



KOCHHAR & Co.
ADVOCATES & LEGAL CONSULTANTS



India: Marketing Services Rendered by Indian Subsidiary to Foreign Parent Entity / Client Qualify as Intermediary Subject to GST

18 March 2020

by [Shampa Bhattacharya](#) (Gurgaon)

Kochhar & Co.

Your [LinkedIn Connections](#)
with the authors

This Tax Alert summarizes a recent ruling of the Karnataka Appellate Authority for Advance Rulings¹ which upheld that '**Pre-sale and Marketing Services**' rendered by an Indian subsidiary ('service provider' / 'supplier') to its foreign parent entity ('service recipient') qualify as **intermediary services**, thereby subject to **GST**.

The issue that the person should not be supplying on its own risk and reward entirely, the very services whose supply he is arranging or facilitating has been delved in detail by the authorities, thereby concluding such supply qualifying as intermediary services.

Background

- Service provider is a wholly owned subsidiary of its foreign parent entity, engaged in software development services in India of products of its parent entity.
- In addition, the service provider also renders presales and marketing services in India to its parent entity which includes viz. coordination of *sales promotion and advertising for its parent entity's product in India; conduct market research and keeps parent entity informed and advised regarding matters in India; provide informational, educational, and service programmes in India.*
- The service provider had no authority to negotiate prices / to enter into / conclude contracts for on behalf of its foreign parent entity.
- It is not executing end to end process but execute only specific process.
- The performance of the services and the remuneration is not linked to the purchase price or the price at which the contracts are concluded.
- It provides services on a principal-to-principal basis and on its own account on a cost-plus basis.
- In addition, it had no role in post - sales activities viz installation etc.

- Under GST laws, an **intermediary service** has been defined to mean a **broker, an agent or any other person**, by whatever name called, who **arranges or facilitates** the supply of goods and/or services/ securities **between two or more persons but does not include a person who supplies such goods / services or both on his own account.**
- The service provider is of the view that it acts as an independent contractor and does not represent / act as an agent of the foreign parent entity / incur any obligation on behalf of the foreign parent entity.
- With regard to facilitation and arranging supply of goods/ services, the Service provider is of the view that it basically acts as a communication and coordination channel between potential customers in India and the product line marketing team of the foreign parent entity.
- The contracts are agreed and finalised between the customers and the foreign parent entity, wherein the deployment of the product is done outside India. Further, the Indian subsidiary plays no role in the release of shipment of the products to the customers in India.
- The service provider is of the view the pre-sales marketing services are supplied on a principal-to-principal basis on their own account and hence fall within the exclusion of the definition of intermediary services.

Appellate Authority's Ruling

- The appellate authority discussed in detail the conditions to be fulfilled order to qualify as an intermediary as follows:
 - - i. Service provider must be a broker/ agent or any other person by whatever name called.
 - ii. The supply of goods/ services or both has to be arranged / facilitated between two or more persons.
 - iii. Service provider is not the person who supplies such goods/services/ securities on his own account.
- The appellate authority in light of the above conditions held that any other person beyond that of an agent / broker would also be covered within the ambit of an intermediary. An agent acts on behalf of a principal whereas a broker is a middleman whose job is only to facilitate.
- Evaluating the next condition of arranging or facilitating the supply between two or more persons, the authorities held that it is not the type of person which determines whether one is an intermediary or not, rather it is the action/ arranging/ facilitating the supply of goods/ services/ both/ securities between two or more persons. The act of arranging or facilitation gives rise to two supplies:
 - Supply between the Principal and the third party; and
 - Supply by intermediary to the principal for a consideration/ fees
- Accordingly, an intermediary is a person between the supplier and the principal who arranges or facilitates the supply for a commission.
- Reliance has been placed on the dictionary meaning of **facilitate** which have been construed to include to *make something easier, to help cause something, to help something run smoothly and effectively.* Further **arrange** has been interpreted to include to bring about an agreement or understanding

concerning, to make preparations to move and organize (things) into a particular order or position, to organise the details of something before it happens, to plan something.

- Accordingly, the appellate authorities are of the view that arranging or facilitating would cover a very wide range of activities covering marketing / sales promotion of the goods/ services of the client, locating prospective buyers for the client's product, or locating sources of supply of the goods/ services required by the client, price negotiation with the prospective supplier, procuring sales order in respect of the goods or services of the client and the like activities. In the instant case the service provider is facilitating the supply of optical networking equipment between foreign parent entity and its customers in India. The facilitation happens by way of meeting prospective customers in India, demonstrating the products, obtaining feedback, and passing on the same to the foreign parent entity. The service provider acts as a communication and coordination channel between the foreign parent entity and the customers in India.
- A person acting in a liaison capacity is the person who has to act as the go between, is the emissary, the interceder, the medium, the intermediary, the representative for all proper purposes.
- The last condition of rendering services on his own account has been interpreted that **the person should not be supplying on his risk and rewards entirely, the very goods/ services whose supply he is arranging or facilitating.** In the instant case, the service provider is not supplying the goods on his own account on its own risk and reward.
- In view of the above discussion, it emerges that the service provider acts as an intermediary facilitation supply of products of its foreign parent entity to customers in India through its marketing services.

Comments

- The ruling shall be an eye opener for Indian subsidiaries of foreign entities engaged in rendering marketing services to its parent entity.
- It is recommended that a revisit and review of the service agreements are undertaken to identify the services and the GST liability, if any

Footnote

1. 2020-VIL-06-AAAR

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

AUTHOR(S)



Shampa Bhattacharya
Kochhar & Co.

