GUJARAT APPELLATE AUTHORITY FOR ADVANCE RULING GOODS AND SERVICES TAX D/5, RAJYA KAR BHAVAN, ASHRAM ROAD, AHMEDABAD – 380 009.	

ADVANCE RULING (APPEAL) NO. GUJ/GAAAR/APPEAL/2021/32

(IN APPLICATION NO. Advance Ruling/SGST&CGST/2020/AR/34)

Date :02.11.2021

Name and address of the Appellant	:	M/s. Stovec Industries Ltd., NIDC Narol Post, Nr. Lammbha Village, Ahmedabad – 382405 Gujarat.
GSTIN of the Appellant	:	24AABCS7223D1ZS
Advance Ruling No. and Date	:	GUJ/GAAR/R/70/2020 dated 17.09.2020
Date of filing appeal	:	03.11.2020
Date of Personal Hearing	:	22.01.2021
Present for the applicant	:	Shree Kumar Parekh

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

2. The applicant M/s. Stovec Industries Ltd. filed an application for advance ruling before the Gujarat Authority for Advance Ruling (herein after referred to as the 'GAAR'). The applicant has submitted that they are engaged in manufacturing Rotary screen printing machine, installation and servicing of the machines, and also offers products for conventional and digital engraving methods. They have entered into a contract with SPG Prints Austria GMBH (herein after referred as 'SPA') to provide particular services to customers of SPA in India, as per SPA's instruction. Such services shall include installation / up-gradation of machines sold by SPA, training at SPA's customers' site etc. The relevant extract from the contract relating to scope of service is as under:

*"**Services***

Stovec has agreed that it shall on behalf of and as per the instruction from SPA shall provide services with respect to:

a) Installation and/or upgrades of machines sold by SPA and shall also give training at SPA's customer site in co-ordination with SPA

b) Machines sold by SPA in India and which are under warranty period

c) Machines which are under service contracts with SPA

d) Machines which are not having warranty and/or service contracts"

Apart from the above mentioned scope of services, Stovec (applicant) will also receive commission for service contracts sold in India from SPA.

2.1 The applicant shall raise the invoice to SPA for services mentioned under Clause (a) to (c). In the case of service at (d), they shall raise the invoice to Indian Customer for such services. The relevant extract of the contract with regard to invoicing has been reproduced hereunder:

"Stovec shall raise an invoice for the said services:

- *to SPA, if the service belongs to service mentioned under Clause 1(a) to Clause (c)*
- *to the Indian Customer, if the service belongs to service mentioned under Clause 1(d)"*

The Applicant has submitted that they had sought Advance Ruling only with respect to activities covered under clause (a) to (c) of the 'Services' section of the contract.

2.2 The applicant has submitted that to provide such services, they would receive service charges as consideration in convertible foreign currency periodically. The applicant would invoice SPA on the basis of number of hours spent on supply of service in terms of the said contract. Hourly rates have also been agreed upon in the contract for the various area of hours spent on the supply of service.

3. The GAAR, vide Advance Ruling No. GUJ/GAAR/R/70/2020 dated 17.09.2020, ruled as follows:

Question 1. *Whether, in the facts and circumstances, the specified transaction of the Applicant should be categorized as individual supply or composite supply of service as per the Central Goods and Services Tax Act, 2017 and the Gujarat Goods and Services Tax Act, 2017?*

Answer : *The specified transaction of the Applicant is a composite supply of service as per the Central Goods and Services Tax Act, 2017 in view of the discussion herein above.*

Question 2*. Whether, in the facts and circumstances, the specified transaction of the Applicant is to be reckoned as being provided to SPA or to the customers of SPA located in India?*

Ans. *The person i.e. Indian customer to whom service is supplied in India in terms of the above discussion.*

Question 3. *Whether, in the facts and circumstances, the specified transaction of the Applicant could be categorized as that of an "intermediary" as per Section 2(13) of The Integrated Goods and Service Tax Act, 2017?*

Ans. *The specified transaction of the Applicant is categorized as an "intermediary" as per Section 2(13) of The Integrated Goods and Service Tax Act, 2017.*

Question 4. *Whether, in the facts and circumstances, the specified transaction qualifies to be "Export of service" as per Section 2(6) of The Integrated Goods and Services Tax Act, 2017?*

Ans. *Negative as per the above discussion.*

4. Aggrieved by the aforesaid advance ruling, the appellant has filed the present appeal on 03.11.2020. During the course of personal hearing held on 22.01.2021, the appellant reiterated the submissions made in the appeal.

5. The appellant in the ground of appeal has submitted that the advance ruling issued by GAAR has failed to appreciate the facts, legal provisions and rules of interpretation of law. The appellant has put forth their argument on each and every question of Ruling passed by the Advance Ruling of Authority. The brief of the grounds of appeal in respect of each question of the appellant are as under:

Submission against qualification of the specified transaction as 'composite supply'

6.1 The appellant has submitted that the GAAR has observed the conditions specified for composite supply in Section 2(30) of the CGST Act are fulfilled in the present case. The appellant has reiterate the conditions specified under Section 2(30) along with the observations of GAAR as under :

There should be more than two supplies of goods or services or both

6.2 The Appellant has submitted that they would provide only one service at a time i.e. installation / up-gradation of machine or training to the customers of SPA

in respect of machines and GAAR has not understood the facts well. The charges for travelling, working hours or overtime are not separate activities or services at all. These are the benchmarks or methodology based on which consideration for actual service such as installation / up-gradation of machine or training in respect of machines would be determined. They receives instruction from SPA to provide installation OR/ up-gradation service of machinery belonging to customer in India. In this regard, they would raise invoice to SPA for travelling time, working time & overtime, if any, based on agreed hourly rate in the contract. Here, in this situation, there is only one individual service i.e. installation OR/ up-gradation of machinery is provided and not multiple services. Further, as per instruction, another service could be providing training to customers of SPA in India. Again, the consideration would be determined in same manner referred above. Accordingly, the Appellant humbly submits that ruling pronouncing by GAAR that there are more than two supplies is not correct.

They should be naturally bundled and supplied in conjunction with each other in the ordinary course of business

6.3 The appellant has submitted that GAAR has treated working hours, travelling hours and overtime hours as different supplies without understanding the facts / contract in the present case. The impugned order has failed to understand that the supplier of a service would have to travel and have to spend hours (working as well as overtime) to complete a supply which in this case could be installation / up-gradation or training. Accordingly, the Appellant would bill the hours to SPA. The ruling pronounced by impugned order that the services are naturally bundled and supplied in conjunction with each other in the ordinary course of business is against the basic understanding of contract as there are no more than one service is provided at one time.

There should be one principal supply

6.4 The appellant has submitted that GAAR has observed that they are supplying the service of installation/up-gradation & training and said supply of service is a principal supply as such they are charging per hour for the said service under the head ‘working hours’ and other service like ‘travelling hours’ and ‘overtime hour’ are naturally bundled service to the main service. As discussed above, they would provide independent services and therefore, the question of principal supply does not arise. Further, the services to be rendered by the Appellant would be as per the requirement of each of the customers and would be

offered independently. Since the activities are individual, there is no principal supply as predominant element.

The Appellant has submitted that considering the above discussion present supplies are individual / independent supplies and there is no composite supply.

Submission against contemplation of Indian customer as service recipient for the present transaction

7.1 The Appellant has submitted that GAAR has failed to understand the definition of 'recipient' completely and the punctuations used in definition are ignored. The definition of 'recipient' has been defined in Section 2(93) of CGST Act which is read as under :

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

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

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

(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered ***,*** *"*

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

7.2 The Appellant has submitted that the definition mainly envisages two situations viz. where consideration is payable and where consideration is not payable. Since, in present case, the consideration is involved, the relevant clause would be clause 'a'. It is worthwhile to note that clause (a) and (b) of the definition ends with semi colons **(;)** whereas clause (c) ends with a comma **(,)** followed by 'and'. The punctuation semi colon indicates separation of clauses wherein comma connects the clauses & para used in the definition; that clause (a) is independent of latter part of definition and therefore, when the consideration is payable in any transaction, the service recipient would be the person who is liable to pay consideration.

7.3 The appellant has referred to the decision of Patna High Court in the case of Shapoorji Paloonji & Company Ltd. Vs CCE, Patna [2016-TIOL-556-HC-PATNA-ST] wherein the Hon'ble High Court had occasion to decide whether the condition attached to definition of Governmental Authority viz. participation of government by way of 90% or more of equity and control to carry out the functions of municipality under article 243W of the Constitution, is relevant for both the clauses separated by semi colon or not. In this decision, the High Court is of the opinion that the clause (i) is followed by ";" and the word "or". Therefore, each of the sub-clauses is independent provision and condition of 90% participation would not be applicable to clause (i).

7.4 The Appellant has submitted that considering the above discussion clause (a) is independent of latter part of definition and therefore, when the consideration is payable in any transaction, the service recipient would be the person who is liable to pay consideration.

The appellant has relied upon the decision of the following cases:

- Paul Merchants Limited Vs. Commissioner of C. Ex., Chandigarh [2013 (29) STR 257 (Tri.-Del.)]
- GAP International Sourcing (India) Pvt. Ltd. vs. Commr. of S.T., Delhi 2015 (37) S.T.R. 757 (Tri. - Del.)
- *Universal Services India Private Limited [2016 (5) TMI 750[*

The appellant has submitted that based on above discussion, it could be stated that a person would qualify as recipient of supply if the following ingredients are satisfied:

Ingredients / attributes	Present set of facts
On whose instructions the services are provided	SPA
Who would pay for the services so provided	SPA
Whose needs would be satisfied as a reason of provision of service	SPA

7.5 The appellant has relied upon the Appellate Authority of Advance Ruling, Karnataka order in case of M/s. VOLVO-EICHER COMMERCIAL VEHICLES LTD. The appellate authority has observed that the person who is required to make a payment for getting the job done is the recipient of service. Accordingly, the recipient of service supplied by the Distributor during the warranty period will be Volvo Sweden as it is at their behest that the Distributor has undertaken the

activity of repair and/or replacement of parts to the customer. The reimbursement received from Volvo Sweden is in the nature of consideration paid by the manufacturer to the Distributor for carrying out the service during the warranty period, which activity was part of obligation of Volvo Sweden. Accordingly, it was held by AAAR that the recipient of supply of service by the Distributor is Volvo Sweden and not the customer.

7.6 The appellant has submitted that considering above discussion, the Appellant refutes the contention of the AAR and submits that the service recipient for present transaction would be SPA, who is paying the consideration and not the customers of SPA located within India.

Submission on qualification of Applicant to be an 'intermediary'

8. The appellant has submitted that they negates the basis for the conclusion reached by GAAR ruling that they qualifies to be an intermediary as defined under the Act.

Submission that the Appellant is not an "agent", "broker" or any other person

8.1 The Appellant has submitted that there is no difference in the terms 'broker' or 'agent' and both are one & the same. The term 'agent' is prescribed in GST law vide Section 2(5) which is defined to mean 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. Similarly, the term 'broker' is not prescribed in GST law but from public domain research & as per Black Law's Dictionary, the term broker is defined to mean an agent employed to make bargains and contracts between other persons, in matters of trade, commerce, or navigation, for a compensation commonly called "brokerage." They are no different from each other and both are having representational feature or doing activity on behalf of other with third party.

8.2 The Appellant has submitted that the rule of Ejusdem Generis would also be applicable in present case. The application of this Rule is necessitated because of the use of a general phrase preceded by specific words. The words *'ejusdem generis'* mean 'of the same kind or nature'. *Ejusdem generis* is a rule of interpretation that where a class of things is followed by general wording that is not itself expansive, the general wording is usually restricted things of the same

type as the listed items. The rule of *Ejusdem Generis* is applied in the following cases :

- The statute enumerates the specific words;
- The subjects of enumeration constitute a class or category;
- That class or category is not exhausted by the enumeration;
- The general terms following the enumeration; and
- There is no indication of a different legislative intent.

The appellant has placed reliance on the following case laws:

- ***CIT v. Rani Tara Devi[2013] 355 ITR 457 (P & H)***
- ***Commissioner of Income Tax, Udaipur v. Mcdowell& Co. LtdIn civil Appeal 3471/ 2007***

8.3 The appellant has submitted that applying the principle laid down by the Hon'ble Supreme Court(supra), and the interpretative rule of Ejusdem Generis, the phrase; 'by whatever name called' will include a person in the same genus as that of a broker or an agent. In other words, the phrase 'by whatever name called', will mean a person who is also appointed in a representative capacity. The Appellant is thus clearly neither appointed to act as a broker or an agent nor in any manner similar to that of a broker or agent. If that were the case, the same would have been apparent from the agreement itself.

8.4 The appellant has submitted that GAAR has observed that the Appellant has himself admitted that they are working on behalf of their principal. In this regard, they submitted that the usage of the words 'on behalf of and as per the instructions from SPA' does not always signify principal-agent relationship, specifically when they are used once or twice in entire contract and no other clause specifically appoints Appellant as agent or broker.

8.5 The Appellant has further submitted that generally, the principle of agency involves a person, called the agent, that is authorized to act on behalf of another (called the principal) to create legal relations with a third party. In present case, the Appellant is not authorized to create any such legal relationship with third party including price negotiation etc.

8.6 The Appellant has submitted that in substance they are undertaking the activity on principal to principal basis. Further stated that mere mentioning of words 'on behalf of' or 'as per instruction' would not establish principal agent relationship to qualify as intermediary. Even, the consideration in present case is on hourly basis for providing the service and it is not commission or variable in

nature depending on quantum or success of any activity. Whereas in the case of agent or broker, the agent earns commission on the value of sale or to say closure of transaction which is not the case here.

The Appellant does not *"arrange or facilitate provision of services or supply of goods"*

8.7 The Appellant has submitted that the second part of the definition of the term 'intermediary' defines the nature of transactions which if provided by a broker or an agent or by any person (by whatever name called) would be covered under the services provided by an 'intermediary'. This second condition needs to be cumulatively fulfilled, i.e. it should entail "arrangement" or "facilitation" of a 'main supply of goods or services' between the service recipient, i.e. the overseas entity and its customers in India. In other words, an 'intermediary' is expected to play an active role in arranging or facilitating the actual provision of service or supply of goods between the real service provider and real service recipient. Hence, there should be an interaction or facilitation with the feature of supply of the (main) service and the 'intermediary' should have a role in the main supply of goods or services being rendered by the service recipient to its customer in India.

8.8 The appellant has submitted that in the present case, there is no performance of service by SPA and actual services are performed by the Appellant itself. To mean, there is no facilitation but actual doing / undertaking of activity on their own. Moreover, the Appellant does not arrange the supply by organizing or making plans but as discussed, the Appellant actually indulges itself into doing the act on their own. Thus, it is clear that there is no facilitation or arrangement of supply of goods or services by the Appellant in present case.

Arguments in favour that the Appellant supplies services on their own account

8.9 The appellant has submitted that the definition of the term 'intermediary' contains exclusion in as much as any person (including a broker, agent or any other person) who provides the main supply on his own account, would be outside the purview of the definition of intermediary. The importance of this condition has been explained in the Education Guide released under the erstwhile Service Tax era, which provides that a person 'who arranges or facilitates a provision of a service, but provides the main service on his own account is also excluded from the definition of 'intermediary''. The Education Guide specifically recognizes and well explains that all situations of provision of service on a client's behalf, will not

qualify as an "intermediary". Where the service is provided on the "own account" of the service provider, the categorization as an "intermediary" does not arise. The relevant extract of the Education Guide issued by the CBEC in June 20, 2012 is reproduced below:

> ***"5.9.6 What are "Intermediary Services"? ...***
> ***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."***

In this regard the appellant has placed reliance on the following decision :

- **Principal Commissioner Vs. Comparex India Pvt. Ltd. [2020-TIOL-159-CESTAT-DEL]**

8.10 The appellant has referred the guiding principles provided in Education Guide issued during erstwhile Service Tax regime for determining whether a person is acting as an intermediary or not and these are reproduced as under :

(i) 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.

(ii) 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".

(iii) Identity and title: The service provided by the intermediary on behalf of the principal is clearly identifiable.

8.11 The appellant has submitted that in light of the above parameters of the definition of intermediary, it is to be evaluated now whether the services to be provided by the Appellant to SPA under the present agreement fulfils the parameters of intermediary or not.

S No	Nature of service/activity	Criteria to qualify as intermediary	Applicability in case of the Appellant
Nature and Value			
1	Relation of principal and agent	Yes	Not fulfilled - Relationship between the Appellant and SPA is that of independent contractors or principal to principal basis and not of principal and agent
2	Power to make contract on behalf of other party which will bind the other party	Yes	Not fulfilled - The Appellant shall not have any right to sign any document in the name of or on behalf of SPA
3	Power to alter the nature or value of the service	No	Not applicable - the services provided by the Appellant to SPA are independent of the transaction between SPA and their customers in India
4	Power of negotiation on behalf of principal	Yes	Not fulfilled - SPA can only negotiate the terms with customers in India
5	Arrangement or facilitation of supply of service	Yes	Not fulfilled - as explained above in the facts that the Appellant's role is to actually provide services and there is no element of facilitation or arrangement of supply
Separation of value:			
6	Value of service is invariably identifiable from the main supply	Yes	No - Value is not linked with the supply by SPA. The Appellant charges fees / consideration based on hours spent.
7	Consideration is generally an agreed percentage of the sale or purchase price which is	Yes	Not applicable - there is no consideration paid to the Appellant by SPA which is

S No	Nature of service/activity	Criteria to qualify as intermediary	Applicability in case of the Appellant
	called commission		dependent on the volume of supply made or to be made by SPA
Identity and title			
8	Service provided on behalf of the principal is clearly identifiable	Yes	Not fulfilled - the Appellant is not providing any services on behalf of principal, as the specified transaction explained in the facts above, are provided by the Appellant in its own capacity directly to SPA on principal to principal basis and are independent of any supply by SPA.

8.12 The appellant has submitted that in light of the above parameters of the definition of intermediary they are neither broker, agent or any other person nor arranging or facilitating supply of service between SPA and the customer in India. Further, the services are provided by the Appellant on their own account and therefore, they would not fall within the purview of 'intermediary'.

The Appellant receives fixed consideration based on number of hours spent and does not receive any commission amount as in the case of "intermediary"

8.13 The appellant has further submitted that the observation of the GAAR that the nature of consideration whether on hourly basis or any other method does not have bearing on intermediary service. There is nothing in the definition to state that if the person supplying service receives the consideration other than as commission or brokerage would exclude him from intermediary. Further, there is nothing in the definition that if applicant does not negotiate on behalf of the principal would not be covered as an intermediary. The appellant has submitted that the said argument put forth by GAAR is baseless. Though the definition does not state such condition, the method of consideration helps in determining the role of the service provider. Generally, the commission is paid as a result of successful occurring of transaction and it has direct nexus with main supply. In case, the main

supply does not take place then there is no income of commission. This is clear case of arranging or facilitating supply. However, in present case, there is no connection of consideration received by Appellant and the consideration received by SPA and they are completely independent. This helps in determining that the Appellant is not involved in arrangement or facilitation of supply.

8.14 The appellant has submitted that in case of principal & agent arrangement, the agent has certain authority one of which is to negotiation the price with third party. This is also one of the factors to determine intermediary. However, in the present case, the Appellant is not involved in any kind of negotiation or to say the Appellant does not have any authority to deal with customer except to provide service as agreed with SPA. This also substantiates that the Appellant is not agent, facilitating supply of service.

8.15 The appellant has further submitted that observation of GAAR that the Appellant is receiving commission from SPA and have stated that the claim of the Appellant is false and misleading. The appellant has submitted that the GAAR has misplaced the reference in the contract and have relied upon irrelevant clause of contract for the purpose of determining intermediary. The Appellant are receiving commission on selling of service contracts on behalf of SPA. This is completely separate transaction wherein the Appellant helps SPA in selling the service contracts and on successful sale, the Appellant receives commission. They duly discharge GST on this amount of consideration. Whereas the service under consideration of this appeal is different and have no nexus with commission or selling of any kind of contracts. For services under consideration, the Appellant receives consideration based on hourly rate for providing service of installation / up-gradation of machinery or training. Thus, they are not receiving any commission for services referred in advance ruling application and therefore, they would be outside the purview of intermediary.

8.16 The appellant has submitted that under the erstwhile service tax regime, the scope of the definition of the intermediary services were analysed and it was held that when the services are provided on a principal to principal basis, then the activity will not qualify under the definition of intermediary. In this regard the appellant has placed reliance on the following case laws :

- Chevron Philips Chemicals India Private Limited [2020-TIOL-178-CESTAT-MUM
- Commissioner of Goods and Service Tax Gurgaon-II Vs. Orange Business Solutions Pvt. Ltd. [2019-TIOL-1556-CESTAT-CHO]

- *M/s. Evalueserve. Com Pvt. Ltd. Versus CST, Gurgaon2018 (3) TMI 1430 - CESTAT CHANDIGARH*
- *Sunrise Immigration Consultants Private Limited v. CCE &ST, Chandigarh2018-VIL-539-CESTAT-CHD-ST*
- M/s Godaddy India Web Services Pvt. Ltd. [2016-TIOL-08-ARA-ST]

8.17 Appellant has submitted that considering the above discussion they are not broker, agent or any other person who arranges or facilitates the supply. Also, the Appellant is providing the services to SPA on their own account and hence, the Appellant would not qualify as intermediary for the services under question.

Submission on non-qualification of the specified transaction as 'export of service'

9.1 The appellant has submitted that the observation of GAAR that 3 out of 5 conditions are not fulfilled and hence, the services under question would not qualify as export of service. The Appellant refutes the contention of AAR *qua* conditions as under:

- The recipient of service is located outside India

  As discussed above, the definition of service recipient is crystal clear and according to definition, the person who pays the consideration would be contemplated as service recipient. Since, SPA located outside India is paying consideration, the Appellant submits that the service recipient is located outside India and thus, condition is fulfilled.

- The place of supply of service is outside India

  Section 13 of the IGST Act, 2017 is applicable in case where location of supplier or location of recipient is outside India. Further, as per Section 13(2), the place of supply shall be the location of recipient of services provided the services are not covered in sub-section (3) to (13). As discussed above, the Appellant does not qualify as intermediary at all and therefore, Section 13(8), relied upon in impugned order, is not applicable in the present scenario. Therefore, the Appellant submits that Section 13(2) would be applicable and hence, the place of supply of services shall be the location of the recipient of services i.e. location of SPA, which is outside India. Thus, this condition is also fulfilled.

- Supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;

  In order to understand this condition, the Appellant would first like to refer to Explanation 1 in Section 8. Explanation 1 in Section 8 has been reproduced hereunder:

  "Explanation 1.—For the purposes of this Act, where a person has,—
  (i) an establishment in India and any other establishment outside India;
  (ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or
  (iii) an establishment in a State or Union territory and any other establishment being a business vertical registered within that State or Union territory,
  then such establishments shall be treated as establishments of distinct persons.

  Explanation 2.—A person carrying on a business through a branch or an agency or a representational office in any territory shall be treated as having an establishment in that territory."

9.2 From the perusal of the above, the Appellant submits that where the person has a branch or agency or representational office outside India then such branch, agency or representational office would be considered as an establishment of that person. Further, these establishments would be treated as distinct person as per above explanation. However, the condition to qualify as export service states that the two entities should not be distinct persons merely because of above referred explanation. In present case, the Appellant and SPA are not branch, representational office or agency of each other. Both are separate legal entities and even they are not holding & subsidiary companies as well. In this regard the appellant has relied upon the decision of Hon'ble Gujarat High Court in the case of M/s. Linde Engineering India Pvt. Ltd Vs. Union of India [2020-VIL-349-GUJ-ST].

9.3 The appellant has submitted that they and SPA are not mere establishment of distinct persons and therefore, they would not be covered within the restriction stated in the definition of export of service. Hence, the Appellant submits that the 5th condition referred above is also fulfilled.

9.4 The appellant has submitted the additional submission vide their letter dated 27.01.2021 wherein it is stated that determining the place of consumption is a complex task on account of intangible nature of services and the different modes

by which a service can be provided and can be consumed i.e. used by the recipient to satisfy his needs. The place of consumption and the location i.e. permanent address of the service recipient may be different. A uniform criteria for determining the place of consumption/receipt for different categories of services like, services in relation to immovable property, services in relation to business, performance based services, transport services, etc., cannot be adopted.

9.5 Accordingly, the appellant has taken shelter of Export of Services Rules, 2005 ('EOSR') framed by the Central Government in the erstwhile Service Tax regime under Section 94(1)(f) of the Finance Act, 1994 in support of their argument. The appellant has submitted that these Rules follow the general principle that a taxable service provided by a person in India will be subject to tax only when it has been consumed in India and would not be taxed in case it has been consumed outside India.

9.6 The appellant has submitted that the services which fall within Rule 3(1)(iii) of Export Of Service Rule (EOSR) continue to fall in Rule 3 of Place Of Provision Of Service (POPS) and Section 13(2) of IGST Act, 2017 which stipulates that the place of provision of service would be the location of service recipient in recipient based services. The services provided by Appellant in present case would be recipient-based services and hence, same falls in Rule 3(1)(iii) of EOSR and continues to fall within Rule 3 of POPOS and Section 13(2) of the IGST Act. In such situation, the Appellant respectfully submits that classifying services in hand as a performance-based service is not inappropriate and bad-in-law. In this regard the appellant has placed reliance on the following case laws :

Capgemini India Pvt. Ltd. Vs. Commissioner Of Service Tax, Mumbai 2015 (39) S.T.R. 641 (Tri. – Mumbai)

Samsung India Electronics Pvt. Ltd. Vs. Commissioner of Central Excise, Noida [2016 (42) S.T.R. 831],

Simpra Agencies Vs. Commissioner of Central Excise, Delhi [2014 (36) S.T.R.]

Prime Energy Pvt. Ltd. Vs. Commissioner of Service Tax, New Delhi [2016 (45) S.T.R. 459]

DISCUSSION AND FINDINGS

10. We have carefully gone through and considered the appeal and written submissions filed by the appellant, submissions made at the time of personal

hearing, Advance Ruling given by the GAAR and other material available on record.

11. We find that the appellant has contended all the four Rulings given by the Authority for Advance Ruling in his ground of appeal. Accordingly, we examine the contentions of the appellant in respect of all the four Rulings.

First Ruling : qualification of the specified transaction as 'composite supply'

12.1 The appellant has contended that the observation of the GAAR that conditions specified for composite supply in Section 2(30) of the CGST Act, 2017 are fulfilled in respect of the specified transactions are not correct. Hence, first we refer to the definition of **`*Composite Supply'*** defined in sub-section (30) of Section 2 of CGST Act, 2017, which is read as under:

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

12.2 In view of the above definition a composite supply would mean a supply consisting of two or more taxable supplies of goods or services or both or any combination thereof which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply. We have examined the contention of the appellant in light of the definition of composite supply and find that the appellant is providing service of installation / up-gradation of machine or training to the customers of SPA in respect of machines. The consideration agreed with SPA is based on hourly rate for activities such as travelling, regular work or overtime hours and based on the time spent for each of the activities. Accordingly, they are providing more than two services i.e. installation or up-gradation of service, training to the customer for the operation of machine and other activities like overtime service. The contention of the appellant that charges for travelling, working hours or overtime are not separate activities and these are the benchmarks or methodology based on which consideration for actual service such as installation / up-gradation of machine or training in respect of machines would be determined but appellant have not put forth any argument how the travelling hours, working hours or overtime are not separate activities. Further, if these activities are not separate activities then why the appellant is

charging hourly rate separately for each activities in the invoices. Being only one supply of service the appellant need not to require the bifurcation of separate hourly charges of each and every work in the invoice meant to SPA. The appellant may received the one consolidated charges for their service provided to customer considering it as one supply and not more than one. However, in the contract held between appellant and SPA hourly rate is fixed for each work i.e. working hours, travelling hours and overtime hours. Therefore, we hold that the appellant is providing more than two services and contention of the appellant that they are providing only one service is not correct.

12.3 The contention of the Appellant that ruling pronounced by GAAR that the services i.e. travelling, regular work or overtime are naturally bundled and supplied in conjunction with each other in the ordinary course of business is against the basic understanding of contract as there are no more than one service is provided at one time. We have examined the said argument and find that the appellant has not explained how the travelling, regular work or overtime are not naturally bundled service because to provide service of installation/up-gradation or training, engineer has to travel at the place of customer and may work overtime to complete the service. Thus without travelling and overtime how would appellant provide the service of installation/ up-gradation of machine and training. Therefore, we are of the opinion that service of installation/up-gradation or training and travelling, regular work or overtime are naturally bundled service.

12.4 The appellant has argued that the services to be rendered by them would be as per the requirement of each of the customers and would be offered independently. We have examined and find that the appellant is supplying the service of installation/up-gradation & training and said supply of service is a principle supply as such they are charging per hour for the said service under the head “Working hours” and other service like “travelling hours” and “Overtime hour” are naturally bundled service to the main service. The appellant has not put forth any argument that without travelling to the place of customer and without performing overtime to complete the work of customer how would they complete/ finish the service . Thus, the above argument of the appellant that they are offering independent service does not find support in view of the above discussion. Hence we hold that the appellant services get covered under the definition of “composite supply”.

Second Ruling : Indian customer as service recipient for the present transaction

13.1 The Appellant has submitted that GAAR has failed to understand the definition of 'recipient' completely and the punctuations used in definition are ignored. The definition of 'recipient' has been defined in Section 2(93) of CGST Act which is read as under :

> *"(93) "recipient" of supply of goods or services or both, means—*
>
> *(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration* **;**
>
> *(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available* **;** *and*
>
> *(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered* **,"**
>
> *and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;*

As per Section 2(31) of the CGST Act, "consideration" in relation to the supply of goods or services or both includes -

> *(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;*
>
> *(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government :*
>
> *Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;*

13.2 A reading of the definitions given in Section 2(93) and 2(31) of the CGST Act, indicates that the person who is required to make a payment for getting a job done is the recipient of service. Accordingly, the recipients of the service supplied

by the appellant will be the manufacturer as it is at their behest that the appellant has undertaken the activity of installation/up-gradation of the machine, service of machines which are under service contract with SPA and machine which are under warranty period to the customer. The payment received from SPA is in the nature of consideration paid by the manufacturer to the Appellant for carrying out the service. The appellant has make an argument that clause (a) and (b) of the definition ends with semi colons (;) whereas clause (c) ends with a comma (,) followed by 'and'. The punctuation semi colon indicates separation of clauses wherein comma connects the clauses & para used in the definition; that clause (a) is independent of latter part of definition and therefore, when the consideration is payable in any transaction, the service recipient would be the person who is liable to pay consideration. We find force in their argument and in present case SPA is paying consideration to the appellant for the service provided to the Indian customer. Therefore, we hold that in present case SPA is recipient of supply of service in terms of the consideration paid to the appellant and not Indian customer.

Third Ruling: Submission on qualification of Applicant to be an 'intermediary'

14.1 The appellant has contended that the GAAR, in the impugned order, has held that the Appellant qualifies to be an intermediary as defined under the Act. They negate the basis for the conclusion reached in impugned order.

14.2 The appellant has make an argument that there is no difference in the terms 'broker' or 'agent' and both are one & the same and both the term are having representational feature or doing activity on behalf of other with third party. The appellant has submitted that the rule of Ejusdem Generis would also be applicable in present case. The application of this Rule is necessitated because of the use of a general phrase preceded by specific words. The words 'Ejusdem Generis' mean 'of the same kind or nature'. Ejusdem generis is a rule of interpretation where a class of things is followed by general wording that is not itself expansive, the general wording is usually restricted things of the same type as the listed items.

14.3 To examine whether the applicant can be categorized as "intermediary" or not, we refer to the definition of the "intermediary" as provided under Section 2(13) of the Integrated Goods and Services Tax Act, 2017 and the same is reads 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;"

The intermediary means, as per the above clause, the following persons -

(a) A broker by whatever name called, or

(b) An agent by whatever name called, or

(c) Any other person by whatever name called.

The term 'broker' has not been defined under GST Act. However, the term 'agent' has been defined in Section 2(5) of the CGST Act 2017 which is read as under :

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.

14.4 The above definition of agent includes a broker but it is not necessary that every" broker" is an "agent". The term broker has not been defined in the GST Act but as per Black Law's Dictionary, the term "broker" is defined to mean an agent employed to make bargains and contracts between other persons, in matters of trade, commerce, or navigation, for a compensation commonly called "brokerage". From the above definition and meaning of term "broker" and "agent", the basic difference between them is that broker is a person who acts as middleman between two parties and whose job is only to facilitate whereas an agent acts on behalf of the Principal. In the agreement held between applicant and SPG Print (SPA) it is mentioned in "Service" clause that, *" Stovec (Applicant) has agreed that it shall on behalf of and as per instruction from SPA, shall provide services with respect to :"* In para 4 of the agreement "Customer Contact/Service Process" it is mentioned that *if customer directly contact to the appellant (Stovec) then appellant has to be informed SPA and SPA's instruction action be initiated by the appellant.* The said clause of agreement is reproduced as under :

In case of service request for any machine, customer can directly contact either SPA or Stovec. In case the customer contact Stovec first then SPA has to be informed and as per SPA's instruction action to be initiated from Stovec.

14.5 The appellant vide their letter dated 21.09.2021 made additional submission wherein they referred to Circular No. 159/15/2021-GST dated 20.09.2021. In the said circular it has been stated that sub-contracting of service cannot be included within the purview of intermediary services. The circular states an illustration that, 'A' and 'B' have entered into a contract as per which 'A' needs to provide a service of, say, Annual Maintenance of tools and machinery to 'B', 'A' subcontracts a part or whole of it to 'C'. Accordingly 'C' provides the service of annual maintenance to 'A' as part of such sub-contract, by providing annual maintenance of tools and machinery to the customer of 'A' i.e. to 'B' on behalf of 'A'. Though 'C' is dealing with the customer of 'A' but 'C' is providing main supply of annual maintenance service to 'A' on his own account i.e. on principal to principal basis. In this case 'A' is providing supply of annual maintenance service to 'B', whereas 'C' is supplying the same service to 'A'. Thus supply of service by 'C' in this case will not be considered as intermediary.

The appelant submitted that in their present case, SPA has sub-contracted the services like installation/ upgradation of machines sold by SPA, training at customer's site etc. to the appellant. Such services would be provided by the appellant to SPA as part of sub-contract agreement , by providing serices to customers of SPA. Accordingly present scenario would be construed to be arrangement on principal to principal basis and same would not fall within the purview of 'intermediary services'. The appellant submitted that since CBIC has already provided requisite clarity on the subject matter, the order may be passed on similar lines.

14.6 In view of the submissions made and clarification given by CBIC vide Circular No. 159/15/2021-GST dated 20.09.2021 we agree with contentions of the appellant that their services will not fall under the category of 'intermediary' services. Since there is no performance of service by SPA and actual services are performed by the appellant itself they are outside the purview of the definition of 'intermediary'. Further as per CBIC circular dated 20.09.2021 referred above, sub-contracting of services whether a part or whole cannot be included within the purview of intermediary services. In the present case, SPA has sub-contracted the services like installation/ upgradion of machines sold by SPA, training at custmer's site etc. to the appeallant. Such services would be provided by the appellant to SPA as part of sub-contract agreement , by providing services to the customers of SPA. The supply of service by the appellant where it has been sub-

contracted to it by the recepient will fall under the exclusion part of the definition of 'intermediary' as per the provisions of Section 2(13) of the IGST Act 2017.

Hence in view of the above discussion we agree with the appellant that the specified transactions are not "intermediary" in nature and they fall under exclusion part of the definition of 'intermediary' as provided under Section 2(13) of the IGST Act, 2017.

Fourth Ruling: Submission on non-qualification of the specified transaction as 'export of service'

15.1 The appellant has contested the ruling of the GAAR that the specified transaction do not qualify as export because 3 out of the 5 conditions are not fulfilled which are specified under Section 2(6) of IGST Act, 2017.

2(6) 'export of services' means the supply of any service when,"
(i) the supplier of service is located in India;
(ii) the recipient of service is located outside India;
(iii) the place of supply of service is outside India;
(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and
(*v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;*

15.2 The GAAR has ruled that the recipient of service is located in India, therefore, second condition is not fulfilled. We find that as per definitions given in Section 2(93) and 2(31) of the CGST Act, the person who is required to make a payment for getting a job done is the recipient of the service. The receipient of the service supplied by the appellant will be the manufacturer as it is at their behest the appellant undertakes activity of installation/up-gradation of the machine, service of the machines which are under service contract with SPA and machine which are under warranty period to the customer. The payment received from SPA is in the nature of consideration paid by the manufacturer to the appellant for carrying out the service. As held earlier in the above order, in the present case SPA is recipient of supply of service in terms of the consideration paid to the appellant and not the Indian customer.

15.3 The third condition that place of supply of service should be outside India. The Appellant has contended that as per Section 13(2), the place of supply shall be the location of recipient of services provided the services are not covered in sub-section (3) to (13). That they do not qualify as intermediary at all and Section 13(8) of IGST Act, 2017, relied upon by GAAR in their Ruling,

is not applicable in the present scenario is not tenable. The appellant contention is legally not correct as such their service is performance based and location of performance of service is within India. They fall within the category as described under Section 13 (3) (4) of IGST Act, 2017. **In view of same it is concluded that the place of supply of service is not outside India.**

15.4 The fifth condition is that *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.* We refer to Explanation 1 in Section 8. Explanation 1 in Section 8 has been reproduced hereunder:

> *"Explanation 1.—For the purposes of this Act, where a person has,—*
>
> *(i) an establishment in India and any other establishment outside India;*
>
> *(ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or*
>
> *(iii) an establishment in a State or Union territory and any other establishment being a business vertical registered within that State or Union territory,*
>
> *then such establishments shall be treated as establishments of distinct persons.*

15.5 The aforementioned condition to qualify as export of service states that the two entities should not be distinct persons merely because of above referred explanation. The Appellant has submitted that they and SPA are not branch, representational office or agency of each other. Both are separate legal entities and even they are not holding & subsidiary companies as well. As per CBIC Circular No. 161/17/2021-GST dated 20.09.2021 it has been clarified "that a company incorporated in India and a body corporate incorporated by or under the laws of a country outside India, which is also referred to as foreign company under Companies Act, are separate persons under CGST Act, and thus are separate legal entities. Accordingly, these two separate persons would not be considered as 'merely establishments of a distinct person in accordance with Explanation 1 in section 8". In view of the same it is held that SPG Prints B.V. holding and foreign company of Stovec Industries Ltd. (i.e. is appellant) are two separate legal person and are not merely establishments of distinct person in accordance with Explanation 1 in Section 8 of IGST Act.

16 The appellant has contended that there service is not performance based and not recipient base and in support of their argument they has taken shelter of Export of Services Rules, 2005 ('EOSR') of erstwhile service tax regime and same

was replaced by Place of Provision of Service Rules, 2012 (POPOS). The appellant has contended that services provided by them in present case would be recipient-based services and hence, same falls in Rule 3(1)(iii) of EOSR and continues to fall within Rule 3 of POPOS and Section 13(2) of the IGST Act. We have examined the said contention of the appellant and first of all we strongly hold that to refer the provision of erstwhile Service Tax regime to determine the place of provision of service is legally not correct and out of place. Further the contention of the appellant that their service is recipient based service but they do not elaborate how it is recipient based service and not performance based service. The appellant company is providing services of installation, up-gradation of machine and training to the staff of the customer in India of SPA. It would be pertinent here to reproduce the service clause of agreement to negate the argument of the appellant that their service is not performance based and same is read as under :

> *"**Services***
> *Stovec has agreed that it shall on behalf of and as per the instruction from SPA shall provide services with respect to:*
> *a) Installation and/or upgrades of machines sold by SPA and shall also give training **at SPA's customer site** in co-ordination with SPA*
> *b) Machines sold by SPA in India and which are under warranty period*
> *c) Machines which are under service contracts with SPA*
> *d) Machines which are not having warranty and/or service contracts"*

The aforesaid clause of the agreement clearly states that Stovec (appellant) shall provide the service at SPA's customer site i.e. in India. This clearly shows that the appellant service is performance based as such the appellant can perform service only at SPA's customer in India and not outside India. We strongly hold that the contention of the assessee that their service is recipient base is baseless and against the law.

16.1 Hence in view of above discussion the specified transaction do not qualifies the export of service because all the conditions which are stipulated under Section 2(6) of IGST Act, 2017 are not fulfilled which is the foremost condition for any transaction to be qualified "Export of Service".

16.2 The appellant has relied upon the following case laws:

- *M/s. Capgemini India Pvt. Ltd. Vs. Commissioner Of Service Tax, Mumbai 2015 (39) S.T.R. 641 (Tri. - Mumbai)*
- *Samsung India Electronics Pvt. Ltd. Vs. Commissioner of Central Excise, Noida [2016 (42) S.T.R. 831],*

- *Simpra Agencies Vs. Commissioner of Central Excise, Delhi [2014 (36) S.T.R.],*
- *Prime Energy Pvt. Ltd. Vs. Commissioner of Service Tax, New Delhi [2016 (45) S.T.R. 459]*

We find that the facts and circumstances of all the above cases are not similar to the present case and also these cases pertain to erstwhile Service Tax regime, therefore are not applicable in the case at hand.

16.3 The appellant has relied upon the ruling of Karnataka Appellate Authority of Advance Ruling ('AAAR') in the case of *M/s Volvo-Eicher Commercial Vehicles vide Order #KAR/AAAR-14B/2019-20 dated February 6, 2020.*

We are of the view that as per Section 103 of the CGST Act, any Advance Ruling is binding on the Applicant who has sought it and on the concerned officer or the jurisdictional officer in respect of the Applicant. Accordingly, AAARs Ruling as cited above can't be relied upon in the present case of the Appellant.

17. In view thereof, we confirm the Advance Ruling No. GUJ/GAAR/R/70/2020 dated 17.09.2020 of the Gujarat Authority for Advance Ruling in respect of Ruling No. 1 and 4 and reject the appeal filed by the appellant M/s. Stovec Industries Ltd. to that extent as discussed above in respect of said Ruling. We modify the Advance Ruling No. GUJ/GAAR/R/70/2020 dated 17.09.2020 of the Gujarat Authority for Advance Ruling in respect of Ruling No. 2 and 3. We do not agree with the view of the GAAR ruling in respect of Question No.2 and rule that the recipient of service is located outside India i.e. SPA in terms of consideration paid to the appellant and not Indian Customer. Further in respect to Ruling No. 3, in view of the clarification given by the board (CBIC) vide Circular No. 159/15/2021-GST dated 20.09.2021, it is ruled that the appellant is not an 'intermediary' in terms of provisions of Section 2(13) of IGST Act, 2017.

(J.P. Gupta)
Member

(Seema Arora)
Member

Place : Ahmedabad
Date :02.11.2021