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/26/2018-19 Date- 22.03.2019

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri Rajiv Jalota, MEMBER

GSTIN Number	27AAACS0730L1ZG
Legal Name of Appellant	Micro Instruments
Registered Address	15, Shri Kripa, Ramakrishna society, Ram Mandir Road, Kherwadi, Bandra (East), Mumbai- 400 051
Details of appeal	Appeal No. MAH/GST-AAAR-26/2018-19 dated 24.12.2018 against Advance Ruling No. GST-ARA-23/2018-19/B-87 dated 10.08.2018
Jurisdictional Officer	Asstt. Commr. Of State Tax (MUM-VAT-D- 906), Nodal Division -5, Mumbai

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 Micro Instruments (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-23/2018-19/B-87 dated 10.08.2018.

BRIEF FACTS OF THE CASE

A. The facts relevant for the purposes of these appeal proceedings, briefly stated, are as under:

(a) The Appellant is a sole Proprietary firm carrying on the business in the trade name: "MICRO INSTRUMENTS", and holds GSTIN Number: 27AHSPB0847K1Z2 under the Maharashtra Goods & Services Tax Act, 2017 (MGST Act).

(b) The Appellant is an accredited Distributor of M/S Carl Zeiss Microscopy GmbH, Jena, Germany, manufacturers of Laser Scanning Microscopes and Systems. The Appellant is, inter alia, dealing in Laboratory Instruments & its spare parts, Laboratory Equipment, and carries on other related activities such as servicing, repairs and maintenance of Laboratory Instruments/ Equipment.

A copy of the Dealership Agreement is enclosed with the Appeal.

(c) One of its activities relates to providing services to M/S Carl Zeiss, Germany, (for brevity: "the Principals") by way of procuring/securing Purchase Orders (P.O.) from the Indian customers desirous of purchasing advanced type of Equipment, by negotiating the terms of supply including fixation of price above the floor price, fixed by the Principals.

(d) If the Appellant can negotiate better price than the floor price, the difference between the floor price and the actual price is given to the Appellant by way of "Commission" in "convertible foreign exchange", usually in EURO (sign: €; code: **EUR**), currency of the European Union .

B. The modus operandi of the negotiated transactions can be briefly summarized, as under:

(i) The prospective customer in India say at Mumbai, places the P.O. directly on the Principals, and arranges for Letter of Credit for remittance of price in foreign currency.

(ii) The principals directly supply the Equipment to the party, which pays the price and gets the delivery from the Customs on payment of custom duty, IGST, as may be applicable.

(iii) Ordinarily, the P. O. mentions the name of the Appellant, and also the entitlement of the Indian Purchaser to get some "discount in kind", like "Free of cost items", such as: a TV set, a Computer or a Camera etc.; which is to be provided by the Appellant as a necessary charge on the "commission", received in convertible Foreign Exchange from the Principals.

(iv) Accordingly, the Appellant, at its own cost, supplies the articles representing "discount in kind", to the Purchasing Party in fulfilment of the sale / purchase Agreement between the Principals and the Indian Purchasing Customer.

(v) The P.O. acceptance states that during the Warranty period, the Principals will give "free service", if required, but the Appellant is not concerned with such "free Service".

(vi) Once the P.O. is completed, the Principals issue a "Credit Note", for the "Commission", which is remitted in freely convertible Foreign Exchange, normally in Euro Currency.

- Two Specimen copies of the Sales Invoices raised directly by the Principals on the Indian importers, and related Credit Notes for Commission paid to the Appellant are enclosed with the Appeal.

	INVOICES AND CREDIT NOTES
17-07-2017	4B / 1140173780 Ultra Engineers, Pune TURL Metallurgical Microscope
28-07-2017	1140174992 Haffkine Inst., Mumbai Stereo Microscope, With Warranty,
30-08-2017	Credit Note: 4 *B/1091201370* € 1189
07-09-2017	Credit Note: 47/1091201407 € 1675

C. On the aforesaid facts, substantiated with the documentary evidence, which has not been controverted, the principal question for determination placed before the Learned Authority under Section 97 (2) (e) of the CGST Act, was:

*"Whether the "Commission" received by the Applicant in convertible Foreign Exchange for rendering services as an "Intermediary" between an exporter abroad and an Indian importer of an Equipment, is an **"export of services"** falling under section 2(6) & outside the purview of section 13 (8) (b), attracting zero-rated tax under section 16 (1) (a) of the Integrated Goods and Services Tax Act, 2017?"*

D. During the Course of hearing before the Advance Ruling Authority, reference were made to various provisions of the IGST ACT, the basic philosophy and principles governing the GST Laws and pointed attention was drawn to the Apex Court decision in the case of RBI vs. Peerless General Finance and Investment co. Ltd. (1 SCC 424) on settled principles of interpretation of statutes.

E. Attention of the Learned Authority was also drawn to the case laws submitted in the Paper Book II and the other two direct decisions of the CESTAT in the case of Blue Star and ABS India Ltd., and the decision of the Delhi High Court, which had in paragraph 51, (quoted below) endorsed and approved the decision of the Customs& Excise Appellate Tribunal Larger Bench decision in the case of *Paul Merchants Ltd. Vs. CCE, Chandigarh* [2018 (8)G.S.T.L. 32 **(Del. High Court)**:

> **51.** In the considered view of the Court, the judgment of the CESTAT in *Paul Merchants Ltd.* v. *CCE, Chandigarh* (supra) is right in holding that "The service recipient is the person on whose instructions/orders the service is provided who is obliged to make the payment from the same and whose need is satisfied by the provision of the service." The Court further affirms the following passage in the said judgment in *Paul Merchants Ltd.* v. *CCE, Chandigarh* (supra) **which correctly explains the legal position**:

"It is the person who requested for the service is liable to make payment for the same and whose need is satisfied by the provision of service, who has to be treated as recipient of the service, not the person or persons affected by the performance of the service. Thus, when the person on whose instructions the services in question had been provided by the agents/sub-agents in India, who is liable to make payment for these services and who used the service for his business, is located abroad, the

destination of the services in question has to be treated abroad. The destination has to be decided on the basis of the place of consumption, not the place of performance of Service."

F. It was then submitted that the statutory provisions & the judicial view was loud and clear that the GST law permitted taxation of the goods or services only when rendered in the taxable territory (Sec.2 (109) CGST) and in the jurisdiction of its consumption.

In the instant case the 'services' were provided or agreed to be provided to the client or customer in Germany, who was the user of the Service, and the effective use and enjoyment was outside India, and as such it was an Export Services.

A reference was invited to the decision of the CESTAT, South Zonal Bench, Bangalore, in the case of **ABS INDIA LTD**. Versus Commissioner of Service Tax, Bangalore, reported in 2009 (13) S.T.R. 65 (Tri. - Bang.), wherein the CESTAT had held:

"Refund (Service tax) - Erroneous payment - Service tax paid for Business Auxiliary Services of marketing of products manufactured by subsidiary located abroad - Transaction contended as covered under Export of Services and refund claimed - **Booking of order in India not indicative of rendering of services in India - Service delivered only to company located abroad** - Service not to be considered as delivered in India when recipient located abroad - **Benefit derived by recipient and hence, service utilized abroad - Impugned services having been exported, exemption** under Export of Services Rules, 2005 admissible - Impugned order set aside - Section 11B of Central Excise Act, 1944 as applicable to Service tax vide Section 83 of Finance Act, 1994 - Rule 3(2) ibid. *[para 4]*

G At the end of the hearing the Learned Authority indicated that if the provisions of Section 13 (8) (b) of the IGST Act, ***are read literally*** it would mean that the 'intermediary services' would be taxable at the location of the supplier of services, i.e. the state of Maharashtra, where the Appellant /Applicant-Dealer, is registered.

H. When the Department representative was called upon to make submissions, he was rather un-prepared and hence further time was given by the Learned Authority, suo

motu, to place written /oral submissions on 2nd August 2018, with a direction to give an advance copy thereof to the Appellant.

I. From the impugned Order, it appears that the Department has contended that the services by the Appellant are not export services and the consideration received in convertible foreign exchange is liable to GST @ 18% as per section 13(8) (b) of the IGST Act.

GROUNDS OF APPEAL

1. Being aggrieved by the said Order dated 10th August 2018, passed by the Learned Authority rejecting the contention of the Appellant/Applicant that the impugned Services be held as "Export Services" under Section 16 (1) (a) of the IGST Act as Zero – Rated Services, and declaring that the services are covered by the residuary provisions of Section 7 (5) (c) of the said Act, as Inter-sate supplies attracting IGST @ 18%, the Appellant prefers this appeal challenging the correctness, legality & propriety of the said order, inter alia, on the following grounds and contentions, which are without prejudice to one another:

2. The Appellant submits that the impugned Order dated 10th August 2018 is:

   (i) illegal, contrary to law, and otherwise bad in law;

   (ii) violative of rules of natural justice as it denied adequate, effective and reasonable opportunity of being heard even when asked for;

   (iii) contrary to well-settled canons of construction;

   (iv) non-speaking (fails to record reasons for its decision);

   (v) biased in favour of revenue, and;

   (vi) erroneous due to non-application of mind,

   and as such, required to be quashed & set aside.

3. The Appellants further submit that the impugned Order needs to quashed & vacated as it has incorrectly & wrongly decided the following questions of law & fact:

(a) Whether the learned Authority was justified in holding that supply of services to the recipient located abroad by way of procuring purchase orders is not an "Export Services" under the IGST Act?

(C) Whether the expression "intermediary Services" appearing in Section 13 (8) (b) of the IGST Act has been misread, misconstrued and misinterpreted by the Learned Authority by ignoring the well settled canons of construction of statutes?

(d) Whether the Learned Authority was justified in re-writing the expression: "intermediary Services" in section 13 (8) (b) of the IGST Act, by 'adding' a punctuation mark, an apostrophe, to the word " intermediary" and equating the expression as " intermediary's services" or by re-writing the expression as "Services of intermediary" to cover the impugned services provided by the Appellant?

(e) When the expression "intermediary services" has not been defined, is it to be construed as 'Nomen Juris' or left open for multiple interpretations, meanings to be assigned by each reader, Authority?

(f) When section 2 of the IGST Act starts by saying : "In this Act, unless the context otherwise requires", was it not obligatory for the Learned Authority to construe the defined term: "intermediary" as having restricted connotation to encompass only those "intermediaries" dealing in transactions involving supply of services alone & not supply of goods, as in the case on hand?

(g) Whether the expression "intermediary services" in clause (b) has to be construed in conformity with the cognate clauses (a) & (c) of sub-section (8) referring to 'pure services' and in the context understood as "intermediary service" contradistinguished with "the main service"?

(h) Whether the learned Authority grossly erred in law in concluding that section 13(8) (b) of the IGST Act is applicable in the facts and circumstances of the case?

(i) Whether the learned Authority failed to appreciate that the burden of proof is on the taxing authority to establish that the case on hand strictly falls within the "exemption/Exception" embodied in section 13 (3) to (8) of the IGST Act and in

the event of an ambiguity the benefit accrues to the subject and not to the State?

(j) When the "recipient" as defined in section 2 (93) (a) of the CGST Act is located outside India, and the impugned services are used, consumed and enjoyed by the recipient for his business, can such transaction be held taxable in India just because the supplier of services is registered in India under the GST law?

(k) Whether the inference that the "place of supply" is the "location of the supplier of services" as per Section 13 (8) (b) of the IGST Act is rendered incongruent in cases where the use, user or consumption of services is by the "recipient" located outside India, and not at the place of supply?

(l) When the services provided by the Applicant to the "recipient" abroad, are neither used or consumed in the taxable territory, can such services be held taxable under any of the GST laws?

(m) Whether the Learned Authority erred in law in opting a construction of section 13(8) (b) of the IGST which, ex-facie, leads to absurdity and defeats the cardinal principle of 'destination based taxation', in preference to the interpretation canvassed by the Applicant to accept the default provision in section 13(2) of the IGST Act on the ground that section 13(8) (b) is inapplicable as it is meant for a specific situation where there are two supplies of 'services' at one and the same time ?

(n) Whether the impugned Order authorizing levy of non-refundable IGST amounts to double taxation or taxation contrary to the established policy/practice for decades that "India exports goods, services and NOT taxes, duties"?

(o) Whether the impugned Order is contrary to the basic philosophy that a service is to be taxed in the jurisdiction of its consumption, and opposed to the universally applicable principle that services are taxed on their importation in the taxable territory?

(p) Whether the learned Authority violated the settled principle: "In a case of doubt or dispute, it is well-settled, construction has to be made in favour of the taxpayer and against the Revenue." **J. Srinivasa Rao v. Govt. of A.P. [2006 (13) SCALE 27]`**

4. The text and tenor of the impugned order gives one an impression of a bias in favour of the Revenue as the Learned Authority has not discussed or distinguished any Court or Tribunal decisions laying down some sound principles of law. While the case laws were based on the law prevailing on the date the GST regime was ushered in, yet the GST law is nothing but a compendium of various laws which were subsumed without touching the core principles of VAT system of taxation, best described in the following words of the Supreme Court:-

> *"It is clear that Service Tax is a VAT* ***which in turn is destination based consumption tax*** *in the sense that it is on commercial activities and is not a charge on the business but on the consumer and* ***it would, logically, be leviable only on services provided within the country****. Service tax is a value added tax". {All India Federation of Tax Practitioners and Ors.* v. *Union of India (UOI) and Ors.* 2007 (7) S.T.R. 625 (S.C.)}

5. The impugned Order no doubt reproduces the submissions urged in the Application filed on 15th May 2018 under section 97 of the CGST Act, but it takes no cognizance of the grounds & reasons mentioned therein, nor does it notice additional submissions placed before the Learned Authority after it had tentatively indicated that the provisions of section 13 (8) (b) of the IGST Act are attracted and the services provided to the "recipient" abroad cannot be treated as "Export Services".

6. The Appellant, therefore, considers it imperative to place before this Honourable Appellate Authority **a brief overview of the grounds and reasons mentioned in the Rejoinder dated 4th August 2018.** However, instead of just reproducing the grounds, reasons, urged before the Learned Authority through the said rejoinder, the Appellants ***wish to place before the Honourable Appellate Authority for due consideration an up-graded and refined version of various submissions therein***, in support of this Appeal petition:

QUOTE: (Paragraph numbers below are as in the Rejoinder)

7. *It appears that the entire case rests on the true and proper interpretation of the phrase or expression "intermediary services" appearing in Section 13 (8) (b) of the IGST ACT".*

8. For interpreting this phrase one has to bear in mind the settled rules or principles of interpretation. A reference may be made to one leading authority: RBI vs. Peerless General Finance & Investment Co. Ltd., 1 SCC 424, the Honorable Supreme Court held:

> " We do not think that in defining the expression 'Prize Chit', the Parliament *intended to depart from the meaning which the expression had come to acquire in the world of finance, the meaning which the Datta and the Raj Study Groups had given it.* That this is the only permissible interpretation will also be further evident from the text Chit and the context as we shall presently see.

9. It is undoubtedly true that the word or term "intermediary" has been defined in section 2(13) of the IGST Act, which reads:

> (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;

It is also true that the word or term "services" is also defined in section 2 (102) of the CGST Act, which reads:

> (102) "services" **means anything other than goods**, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination **for which a separate consideration is charged**;

But the phrase or expression "intermediary services" has not been defined in any of the GST Laws (CGST/MGST/UGST or IGST) and consequently, one has to apply canons of construction to arrive at its true meaning and purport.

Several aspects have to be examined to construe its meaning and purport on the contextual background & its setting in sub-section (8) which applies to "services" simpliciter; and not where the person renders "services" by facilitating or arranging the sale/purchase of goods. xxxx

10. Coming to ***the juxtaposed words, "intermediary services"***, there are two ways to read: one, as an adjective + noun, or secondly, as a compound word. Incidentally, there are three types of 'compound words' in English language:

(i) *Closed form*: Two words are joined together to create a new meaning (firefly, softball, redhead, keyboard, makeup, notebook).

(ii) *Hyphenated form*: Words are joined together by a hyphen (daughter-in-law, over-the-counter, six-year-old).

(iii) *Open form*: **Words are open but when read together; a new meaning is formed (post office, real estate, full moon).**

It is evident that the phrase "intermediary services" is not intended to convey the meaning, which either of the two words, conveys when taken and read separately; but it conveys the "third meaning", namely, **the 'intermediary services' as opposed to "main services", and no other meaning can be attributed to the phrase.** There are other reasons that follow.

11. This phrase or expression, intermediary services, is not engrafted in the statute book for the first time.

12. The expression "intermediary services" was elaborately explained in the Taxationof Services: AnEducationGuide: DT. 20-06-2012.

5.9.6 What are "Intermediary Services"?

Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with 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.

For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition.

Also excluded from this sub-rule is a person who arranges or facilitates a provision of a service (**referred to in the rules as "the main service"),** but provides the main service on his own account.

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In accordance with the above guiding principles, services provided by the following persons will qualify as 'intermediary services':-

i) **Travel Agent** (any mode of travel)

ii) Tour Operator

iii) Commission agent for a service [an agent for buying or selling of goods is excluded]

iv) Recovery Agent

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 of the 'main service'.***

13. It is manifestly clear that there has to be two independent services, one of which is called "intermediary services" and another "main services". The phrase or expression "intermediary services" fits in well when a role similar to that of Travel Agent is kept in mind.

Even if the term "intermediary" engulfed "both, goods or service" effective 14-10-2014, or under the IGST Act [sec. 2(13)] it makes no difference, because the phrase or expression has to be construed in the same sense, manner, as it had acquired in the predecessor legislation, namely, "intermediary services" as distinguished from the "main services".

In other words, when the "intermediary" is acting as such for the goods, there are "two supplies" at one time, not "two services" at one and the same time.

The term "intermediary" in the case on hand is a go-between the cross-border supply of goods; and not "services".

14. The term "intermediary" as defined in section 2 (13) of the IGST Act encompasses both categories, intermediary for "goods" or intermediary for "services"; *but the defined word carries the same meaning as defined, in the enactment, unless the context otherwise requires. Section 2 of the definition section reads:*

> **2. Definitions.** — In this Act, ***unless the context otherwise requires***, -
>
> (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;

The clause (b) of sub-section (8) of section 13 is in the setting of "services" of specified categories.

Only for the enumerated services, "the place of supply" is the place of "service provider". As this interpretation alters the fundamental principle of "destination based taxation", the provisions of section 13 (8) (b) must be construed strictly.

Even if the literal interpretation is considered for the sake of argument, the rule of strict interpretation would need the term "intermediary" to be read as concerning "services" only, as the word 'intermediary' in the 'compound word: 'intermediary services' is necessarily in contrast to "main services".

To that extent, the context does require the defined term, "intermediary" in section 2(13) of the IGST Act, to be construed or understood as it was originally defined under the Service tax law, prior to its amendment in 14-10-2014.

15. The above interpretation finds support from the provisions of section 13 of the IGST Act. The default rule is given go-bye in relation to "specified services" enumerated under sub-section (3) to (13) and in particular sub-section (8) of section 13.

The clauses (a) or (c) in sub-section (8) of section 13 are referring to pure services;

and as such the context compels exclusion of services of intermediary who is acting as such for arranging "export/import of goods", which has nothing to do with any kind of "services".

The literal interpretation of the phrase "intermediary services" in section 13 (8) (b) must yield to the context, on authority and in principle.

16. It may be added that the sub-clauses (3) to (13) of section 13 are ***in the nature of "exceptions" to the "default Rule"*** in section 13(2) of the Act, and hence the Department claiming benefit of this "exception" in sub-section (8) to avoid inapplicability of default rule, then it has to prove by "the letter of the law" that the case of the Applicant falls in it without any shed of ambiguity.

If there is any slightest doubt, which certainly exists in the present case because the statute fails to define the phrase or expression: "intermediary services", and leaves the matter at large open for anyone to put his or her own private interpretation to deny any benefit or saddle liability on the Appellant.

Just as the claim for "exemption" must be proved by the assessee by showing that his case falls strictly in the four corners of law, the claim of the Department must also be proved beyond any shed of doubt that the Appellant's case falls in the "exception" in clause (b) of sub-section (8) of section 13 of the Act; otherwise the benefit of doubt goes to opposite party. If there is any ambiguity or failure of the Department to claim that the Appellant's case falls in Rule 13(8) (b) of the Act, the benefit of doubt must be in favour of the Appellant.

A reference may be made to the Constitution Bench decision handed down on the 30th July 2018:

'We may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue.' Vide: Constitution bench of the Supreme Court in Commissioner of Customs (Import), Mumbai vs. M/s. Dilip Kumar and Company,

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17. The above discussion shows that the expression or phrase, "intermediary services" is a *nomen juris* and has to be construed in the legal sense only. When so understood, it would be clear that the interpretation suggested or canvassed by the Department and endorsed by the Learned Authority to bring the case of the Applicant in the "exception" to the Default Rule in section 13(2) of the IGST Act, is a feeble attempt that stems from the Revenue bias and nothing else.

18. A reference is invited to the decision of **the Rajasthan High Court.** Head Note and paragraph 12 is reproduced below:

2018 (11) G.S.T.L. 235 (Raj.)

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

BENCH AT JAIPUR

COMMR. OF C.E., JAIPUR versus NATIONAL ENGINEERING INDUSTRIES LTD.

D.B. Central Excise Appeal Nos. 22 with 47 of 2016, decided on 7-12-2017

Export of services - Distributor for foreign company - Promoting sales of their product in India - Receiving commission on imports into India when orders were placed through them - Foreign company with which assessee did work had no branch in India - *HELD : **It was case of export of services for which assessee was not liable to pay Service Tax*** - Merely because subsidiary company had branch in India did not amount to branch of company with which assessee has entered into contract - Assessee had nothing to do with subsidiary company - Rule 3 of Export of Services Rules, 2005. *[para 23]*

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19. The Export of Services Rules owes it origin to General Agreement on Trade and Tariff. In the 8th round of the GATT (Uruguay Round), negotiations were carried **out in the area of services** which led to the General Agreement on Trade in Services **(GATS) *to which India is a signatory.*** This Agreement recognized four modes of delivery of services in the case of exports. These are -

1. *Cross Border* - The service itself crosses the border

2. *Consumption Abroad* - The consumer travels across the border

3. *Commercial Presence* - Establishment of an office or industry

4. *Movement of Natural Persons* -The service supplier travels across the border.

- These principles can be diagrammatically represented as follows:-

		USER	
		In India	**Outside India**
USE	In India	1 (Taxable)	2 (Taxable)
	Outside India	3 (Taxable)	4 (Export)

- *Thus only when the user and the use of the service are located outside India, the transaction amounts to export and not otherwise. In the case under consideration, the user is outside India but the use of the service is in India - situation 2 of the table above. In this situation, the transaction does not amount to export and hence taxable in India.*

Unquote:

- ***The GST law also adopts the principles agreed at Uruguay Round.***
- Based on the leading case of Kesavananda Bharati it can be said that in case the language of domestic law (law enacted by the Parliament or State legislatures) are not clear, then the Court must rely on the International law (parent authority based on which the domestic law was enacted). (Also Article 263)

20. ***The VAT/GST law and its implementation in the Member country (India) cannot deviate from the basic guidelines. Here is the legal frame work:***

LEGAL FRAMEWORK

The GATS covers governmental measures that would influence trade in any and all services (excluding services supplied in the exercise of governmental authority). The GATS defines 155 service sectors based on categories developed by the GATT Secretariat, and specifies four modes of trade in services (see Figure 11-2):

1) **Cross-border supply** (supply of services from the territory of one Member into the territory of another Member);

2) **Consumption abroad** (supply of services in the territory of one Member to a service consumer of another Member);

3) **Commercial presence** (supply of services by a service supplier of one Member through commercial presence in the territory of another Member); and

4) **Presence of natural persons** (supply of services by a service supplier of one Member through the presence of natural persons of that Member in the territory of another Member.)

Box A: **Examples of the four Modes of Supply**

(from the perspective of an "importing" country A)

Mode 1: Cross-border

- A user in country A receives services from abroad through its telecommunications or postal infrastructure. Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings.

Mode 2: Consumption abroad

Nationals of A have moved abroad as tourists, students, or patients to consume the respective services.

Mode 3: Commercial presence

The service is provided within A by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and — controlled company (bank, hotel group, Construction Company, etc.).

Mode 4: Movement of natural persons

A foreign national provides a service within A as an independent supplier (e.g., consultant, health worker) or employee of a service supplier (e.g. consultancy firm, hospital, Construction Company).

COMPARABLE VAT LAW PRACTICES:

21. *A recent VAT Directive of EU speaks about preference to effective use and enjoyment rule of consumption.*

- To prevent double taxation, non-taxation or distortion of competition, Member States may decide to shift the place of supply of services, which are either inside or outside the EU to inside or outside their territory, when, according to the **effective use and enjoyment** of the service, this differs from the place of supply as determined by the general rules, those for hire of means of transport, or certain B2C services to a customer outside the EU [Article 59a of the VAT Directive]

- *Example 49: Advertising services provided by a company in Norway to a US business is normally taxed where the customer is established and no EU VAT is due. However, if the media used for the advertising campaign is within a Member State, this Member State may decide that VAT is due on its territory, making use of the effective use and enjoyment rule.*
- *Example 50: A German company supplies to a Swedish company the service of transporting goods from the US to China. Even though the transport takes place fully outside the EU, this supply is taxable in Sweden, at the place where the customer is established. Sweden may make use of the effective use and enjoyment*

rule in order to avoid taxing such a transport taking place outside its territory and outside EU.

- *Each Member State is responsible for the implementation of the effective use and enjoyment rule.* The use made of the rule must be verified with the Member State concerned.

Subsection 10: **Prevention of double taxation or non-taxation**

- Article 59a

In order to prevent double taxation, non-taxation or distortion of competition, Member States may, with regard to services, the place of supply of which is governed by Articles 44, 45, 56 and 59:

(a) consider the place of supply of any or all of those services, if situated within their territory, as being situated outside the Community ***if the effective use and enjoyment of the services takes place outside the Community;***

(b) Consider the place of supply of any or all of those services, if situated outside the Community, as being situated within their territory if the effective use and enjoyment of the services takes place within their territory. xxxx

In, India, this principle is embodied in section 13 (13) of the IGST Act.

DOUBLE TAXATION:

22. It may be noted that the Importer of the goods, whether in the State of Maharashtra or Gujarat, would pay IGST @ 18% on the total Value of Imported consignment; and by virtue of the impugned Order Dated 10th August 2018, the Appellant may also be required to pay IGST at 18% on the Convertible Foreign Exchange amount (at Rupee equivalent). In other words, ***on the amount of Commission, the Applicant will pay IGST and the Importer will pay IGST***. Thus, there will be double taxation of the same "consideration amount", which is wholly illegal & unjust.

Illustratively:

Value of Import (a) Total Cost Rs. 15,00,000 includes	**Importer pays IGST** on Rs. 15,00,000 inclusive of commission amount	Applicant (if so held) also pays CGST +MGST or IGST as may be determined on

Commission of (b) Rs. 300,000		Rs. 300,000

UNQUOTE:

NARROW AND PEDANTIC CONSTRUCTION:

23. The entire case turns on the interpretation of the provisions of section 13 (8) (b) of the IGST Act.

To appreciate the narrow approach taken by the Learned Authority, the findings and reasoning can be looked at. It reads:

> "Further, we find that their contentions that though they are covered under the definition of 'intermediary', the services being provided by **them are not "intermediary services'** are not tenable for the reason that they are very clearly covered under the definition of intermediary' and the ***services being provided by them are clearly the services as given in the definition*** of 'intermediary' as referred in the discussion above."

(i) In effect, the simplistic meaning is that the undefined expression is to be read as "*Intermediary's services*", i. e. **services provided by intermediary**.

The reasoning & logic adopted by the Learned Authority is that the Appellant falls in the definition of the term: 'Intermediary' and the 'services' provided by it are the same as mentioned in the definition, therefore, the Appellant's services are "intermediary services" as mentioned in section 13 (8) (b) of the IGST Act. *QED* = "thus it has been demonstrated."

(ii) But the legislature has not used an apostrophe. The expression has to be read **as two separate words**: "intermediary" & "services", because the law is an edict of Parliament to be read as it is, without any addition or deletion or modification to suit assumed objectives or purposes.

(iii) It may be mentioned that the literal rule of construction is to read the text of the legal provision as it exists, by taking into consideration rules of grammar of the English language in which the law is enacted.

A reference is invited to the Privy Council dictum:

In Ram Rattan v. Parma Nand reported in AIR 1946 PC 51, the Hon'ble Mr. S. R. Das, held as follows:

> *"The cardinal rule of construction of statutes is to read the statutes literally, that is,* ***by giving to the words their ordinary, natural and grammatical meaning.*** *If, however, such a reading leads to absurdity and the words are susceptible of another meaning, the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation".*

(iv) If one looks to grammar, the word "intermediary" is capable of being used in two senses:

First Known Use of *intermediary*

Adjective**: 1777, in the meaning defined at sense 1**

Noun: 1791, in the meaning defined at sense 1a

- **Examples of *intermediary* in a Sentence**
- Adjective
  the bridal couple was regally ensconced in *intermediary* seats at the head table
- Noun
  He served as an *intermediary* between the workers and the executives.

(v) It would be noticed that when it is used as an "adjective" it is necessarily associated with a noun. When used singly, it is a noun.

(vi) Therefore, when legislature has used "intermediary" in conjunction with a noun: (plural) "services", it is used as an adjective. It tells something more about services: e.g. 'Not main services', 'not partial services', 'not final' etc. It is in a sense that it points to type or nature of services as: "intermediary" in contradistinguished with "main services". This interpretation is in consonance with the Legislative practice & usage of adopting well-known phrases that have acquired specific connotation and hence are not required to be defined specifically in subsequent legislation.

(vii) **Alternatively**, even if the two words are taken as a "compound word", it denotes a third meaning. The expression does not rest on the meaning of either word, but the compound word conveys a third meaning.

24. The interpretation as above is backed by the well settled canons of construction. A few case laws may be perused.

(a) In D.R. Venkatachalam v. Dy. Transport Commr. [1977 (2) SCC 273] it was observed that *courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted*. They are not entitled to usurp legislative function under the disguise of interpretation.

(b) In A. N. Roy Commissioner of Police v. Suresh Sham Singh reported in AIR 2006 SC 2677, the Apex Court held that, It is now well settled principle of law that, the Court cannot change the scope of legislation or intention, when the language of the statute is plain and unambiguous. *Narrow and pedantic construction may not always be given effect to. Courts should avoid a construction, which would reduce the legislation to futility.* It is also well settled that every ***statute is to be interpreted without any violence to its language.*** *It is also trite that when an expression is capable of more than one meaning, the Court would attempt to resolve the ambiguity in a manner consistent with the purpose of the provision, having regard to the great consequences of the alternative constructions.*

(c) In State of Haryana v. Suresh reported in 2007 (3) KLT 213, the Supreme Court held that, One of the basic principles of Interpretation of Statutes is to construe them according to plain, literal and grammatical meaning of the words. *If that is contrary, to or inconsistent with any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no further.* The onus of showing that the words do not mean what they say lies heavily on the party who alleges it must advance something which clearly shows that the

grammatical construction would be **repugnant to the intention of the Act or lead to some manifest absurdity**

25. It may be added that as recently the CBIC has reiterated the position vide Flyer no. 21 dated 1st January 2018, excerpts from it are reproduced below:

Integrated Goods and Services Tax Act **C.B.E. & C.**

Flyer No. 21, dated 1-1-2018

The introduction of *Goods and Services Tax (GST)* is a significant reform in the field of indirect taxes in our country. Multiple taxes levied and collected by the Centre and states would be replaced by one tax called Goods and Services Tax (GST). GST is a multi-stage value added tax on consumption of goods or services or both. Xxxxx

26. **Nature of Supply**

It is very important to determine the nature of supply - whether it is inter-state or intra-state, as the kind of tax to be paid (IGST or CGST+SGST) depends on that. xxxxxx

10. **Place of supply**

10.1 **Place of supply provisions have been framed for goods & services keeping in mind the destination/consumption principle.** In other words, place of supply is based on the place of consumption of goods or services. As goods are tangible, the determination of their place of supply based on the consumption principle is not difficult. Generally the place of delivery of goods becomes the place of supply. However, the services being intangible in nature, it is not easy to determine the exact place where services are acquired, enjoyed and consumed. In respect of certain categories of services, the place of supply is determined with reference to a proxy.

10.2 & 10.3. xxxxxxx

D. Place of supply of services in case of cross-border supplies: (Section 13)

(Where the location of the supplier of services or the location of the recipient of services is outside India)

i. In respect of following category of services, the place of supply is determined with reference to a proxy. Rest of the services are governed by a default provision.

S. No.	Nature of service	Place of supply
1	Services supplied in respect of goods that are required to be made physically available from a remote location by way of electronic means, (Not Applicable in case of goods that are temporarily imported into India for repairs and exported.)	the location where the services are actually performed, the location where goods are situated
2	services supplied to an individual which require the physical presence of the receiver	the location where the services are actually performed.
3	Immovable property related services including hotel accommodation.	Location at which the immovable property is located.
4	Admission to or organisation of an event.	The place where the event is actually held.
5	If the said three services supplied at more than one location i.e. (i) goods & individual (ii) immovable property related (iii) event related	
5.1	at more than one location including a location in the taxable territory,	Its place of supply shall be the location in the taxable territory where the greatest proportion of the service is provided.
5.2	in more than one State	its place of supply shall be each such state in proportion to the value of services so provided in each State

6	Banking, financial institutions, NBFC Intermediary services, hiring of vehicles services etc.	Location of the supplier of service
7	Transportation of goods.	The place of destination of the goods
8	Passenger transportation.	Place where the passenger embarks on the conveyance for a continuous journey
9	Services on board a conveyance.	The first scheduled point of departure of that conveyance for the journey.
10	online information and database access or retrieval services"	The location of recipient of service.

ii. For the rest of the services other than those specified above, a default provision has been prescribed as under.

Default Rule for the cross border supply of Services other than nine Specified Services		
S. No.	**Description of supply**	**Place of supply**
1	Any	**Location of the Recipient of Service If not available in the ordinary course of business: The location of the supplier of service.**

11 to 14: **xxxx It** follows from the above Default Rule that if the location of the Recipient is unavailable then ONLY the place of supplier of services is applicable.

UNQUOTE:

PARLIAMENTARY BILL:

27. It is important to refer to the Bill no. 144 of 2018 dated 4th August 2018 introduced in the Parliament, to amend section 12 of the IGST Act. The proposed Amendment reads:

5. In section 12 of the principal Act, in sub-section (*8*), the following proviso shall be inserted, namely:—

"Provided that where the transportation of goods is to a place outside India, ***the place of supply shall be the place of destination of such goods***."

STATEMENT OF OBJECTS AND REASONS

2. The Act makes certain provisions for smooth transition of existing taxpayers to new goods and services tax regime. However, the new tax regime has been facing certain difficulties in respect of matters relating to supply of taxable goods or services by a supplier, who is not registered and in facilitating the settlement of balance in the integrated tax account between the Central Government and the State Governments. ***In order to overcome these difficulties and to improve the ease of doing business for taxpayers and to extend the export related benefits to certain specific supplies, it is proposed to amend the Integrated Goods and Services Tax Act, 2017.***

NEW DELHI; PIYUSH GOYAL

The 4th August, 2018.

This clearly demonstrates that the Suppliers of gods & services are facing problems. The Amendment is "***to improve the ease of doing business for taxpayers and to extend the export related benefits to certain specific supplies". The same norm holds good for the "services" as well.***

28. Interpretation of Statutes (Submission at the time of personal hearing)

This Court in RBI vs. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424, laid down the following in paragraph no.33:

" We do not think that in defining the expression 'Prize Chit', the Parliament *intended to depart from the meaning which the expression had come to acquire in the world of finance, the meaning which the Datta and the Raj Study Groups had given it.* That this is the only permissible interpretation will also be further evident from the text Chit and the context as we shall presently see.

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. ***That interpretation is best which makes the textual interpretation match the contextual.*** *A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.* ***No part of a statute and no word of a statute can be construed in isolation.*** *Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act* ***and by reference to what preceded the enactment and the reasons for it that*** *the Court construed the expression 'Prize Chit' in Srinivasa and we find no reason to depart from the Court's construction."*

29. The Appellant craves leave to add to, delete or modify any of the grounds and contentions as above & to produce & file such other & further evidence, Court decisions before or at the time of hearing.

III-PRAYER:

30. On the fats and in the circumstances, the Appellant most respectfully prays:

(a) The Appeal may please be allowed and it be held that the impugned services provided are actually used, consumed outside the taxable territory, and as such are "export services" having regard to the statutory provisions & various direct decisions of the Courts/Tribunals/ AARs relied upon.

(b) Pending final decision on this Appeal, an interim stay be granted to make the impugned order inoperative, suspended.

(c) The impugned Order of the Learned Authority holding that the provisions of section 13(8) (b) of the IGST Act, are attracted be quashed as untenable for the reason that

existence of two services, at one and the same time, is a sine qua non; and in the case on hand there are no two services, though there are "two supplies" at one and the same time.

(d) The interpretation by the learned Authority failed to establish that the case falls in the 'exception clause 13 (8) (b)' and hence the default rule [section 13(2)] be held as applicable.

(e) An opportunity of personal hearing be granted.

(f) Any other or further relief as may be deemed fit, proper and reasonable be granted.

Personal Hearing

31. A personal Hearing in the matter was conducted on 07.03.2019, wherein Shri. D.P. Bhave, Advocate, representing the Appellant, reiterated their written submissions. Shri. Tukaram Godse (Assistant Commissioner of State Tax), appearing as jurisdictional officer, also made the oral submissions, which were in line with their earlier submissions, which were made before the Advance Ruling Authority.

Discussions and Findings

32. We have gone through the record and perused the facts of case and the submissions made by the appellant and the department. The brief facts of the cases as contended by the appellant are that the appellant (MI) is providing services to its principal 'Carl Zeiss GmbH' in Germany in terms of procuring orders from customers in India for procurement of advanced laboratory instruments from its principal. The floor price is fixed by the principal and MI negotiates with customers in India for terms of supply and consideration / price above the floor price, for which they receive the commission from principal. After completion of the negotiations, the customers in India arranges for the foreign remittance for imports, and directly place the order to the foreign principal, who in turns directly supplies the instruments (goods) to the Indian customers. In most of the cases where the Indian Customers are entitled for the discounts, in kind ("discount in kind", like "Free of cost items", such as: a TV set, a Computer or a Camera etc.) with respect to the material purchased by them, are to be provided by the appellant. In view of the above contended facts, documents, namely copy of the agreement, two invoices raised by foreign supplier and two credit notes,

advance ruling was sought with regard to the 'commission' received in foreign convertible currency from foreign supplier.

33. The Authority for Advance Ruling while deciding the issue relied upon the term 'intermediary', and held that the appellant is an 'intermediary' because they are acting as a broker and the facilitating the process of sale of materials by their foreign principals to the Indian parties because they locate the customer, negotiate the prices and ensure the sale, they also provide for discounts to the customers out of the commission received by them. The advance ruling authority further held since the appellant (the service provider) is located in India and service recipient are located outside India, section 13 (8) (b) of the IGST Act would be applicable in determining the place of supply of such service in the instant case. To classify as 'export of service' crucial condition to be satisfied is the place of supply shall be outside India. Thus, the place of supply being in taxable territory such services are not classified as 'export of services'. The contention of the appellant is that though he has been covered under term 'intermediary' the services provided are not 'intermediary services' has been rejected by the Authority for Advance Ruling for reason being not tenable. The authority for Advance Ruling after rejection of the appellant's claim of 'export of service' held it as an 'interstate supply' as per provisions of section 7 (5) (c) of the IGST Act and eligible to levy of IGST.

34. The prayer of the appellant in the present appeal is as follows: -

a. The Appeal may please be allowed and it be held that the impugned services provided are actually used, consumed outside the taxable territory, and as such are "export services" having regard to the statutory provisions & various direct decisions of the Courts/Tribunals/ AARs relied upon.

b. Pending final decision on this Appeal, an interim stay be granted to make the impugned order inoperative, suspended.

c. The impugned Order of the Learned Authority holding that the provisions of section 13(8) (b) of the IGST Act, are attracted be quashed as untenable for the reason that *existence of two services, at one and the same time, is a sine qua non*; and in the case on hand there are no two services, though there are "two supplies" at one and the same time.

d. The interpretation by the learned Authority failed to establish that the case falls in the 'exception clause 13 (8) (b)' and hence the default rule [section

13(2)] be held as applicable.

35. The appellant had placed the following question for decision before the Advance Ruling Authority: -

(i) "Whether the 'Commission'' received by the applicant in convertible foreign exchange for rendering services as an "intermediary' between an exporter abroad and an import of an equipment, is an 'export of services' falling under section 2(6) and outside the purview of section 13 (8)(b) , attracting s\zero-rated tax under section 16 (1) (a) of the IGST Act, 2017?

(ii) 'If the answer to the question (i) is in the negative whether the impugned supply of services forming an integral part of the cross border sale/purchase of goods, will be treated as an 'intra-state supply' under section 8(1) of the IGST Act read with section 2 (65) of the MGST Act attracting CGST/MGST? And if so, at what rate?

36. The Advance Ruling authority decided that applicant is an 'intermediary' and the place of supply of 'Intermediary Services', as per Section 13(8)(b) being the location of the supplier of services, the said intermediary services cannot be treated as export of services under the provisions of the GST Act. Further, the Advance Ruling Authority held that in case the intermediary services are provided to the recipient located outside India, the inter-state provisions as contained under section 7(5)(c) shall be applicable and hence IGST is payable under such transaction. But from the questions posed it is evident that the appellant already **holds himself out as an intermediary** and has only posed the question as to whether the services given by him qualify to be 'export of services' falling under Section 2(6) or whether is a 'intra-state supply'.

37. On perusal of the above facts and circumstances of the case, the moot issue, before us, is whether we have jurisdiction to decide the nature of the levy i.e. CGST and SGST or IGST, to be imposed on any supply of goods or services or both or not, as the first question asked by the Appellant in their application before the Advance Ruling Authority is, whether the 'commission' received by the appellant qualifies as 'export of services'. The second question posed is whether if not export, would the supply be an 'intra-state' supply or not. 'Export of services' is defined under section 2(6) of the IGST Act as follows:-

'export of services' means the supply of 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 or in Indian rupees wherever permitted by the Reserve Bank of India; 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.

38. In order to decide both the issues raised by the appellant, 'place of supply' of the services provided would have to be decided. The appellant, considering himself as an 'intermediary' has asked for a ruling on whether the services qualify to be an 'export' or a 'intra-state' supply' and these questions necessarily demand an examination of the 'place of supply' of the services. Therefore, in order to answer both these questions, we will first have to examine our jurisdiction, which have, clearly, been laid out in the Section 97(2) of the CGST Act, 2017, which is being reproduced herein under:

"(2) The question on which the advance ruling is sought under this Act, shall be in respect of, -

(a) Classification of any goods or services or both under the Act;

(b) Applicability of a notification issued under the provisions of the Act;

(c) Determination of time and value of the goods or service or both;

(d) Admissibility of input tax credit of tax paid or deemed to have been paid;

(e) Determination of the liability to pay tax on any goods or services or both;

(f)Whether the applicant is required to be registered under GST;

(g)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 that term.

On perusal of the above provision, we find that question on determination of the place of supply has not been covered in the above set of questions, on which the advance ruling can be given. Therefore, we cannot give any opinion or verdict on the question which involve the determination of the place of supply of the goods or services or both.

39. Coming to the present case, we observe that in order to determine which levy, whether export, or CGST or IGST, will be imposed on the said supply of 'intermediary services' of

the Appellant, we will have to determine the place of supply. Then only we can determine the nature of levy, as to whether the same qualifies as an 'export'. We are of the view that as per the law we do not have jurisdiction to determine the place of supply of services or goods or both, and accordingly no ruling on this particular question can be passed by the Advance Ruling Authority. This rationale also holds true in case of the second question asked by the Appellant i.e. whether the said supply could be treated as 'intra-state supply' under section 8 (1) of the IGST Act read with section 2(65) of the CGST Act.

40. In view of the above rationale, the Advance Ruling Authority should not have passed any ruling on the above mentioned two questions asked by the Appellant. Since, the Advance Ruling Authority have passed the ruling in the instant case by transcending its jurisdiction, we quash the impugned ruling passed by the Advance Ruling Authority and pass the order as under:

ORDER

We are of the opinion that since the questions asked by the Appellant are not covered under our scope and jurisdiction, no ruling can be passed in the instant matter. The impugned ruling passed by the Advance Ruling Authority is hereby quashed.

(RAJIV JALOTA)
MEMBER

(SUNGITA SHARMA)
MEMBER

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