

**MAHARASHTRA AUTHORITY FOR ADVANCE RULING**  
**GST Bhavan, 8<sup>th</sup> floor, H-Wing, Mazgaon, Mumbai – 400010.**  
(Constituted under section 96 of the Maharashtra Goods and Services Tax Act, 2017)

**BEFORE THE BENCH OF**

(1) Shri B. Timothy, Addl. Commissioner of Central Tax, (Member)

(2) Shri B. V. Borhade, Joint Commissioner of State Tax, (Member)

GSTIN Number, if any/ User-id	Unregistered
Legal Name of Applicant	Mayank Jain
Registered Address/ Address provided while obtaining user id	13 <sup>th</sup> Floor, Tower 1, One Indiabulls Centre 841 Senapati Bapat Marg, Mumbai 400013
Details of application	GST-ARA, Application No. 103 Dated 21.12.2018
Concerned officer	Dy. Commissioner of CGST & Central Excise, Division – III, Mumbai Central.
Nature of activity(s) (proposed / present) in respect of which advance ruling sought	
A Category	Service Provision
B Description (in brief)	Applicant is a retail chain of digital labs and studios.
Issue/s on which advance ruling required	(i) Classification of goods and/or services or both (v) determination of the liability to pay tax on any goods or services or both
Question(s) on which advance ruling is required	As reproduced in para 01 of the Proceedings below.

**PROCEEDINGS**

(Under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

The present application has been filed under section 97 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as “the CGST Act and MGST Act”] by **Mayank Jain**, the applicant, seeking an advance ruling in respect of the following questions.

- 1) Whether the Marketing services to be supplied by the Applicant under the Foreign Immigration Advisor to the Consultant Manager constitutes a supply of “Support services” classified under SAC 9985 or “Intermediary service” classifiable under SAC 9961/9962 or any other heading?
- 2) Whether the Handholding services to be supplied by the Applicant under the Foreign Immigration Advisor Agreement constitute a supply of “Support services” falling under SAC 9985 or “Intermediary service” classifiable under SAC 9961/9962 or any other heading?
- 3) Whether the Marketing services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax Act 2017?
- 4) Whether the Handholding services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated 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 any dissimilar provisions, a reference to the CGST Act would also mean a



reference to the same provision under the MGST Act. Further, henceforth for the purposes of this Advance Ruling, a reference to "GST Act" would mean CGST Act / MGST Act.

## 2. FACTS AND CONTENTION - AS PER THE APPLICANT

The submissions, as reproduced verbatim, could be seen thus-

"Mayank Jain (hereinafter referred to as the "Applicant") is an individual exploring business opportunity in providing marketing and advisory services in relation to the Employee Based Immigration: 5<sup>th</sup> Reference Program notified by the United States Citizenship and Immigration Services (hereinafter referred to as the "EB-5 Program"). The EB-5 Program envisages that an investor is eligible to a permanent residence permit in the United State of America subject to an investment of US\$ 500,000 and job-creation in a commercial entity or investment fund, commonly referred to as a "Regional Centre" or a "Company", which is approved and recognized by the Government of the United States of America.

The Applicant wants to provide certain services in the nature of marketing and intelligence to the "Consultant Manager" acting for the Regional Centre or Company enabling them to receive investments from prospective investors. The scope of work under this Agreement titled as "Foreign Immigration Advisor Agreement" can broadly be stated as below:

- (i) Marketing services
  - a. Collecting and analysing information i.e. market analytics, intelligence, preparing and drafting reports, strategy and providing leads to the Consultant Manager;
  - b. Market the EB-5 Program in India to prospective investors
  - c. Address queries of the Consultant Manager as and when required from the Applicant;
  - d. Marketing support services such as arranging premises for the Consultant Manager and prospective investor to meet and negotiate/ discuss at their discretion and without interference of the Applicant;
- (ii) Handholding services
  - Upon confirmation of a proposed investment from the Consultant Manager and prospective investor, provide hand-holding services thereto.

From the above, it can be discerned that the duties and services to be provided by the Applicant are two-fold, viz., (i) provide Marketing services to the Consultant Manager and subsequently upon confirmation by the Consultant Manager (ii) to provide Handholding services to the investor and Consultant Manager.

The consideration for both the independent services mentioned *supra* will be contingent, i.e., will be provided upon successful investment/ repatriation by the investor. Upon the happening of this event, the Applicant will be paid a fixed amount for Marketing services and another fixed amount for handholding services, by the Consultant Manager. For ready reference, agreement proposed to be signed by the parties is enclosed herewith as Annexure "D"

**Question 1 :-** Whether the Marketing services to be supplied by the Applicant under the Foreign Immigration Advisor to the Consultant Manager constitutes a supply of "Support services" classified under SAC 9985 or "Intermediary service" classifiable under SAC 9961 / 9962 or any other heading?

### Statement of facts having a bearing on the question

The scope of the services to be provided by the Applicant to the Consultant Manager have been provided under the agreement at Clause 1(a) read with Exhibit A hereto.

A bare reading of the relevant clauses *supra* would show that the Applicant is engaged in providing pure marketing services for the benefit of the Consultant Manager. Further, the Applicant is an independent service provider providing services at his own risk and cost. It is



also expressly provided therein that neither party shall represent itself to be the agent of the other nor shall either party accept service of legal process or create or assume any obligation of any kind or nature whatsoever on behalf of the other party. Neither shall have the authority to conclude or negotiate any contracts or secure any orders on behalf of each other.

As a matter of fact, the Applicant will never negotiate or enter into any contract with any prospective customer on behalf of the Consulting Manager for the investment. In all the cases, the terms of investment, the nature of investment, the investment project and the investment vehicle are decided basis the interactions solely between the Consulting Manager and the prospective investor.

In fulfilment of its obligation towards marketing services, the Applicant will undertake *inter alia* the following activities:

- (i) Plan and conduct market surveys to identify the market and prospective investors in relation to the EB-5 program for the Consultant Manager;
- (ii) Prepare reports, marketing plans, market intelligence and compile list of prospective investors for the Consultant Manager;
- (iii) Formulate a strategy plan for the benefit of the Consultant Manager;
- (iv) Address queries of the Consultant Manager in relation to the above, as and when raised by the Consultant Manager; and
- (v) Conduct sales prospection through necessary participation in industry events and provide spotlight to the EB-5 program

#### Statement containing the applicant's interpretation of law

1. For ease of reference, the text of the Service Accounting Code (SAC) is reproduced below:

S. NO.	HSN CODE	TARIFF ENTRY
i.	9961 / 9962	Intermediary service - Services in wholesale trade and Services in retail trade
ii.	9985	Support Service

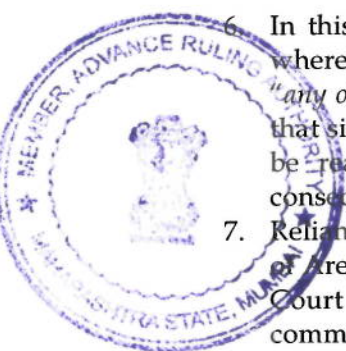
2. The term "intermediary" is defined under Section 2(13) of the Integrated Goods and Services Tax Act 2017 ("IGST Act"). The relevant extract of the said definition is set out hereunder:

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

3. The aforesaid definition has three limbs:
  - a. A broker, an agent or any other person, by whatever name called;
  - b. Arranges or facilitates the supply of goods or services or both, or securities between two or more persons;
  - c. But does not include a person supplying such goods or services or both or securities on his own account.
4. The first limb provides that an intermediary can be a broker, an agent or any other person. In order to examine this limb, it would be apt to refer to the dictionary definitions of the terms "broker" and "agent". The relevant extract of the various dictionary definitions are as follows:
  - a. Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 1, Para 712, Page 424: - A mercantile agent who in the ordinary course of his business is employed to make contracts for the purchase or sale of property or goods of which he is not entrusted with the possession or documents of title [Alapati Ramamurthi, Gelli Krishnamurthy & Co. Vs. J. Ramanujan and Ors. (AIR 1961 AP 408)].



- b. Concise Law Dictionary (2008 Edition): - A middlemen or an agent who for a commission on the value of the transaction, negotiates for others the purchase or sale of stocks, bonds, commodities, or property of any kind; or who attends to the doing of business for another;
  - c. Law Lexicon Dictionary (Sumeet Malik): - An agent employed to make bargains and contracts between other persons in the matters of trade, commerce and navigation, by explaining the intentions of both the parties and negotiating in such a manner as to put those who employ him in a condition to treat together personally; (2) and more commonly an agent employed by one party only to make a binding contract with another.
  - d. Shorter Oxford English Dictionary (Deluxe Edition): - A person who acts for another in business, politics, etc.;
  - e. Section 182 of the Indian Contract Act 1872: - An "Agent" is a person employed to do any act for another or to represent another in dealings with third persons;
  - f. Concise Law Dictionary (2008 Edition): - An agent acts on behalf of his principal and often uses his name and his acts in that capacity are attributable to the principal;
5. Having understood the meaning of the terms "broker" and an "agent", it would be imperative to examine the scope of the term "any other person, by whatever name called". In this regard, it is humbly submitted that the scope of this phrase is restricted by the preceding words "broker or agent" by applying the principle of "*Ejusdem Generis*". As per this doctrine, where there are general words following particular and specific words, the meaning of the latter words shall be confined to things of the same kind as the former (i.e. particular and specific words preceding such generic words). Applying the above to the present case, the phrase "*any other person, by whatever name called*" would include only those classes of persons that are similar to a broker or an agent.
6. In this connection, I also refer to the CBEC Circular No. 83/01/2006 dated 04 July 2006 wherein the principle of "*Ejusdem generis*" was used to construe the meaning of the phrase "*any other person*" appearing u/s 65(105)(m) of the Finance Act 1994. The Circular clarified that since the expression was used in continuation with a specific class of persons, it should be read in consonance with the preceding class of persons mentioned earlier and consequently, the scope of the phrase should be curtailed.
7. Reliance in this regard is also placed on the Hon'ble Delhi High Court decision in the case of *Kreva T & D India Ltd. Vs. DCIT* [2012-TIOL-234-HC-DEL-IT] wherein the Hon'ble High Court applied the principle of *ejusdem generis* to interpret the expression "business or commercial rights of similar nature" referred to in section 32(1)(ii) of the Act and held that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor possible to exhaustively enumerate.
8. The principle of *ejusdem generis* was also upheld by the Apex Court in the case of *Assistant Collector of C. Ex. Vs. Ramdev Tobacco Company* [1991 (51) ELT 631 (SC)] and *CCE Vs. Shital International* [MANU/SC/0884/2010]. Similar view has been affirmed in the following cases:
- i. *CIT Vs. Rani Tara Devi* [2013 (355) ITR 457 (P&H)];
  - ii. *Commissioner of Income tax, Udaipur Vs. McDowell & Co. Ltd.* [MANU/SC/0964/2009]
9. In view of the above, it is submitted that the scope of the term "any other person, by whatever name called" will include a person in the same genus as that of an agent or a broker. Thus, on a combined reading of the dictionary meaning of the terms "broker" and "agent" along with the aforementioned judicial precedents, it can be construed that the only persons appointed in representative capacities can be covered within the scope of the first limb of aforesaid definition (Intermediary).





10. As per the second part of the definition, an intermediary "*Arranges or facilitates the supply of goods or services or both, or securities between two or more persons*". It is further submitted that the service heading 9961 / 9962 refers to intermediary service in wholesale trade and retail trade. Wholesale trade and retail trade relates to the activity of selling of goods.
11. The Applicant submits that the dictionary meaning of facilitation is to make easy or easier, make something possible or aiding or helping. Thus, the dictionary meaning of facilitation is very wide and covers processing, storage, transport, advertising, sales promotion etc, all activities as each and every activity aids or smoothens supply of goods. Goods Transport service (9965), Transport support service (9967), advertising and market research service (9983) are separate service classification. If such a wide meaning is adopted, it will render many of these service classifications redundant. Thus, the Applicant submits that facilitating supply of goods refers to an activity directly related to the sale.
12. In the instant case, the Applicant will act as independent contractors in carrying out the marketing service to the Consultant Manager. Moreover, the Applicant and the service recipient will have no authority to create nor will they assume any obligation on behalf of each other. The services rendered by the Applicant in this bucket of services are limited to the advertising and marketing activities in rem. In other words, therefore, the Applicant is not acting in the capacity of a broker or agent or the like and neither is facilitating any supply of goods or services. Rather, the Applicant is acting on their volition and *simpliciter* providing services to the Consultant Manager. Consequently, no question of facilitation arises. Hence, the Applicant is clearly not covered within the definition of intermediary for this bucket of marketing services.
13. As per the third part of the definition, the definition of intermediary *does not include a person supplying such goods or services or both or securities on his own account*. It is submitted that the since the services rendered are done on the applicant's own risk and reward and are in no way representative of the Consultant Manager, the services would fall outside the purview of the definition of an "intermediary". The Applicant merely is providing marketing and advertising solutions which include sending out pamphlets, posting banners, and using print and electronic media. Nothing amongst these activities mandates there being a communication or any kind of decision making on behalf of the foreign entity. As per the plain words of the Foreign Immigration Advisor Agreement, the Applicant will provide services to the Consultant Manager of his own volition and hence, the services to be supplied by the Applicant to the service recipients fails to comply with the second limb of the definition of the term "intermediary".
14. The activity of sales promotion and marketing are not selling of goods and therefore, such activities would not be classifiable under the said heading. The activities of the Applicant will be in relation to market survey, market intelligence and leads, sales promotion, and customer relation. The Applicant will never participate in the actual sales negotiation or profess to act on behalf of the Consultant Manager or help in concluding the investment by the prospective investor. In other words, the Applicant will not be engaged as an intermediary.
15. At this juncture, it is also submitted that the mere fact that the amount payable by the Consultant Manager for the Marketing services is deferred till successful investment/ repatriation by the investor does not also make it intermediary services. This is for the simple reason that the nature of services is an independent exercise, to be judged *qua* the actual activities carried out thereto and cannot change color basis only the timing of the consideration. In other words, merely deferment of payment to a future time cannot change the character of service.
16. In view of the above, it is amply clear that the services to be provided by the Applicant cannot be considered as an "Intermediary services". However, in order to determine the correct classification of the services to be provided by the Applicant, it would be imperative to refer to the scope of the term "Support services".





17. In the absence of any statutory definition of the term "Support services" under the CGST Act, IGST Act or rules made thereunder, reference is hereby made to the corresponding definitions under the Finance Act 1994. The relevant definitions under the pre-negative list era (Section 65(104c)) and Negative list regime (Section 65B(49)) are reproduced hereunder:

*"Section 65(104c) "support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational or administrative assistance in any manner, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.*

*Explanation – For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security;"*

[Pre-negative List regime]

*"Section 65B(49) "support services" means infrastructural, operational, administrative, logistic, marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of immovable property, security, testing and analysis;"*

[Negative List regime]

18. From the above, it can be construed that marketing services, advertisement and promotion services, customer relationship management, evaluation of prospective customers, etc. would qualify to be in the nature of support services only.

19. Thus, plainly, the supply of services to be provided by the Applicant would be classified under tariff entry 9985 as "Business Support Service".

**Question 2:- Whether the Handholding services to be supplied by the Applicant under the Foreign Immigration Advisor Agreement constitute a supply of "Support services" falling under SAC 9985 or "Intermediary service" classifiable under SAC 9961 / 9962 or any other heading?**

**Statement of facts having a bearing on the question**

The scope of the services to be provided by the Applicant to the Consultant Manager have been provided under the agreement. In brief, this relates to the second tranche or bucket of services, viz., once the investor has confirmed the proposed investment. In this regard, the Applicant provides hand-holding services such collecting documents, filling out forms, addressing any possible issues or difficulties, as the case may be.

A bare reading of the same would show that the Applicant will be an independent service provider providing services at his own risk and cost. It is expressly provided therein that neither party shall represent itself to be the agent of the other nor shall either party accept service of legal process or create or assume any obligation of any kind or nature whatsoever on behalf of the other party. Neither shall have the authority to conclude or negotiate any contracts or secure any orders on behalf of each other.

As a matter of fact, the Applicant will never negotiate or enter into any contract with any prospective customer on behalf of the Consultant Manager for the investment. In all the cases, the terms of investment, the nature of investment, the investment project and the investment vehicle are decided basis the interactions solely between the Consultant Manager and the prospective investor.

**Statement containing the applicant's interpretation of law**



1. The text of the Service Accounting Code (SAC) is reproduced below for ready reference:

SR. NO.	HSN CODE	TARIFF ENTRY
i.	9961 / 9962	Intermediary service - Services in wholesale trade and Services in retail trade
ii.	9985	Support Service

2. The term "intermediary" is defined under Section 2(13) of the Integrated Goods and Services Tax Act 2017 ("IGST Act"). The relevant extract of the said definition is set out hereunder:

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

3. The aforesaid definition has three limbs:

- A broker, an agent or any other person, by whatever name called;*
- Arranges or facilitates the supply of goods or services or both, or securities between two or more persons;*
- But does not include a person supplying such goods or services or both or securities on his own account.*

4. For avoiding repetition and to maintain brevity, the Applicant does not reproduce the submissions but humbly prays that the submissions made in respect of Question No. 1 be treated as part and parcel of the present question.

5. In the instant case, the Applicant and the Consultant Manager will act as independent contractors in carrying out the handholding service. Moreover, the Applicant and the service recipient will have no authority to create nor will they assume any obligation on behalf of each other. The services rendered by the Applicant are limited in this respect. Although the Applicant assists the person of interest in filling of the forms, providing direction to get the necessary security clearances, and getting together all the financial information required as per the Consulting Manager, these duties are purely procedural and do not at any point in time extend to facilitating the investment itself. In simpler terms, the Applicant is acting independently for the benefit of the Consultant Manager and has no role whatsoever to play in respect of the facilitation, negotiations, manner and mode of investment. The handholding service is limited to providing the necessary information so that the application is not left incomplete. At no point is any advice sought or given, and further the Applicant is not privy to the discussions and agreement reached between the Consultant Manager and the customer. Simply put, the Applicant is acting on and for the instructions of the Consultant Manager and nowhere involves himself in investment, and therefore, cannot be termed as an intermediary.

6. The point of distinction between an agent and an independent contractor as per the Supreme Court Words and Phrases (3<sup>rd</sup> Edition) is set out below:

- Agent:** - An agent is bound to exercise his authority which may be given to him from time to time by his principal but is not subject to exercise to the direct control or supervision of the principal;
- Independent Contractor:** - An independent contractor is entirely independent of any control of interference and merely undertakes to produce a specified result by employing his own means.

In this regard, I refer to the Hon'ble CESTAT decision in the case of Amarnath Associates Vs. Commissioner of Central Excise [2017-TIOL-2489-CESTAT-DEL] wherein it was held that the definition of a "commission agent" requires an entity to act on behalf of another person and cause sale or purchase of goods or provision or receipt of services, for a consideration.



7. It would also be apt to refer to the definition of the term "Independent contractor" which has been defined in the Concise Law Dictionary as follows:

*"One who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to his employer's control, except as to the result of the work. An independent contractor is one who undertakes to produce a given result but so that in the execution of the work he is not under the order or control of the person for whom he does it and may use his own discretion in things not specified beforehand."*

8. As highlighted above, the Foreign Immigration Advisor Agreement specifically provides a clause that the Parties do not intend to create any agency or similar relationship. Further, although the consideration is contingent in nature that is for the purposes of determining the timing of payment and quantum thereof. The consideration does not in any way change the nature of services to be provided by the Applicant. Per the plain words of the Foreign Immigration Advisor Agreement, the Applicant will provide services to the Consultant Manager of his own volition and hence, the services to be supplied by the Applicant to the service recipients fails to comply with the second limb of the definition of the term "intermediary".
9. Since the services to be provided by the Applicant will be as an independent contractor, the Applicant will automatically fall within the exclusion provided in the third limb of the definition. In view of the above, the applicant will not be construed as an intermediary in terms of Section 2(13) of the IGST Act.
10. The Applicant will never participate in the actual sales negotiation or profess to act on behalf of the Consultant Manager or help in concluding the investment by the prospective investor. In other words, the Applicant will not be engaged as an intermediary. It is also pertinent to point out that in no case will the Applicant be the sole point of contact between the Consultant Manager and the customer. This direct connection between the customer and the Consultant Manager negates the contention that the Applicant is an intermediary. Further, the mere act of assistance towards filling out of forms and arranging the files/papers in correct order, or arranging for logistical support for either party to meet does not create any agency relationship between the Consultant Manager and the Applicant. There is no representative capacity that the Applicant fulfils. The Applicant is thus providing services on his own account and is not an intermediary within the meaning of the term.
11. In view of the above, it is amply clear that the services to be provided by the Applicant cannot be considered as an "Intermediary services". However, in order to determine the correct classification of the services to be provided by the Applicant, it would be imperative to refer to the scope of the term "Support services".
12. In the absence of any statutory definition of the term "Support services" under the CGST Act, IGST Act or rules made thereunder, reference is hereby made to the corresponding definitions under the Finance Act 1994. The relevant definitions under the pre-negative list era (Section 65(104c)) and Negative list regime (Section 65B(49)) are reproduced hereunder:

*"Section 65(104c) "support services of business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational or administrative assistance in any manner, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.*

*Explanation – For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security;"*

[Pre-negative List regime]

*"Section 65B(49) "support services" means infrastructural, operational, administrative, logistic, marketing or any other support of any kind comprising functions that entities carry out in*



*ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of immovable property, security, testing and analysis;"*

[Negative List regime]

13. From the above, it can be construed that the services of handholding and assisting in in filling forms, and correct documentation for the proper consideration of application, evaluating prospective customers, etc. would qualify to be in the nature of support services only.
14. Thus, the supply of services to be provided by the Applicant would be classified under tariff entry 9985 as "Business Support Service".

**Question 3:- Whether the Marketing services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax Act 2017?**

**Statement of facts having a bearing on the question**

The Applicant will receive payment in freely convertible foreign exchange i.e., United States Dollar.

**Statement containing the applicant's interpretation of law**

1. In this regard I refer to the definition of the term "export of services" as defined under section 2(5) of the IGST Act. The relevant extract is set out hereunder:

*"(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;"*

2. Each of these conditions have been discussed in detail hereunder:

a. Condition I – Supplier of service is located in India

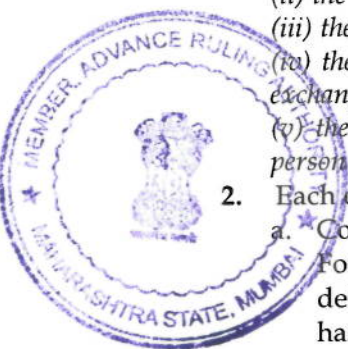
For this, I refer to the definition of the term "location of the supplier of services" as defined under section 2(15) of the IGST Act. As per the said definition, where a supply has been made from a place where the person has obtained registration, the location of the supplier shall be such place of business. In the instant case, the Applicant will provide service from Maharashtra for which it will obtain GST registration. Consequently, the location of the supplier of service shall be Maharashtra i.e. in India.

b. Condition II - Recipient of service is located outside India

The term "location of the recipient of services" has been defined under section 2(14) of the IGST Act. As per the said definition, if a supply has been received from a registered place of business or registered fixed establishment, the location of the recipient shall be the respective place of business or fixed establishment. However, in other cases, the usual place of residence of the service recipient shall be the location of the service recipient. In the instant case, the Consultant Manager will not be registered in India and therefore, their registered place of business will be their registered address (i.e. outside India).

c. Condition III – Place of supply of service is outside India

From (a) and (b) above, it appears that while the service provider will be situated in India, the service recipient will be located outside India. In order to determine the place of supply, I refer to Section 13 of the IGST Act which provides for the place of supply of services in case where either the service recipient or the service provider is situated outside India.





The services to be provided by the Applicant are in the nature of "Support services" classifiable under HSN code 9985. The place of supply in the instant case would therefore be determined as per the general rule i.e. as per Section 13(2) of the IGST Act. Applying the above to the present case, the place of supply of services shall be the location of the Consultant Manager i.e. outside India. Further, it is pertinent to note that there is no consideration flowing from the Indian customer to the applicant and the beneficiary of the services rendered is directly the Consultant Manager.

- d. Condition IV – Payment is received in convertible foreign exchange

As mentioned in the foregoing paragraphs, the consideration to be charged by the Applicant will be in convertible foreign exchange i.e. United States Dollar.

- e. Condition V – Supplier of service and recipient of service are not merely establishment of distinct person

Explanation 1 to Section 8 inter alia provides that where a person has an establishment in India and any other establishment outside India, then such establishments shall be treated as establishments of different legal persons. The term person has been defined to include a Company. In the instant case, the service recipient i.e. Consulting Manager is not an establishment formed by the Applicant and consequently, it cannot be treated as an establishment of a distinct person.

3. In view of the above and in light of the nature of services which is clearly for the benefit of the Consulting Manager who is not located in India, it can be construed that the Applicant fulfils all the conditions for treating the supply of services as an export of services in terms of Section (6) of the IGST Act. Therefore, the answer to Question No. 3 above should be in affirmative.

**Question 4:- Whether the Handholding services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax Act 2017?**

**Statement of facts having a bearing on the question**

The Applicant will receive payment in freely convertible foreign exchange i.e., United States Dollar.

**Statement containing the applicant's interpretation of law**

1. In this regard I refer to the definition of the term "export of services" as defined under section 2(5) of the IGST Act. The relevant extract is set out hereunder:

*"(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;"*

2. Each of these conditions have been discussed in detail hereunder:

- a. Condition I – Supplier of service is located in India

For this, I refer to the definition of the term "location of the supplier of services" as defined under section 2(15) of the IGST Act. As per the said definition, where a supply has been made from a place where the person has obtained registration, the location of the supplier shall be such place of business. In the instant case, the Applicant will provide service from Maharashtra for which it will obtain GST registration. Consequently, the location of the supplier of service shall be Maharashtra i.e. in India.

- b. Condition II – Recipient of service is located outside India

The term "location of the recipient of services" has been defined under section 2(14) of the IGST Act. As per the said definition, if a supply has been received from a registered



place of business or registered fixed establishment, the location of the recipient shall be the respective place of business or fixed establishment. However, in other cases, the usual place of residence of the service recipient shall be the location of the service recipient. In the instant case, the Consulting Manager will not be registered in India and therefore, their registered place of business will be their registered address (i.e. outside India).

c. Condition III – Place of supply of service is outside India

From (a) and (b) above, it appears that while the service provider will be situated in India, the service recipient will be located outside India. In order to determine the place of supply, I refer to Section 13 of the IGST Act which provides for the place of supply of services in case where either the service recipient or the service provider is situated outside India.

The services to be provided by the Applicant are in the nature of “Support services” classifiable under HSN code 9985. The place of supply in the instant case would therefore be determined as per the general rule i.e. as per Section 13(2) of the IGST Act. The said service of assisting the Indian customer in filling of forms and compilation of required documents, without any representation on behalf of the Consulting Manager, will squarely fall under the classification of business support service. The said subsection provides that the location of the recipient of services shall be the place of supply of services. In this case, the Applicant provides services directly to the Consultant Manager and receives consideration thereof. Consequently the customer/recipient of service for the Applicant is solely the Consultant Manager. Applying the above to the present case, the place of supply of services shall be the location of the Consulting Manager i.e. outside India.

d. Condition IV – Payment is received in convertible foreign exchange

As mentioned in the foregoing paragraphs, the consideration to be charged by the Applicant will be in convertible foreign exchange i.e. United States Dollar.

e. Condition V – Supplier of service and recipient of service are not merely establishment of distinct person

Explanation 1 to Section 8 inter alia provides that where a person has an establishment in India and any other establishment outside India, then such establishments shall be treated as establishments of different legal persons. The term person has been defined to include a Company. In the instant case, the service recipient i.e. Consulting Manager is not an establishment formed by the Applicant and consequently, it cannot be treated as an establishment of a distinct person.

In view of the above, it can be construed that the Applicant fulfils all the conditions for treating the supply of services as an export of services in terms of Section (6) of the IGST Act. Therefore, the answer to Question No. 3 above should be in affirmative.

*Additional submissions on 13.05.2019*

**WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT**

*Most respectfully sheweth:*

1. At the outset, the Applicant humbly thanks the Hon'ble Authority for granting an opportunity of personal hearing. In furtherance of the same, the Applicant is now filing the present submissions for consideration of the Hon'ble Authority.
2. At the outset, it is submitted that the submissions herein are without prejudice, and in addition to the averments taken in the application for advance ruling.

*Facts in brief*

3. The EB-5 Program envisages that an investor is eligible to a permanent residence permit in the United State of America subject to an investment of US\$ 500,000 and job-creation in a commercial entity or investment fund, commonly referred to as a “Regional Centre” or a “Company”, which is approved and recognized by the Government of the United States of America.



4. The Applicant proposes to enter into an agreement with a person located and registered in the United States of America (*copy enclosed as Annexure-D to the application for Advance Ruling*), referred to as the Consultant Manager who acts for the Regional Centre. In terms of the same, the Applicant will be providing the following two independent buckets of services, as detailed below:

NATURE OF SERVICE	
Marketing Services	Handholding Services
e. Collecting and analysing information i.e. market analytics, intelligence, preparing and drafting reports, strategy and providing leads to the Consultant Manager;	Upon confirmation of a proposed investment from the Consultant Manager and prospective investor, provide hand-holding services like: (i) Assisting in filling of forms (ii) Assistance in remittance
f. Market the EB-5 Program in India to prospective investors	
g. Address queries of the Consultant Manager as and when required from the Applicant;	
h. Marketing support services such as arranging premises for the Consultant Manager and prospective investor to meet and negotiate/ discuss at their discretion and without interference of the Applicant;	

5. It is apposite to note that the consideration for the services in Marketing services and handholding services are separate and defined in the illustrative agreement itself.
5. As can be seen from Marketing services *supra*, the Applicant will undertake marketing research, surveys and the like in respect of the EB-5 program notified by the Government of the United States of America. Such research, surveys and advertising shall be done for the Consultant Manager. Applicant also facilitate meeting of the perspective investors with the Consultant Manager, however, during such meetings, Applicant merely act as an interpreter without getting involved in the negotiation. The Applicant never represent any party in any capacity whatsoever.
6. Once the perspective investors and Consultant has finalised their deal, as part of Handholding service, the Applicant helps the investor in filling forms, obtain necessary documents as required by the Consultant Manager and allied activities. For such services, the Applicant does not get any consideration from the investor.
7. Once all details are complete and the amount is remitted to the Company, the Applicant is paid for the Marketing services and Handholding service by the Consultant.

**Questions for determination raised**

8. In the above background, the Applicant has approached the Hon'ble Authority for a ruling on the following questions:
- Whether the Marketing services to be supplied by the Applicant under the Foreign Immigration Advisor to the Consultant Manager constitutes a supply of "Support services" classified under SAC 9985 or "Intermediary service" classifiable under SAC 9961 / 9962 or any other heading?
  - Whether the Handholding services to be supplied by the Applicant under the Foreign Immigration Advisor Agreement constitute a supply of "Support services" falling under SAC 9985 or "Intermediary service" classifiable under SAC 9961 / 9962 or any other heading?
  - Whether the Marketing services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax Act 2017?
  - Whether the Handholding services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax Act 2017?



## Contentions

### Question (a.)

9. In respect of question raised at Paragraph 9.a. *supra*, reference must be made to the definition of "intermediary" under the Integrated Goods and Services Tax Act, 2017 ("IGST Act"), reproduced below for ready reference:

"(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;"

10. A bare reading of the definition above would show that an intermediary is a person who is a broker/ agent or any other person by whatever name called. In regard to the phraseology "any other person, by whatever name called" is used in the definition, it is submitted that the same takes colour from the preceding terms, i.e., the legal doctrine of *ejusdem generis*. Hence, for a supplier of services to be treated as an intermediary basis "any other person, by whatever name called" should be in a similar status as that of an agent or broker. Same understanding was displayed by the Central Board of Indirect Taxes and Customs in Circular No. 83/1/2006-ST dated 04 July 2006 (Annexure "1") while interpreting any other person the context of banking or other financial services. The relevant extract is reproduced below for ready reference:

"3. Banking and other financial services are defined under section 65(12). Such services provided to a customer by a banking company or a financial institution including a non-banking financial company or any oilier body corporate or any other person to a customer are liable to service tax under section 65(105)(zm). The expression 'any other person' appearing in section 65(105)(zm) is to be read ejusdem generis with the preceding words. The expression 'other financial services' appearing under section 65(12)(a)(ix) is a residuary entry and includes; those services which are normally rendered by banks or financial institutions.

4. Hence, banking and other financial services provided by a banking company or a financial institution or a nonbanking financial company or any other service provider similar to a bank or a financial institution are liable to service tax under section 65(105)(zm) of the Finance Act, 1994. Department of Posts is not similar to a bank or a financial institution and hence does not fall within the category of any other similar service provider."

*(Emphasis supplied)*

11. Without prejudice to above, it is submitted that if the intention of the legislature was to cover persons of all hue and cry under the phrase "any other person" then words preceding thereto namely "broker, an agent" becomes redundant as also the words succeeding thereto namely "by whatever name called". In such case, "intermediary" ought to have been simply defined to mean a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both....., but that is not the case in the present.
12. It is a matter of fact that the Applicant is not acting in any representational capacity either on behalf of the Consultant Manager or the interested individual. The services are supplied on a principal to principal basis by the Applicant to the Consultant Manager. Further, it is undisputed that the Applicant does not negotiate, take decisions or conduct any similar activity. Hence, the Applicant is not an agent/ broker or similar to an agent/ broker and is therefore, not covered in the definition of intermediary under Section 2(13) of the IGST Act.
13. Further to the above, strong reliance is also placed on the Order No. 62221/2018 of the Customs, Excise and Service Tax Appellate Tribunal in M/s. Sunrise Immigration Consultants Private Limited vs CCE & ST, Chandigarh in Appeal No. ST/52205/2015 (Annexure "2"). In this case, the facts were that the Appellant provided services to foreign universities by way of preparing cases for students was questioned as not being an export but covered within the definition of intermediary under the Finance Act, 1994 which was identical to the intermediary definition under GST. Therein, after a detailed discussion, it was held that the Appellant was not an intermediary but an independent service provider providing services of business support to





the foreign universities/ foreign banks for which a commission is paid to the Appellant upon each successful admission. The relevant parts are provided below for ready reference:

"2. The facts of the case are that the Appellant is providing various services (A) Visa Facilitation Service and (B) Referral Service....W.e.f. 01.07.2012, the introduction of the negative list, ..... but for the referral services which are in the nature of the services rendered to foreign banks and foreign colleges.

... students who wish to get admission in foreign based colleges/universities and they approach the appellant who prepare their case and refer to foreign based colleges. In case college admit the student, the said college pays commissioner/fee to the appellant. Further the people wishes to settle in Canada as investors borrow loan from foreign based banks. The appellant refers their case to foreign banks and in return gets commission from bank if money is landed to such investment.

8. In these set of facts, following issues emerges:

(A) Whether the appellant is intermediary in terms of Rule 2(f) of POPS Rules, 2012 or not?

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

*(Emphasis supplied)*

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

15. Further to the above, reliance is also placed on *In Re: GoDaddy India Web Services Pvt. Ltd.* [2016 (46) STR 806 (AAR)] (Annexure "3") wherein in addition to marketing services, the applicant therein was also providing supervision of customer care service and payment processing services to their parent entity, GoDaddy US, a company registered and incorporated in the United States of America. After due consideration, it was held that the applicant therein was not an intermediary under the Finance Act, 1994. The relevant parts are reproduced below for ready reference:

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

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

10. The definition of "intermediary" as envisaged under Rule 2(f) of POPS does not include a person who provides the main service on his own account. In the present case,





applicant is providing main service, i.e., "business support services" to WWD US and on his own account. Therefore, applicant is not an "intermediary" and the service provided by him is not intermediary service. Further, during arguments, applicant drew our attention to one of the illustration given under Paragraph 5.9.6 of the Education Guide, 2012 issued by C.B.E. & C. Relevant portion is extracted as under;

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

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

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

*(Emphasis supplied)*

16. To similar effect was the order of *In Re: Universal Services India Pvt. Ltd.* [2016 (42) STR (585 (AAR))] (Annexure "4") under the Finance Act, 1994.

17. At this juncture, it is submitted that the decisions and orders quoted *supra*, although under the Finance Act, 1994 have substantial persuasive value as held by this Hon'ble Authority in *In Re: Asahi Kasei India Private Limited infra*.

18. Further reliance is placed on the Order dated 05 September 2018 of this Hon'ble Authority in *In Re: Asahi Kasei India Private Limited* (Annexure "5") wherein it was held as under:

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

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

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

Separation of value: The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging. It can be based on an agreed percentage of the sale or purchase price. Generally, the amount charged by an agent from his principal is referred to as "commission".

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

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

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

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






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

1. Research on the matters related to the functions of the holding company, such as corporate accounting, corporate finance, corporate personnel and labour relations, corporate research and development, quality assurance and corporate intellectual property, and provide Party A with its report of the research thereon.
2. To provide with economic, industrial and technical information on the products falling under the category of the Products and their markets, trends and outlook together with similar information concerning such other industries in the Territory.
3. To provide necessary assistance in liasoning and coordinating activities (including interpreting) to such representatives.
4. To make market surveys of the Products in the Territory and report the results thereof to Party A.
5. All other related services pertaining to above services including, but not limited to, those services with regard to finance, accounting, and patent and legal matters.

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

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

*(Emphasis supplied)*

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19. At this juncture, it is submitted that scope and nature of duties of the Applicant is substantially similar to those provided in Asahi Kasei *supra* including marketing and liaising services (reference is made to the ruling by this Hon'ble Authority on Question No. 2). Basis the same, it is submitted that the decision of Asahi Kasei *supra* squarely applies and the consequently, the Applicant cannot be termed as an intermediary. Further, the tests relating to an intermediary as extracted *supra* are not applicable in the present case since the Applicant cannot in any way change or amend or influence the agreement between the Consultant Manager and interested individual.
  20. Further to the above, it is submitted that the order dated 26 February 2019 of *In Re: Vservglobal Private Limited* (Annexure "6") by the Hon'ble Appellate Authority for Advance Ruling is inapplicable to the present case since the facts are entirely different. In *Vservglobal supra*, the extent of duties provided therein included creating purchase orders, sales contracts, ensure transportation and details thereof, liaising with authorities for pre-shipment inspections and the like. Activities like liaison with various stakeholders, creation of purchase order, sales contract, and bill of lading, payment processing on behalf of customer etc cannot be performed by *Vservglobal* without authority from the customers to act as an agent, and therefore, rightly they have been held as intermediary by the Hon'ble authority.
  21. In the present facts, the Applicant is not concerned and connected in any way with the execution of the order or the investment. The Applicant is in no way required to ensure remittance of the investment. Rather, the job of the Applicant is to conduct only marketing services. Seen in this perspective, the Applicant is providing services as provided in Asahi Kasei *supra* and not *Vservglobal supra*. Basis the same, it is submitted that the marketing services provided by the Applicant cannot be termed as "intermediary services".



Consequently, these are in the nature of business support services as elaborated in the application for advance ruling.

22. At this juncture, it is also submitted that the undisputed facts are that the Applicant/ supplier of service is resident in India and the Consultant Manager/ recipient of service is resident outside India. Hence, the location of the supplier of services is India and location of the recipient of service is outside India, in terms of Sections 2(15) and 2(14) of the IGST Act. Further, the activities of marketing will be conducted in India itself. This, however, cannot automatically make it to mean that the place of supply of services is in India itself. Place of supply is to be determined only in terms of Section 13 of the IGST Act and there cannot be any other consideration thereto. In terms of Section 13(2) of the IGST Act, place of supply would be the location of recipient of service (Consultant Manager, USA) and hence, clearly outside India.

**Question (b.)**

23. In as far as question raised at Paragraph 9.b. *supra* is concerned; it is submitted that the hand-holding services provided by the Applicant are not that of intermediary as evidenced in terms of the judgment of Sunrise Immigration *supra*. Therein also, the appellant would prepare cases of students and interested persons for obtaining admission/ investment.
24. For the sake of maintaining brevity, the Applicant reiterates the contentions raised *supra*. Basis the same, it is submitted that the Applicant is not an agent/ broker or similarly placed person and thereby not covered within the four corners of the definition of intermediary. Further, it is reiterated that the Applicant cannot negotiate, conclude, or in any manner act to influence the discussions between the Consultant Manager and interested individual. Hence, applying the tests of Asahi Kasei *supra*, the Applicant in respect of the hand-holding services cannot be termed as an intermediary.

**Questions (c.) and (d.)**

25. Basis the submissions *supra*, it is submitted that the Applicant is not a provider of intermediary services. On the contrary, and as detailed in the application for advance ruling, the Applicant is a provider of business support services.
26. Consequently, the Place of Provision is the location of the recipient of service, i.e., United States of America. The Applicant will be paid in foreign exchange for the services rendered. Lastly, as the supplier of services (Applicant) is located in India and recipient of services is located outside India (Consultant Manager), all requirements for export of service under Section 2(6) of the IGST Act are satisfied.
27. Therefore, the marketing services as also the hand-holding services are an export of service."

**CONTENTION - AS PER THE CONCERNED OFFICER**

The submission, as reproduced verbatim, could be seen thus-

The applicant, viz. Mayank Jain, is an individual resident of India (hereinafter referred to as the Applicant), who envisages to provide the services in relation to the "Employee Based Immigration: 5th Reference Program", notified by the United States Citizenship and Immigration Services (hereinafter referred as 'EB-5 program'). The EB-5 program statedly provides that a financial investor, who makes an investment of Us \$ 500,000 or as specified therein, in a commercial entity or investment fund located in (hereinafter referred to as the Company') and resultantly creates job opportunity in the United States of America, shall be allowed to have eligibility for obtaining permanent residency permit in the United States of America.

The replies to the questions raised by the assessee in their Application filed for Advance Ruling are as follows:

- A. Question 1: Whether the Marketing services to be supplied by the Applicant under the Foreign Immigration Advisor to the Consultant Manager constitutes a supply of "Support services" classified under Sac 9985 or "Intermediary Services" classifiable under SAC 9961/9962 or any other heading:**

1. The Applicant seeks to provide such services to their clients (the Company or to their Consultant Managers), located in the United States of America, with the aim of





enabling them to receive prospective investors located in India, for obtaining permanent residency in the United States of America. The services provided by the Applicant to the consultant managers shall inter-alia, include:

- i. Collecting and analysing information i.e market analytics, intelligence, preparing and drafting reports, strategy and providing leads to the Company/Consultant Manager about prospective investors in India, who qualify under Regulation D or Regulation S promulgated under the Securities Act (of the USA) and are willing to deposit \$ 5,00,000 or the minimum amount then required, to qualify for the EB -5 Program;
  - ii. Marketing of the EB-5 program in India to prospective investors to participate in such Offering and to also perform the immigration and administrative related duties on behalf of the Company in India;
  - iii. Providing support services viz. arranging premises for the Consultant Manager and prospective investor in India, to facilitate their meeting and negotiation for prospective investment;
  - iv. After, a valid negotiation, the Applicant shall also assist the Consultant Manager in collecting the qualified investors' personal information and such documentation necessary for his/her investment and also towards completion of the immigration process for such qualified investors.
2. The consideration towards the services provided by the Applicant to the Company/Consultant Manager, shall be received by them by way of payment of a 'Fee' (in USD), towards the advisory services provided by the Applicant upon successful confirmation of a proposed investment by a qualified investor, and a further payment of 'Approval Fee' (in USD), upon receipt of final approval of such investment from authorities.
3. Therefore, from the above, it is evident that the Applicant acts as an intermediary between the Company and the prospective qualified investors in India. Definition of 'intermediary' is contained under section 2 (13) of Integrated Goods and Service Tax Act, 2017 and the same is reproduced hereunder for ready reference ;
- "intermediary means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account".*
4. Important feature that can be derived from the above definition of intermediary' are summarized hereunder-
- i. An intermediary can be a broker, an agent or any other person;
  - ii. An intermediary is a person, who intermediates between two or more persons, i.e either arranges or facilitates the supply of goods or services or both;
  - iii. An intermediary cannot change the nature of supply as provided by his principal.
5. Therefore, it is evident that in case of intermediary services, such supplies essentially involve three persons; principal whose goods or services are being supplied, and recipient who are receiving the supply of goods or services or both, and an intermediary in between. In the instant case, the Applicant is acting as the facilitator between the Company and the prospective investors.
6. The operative part of the definition of "intermediary" is **"who arranges or facilitates the supply of goods or services or both or securities"**, Thus, an intermediary is one who arranges or facilitates supply of goods or services or both, belonging to the principal. Therefore, the nature of goods or services supplied by the intermediary **must be same** as goods or services supplied by the principal. An intermediary cannot alter the nature or value of supply, which he facilitates on behalf of his principal, which is found to be valid and true in the present case also.
7. The consideration for an intermediary's supply is separately identifiable from the main supply that he is arranging and is in the nature of fee or commission charged





by him. It is not necessary that the intermediary must receive consideration from principal only; he/she can receive her consideration from the third party also. In the instant case also, the Applicant receives a consideration from the Company, in the nature of a fees/ brokerage towards the intermediary services being provided by them to the Company

8. A person can arrange or facilitates supply of goods or services belonging to some other person, only when he/she has been authorised by the principal. In view of this, the test of agency must be satisfied between the principal and the agent i.e, the intermediary. In the instant case, the Applicant is authorised by the Company to act and represent them on their behalf and carry out such functions viz: marketing of the EB-5 program in India to prospective investors **and to perform the immigration and administrative related duties on behalf of the Company.** Accordingly, the services being provided by the Applicant do not appear to be on Principal to Principal basis, but it appears that the Applicant by way of acting on behalf of the Company for performing the immigration and administrative related functions of the Company towards their prospective investors, is essentially acting as an agent/representative of the company in India.
9. In the case of **Global Reach Education Services Pvt. Ltd. [2018 (12) G.S.T.L. 387 (A.A.R. - GST)]**, it has been held that "marketing services" provided to global universities, are "intermediary" services. The appellate authority of Advanced Ruling in the said case [2018 (15) G.S.T.L. 618 (App. A.A.R. - GST)] have further expanded the definition and held that "even ancillary services" falls within the meaning of intermediary services.
10. Similarly, in the case of **Vservglobal Private Limited [2018 (19) G.S.T.L. 173 (A.A.R. - GST)]**, it has been held that back office support services, payroll processing, maintenance of records of employee provided by applicant to overseas companies, i.e., clients, after finalization of purchase/ sale between client and its customer falls under the category of 'intermediary services'.
11. Accordingly, the support services being provided by, applicant in the instant case to the company located abroad would be appropriately classifiable as 'intermediary services and the applicant would be covered in the definition of intermediary in terms of Section 2(13) of integrated Goods and Services Tax Act, 2017.

**B. Question 2: Whether the Handholding services to be supplied by the Applicant under the Foreign Immigration Advisor Agreement constitute a supply of "support services" falling under SAC 9985 or "Intermediary service" classifiable under SAC 9961 /9962 or any other heading?**

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

**c. Question 3: Whether the Marketing Services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax Act 2017?**

1. In order to correctly identify the tax applicability of GST i.e. whether CGST & SGST or IGST is payable on any transaction, it is vital to know the place of supply of



goods or services. Taxability of goods or services would be decided on the basis of the place of supply of the said goods or service.

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

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

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

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

(b) *Intermediary services;*

(c) *Services that consist of hiring of the means of transport up to a period of one month.*

*Such means of transport includes yachts but excludes aircrafts and vessels.*

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

Further, it is pertinent to note that the instant issue or question pertaining to 'Place of Supply' is not covered under the mandate of issues given for consideration of the Advance Ruling Authority under the provision of Section 97 of the CGST Act 2017. Hence, the said question appears to be non relevant for consideration before the AAR.

**D. Question 4: Whether the Handholding Services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax Act 2017?**

From the facts and issues as stated and discussed in the sub-paras 1-2 of para 'C' above, it is pertinent to note that the relevant issue or question pertains to determination of 'Place of Supply', which is not covered under the mandate of issues given for consideration of the Advance Ruling Authority under the provision of Section 97 of the CGST Act 2017. Hence, the said question appears to be non-relevant for consideration before the AAR.



**04. HEARING**

Preliminary hearing in the matter was held on 22.01.2019, Sh. Mayank Jain, applicant appeared and requested for time for reframing the questions consistent with statement of facts. His request was found acceptable and the same was to be complied within 15 days. Applicant has reframed his application and Preliminary hearing in the matter was again held on 02.04.2019, Sh. Mayank Jain, applicant, appeared and requested for admission of his application. Jurisdictional Officer Sh. Hemant Kumar, Inspector, Range-III, Mumbai Central, appeared and made written submissions.

The application was admitted and called for final hearing on 24.04.2019, Sh. Dinesh Kumar Agrawal, Consultant and Sh. Mayank Jain applicant, appeared and made oral submissions. The Jurisdictional Officer Sh. M. N. Singh, Suptt., Range-III, Division -III, Mumbai Central appeared. Both requested for time to submit written contentions. Accordingly, they were permitted to submit written contentions within 15 days.



## 05. OBSERVATIONS

We have gone through the facts of the case, documents on record and submissions made by both, the applicant as well as the jurisdictional office. The issue put before us is in respect of a future transaction which would be on the lines thus -

The USA has in place, Employee Based Immigration Program notified by the United States Citizenship and Immigration Services (hereinafter referred to as the "EB-5 Program"). The EB-5 Program envisages that an investor is eligible to a permanent residence permit in the USA subject to an investment of US\$ 500,000 leading to job-creation in a commercial entity or investment fund, commonly referred to as a "Regional Centre" or a "Company", approved and recognized by the Government of the United States of America. It has been submitted that a 'Consultant Manager' represents the "Regional Centre" or a "Company" in the USA.

The applicant will provide certain services in the nature of marketing and intelligence to the "Consultant Manager" acting for the Regional Centre or Company enabling them to receive investments from prospective investors. The scope of work under this Agreement titled as "Foreign Immigration Advisor Agreement". The details of services to be provided by the applicant is mentioned in his application and includes various services which will enable the applicant to market the EB-5 Program in India to prospective investors in India. Towards this end they will be entering into a Foreign Immigration Advisor Agreement with the Consultant Manager to provide such marketing services to them. In addition to such services, after a willing investor is found, the applicant will also be providing certain services i.e Handholding services to the investor. The consideration for both the services mentioned above will be received by the applicant from the Consultant Manager only upon successful investment/repatriation by the investor. This consideration will be received in foreign exchange.

EB 5 is a visa category for investors, an investor program where the investor has to invest a certain amount of money in the USA in a new residential or commercial project or any other projects which in turn has to create a minimum number of jobs for local American citizens. The entire process starts with filing of I-526 application with the US Consulate which indicates that the investor is looking to avail the EB 5 visa facility. The investments made by the investor can get a return of a minimum of 0.25% in the US. Higher returns are possible with investment in high risk projects i.e the returns would depend on the risk capacity of the investor. In addition to the investment of \$ 500,000 there will also be administration fees and attorney fees which are charged to the investor. The mediator/advisor in India, like in this case, the applicant, is paid an amount from such fees only. After the meeting of the investor and the attorneys/consultants is done the investor receives the terms and condition and fee structures from such attorneys/consultants and then they can be hired and then they will advise on where to make the investments. The consulate also charges administration fees.





Keeping the above in mind we now discuss the queries raised by the applicant as below:

**Question 1 :- Whether the Marketing services to be supplied by the Applicant under the Foreign Immigration Advisor to the Consultant Manager constitutes a supply of "Support services" classified under SAC 9985 or "Intermediary service" classifiable under SAC 9961 / 9962 or any other heading? AND Question 2: Whether the Marketing services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax Act 2017?**

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

Thus we find that in this case, once the Indian investor makes a decision to invest in the US, he contacts the applicant who provides services to the Indian investor and also facilitates meeting/contact between both of them. Indian investor through the applicant contacts the investment consultant in America for advice as to where to invest and the formalities to be fulfilled for the investment under the EB-5 Scheme. For that purpose the Consultant manager appoints an agent or a facilitator who will facilitate such service. The agreement may not call him as an agent but his services are in the nature of a middleman who facilitates meetings between the Consultant and the Indian investor. The general process begins when a meeting is arranged between the Consultant Manager and the investor and such meetings are arranged either in India or abroad, by the mediator who in this case is the applicant. In such meetings the entire process including where the investments will be made is also explained to the investor. In this application the applicant has only said that they would be marketing the project for a particular Consultant Manager, but in fact he is acting as a facilitator between the Consultant and the investor. For the EB-5 programs there are various such Consultant Managers/Attorney who specialize in this field in the USA and the applicant will be doing all the process in India on behalf of the Consultant Manager and effectively will be working on his behalf as an agent and hence the applicant's contention that he is providing marketing service on his own is not acceptable. The fact of the matter is that he is providing the intermediary service in the name of marketing service.

The next process for the applicant is hand holding i.e., to help the investor fill up forms, helping in preparation of various documents on behalf of the Consultant manager who



ultimately identifies the appropriate and profitable projects for investment and advises on the procedure to obtain permanent residence in USA. This in fact an intermediary service in the name of hand-holding service.

Another fact of the EB5 program is that in addition to the amount to be invested, the investor has to pay fees to the Consultants/Attorneys, etc. in USA, out of which the fees are paid to the applicant. The consideration for the services rendered by the applicant will be paid upon successful investment/ repatriation by the investor. The applicant does not provide any services on his own but is acting as an intermediary in the subject case.

The term “intermediary” is defined under Section 2(13) of the Integrated Goods and Services Tax Act 2017 (“IGST Act”). The relevant extract of the said definition is set out hereunder:

*“(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 above definition is examined in detail in the below table –

Sr.No.	Intermediary Definition	Explanation
1	<i>means a broker, an agent or any other person, by whatever name called</i>	The Applicant is the ‘any other person, by whatever name called’
2	<i>who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons</i>	The Applicant facilitates the investment / permanent residence advisory service provided by the Consultant in USA to the Indian investor. Further, applicant will arrange/facilitate meetings between investors and the Consultant Manager and once the investors agree to invest, applicant will help them in all respects to complete the formalities in a perfect manner so that the application is not rejected. In a way the applicant arranges and facilitates supply of services between the Consultant Manager and the Indian Investor, for which they receives fees from the Overseas Consultant Manager.
3	<i>but does not include a person who supplies such goods or services or both or securities on his own account;”.</i>	The Applicant does not provide the services on his own account. He will facilitate the provision of services of Investment/permanent residence advisory by the Consultant Manager to the investor.



Thus we find that the applicant answers to the description of an intermediary as stated above. Having found that applicant's service is an intermediary service, we now take up the issue of export of services by the applicant, whether the same can be considered as export.

"Export of services" is defined under section 2(6) of the IGST Act and 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;"

We find from the submissions made by the applicant that, the proposed transactions easily satisfies conditions mentioned in (i), (ii), (iv) and (v) above i.e the applicant is situated in India (the supply will be made from Maharashtra where GST registration will be obtained), the Consultant manager is located abroad (The Consultant Manger will be registered in USA under their laws and not in India), the consideration will be received by the applicant in convertible foreign exchange and both, the applicant as well as the Consultant Manager are distinct persons with establishments in their respective countries and not merely establishments of a distinct person in accordance with Explanation 1 in section 8 of the IGST Act, 2017. Now to determine the place of supply we refer to the provisions of Section 13 of the IGST Act, 2017. Sec 13(2) of IGST Act, 2017 is reproduced below -

"13(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services: Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services."

Section	Extract	Applicability ?
13(3)	(3) The place of supply of the following services shall be the location where the services are actually performed, namely: (a) services supplied in respect of goods ..... Provided ..... (b) services supplied to an individual, .....	Applicant does not provide any of the services listed in the Section
13(4)	The place of supply of services supplied directly in relation to an immovable property, .....	---do---
13(5)	The place of supply of services supplied by way of admission .....	---do---
13(6)	(6) Where any services referred to in sub-section (3) or sub-section (4) or sub-section (5) is supplied at more than one location, .....	Applicant does not provide such services



13(7)	Where the services referred to in sub-section (3) or sub-section (4) or sub-section (5) are supplied in more than one State or Union territory, .....	---do---
13(8)	8) The place of supply of the following services shall be the location of the supplier of services, namely: --- (a) services supplied by a banking company, ....., (b) intermediary services; (c) services consisting of hiring .....	b. Applicant provides intermediary Services
13(9)	The place of supply of services of transportation of goods,....	---do---
13(10)	The place of supply in respect of .....	---do---
13(11)	The place of supply of services provided on board.....	---do---
13(12)	The place of supply of online information .....	---do---

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

**Question 3:-Whether the Handholding services to be supplied by the Applicant under the Foreign Immigration Advisor Agreement constitute a supply of "Support services" falling under SAC 9985 or "Intermediary service" classifiable under SAC 9961 / 9962 or any other heading? AND Question 4: Whether the Handholding services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax Act 2017?**

As discussed above the applicant is providing intermediary service in the name of hand-holding service and not 'support service' as being claimed by the applicant and the said service does not qualify to be an export of service for the same reasons stated in the discussion under the Question 1 and 2 above.

05. In view of the extensive deliberations as held hereinabove, we pass an order as follows

### ORDER

(Under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

NO.GST-ARA- 103/2018-19/B-

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Mumbai, dt.

01/06/2019

For reasons as discussed in the body of the order, the questions are answered thus -

**Question 1)** Whether the Marketing services to be supplied by the Applicant under the Foreign Immigration Advisor to the Consultant Manager constitutes a supply of "Support services" classified under SAC 9985 or "Intermediary service" classifiable under SAC 9961 / 9962 or any other heading?

**Answer :-** The services to be supplied by the Applicant under the Foreign Immigration Advisor to the Consultant Manager constitutes a supply of "Intermediary services" classified under SAC 9985.



Question 2) Whether the Handholding services to be supplied by the Applicant under the Foreign Immigration Advisor Agreement constitute a supply of "Support services" falling under SAC 9985 or "Intermediary service" classifiable under SAC 9961 / 9962 or any other heading?

Answer :- In view of the discussions made above, the Handholding services to be supplied by the Applicant under the Foreign Immigration Advisor to the Consultant Manager constitutes a supply of "intermediary services".

Question 3) Whether the Marketing services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax Act 2017?

Answer :- Answered in the negative, in view of the discussions made above.

Question 4) Whether the Handholding services to be provided by the Applicant will be an export of services as defined under Section 2(6) of the Integrated Goods and Services Tax Act 2017?

Answer :- Answered in the negative in view of discussions made above.



  
B. TIMOTHY  
(MEMBER)

  
B. V. BORHADE  
(MEMBER)

**CERTIFIED TRUE COPY**

**Copy to:-**

1. The applicant
2. The concerned Central / State officer
3. The Commissioner of State Tax, Maharashtra State, Mumbai
4. The Chief Commissioner of Central Tax, Churchgate, Mumbai
5. Joint commissioner of State Tax, Mahavikas for Website.

  
**MEMBER**  
**ADVANCE RULING AUTHORITY**  
**MAHARASHTRA STATE, MUMBAI**

**Note :-** An Appeal against this advance ruling order shall be made before The Maharashtra Appellate Authority for Advance Ruling for Goods and Services Tax, 15<sup>th</sup> floor, Air India building, Nariman Point, Mumbai - 400021.