relying on above paragraph submitted that call centers, by dealing with customers of their clients, on client's behalf are providing service to their client on their own account. Similarly, applicant is providing business support service such as marketing and other allied services like oversight of quality of third party customer care centre operated in India and payment processing services, on behalf of GoDaddy US ***Therefore, these services provided by the applicant to GoDaddy US cannot be categorized as intermediary or services, as intermediary service.***

11. Applicant proposes to provide support services in relation to marketing, branding, offline marketing, oversight of quality of third party customer care centre and payment processing, on principal to principal basis. These services are proposed to be provided with the sole intention of promoting the brand GoDaddy US in India and thus augmenting its business in India. Therefore, these services proposed to be provided by the applicant, would support the business interests of Go Daddy US in India."

(Emphasis supplied)

d. In ***Re: Asahi Kasei India Private Limited*** it was held as under:

"The concept of intermediary under the GST Act is substantially identical to the concept of intermediary under the erstwhile service tax regime. This concept has been explained in the Education Guide issued by CBEC in the year 2012 as under:

In order to determine whether a person is acting as an intermediary or not, following factors need to be considered:

Nature and value: An intermediary cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price. Also, the principal must know the exact value at which the service is supplied (or obtained) on his behalf and any discounts that the intermediary obtains must be passed back to the principal.

Separation of value: The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging. It can be based on an agreed percentage of the sale or purchase price. 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.

Even in other cases, wherever a provider of any service acts as an intermediary for another person, as identified by the guiding principles outlined above, this rule will apply.

Normally, it is expected that the intermediary or agent would have documentary evidence authorizing him to act on behalf' of the provider o[the 'main service'.

In simple term intermediary means a person who acts to arrange an agreement between two or more persons as a mediator or a link

In the present case as per services agreement, applicant has undertaken following activities namely-

1. Research on the matters related to the functions of the holding company, such as corporate accounting, corporate finance, corporate personnel and labour relations, corporate research and development, quality assurance and corporate intellectual property, and provide Party A with its report of the research thereon.

2. To provide with economic, industrial and technical information on the products falling under the category of the Products and their markets, trends and outlook together with similar information concerning such other industries in the Territory.

3. To provide necessary assistance in liasoning and coordinating activities (including interpreting) to such representatives.

4. To make market surveys of the Products in the Territory and report the results thereof to Party A.

5. All other related services pertaining to above services including, but not limited to, those services with regard to finance, accounting, and patent and legal matters.

We clearly find from the scrutiny of clause 15 of the Services Agreement that the relationship between the parties is that of independent contractors meaning that the agreement does not intend to create relationship of principal and agent. The applicant shall riot represent itself to be agent of party A and vice-versa. Further applicant has no authority to conclude or negotiate any contracts or secure any orders or maintain any stock of goods on behalf of Party A in this case. On the contrary applicant would provide service on own account to party A to improve functioning of holding company and further augment its business vis a vis sale of all products manufactured and or sold or to be manufactured and or sold in India territory. Thus we find that applicant is not a person who arranges or facilitate supply of services between two or more persons.

Thus applying the test mentioned in the Education Guide to the facts of the case we can safely conclude that the proposed service would not fall to be classified as 'intermediary service'."

(Emphasis supplied)

17.14 At this juncture, it is submitted that scope and nature of duties of the Appellant is substantially similar to those provided in *Asahi Kasei* (supra) and in the case of *Sunrise Immigration Consultants* (Supra). In both cases, it was held that the service provider was engaged in providing service on his own account and hence would not become an intermediary. The Appellant cannot be regarded as an intermediary as the Appellant cannot in any way change or amend or influence the agreement between the Consultant Manager and interested individual.

17.15 Considering the above judicial precedents and the facts of the present case, it is

submitted that the services provided by them would not be regarded as an intermediary on account of the following reasons:

a. Services provided by the Appellant, whether by way of Marketing services or the Handholding services, does not have direct nexus with the services provided by Consultant Manager to the prospective investor.

b. The Appellant at no time acts between the Consultant Manager and the prospective investor. The Appellant is kept out of any discussion with respect to investment proposition between the Consultant Manager and the prospective investor. He neither takes part, or negotiate, or kept in the position so as to influence the decision of either party. Hence, the Appellant cannot be regarded as facilitating or arranging the provision of services by the Consultant Manager and the prospective investor.

c. Mere fact that the Appellant has entered into an agreement with the Consultant Manager to provides services to him, proves that it is providing services to the Consultant Manager on Principal to Principal basis.

d. The Appellant is an independent service provider providing services in the nature of Marketing and Handholding services. The role of Appellant (under Handholding services) is only limited to assisting the applicant (i.e. the investor) in undertaking formalities such as filling up the forms, managing logistics, etc.

e. The consideration of Appellant is linked to success of the investment and not on the quantum of investment.

17.16 Basis the above, it is submitted that the Appellant would not be acting as an intermediary in the instant case. Accordingly Ruling passed by the AAR is bad in law and should be set aside.

18. <u>Merely because receipt of consideration by the Appellant in contingent up on the successful investment / repatriation, the Appellant cannot be regarded as an intermediary</u>

18.1 In this regard, it is submitted that the nature of service cannot be determined only on

the basis of manner in which consideration is determined. In the present case, the consideration for both the independent services mentioned supra will be contingent, i.e., will be provided upon successful investment/ repatriation by the investor. Upon the happening of this event, the Appellant will be paid a fixed amount for Marketing services and another fixed amount for handholding services, by the Consultant Manager. It is also submitted that the mere fact that the amount payable by the Consultant Manager for the Marketing services is deferred till successful investment/ repatriation by the investor does not also make it intermediary services. It is submitted that the nature of services is an independent exercise which should be judged qua the actual activities carried out thereto and cannot change color basis only the timing of the consideration. In other words, mere deferment of payment to a future time cannot change the character of service.

18.2 In this regard, the Appellant invites your attention to the following:

a. The observations of Hon. Supreme Court in **Union of India v. Bombay Tyre International Ltd., [1983 (14) E.L.T. 1896 (S.C.)]:**

"..... It has long been recognised that the measure employed for assessing a tax must not be confused with the nature of the tax. In Ralla Ram v. Province of East Punjab (I 948 FCR 267, AIR 19../9 FC 81), the Federal Court held that a tax on buildings under S. 3 of the Punjab Urban Immovable Property Tax Act, 1940 measured by a percentage of the annual value of such buildings remained a tax on building under that Act even though the measure of annual value of a building was also adopted as a standard for determining income from property under the Income-tax Act. It was pointed out that although the same standard was adopted as a measure for the two levies, the levies remained separate and distinct imposts by virtue of their nature. In other words, the measure adopted should not be identified with the nature of the tax .....".

b. Kerala Colour Lab. Association Vs. Union of India [2003 (156) E.L.T. 17(Ker)]:

In this case, it was held that taxable event occurs because of the service rendered. Merely because the measure or valuation of tax is linked to the gross consideration

received in the transaction it does not determine the nature of tax. Taxable event determines the true event of tax; the measure of tax does not determine the nature of tax, but the quantum of tax which can be levied and collected.

c. In the case of Petronet LNG Limited Vs. CCE, Delhi [2017 (7) GSTL 54 (Tri. - Del.)], it has been categorically stated by the Hon. CESTAT as under:

> *"Regarding the nature and classification of service received by the appellant, we note that the invoice description need not actually replicate the words of the classification and taxable service. Generally, the invoice will mention the generic nature of activity as understood by the parties in contract. The exact classification of the activities subjected to service tax can be arrived at by perusal of the agreements and the nature of documents including invoices, which were used for claiming the consideration."*

18.3 Based on the above, it is submitted that nature of service provided by the Appellant would be relevant to determine the Appellant would be regarded as an intermediary or not. Manner of computing, determining and payment of consideration is not at all a relevant criterion.

19. The services of the Appellant would qualify as export of services

19.1 It is not in dispute that all other conditions (except for Place of Supply being outside India), for being qualified as export of services, are satisfied by the Appellant in the present case.

19.2 As regards the POS, it is submitted basis the above submissions, the Appellant would not be regarded as an 'intermediary' for the purpose of GST. Accordingly, the POS would be determined on the basis of the location of service recipient. Accordingly, since the location of Consultant Manager is outside India, the POS would also be outside India.

20. The Appellant therefore submits that based on the submissions incorporated hereinabove, the impugned Ruling of the AAR is bad in law and suffers from an infirmity, and therefore, deserves to be set aside.

PRAYER

21. In view of the submissions made herein above, the Appellant prays that the Hon'ble Tribunal may be pleased to:

1. Set aside the Impugned Advance Ruling No. GST-ARA-103/2018-19/B-63 dated 01 June 2019 passed by the Maharashtra Authority for Advance Ruling, Mumbai, with consequential relief;
2. Pass an order holding that the services of the Appellant would not be regarded as that of an intermediary;
3. Pass an order holding that the services of the Appellant would qualify as export of service Pass any other order or orders as deemed fit and proper in the circumstances of the case.
4. Pass any other order or orders as deemed fit and proper in the circumstances of the case.

RESPONDENT'S SUBMISSION DT. 04.11.2019

Point A & B: 'The impugned Ruling is grossly erroneous on the facts and bad in law as it disregards judicial precedents and liable to be set aside; that w.r.t marketing services has been passed based on incorrect understanding of the facts':

22. The Applicant seeks to provide such services to their clients (the Company or to their Consultant Managers), located in the United States of America, with the aim of enabling them to receive prospective investors located in India, for obtaining permanent residency in the United States of America. The services provided by the Applicant to the consultant managers shall inter-alia, include:

i. Collecting and analysing information i.e., market analytics, intelligence, preparing and drafting reports, strategy and providing leads to the Company/Consultant Manager about prospective investors in India, who qualify under Regulation D or Regulation S promulgated under the Securities Act (of the USA) and are willing to deposit $ 5,00,000 or the minimum amount then required, to quality for the EB -5 Program;

ii. Marketing of the EB-5 program in India to prospective investors to participate in such Offering and to also perform the immigration and administrative related duties on behalf of the Company in India;

iii. Providing support services viz. arranging premises for the Consultant Manager and prospective investor in India, to facilitate their meeting and negotiation for prospective investment;

iv. After, a valid negotiation, the Applicant shall also assist the Consultant Manager in collecting the qualified investors' personal information and such documentation necessary for his/her investment and also towards completion of the immigration process for such qualified investors.

23. The consideration towards the services provided by the Applicant to, the Company/Consultant Manager, shall be received by them by way of payment of a 'Fee' (in USD), towards the advisory services provided by the Applicant upon successful confirmation of a proposed investment by a qualified investor, and a further payment of' Approval Fee' (in USD), upon receipt of final approval of such investment from authorities.

24. Therefore, from the above, it is evident that the Applicant acts as an intermediary between the Company and the prospective qualified investors in India. Definition of 'intermediary' is contained under section 2 (13) of Integrated Goods and Service Tax Act, 2017 and the same is reproduced hereunder for ready reference:

"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".

25. Important feature that can be derived from the above definition of 'intermediary' are summarized hereunder: -

i. An intermediary can be a broker, an agent or any other person;

ii. An intermediary is a person, who intermediates between two or more persons, i.e. either arranges or facilitates the supply of goods or services or both;

iii. An intermediary cannot change the nature of supply as provided by his principal.

26. Therefore, it is evident that in case of intermediary services, such supplies essentially involve three persons; principal whose goods or services are being supplied, and

recipient who are receiving the supply of goods or services or both, and an intermediary in between. In the instant case, the Applicant is acting as the facilitator between the Company and the prospective investors.

27. The operative part of the definition of "intermediary" is "who arranges or facilitates the supply of goods or services or both or securities". Thus, an intermediary is one who arranges or facilitates supply of goods or services or both, belonging to the principal. Therefore, the nature of goods or services supplied by the intermediary must be same as goods or services supplied by the principal. An intermediary cannot alter the nature or value of supply, which he facilitates on behalf of his principal, which is found to be valid and true in the present case also.

28. The consideration for an intermediary's supply is separately identifiable from the main supply that he is arranging and is in the nature of fee or commission charged by him. It is not necessary that the intermediary must receive consideration from principal only; he/she can receive her consideration from the third party also. In the instant case also, the Applicant receives a consideration from the Company, in the nature of a fees/brokerage towards the intermediary services being provided by them to the Company.

29. A person can arrange or facilitates supply of goods or services belonging to some other person, only when he/she has been authorized by the principal. In view of this, the test of agency must be satisfied between the principal and the agent i.e. the intermediary. In the instant case, the Applicant is authorized by the Company to act and represent them on their behalf and carry out such functions viz. marketing of the EB-5 program in India to prospective investors and to perform the immigration and administrative related duties on behalf of the Company. Accordingly, the services being provided by the Applicant do not appear to be on Principal to Principal basis, but it appears that the Applicant by way of acting on behalf of the Company for performing the immigration and administrative related functions of the Company towards their prospective investors, is essentially acting as an agent/representative of the company in India.

30. In the case of Global Reach Education Services Pvt. Ltd. [2018 (12) G.S.T.L. 387 (A.A.R. - GST)], it has been held that "marketing services" provided to global universities are "intermediary" services. The appellate authority of Advanced Ruling in the said case [2018 (15) G.S.T.L. 618 (App. A.A.R. - GST)] have further expanded the definition and held that "even ancillary services" falls within the meaning of intermediary services.

31. Similarly, in the case of Vservglobal Private Limited [2018 (19) G.S.T.L. 173 (A.A.R. - GST)], it has been held that back office support services, payroll processing, maintenance of records of employee provided by applicant to overseas companies, i.e., clients, after finalization of purchase/sale between client and its customer falls under the category of 'intermediary services'.

Accordingly, the support services being/to be provided by applicant in the instant case to the company located abroad would be appropriately classifiable as 'intermediary services' and the applicant would be covered in the definition of 'intermediary' in terms of Section 2(13) of Integrated Goods and Services Tax Act, 2017.

Accordingly, the impugned Ruling is proper and valid as per law.

Point No. C: - 'The Applicant does not fall within the definition of "intermediary" for Marketing services or for Handholding services.

Department Comments: -

32. From the facts and issues as stated and discussed in the sub-paras 1-8 of Point 'A' above, it appears that the Applicant is authorized by the Company to act and represent them on their behalf and carry out such functions viz. marketing of the EB-5 program in India to prospective investors and to perform the immigration and administrative related duties on behalf of the Company. Therefore, the Applicant by way of acting on behalf of the Company for performing the immigration and administrative related functions of the Company towards their prospective investors, is essentially acting as an agent/representative of the company in India, i.e. the intermediary. Therefore, such services provided by the Applicant to the Company may be appropriately classifiable as 'intermediary services'.

This view of the Department has been validated in the impugned AAR Order No. GST-ARA-103/2018-19/B-63 dtd. 01.06.2019 which have held that:

"..... For the EB-5 programs there are various such Consultant Managers/Attorney who specialize in this field in the USA and the applicant will be doing all the process in India on behalf of the Consultant Manager and effectively will be working on his behalf as an agent and hence the applicant's contention that he is providing marketing service on his own is not acceptable. The fact of the matter is that he is providing the intermediary service in the name of marketing service."

Point D: 'Merely because receipt of consideration by the Appellant in contingent upon the successful investment/ repatriation, the Appellant cannot be regarded as an intermediary'.

Department Comments: -

33. The facts of the situation as discussed in sub-paras 1-8 of Point 'A' above, it appears that the Applicant is, is essentially acting as an agent/representative of the company in India, i.e. the intermediary. Therefore, such services provided by the Applicant to the Company may be appropriately classifiable as 'intermediary services'. The impugned AAR Order No. GST-ARA- 103/2018-19/B-63 dtd 01.06.2019 is therefore correct and valid in defining the activity of the Applicant as that of 'an intermediary'.

Point E: 'The services of the Appellant would qualify as export of services'.

Department Comments: -

34. In order to identify an activity for its qualification as an export of service and/or to determine the tax applicability of GST i.e. whether CGST & SGST or IGST is payable on any transaction, it is vital to know the place of supply of goods or services. Taxability of goods or services would be decided on the basis of the place of supply of the said goods or service.

35. The Provision of place of supply of service in case of intermediary are specifically contained under section 13 (8) of Integrated Goods and Service Tax Act, 2017 and the same is summarized hereunder for ready reference -

Section 13 (8) of the IGST Act states that -

The place of supply of the following services shall be the location of the supplier of services, namely:

(a) Services that are supplied by a banking company or a financial institution or a non-banking financial company to its account holders;

(b) Intermediary services;

(c) Services that consist of hiring of the means of transport up to a period of one month. Such means of transport includes yachts but excludes aircrafts and vessels.

Hence on the basis of above the provisions of section 13 (8)(b), it is pretty clear the place of supply of the intermediary service would be location of the supplier of services, i.e., the intermediary. In the instant case, the location of the Applicant (the intermediary) is the taxable territory of India.

Further, it was pointed out in the earlier Department Reply to the AAR on the instant issue or question pertaining to 'Place of Supply' is not covered under the mandate of issues given for consideration of the Advance Ruling Authority under the provision of Section 97 of the CGST Act 2017. Hence, the said question appears to be non-relevant for consideration before the AAR.

However, it is observed that the AAR has rightly interpreted this question raised by the Applicant, as following:

"..... we find that these services are provided to the Consultant Manager situated in foreign territory fall in Sections 13(8b) of Section 13 of the IGST Act, 2017. Hence the place of supply of service is within India and therefore the service rendered by the applicant is not "export of service" as condition (iii) of Section 2(6) of JGST Act is not fulfilled."

Therefore, it is found that the impugned AAR Order No. GST-ARA-103/2018-19/B-63 dtd O 1.06.2019 has rightly interpreted the questions of law raised by the applicant M/s. Mayank Jain, and is therefore, valid and proper, and the application made by the Appellant may be set aside on legal grounds.

Personal Hearing

36. A personal Hearing in the matter was conducted on 04.11.2019, wherein Shri Mayank Jain, the Appellant in the present case, reiterated their earlier written submissions. The Department was represented by Shri Durgesh Salunke, Deputy Commissioner in the capacity of the jurisdictional officer, who also reiterated the written submissions filed before us.

Discussions and Findings

37. At the outset of proceedings, we observe that there is a delay of 2 days in filing the aforesaid appeal by the appellant and the appellant has, accordingly, filed an application for the condonation of the delay vide which he submitted that the physical copy of the impugned order was received by him on 23.07.2019, and therefore, he filed the instant appeal on 22.08.2019 considering the date of receipt of the impugned ruling as 23.07.2019. However, at the time of the filing of the appeal, he was informed by the concerned registry that the date of the receipt of the impugned order would be considered as the date on which the impugned order was received by him, which

would be 20.07.2019, the date on which the impugned ruling had been served electronically. Thus, this delay of 2 days has occurred due to due to genuine oversight on part of the Appellant due to his bona-fide belief that the correspondences from the Government Authorities are normally made by the Post and not e-mail. Thus, it was prayed by the Appellant that the said delay of 2 days may be condoned, pleading that grave harm or loss or prejudice would be caused to the Appellant if the condonation prayers are not accepted. He further submitted on the contrary no harm or loss or prejudice would be caused to the Revenue if the aforesaid prayers for the condonation of delay are accepted. He also cited few judicial precedents, wherein the court has taken lenient view on the issue of the condonation of delay in filing the appeal. which is being filed within the maximum permissible time of 60 days including the maximum condonation period of 30 days allowed under the proviso to sub-section 2 of section 100 of the CGST Act, 2017.

We agree with the submissions made by the Appellant in this regard. Further, the Jurisdictional Officer, in the present case, has also not contended the present application for the condonation of delay in filing the appeal. Therefore, we are satisfied to the extent that the said delay of 2 days in the filing the appeal was not deliberate on the part of the Appellant. Further, the Appellant has filed the present appeal within a further period of 30 days in terms of proviso to sub section 2 of section 100 of the CGST Act 2017.Hence, we condone the said delay of 2 days in filing the present appeal, and set out to examine the present appeal on merit.

38. We have gone through the entire case records encompassing the facts of the case, documents placed on the record, and the submissions made by the Appellant as well as the Respondent. We have also gone through the impugned Advance Ruling order, wherein it was, inter-alia, held that the entire gamut of activities carried out the Appellant as per the Foreign Immigration Advisory Agreement (herein after referred to the 'subject agreement') would be classified as those of an Intermediary, as defined under section 2(13) of the IGST Act, 2017, and accordingly it was held by the AAR that the services rendered by the Appellant would be not be considered as export of services in terms of section 2(6) of the IGST Act, 2017, as the place of supply of the services provided by the Appellant will not be outside India in terms of section 13(8)(b)

of the IGST Act, 2017, thereby, not complying with all the conditions prescribed for the export of services as envisaged under section 2(6) of the IGST Act, 2017.

39. On perusal of the aforesaid appeal, the moot issue, before us, is as to whether the spectrum of services rendered by the Appellant to the Consultant Manager, located in the USA, would be construed as those of an intermediary as defined under section 2(13) of the CGST Act, 2017, or otherwise. To examine this issue, first we would like to understand the meaning of "intermediary" as provided under section 2(13) of the IGST Act, 2017, which is being reproduced herein under ready reference:

Section 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;"

40. Thus, the definition of "intermediary" can be divided into three limbs:

a A broker, an agent or any other person, by whatever name called;

b such person should arrange or facilitate the supply of goods or services or both, or securities between two or more persons;

c but does not include a person supplying such goods or services or both or securities on his own account.

Further, the term "agent" has been defined in section 2(5) of the CGST Act, 2017, which is being reproduced as under:

(5) "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;

Thus, from the above definition of the term "agent", it is revealed that the agent undertakes the supply of goods, or services, or both, on behalf of its principal, who must have authorized such person to undertake such supply. Thus, the Agent is undertaking the supply of the same goods or services or both as those of its Principal.

41. Therefore, in view of the above meaning assigned to the term "Agent" and nature of its activities as interpreted above, it may decisively be inferred that there is fundamental difference between the term "Agent" as defined under section 2(5) of the CGST Act, 2017 and term "Intermediary" as defined under section 2(13) of the IGST Act, 2017 due to the presence of the condition, prescribed under section 2(13) of the IGST Act, 2017, which stipulates that the person, acting as an intermediary, from his own account, should not supply such goods or services or both, which are being facilitated by him, whereas the Agent undertakes the same supply of goods or services or both as those of its Principal. The fact that Agent and Intermediary are the entirely two different concepts in so far as the GST Law is concerned, is evident from the fact that the "Agent" and "Intermediary" are separately defined under CGST Act and IGST Act respectively, having their own meanings assigned to them. In view of this very interpretation, under the GST provisions, it would not be proper to use these two terms, i.e., Agent or Intermediary, interchangeably, as these two terms have completely different essence and characteristics. Thus, it is opined that though there has been mention of the terms agent, broker in the definition of Intermediary as provided under section 2 (13) of the IGST Act, 2017, because of the proximity between these terms, i.e., agent, broker , intermediary, etc., as understood in the common parlance, but under the legal provisions of the GST Act, an agent does not necessarily mean intermediary, unless the conditions prescribed under the meaning assigned to the Intermediary under section 2(13) of the IGST Act, 2017 is satisfied in entirety. i.e. he should be merely acting as facilitator of the supply of goods or services or both between the two or more persons, and not supply of the goods or services or both himself from its own account. Thus, the definition of Intermediary as provide under the IGST Act has given utmost emphasis on the facilitation between two or more persons along with the rider that supply of goods, or, services, or, both, which are being facilitated by such intermediary, should not be undertaken by the intermediary himself.

42. Now, having clearly understood the meaning of Agent and Intermediary as envisaged under the GST Law, we proceed to examine the gamut of services provided by the Appellant to the Consultant Manager as per the subject agreement. The said gamut of activities/services, as per the subject agreement, are being reproduced herein

under:

a. Planning and conducting market surveys to identify the market and prospective investors;

b. Prepare reports, marketing plans, market intelligence and compile list of prospective investors;

c. Formulate strategy;

d. Address queries of the Consultant Manager in relation to the above; and

e. Conduct sales prospection through participation in the industrial events such as scientific gatherings, exhibitions, trade shows, and the like.

On perusal of the above activities undertaken by the Appellant, it is observed that all such activities are culminating into the exploration and identification of the prospective investors, who would be investing their money in the EB-5 programme of the USA on the consultancy or advices provided by the Consultant Managers, who will be charging certain consultation fee from such interested investors. Now, it is expressly mentioned in the subject agreement that the Appellant would be receiving a fixed amount of consideration from their client, i.e. Consultant Manager, only after the successful completion of the deal between the Consultant Manager and the prospective customers, who have been identified, persuaded, and ultimately referred by the Appellant to such Consultant Manager after carrying out all these above enumerated activities, viz.- planning, research, surveys, formulation of strategy, sales prospection through various participation in industrial events, which eventually resulted into identification of the pool of prospective investors, interested in the said EB-5 programme. Out of this pool of investors, who eventually enter into contract with the Consultant Managers for investing their money in the EB-5 programme, after receiving the investment consultancy services from such Consultant Managers, the Appellant receives his consideration from its client, i.e. the Consultant Manager, at the two stages, i.e., one after the successful negotiation between the Consultant Manager and the prospective investors, identified and referred by the Appellant, and then after the investment of the prospective investors has been accepted and approved by the concerned USA authority supervising the EB-5 Programme. Thus, from the above, it is clearly seen that the Appellant is receiving consideration against the actualization of the facilitation of the main services of the investment related

consultancy between the Consultant Manager and the prospective investors. In other words, if this supply of the main service, i.e., investment consultancy service, between the Consultant Manager and prospective buyers does not take place due to any reasons, the Appellant is not going to receive any consideration, whatsoever, for any or all activities, undertaken by him. Thus, it is observed that in case of unsuccessful negotiation between the Consultant Manager and the prospective investors, all these aforesaid activities undertaken by the Appellant would not be considered as supply even, as there would not be any consideration in such case, thereby, precluding the entire activities from the scope of the "supply", as envisaged under section 7(1)(a) of the CGST Act, 2017. In view of this, all these activities carried out by the Appellant for its client, i.e., Consultant Manager, which are being claimed by the Appellant as the Business Support Services, have got no relevance, when performed independently and in isolation until all these services, when combined together, culminate into the supply of facilitation services between the Consultant Manager and the prospective investors, thereby, making the entire activities of the Appellant as those of an Intermediary as conceived under section 2(13) of the IGST Act, 2017.

43. Besides the aforesaid activities, the Appellant, after the successful negotiations between the Consultant Manager and the prospective customers, provide the hand holding services to such prospective customers to initiate the process and formalities of the aforementioned EB-5 programme, in respect of which the investment consultancy services are provided by the Consultant Manager. The scope and nature of such hand holding services rendered by the Appellant in terms of the subject agreement are enumerated as under:

a. Identify and report to the Consultant Manager, the prospective investors who qualify the eligibility criteria and are willing to deposit the requisite amount in an escrow account and pay applicable fees for the purpose of EB-5 programme.

b. Assist the Consultant Manager in obtaining personal information of the qualified investor.

c. Assist the qualified investor in coordinating and staffing informational meeting about EB-5 program.

d. Assistance relating to documentation.

e. Provide information collecting documents, filling out forms, addressing any possible issues or difficulties.

f. Communicate immigration status / processing related update to the qualified investor.

Thus, on perusal of the abovementioned bucket of hand holding services, it is observed that the Appellant is doing nothing but facilitating the supply of main services, i.e. investment related consultancy services, which are actually provided by the Consultant Manager to the prospective investors. To put this very observation into clearer perspective, it can also be said that if there was no Appellant in this present transactional arrangement between the Consultant Manager and the interested prospective investors for the main supply of investment consultancy service, this very supply of investment consultancy services would not have actualized or realized. Thus, in the present case, the Appellant is clearly playing the role of Intermediary, as envisaged under section 2 (13) of the IGST Act, 2017. As regards the classification of the services provided by the intermediary, it is stated that the said services of the Appellant, who is acting as an intermediary, would aptly be classified under the Heading 9997 bearing description other services.

44. Now, we would like to examine the merits and substance of Appellant's contention. On perusal of the grounds taken the Appellant in the case at hand, it is seen that the Appellant has based his entire contention on his erroneous belief and notion that he is providing the business support services to its client, i.e., the Consultant Manager by carrying out aforesaid activities, incorporated under the subject agreement. It was also argued by the Appellant that since he is providing these business support services to the Consultant Manager from his own account, he cannot be categorized as an intermediary. It is observed that the aforesaid contentions put forth by the Appellant is erroneous, flimsy, and devoid of any merit, as there is no restriction imposed on the intermediary with respect to the supply of goods, or services, or both. Since, the facilitation activities undertaken by Appellant are the supply of services in itself, hence to conclude that the intermediary can not provide any service on his own account is preposterous notion.

45. It has been further argued by the Appellant that he does not participate at all in the negotiation between the Consultant Manager and prospective investors, as he does

not represent his client, i.e. Consultant Manager in any capacity including agent. It is further argued by the Appellant that since the definition of the intermediary as provided under section 2 (13) of the IGST Act, 2017 includes the terms "Agent" and "broker", therefore, applying the legal principle of "ejusdem generis", it can be inferred that the expression "any other person by whatever name called" would include only such persons, who are in the genus of broker, or agent. Bases on this interpretation, the Appellant further submitted that since they do not act as an agent or broker of his client, i.e. Consultant Manager, they would not fall under the category of Intermediary. It is observed that the above- mentioned arguments put forth by the Appellant is flimsy and devoid of any merit, as it has been established herein above that under the GST law, agent and intermediary are two different and independent concepts, and therefore, it is not mandatory for an intermediary to be acting like an agent as envisaged under section 2(5) of the CGST Act, 2017. Hence, the contention made by the Appellant in this regard in clearly not tenable.

46. The Appellant has placed reliance on Circular No. 107/26/2019-GST dated 18 July 2019 wherein the CBIC has clarified that the definition of intermediary inter alia provides specific exclusion of a person, i.e., that of a person who supplies such goods or services or both or securities on his own account. Having regard to this CBIC Circular dated 18.07.2019, here it is worthwhile to mention that such persons have been excluded from the periphery of the intermediary, who themselves supply, from their own account, the main services, to its client's customers on behalf of its client. We would like to mention one of the illustrative scenarios proposed by the CBIC, namely Scenario II, mentioned in the above said Board Circular. In the said Scenario II, it has been envisaged as under:

The supplier of backend services located in India arranges or facilitates the supply of goods or services or both by the client located abroad to the customers of client. Such backend services may include support services, during pre-delivery, delivery and postdelivery of supply (such as order placement and delivery and logistical support, obtaining relevant Government clearances, transportation of goods, post-sales support and other services, etc.). The supplier of such services will fall under the ambit of intermediary under sub-

section (13) of section 2 of the IGST Act as these services are merely for arranging or facilitating the supply of goods or services or both between two or more persons. In other words, a supplier "A" supplying backend services as mentioned in this scenario to the customer "C" of his client "B" would be intermediary in terms of sub-section (13) of section 2 of the IGST Act.

47. Now, when we compare the present case with that of the instances envisaged under Scenario II, reproduced above, it is observed that the facts and circumstances of the Appellant's case is pretty similar to those of the illustrative instances envisaged under Scenario II of the aforesaid Circular in as much as the Appellant is also facilitating the main service of Investment Consultancy/Permanent Residence Advisory Services provided by its client to the prospective customers by undertaking facilitation and support activities like arranging the venue for meeting between its client, i.e., Consultant Manager and the prospective customers including the arrangement of the translators, filling of various immigration related forms as a part of the EB-5 programme for the prospective investors after the successful negotiation, communicating with its client's customers, i.e., the prospective investors and providing them regular updates about the immigration status, addressing any possible issues or difficulties faced by the qualified investors or its client, i.e. Consultant Manager. Thus, from the foregoing, it is amply evident that all these activities undertaken by the Appellant, which may be in nature of the support services, are ultimately for the facilitation of the main services, i.e. Investment Consultancy/Permanent Residence Advisory services provided by its client, i.e. Consultant Manager and its customers, i.e. prospective investors. Since, the Appellant does not provide the main services, i.e., Investment Consultancy/Permanent Residence Advisory services from his own account, therefore, he may aptly be considered as intermediary under the facts and circumstances of the present case. Thus, the reliance placed by the Appellant on the CBIC Circular does not support his cause.

48. The Appellant, in defense of their case, has, inter alia, relied upon the various judicial precedents, which are being considered herein below:

(i) M/s Evalueserve.com Pvt. Ltd. v CST, Gurgaon [2018 (3) TMI 1430- CEST AT Chandigarh]

In this case, the appellant was registered under Service Tax under the categcry of

business Auxiliary Services. The appellant filed claim for refund of unutilized CENV AT credit availed on input services used for providing taxable services, inter alia, Business Research (including financial services), Market research and intellectual Property activities, classifiable under the category of Business Auxiliary Services. The Hon. CESTAT examined whether the Appellant would be regarded as an 'intermediary' in providing the aforesaid services. Hon. CESTAT observed that the appellants in the said case were themselves engaged in providing of services to their client. Hon. CESTAT observed that the appellant provided the services to customers of their Client and have no direct nexus with the customers of their client and nowhere has facilitated or arranged for the services provided to their client by third party. Therefore, the activity undertaken by the appellant do not qualify intermediary.

The ratio of the aforesaid CESTAT judgment is not applicable to the facts and circumstances of the present case, as the Appellant, in the instant case, is not providing the main services, i.e., Investment Consultancy/Permanent Residence Consultancy Services, from its own account. It is rather acting as a facilitator between the Consultant Manager, its client and the prospective investors, its client's customers, by way of undertaking various activities which are purely in the nature of facilitation between its client and its client's customer, as has been discussed above. Hence, the case law cited by the Appellant is clearly distinguishable.

(ii) *M/s.* Sunrise Immigration Consultants Private Limited v CCE & ST, Chandigarh [2018-TIOL-1849-CESTAT-CHD]

The facts and circumstances of the aforesaid case law is different from those of the present case in as much as in the aforesaid case, the assessee, i.e., *M/s.* Sunrise Immigration Consultants Private Limited, is just referring the aspiring students to the foreign college and universities for the purpose of admission thereinto. Besides this, they are doing nothing, which could be said to be in nature of facilitation between the colleges/universities and the aspiring students, whereas in the present case, the Appellant is doing all sorts of activities, which are facilitating the

main services of investment consultancy between the Consultant Manager and the prospective customers. Hence, the ratio of the aforesaid CESTAT Judgment is clearly not applicable.

(iii) Re: GoDaddy India Web Services Pvt. Ltd. [2016 (46) STR 806 (AAR)]:

In this case, in addition to marketing services, the Appellant therein was also providing supervision of customer care service and payment processing services to their parent entity, GoDaddy US, a company registered and incorporated in the United States of America. In this case, the Hon'ble CESTAT, inter alia, observed that *applicant is providing main service, i.e., "business support services" to WWD US and on his own account. Therefore, applicant is not an "intermediary" and the service provided by him is not intermediary service.*

Thus, the facts and circumstances of the aforesaid case is entirely different from those of the present case, as the Appellant, as discussed above, is not providing the main services in the present case as opposed to the facts of the case concerning GoDaddy India Web Services Pvt. Ltd., where GoDaddy India was providing marketing services, supervision of customer care services and payment processing services, which are independently provided to their parent company GoDaddy U.S., and which do not have any nexus between the main services provided by GoDaddy U.S. to its customers. Thus, the ratio of the aforesaid CESTAT Judgment is clearly not applicable.

49. The Appellant, inter alia, relied upon the below mentioned case laws to support their argument that that the nature of services is an independent exercise which should be judged qua the actual activities carried out thereto and cannot change color basis only the timing of the consideration.

a. Union of India v. Bombay Tyre International Ltd., [1983 (14) E.L.T. 1896 (S.C.)]:

b. Kerala Colour Lab. Association Vs. Union of India [2003 (156) E.L.T. 17(Ker)]:

The ratios of the aforesaid judgments will not be applicable in the present case, as the aforesaid judgements have been passed under different acts. Also, the facts and

circumstances of the above cases are different from those of the instant case.

50. Now, once it has been decided that the entire gamut of activities of the Appellant, which are in the nature of the facilitation of the main services between the Consultant Manager and its customers, i.e. prospective investors, are those of an intermediary, we proceed to the determination of the other issues as to whether the activities carried out by the Appellant are export of services or not. As regards the aforesaid issue of the determination of the Appellant's activities as the export of services or otherwise, we are of the view that the determination of the export in respect of supply of any goods, or services, or both are out of the ambit of the Advance Ruling in terms of section 97(2) of the CGST Act, 2017, which lays down the set of questions, in respect of which advance ruling can be sought under the GST Act, 2017. The said set of questions do not cover the determination of the place of supply of any goods, or services, or both. Further, to determine the export of services in terms of section 2(6) of the IGST Act, 2017, place of supply of the services has to be determined so as to ascertain whether the supply of services under question can be considered as export of service or not. Now, since the place of supply is beyond the ambit of the advance ruling as discussed above, we cannot pass any ruling in relation to the issue of the export. Accordingly, the Advance Ruling Authority should also have refrained from passing the ruling in the issues of export raised by the Appellant in his application.

51. Now, in view of the above discussion and findings, we modify the ruling passed by the Advance Ruling Authority, and pass the following order:

ORDER

We, hereby, hold that the entire gamut of activities performed by the Appellant in terms of the subject agreement, are those of an intermediary, which would be classified under the heading 9997 bearing the description 9997. As regards the issue of export of the services provided by the Appellant, it is held that advance ruling in this issue cannot be passed as the same is beyond our jurisdiction.

(RAJIV JALOTA)
MEMBER

(SUNGITA SHARMA)
MEMBER

Copy to- 1. The Appellant

2. The AAR, Maharashtra

3. The Pr. Chief Commissioner, CGST and C.Ex., Mumbai

4. The Commissioner of State Tax, Maharashtra

5. The Jurisdictional Officer

6. The Web Manager, WWW.GSTCOUNCIL.GOV.IN

7. Office copy