TAXABILITY UNDER THE GST LAWS: ON "COMMISSION" RECEIVED IN CONVERTIBLE FOREIGN EXCHANGE

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A Sole Proprietary Concern, say M/s. Midas Instruments, Mumbai, (for brevity: "Midas") is dealing in Laboratory Instruments, its spare parts, Laboratory Equipment, and other related activities such as servicing, repairs and maintenance of Laboratory Equipment/Instrument.

2. One of its activities relates to providing services to its Principals, M/S Fisher & CO., France, by way of procuring Purchase Orders (P. O.) from the parties desirous of purchasing advanced type of Laboratory Equipment, by negotiating the terms of supply including fixation of price above the floor price, fixed by the Principals. If Midas can negotiate better price than the floor price, the difference between the floor price and actual price is given to Midas by way of "Commission" in "convertible foreign exchange".

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

(a) The prospective customer in India places the P.O. directly on the Principals , M/S Fisher & CO., France, and arranges for Letter of Credit for remittance of price in foreign currency,

(b) The principals directly supply the Laboratory Equipment to the party in India, say M/S Panama Laboratory, Mumbai which pays price and gets the delivery from the Customs on payment of custom duty and IGST as applicable.

(c) In the majority of cases, barring one or two exceptions, the P. O. states the name of Midas, and also mentions that the Indian Purchaser will be entitled to have some "discount in kind", like getting some items Free of cost such as a TV set, a Computer or a Camera etc.; which is to be provided by Midas as a necessary charge on the "commission", it receives in convertible Foreign Exchange.

(d) Accordingly, Midas arranges, at its own cost such articles to be given free, in the nature of "discount in kind", and hands over to the same to the Purchasing Party in India in fulfillment of the accepted terms of sale / purchase Agreement between the Principals at France and the Indian Purchasing Party.

(e) The P.O. also states that during the Guarantee period, say, one year the seller/supplier at France will give "free service", if required (but that would not include any replacement of parts etc.). Midas, however, has no contractual obligation to give such "free Service".

(f) Once the P.O. is completed, the Principals M/S Fisher & CO., France, issues a "Credit Note", for the "Commission", which is remitted in freely convertible Foreign Exchange, normally in Euro Currency: (sign: €; code: **EUR**) the official currency of the European Union).

(g) Midas was not issuing any Debit Note or Invoices or any other document, but Accounting was done on the basis of the Credit Note/s. In the erstwhile Service Tax regime (prior to July 2017, before the GST Laws) the service tax was paid on the commission amounts and the Rupee equivalent was offered for Income Tax as per the law.

(h) Midas may, now, have to issue Debit Note or Tax Invoice as required by or under the applicable GST Laws.

4. Now, the following questions arise for consideration:

(i) Whether the "Commission" received by Midas in convertible Foreign Exchange as an "Intermediary" for acting as a Broker or facilitator, in procuring from an Indian Customer/s purchase order/s (P.O.) for Laboratory Equipment, is liable to GST either under CGST/SGST Acts or the IGST Act? And

(ii) If liable, whether the entire amount of "Commission" as converted in rupees, will be the "taxable Value" for tax quantification or whether the following deductions can be claimed:

(a) Deducting "expenditure" on free supplies, which is a "charge on the commission amount" under the Contractual Terms as per P.O.

(b) Deduction of tax element treating amount of "net Commission" (as per (a) above) as inclusive of CGST/SGST Act or IGST Act as the case may be.

(iii) Whether Debit Note can be issued to M/S Fisher & CO., France, showing the value break-up as per (ii) above?

5. For the purposes of examining the issues involved one needs to go through the labyrinth of new GST Laws.

6. The conspectus of various provisions gives the following picture:

(i) Services provided by the Commission Agent (located in the Taxable Territory) to the Principal-Seller (located in Non-Taxable Territory/ Abroad) in respect of procurement of order/s from the Customers located in the Taxable Territory on behalf of the foreign supplier of goods, would be termed as "taxable services" under the GST Regime, because the intermediary (Midas) does some activity for which monetary consideration, that is, "Commission" amount is received in freely convertible currency. These activities would fall in the widely worded definition of "Service", in section 2 (102), which reads:

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

(ii) Section 13 of the IGST Act, 2017 is made applicable to determine the 'place of service', where location of supplier or location of recipient of service (either) **is outside India.**

(iii) In the present case, Midas being the supplier of service (located in India in Taxable Territory) and customer i.e. recipient of Service (i.e. supplier of goods is located outside India, France, in Non-Taxable Territory), Section 13 of the above IGST At gets attracted.

(iv) Section 13 of IGST Act, has in all 13 sub-sections applicable to different situations /circumstances.

- Sub-section (2) of Section 13 is the general section which provides that the 'place of supply of service' is the location of recipient of service, **except the services specified in sub-sections (3) to (13).**
- It means the general principle in sub-section (2) is displaced i.e. not applicable to sub-section (3) to (13), which needs to be examined individually & separately.
- **Sub-section (8) covers the case on hand; and the same is reproduced here below**–

  "(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, or a financial institution, or a non-banking financial company, to account holders;

  (b) Intermediary services;

(c) **Services** consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month."

(v) The term "Intermediary" is defined in Section 2(13) of the IGST Act, which says:

"(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".

(vi) Consequently, Midas being an Agent or Broker (or Commission Agent) and facilitator between the France -seller of the goods and the Indian-buyer of the goods, it shall be covered under the definition of 'Intermediary" under Section 2 (13) of the IGST Act; but **may not be regarded as providing "Intermediary Services", which expression is a coined phase, by the Draftsman, and not defined in any GST Law, i.e. CGST/SGST Act or IGST Act.** Apparently, "Intermediary" is an "adjective' and qualifies "services". {Adjective: 4.being between; intermediate. 5. Acting between persons, parties, etc.; serving as an intermediate agent or agency: e.g. an intermediary power.}

(vi) It may be argued that the "Intermediary" providing such Agency or Broker's services may fall in the expression of "Intermediary services" appearing in clause (b) of sub-section (8) of Section 13 of the IGST Act. If it were to be true interpretation**,** the registered place of the Supplier (Midas) being in India /in Taxable Territory, the place of supply becomes 'India /Taxable Territory' and hence CGST + SGST may get attracted.

7. Though Midas is providing the service to the foreign supplier of goods and also receiving 'valuable consideration' in freely convertible foreign exchange, but still it is not considered as 'Export of service' for the reason given in the definition of 'Export of Service', quoted below, read with section 13(8) (b) of the IGST Act as **all the conditions of "export of service" are not met in the case on hand:–**

- Conditions precedent for treating the service as 'export of service' [as per Section 2(6) of the IGST Act] – All conditions have to be met.

"(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".

- A plain reading of the definition of "export of services" shows that the word "means" is used while defining. Where 'means' is employed in the definition clause it shows that the definition enacted is a hard and fast one and that no other meaning can be assigned to the word "defined" than the one that is put down in the definition.
- Secondly, the definition starts by saying "**when**" and followed by each clause ending with a semi-colon showing close connection with each other and the last but one clause uses "and", to make it clear that all the clauses must be fulfilled concurrently and coextensively & then alone it will qualify as an "export of services".
- On the superficial or flash reading, it may appear that in the present case, **the condition No. (iii) in section 2(6) is not getting fulfilled** because of the **terminology used** in section 13(8) (b) of the IGST Act, ("intermediary services") read with section 2(13) defining "intermediary" to include broker or agent **who arranges or facilitates the supply of goods or services**, and consequently the "place of supply" gets coincided with "the place of supplier", both in the taxable territory, India, and rendering the transaction taxable under the CGST/SGST Act, by denying the benefit of "export of services" or IGST Act legitimately due by virtue of the "recipient of Services" being in non-taxable territory, abroad.
- In the light of the above discussion, one may consider that the supply of services by Midas would fall in the tax-net, fastening tax burden of 18% (9% CGST + 9% SGCT) under Services Tariff Heading no.9997 (residuary entry).

8. Now, therefore, the CGST/SGST will be payable in the Taxable Territory on account of the 'place of supply', being the place where the Supplier, i.e. Midas, is registered, that is in the State of Maharashtra.

9. In the context of the case on hand, the aforesaid interpretative process makes taxable "intermediary services" rendered by Midas to the recipient abroad in non-taxable territory, liable tax in Maharashtra State, which is the place where the Supplier (Midas) is Registered and happens to the place of supply; and fortunately further also the "destination state " or "consumption State"; because the Laboratory Equipment imported by M/S Panama Laboratory, Mumbai, would

be used by the Purchasing Customer, who is also residing in the State of Maharashtra.

10. Before looking at another example, a few words on new taxation Policy. Effective July 1, 2017 there has been a paradigm shift in taxation Policy, now, adopting the destination based tax. The basic difference between the ***Destination*** based tax **and** *origin based* tax lies in the fact that origin based taxation seeks to levy and collect tax on the basis of location of production and destination based taxation seeks to levy and collect tax on the basis of location of consumption. Further, a fundamental proposition under the new GST regime is that the concept of "place of consumption" also called and known as the "Place of supply", merely determines that **the tax would accrue to the Sate of consumption.**

11. Now, look at another case, in which Midas procures the P.O. from the Customer at Vadodara (formerly known as Baroda), in the State of Gujarat, for purchase of Laboratory Equipment from the same M/S Fisher & CO., France. By virtue of section 13 (8) (b) read with 2(13) of IGST Act, the "place of supply" remains the same i.e. "the place of Supplier", State of Maharashtra. But the destination based or consumption based taxation Policy would get a jolt; because the actual use of the goods imported would be in the State of Gujarat, whereas the tax will accrue to the state of Maharashtra, where the place of supplier and the place of supply synchronize.

12. The matter needs to be examined further.

13. Actually, the "nature of supply" is determined under Section 7 and 8 of the IGST Act, which reads:

CHAPTER IV

DETERMINATION OF NATURE OF SUPPLY

7. Inter-State supply.- (1) Subject to the provisions of section 10, supply of goods, where the location of the supplier and the place of supply are in -

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of goods in the course of inter-State trade or commerce.

(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.

(3) Subject to the provisions of section 12, supply of services, where the location of the supplier and the place of supply are in -

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of services in the course of inter-State trade or commerce.

(4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.

(5) Supply of goods or services or both, -

(a) when the supplier is located in India and the place of supply is outside India;

(b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or

(c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section,

shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.

14. It is manifestly clear from the conjoint reading of section 7 (5) of the IGST Act read with Section 13 (8) (b) that the nature of transaction on hand is taken out of the IGST Act and by virtue of the Supplier's Location and the Place of Supply make the transaction fall into the trap of the "intra-state" service and hence would attract 9% CGST+ 9% SGST, in the aggregate 18%, the services being Classifiable under the Residuary Tariff Classification, namely, 9997.

15. With the result that the benefit of "Zero rated tax" defined under Section 16 of the IGST Act is unavailable, simply because the role played by the Midas is treated as **"Intermediary Services"** under section 13 (8) (b) of the IGST Act.

16. As a direct consequence of this situation, although all other transactions of export of goods or service or both get the advantage of zero tax burden, the case on hand gets discriminatory dispensation by saddling it with unintended cost burden of 18%, (with another Income Tax burden @ 30%); and to add salt to the injury, Refund of such CGST/SGCT is unavailable, being "forward charge".

17. However, **there is another way to look at the transaction**.

18. Now, for this new approach two definitions are important:

- **Section 2(13) of the IGST Act**

(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;

- **Section 2(5) of the CGST Act**

(5) **"agent"** means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, **who carries on the business of supply or receipt of goods or services or both on behalf of another;**

15. Since Midas does not supply or receive goods /services on behalf of anyone, Midas carries on business of its own, it is certainly not an **"Agent"** as defined in section 2 (5) of the CGST Act. But surely, the activities of Midas are in the nature of **"intermediary"** as defined in section 2 (13) of the IGST Act, for bringing together the Principals abroad (M/S Fisher & CO., France,) and the Indian Customer (M/S Panama Laboratory) , who wants to buy a high-end product. What is received by Midas may be called "brokerage" for the sale of goods. Even if it is called "commission" it is specifically understood as being in respect of and in relation to the transaction of sale of goods directly made by the France –seller and the Indian buyer, and which at the hands of the Indian-buyer, M/S Panama Laboratory, is an Import in every sense of the term. In other words, the nature of supply is intended and actually a cross-border transaction, export/ import of goods simpliciter, which under the GST regime is "an inter-state supply, covered by the IGST Act.

16. All the analysis & discussion above**,** finally boils down to and depends on the true meaning and purport of the expression: **"intermediary services" in section 13 (8) (b) of the IGST Act.** If it is not the same thing as **"Intermediary"**, the provisions of section 13 (8) (b) will not apply; and consequently, provisions of section 7 (5) (a) of the IGST Act will get attracted, as can be seen from the quoted provision:

(5) Supply of goods or services or both, -

(a) when the supplier is located in India and the place of supply is outside India;

In that case, Section 16 of IGST Act will apply and there would be two options available: (i) export the services under bond/LOU without payment of IGST Act and claim refund of un-utilized input tax credit; OR (ii) Sully export services on payment of IGST and then claim refund of such tax under section 54 of the CGST Act/Rules,2017. Section 16 of the IGST Act, reads:

CHAPTER VII

ZERO RATED SUPPLY

16. Zero rated supply.- "Zero rated supply" means — (1) any of the following supplies of goods or services or both, namely:-

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:-

(a) **he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of un-utilised input tax credit; or**

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder.

17. Now, the crucial question is: what is the true meaning & purport of the expression "intermediary services" appearing in section 13 (8) (b) of the IGST Act. **It may be added that the term "intermediary" has been defined in section 2(13) of the IGST Act, but the expression "intermediary services" appearing in section 13 (8) (b) has not been defined.**

18. What is the significance of use of the two terms/expressions, apparently looking similar, by the Legislature in the GST statute. One thing is clear that they are not synonymous terms or expressions, having the same meaning as another word or phrase in the same language.

19. One has to construe the true meaning of the undefined expression, namely, ""intermediary services", which is not simply a coined expression, but seems to have acquired a well set connotation. This expression is not used for the first time by the Legislature.

20. It may be added that this precise expression: 'Intermediary service" was adopted by the Delegated Legislation while framing the Place of Provision of Service Rules, 2012 (POPS Rules, 2012). In those Rules, Rule 2 (f) had defined "intermediary" as below:

(f) "intermediary" means a broker, an agent or any other person, by whatever name called, **who arranges or facilitates a provision of a service (**hereinafter called the "main" service**) between two or more persons**, but does not include a person who provides the main service on his account.;

· The POPS Rules, 2012 came into force effective 01-07-2012 and Rule

9 of the said Rules, 2012 is exactly the same as now bodily lifted and placed in its new GST 'avatar' as section 13 (8) (b) of the IGST Act.

- The said Rule 9 of the POPS Rules, 2012 and the clarification issued by the Board (C.B.E.C.) on the concept of "Intermediary Services" appearing Rule 9 (C) is reproduced below:

9. Place of provision of specified services.-

The **place of provision of following services** shall be the location of the service provider:-

(a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) Online information and database access or retrieval services;

(c) Intermediary services;

(d) Service consisting of hiring of means of transport, up to a period of one month.

21. Clarification and Legal nemesis:

An Education Guide ('Guidance Note') on June 20, 2012 issued by the Central Board of Excise and Customs clarifying the meaning of intermediary states:

QUOTE:

5.9.6 What are "Intermediary Services"?

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

i) the supply between the principal and the third party; and

ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

- For the purpose of this rule, '**an intermediary' in respect of goods (**such as a commission agent i.e. a buying or selling agent, or a stockbroker**) is excluded by definition.** VIDE Rule 2 (f) of the POPS Rules, 2012 (supra).

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

UNQUOTE:

—-Rule 2(f) defines 'intermediary' to mean a broker, any agent or any other person, by whatever name called, who arranges or facilitates a provision of a service(hereinafter called the **'main service'**) between two or more persons(it doesn't include a person who provides service on his own account).

– Thus an **intermediary service** is involved with two supplies at one time. In other words, the expression "intermediary" connotes distinctness/detachment from the "main" service. The expression "intermediary service" is nomen juris and its use is having a specific legal concept.

22. In this connection one must take a note of the Amendment to the definition of "intermediary" in Rule 2 (f) of the POPS Rules, 2012.

23. By Notification No. 14/2014 – Service Tax , dated the 11th July, 2014, The Place of Provision of Services (Amendment) Rules, 2014, were brought into force on the **1st day of October, 2014**:

(1) In the Place of Provision of Services Rules, 2012,–

(a) in rule 2 for clause (f), the following clause shall be substituted, namely:-

'(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (**hereinafter called the 'main' service**) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account

· Therefore, the definition of "intermediary" was then amended to include the intermediary of goods in its scope.

· Accordingly, with effect from 1.10.2014, an intermediary of goods, such as a commission agent **or consignment agent** shall be covered under rule 9(c) of the Place of Supply of Services Rules.

24. When this modified version of "intermediary" as of 01-10-2014, was re-bottled in the GST law, two changes happened:

(i) the original and basic distinction as to the "main" service and "intermediary" in the context of two co-existing services did not figure in the new definition in 2(13) IGST Act;

(ii) And the definition of Consignment Agent was shifted to Section 2(5) of the CGST Act.

25. Further, as stated earlier, there is one term: "intermediary", which is defined (section 2(13) IGST Act), and entirely different expression : "intermediary services" is used in section 13 (8) (b) of the IGST Act, which is handpicked from

the Legislative phraseology adopted in Rule 9 (c) of the POPS Ruls,2012 as it existed pre-Amendment of 2014, effective 01-10-2014 of section 2 (f) of the POPS Rules, 2012. **The pivotal issue in the case on hand turns on the interpretation of the expression: "intermediary services" in Section 13 (8) (b) of the IGST Act.**

26. At this stage, it is necessary to refer to some well known Rules of Interpretation of statues before embarking on the interpretative process:

(i) Legislative enactment is an edict. One has to read what is expressly stated in the enactment.

(ii) It is not necessary to survey innumerable Apex Court decisions on the Statutory Rules of Interpretation. Suffice it to quote one:

- Raghunath Rai Bareja And Another vs Punjab National Bank And Others (CASE NO. :Appeal (civil) 5634 of 2006 Decided on 6 December, 2006

  (a) It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation.

  (b) The other rules of interpretation e.g. the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute.

  (c) Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match AB vs. Securities and Exchange Board, India, AIR 2004 SC 4219.

  (d) As held in Prakash Nath Khanna vs. C.I.T. 2004 (9) SCC 686, **the language employed in a statute is the determinative factor of the legislative intent.** \

  (e) The legislature is presumed to have made no mistake.

  (f) The presumption is that it intended to say what it has said.

  (g) Assuming there is a defect or an omission in the words used by the legislature, the Court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result, vide Delhi Financial Corporation vs. Rajiv Anand 2004 (11) SCC 625.

  (h) Where the legislative intent is clear from the language, the Court should give effect to it, vide Government of Andhra

Pradesh vs. Road Rollers Owners Welfare Association 2004(6) SCC 210, **and the Court should not seek to amend the law in the grab of interpretation.**

27. In the light of the aforesaid rules of interpretation, it can be said that when the Legislature has used two un-identical and non-synonymous terms/ expression, it has to be inferred that it did not want to convey the same meaning. It may also be noted that the Legislature does not use any surplusage or superficial words or phrases.

If the provisions of section 13 (8) (b) of the IGST Act, were to cover and encompass both the types of Brokers, Agents in relation to goods and services, nothing was simpler than to re-draft section 13 (8) (b) as below and say:

- Section 13(8) (b) **"services of intermediary"**, and
- Then the word "intermediary" being defined, it would have covered the services of the Broker /Agent in relation to either the "goods" or "services" or even both.

(i) Instead, section 13(8)(b) has adopted the expression: "**intermediary services**" which expression was prevalent prior to 2014-Amendment of POPS Rules, 2012, which distinguishes it from the **"main service"**,

(ii) Another reason is that that the term; **Agent**, appearing in the definition of "intermediary" has to be understood as excluding "consignment agent", which stands defined in section 2(5) of the CGST Act.

(iii) As laid down by the Apex Court (Delhi Transport Corporation vs. D.T.C. Mazdoor Congress on 4 September, 1990), the doctrine of reading down is applied where the provisions of the statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made.

(iv) In the case on hand, the section 13(8) of the IGST Act is intended to apply to specified "services", and clauses (a) and (c) relate to "pure services". Clause (b) cannot take in its fold "services in relation to goods"; because the entire GST Law maintains dichotomy between the "goods" and "services".

(v) Further, it is well settled that every word or phrase in a clause takes colour from the other related clauses in the same section, namely, sub-section (8), section 13 of IGST Act.

(vi) As stated earlier, if the Legislature wanted to have wider meaning of "services", it would have used the phraseology **"services of intermediary" rather than "Intermediary services".**

(vii) It is not open to inject definition of "intermediary" as Amended in 2014, by interpretative process when the context of Rule 13 (8) is specifically restricted & made applicable to specified/selected services.

(viii) When reading **"intermediary" as an adjective**, one has to give due meaning to it and read that expression to convey those "services" which are contradistinguished from the "main" services.

(ix) In other words, the clause must be held as applicable if the intermediary is acting as broker /agent in the main transaction of supply of services between the service provider and the service recipient; and not where the seller is supplying "goods" to the buyer or recipient of supply /goods.

(x) Any other interpretation would be against the Legislative mandate expressed from the phraseology used to pin-point its intention. Moreover, it is settled law that by an interpretative process the legislative edict cannot be altered or re-written to bring out presumed intention.

28. In conclusion:

(a) The defined term or phrase must receive the same meaning throughout the statute.

(b) When the Legislature uses a particular phraseology, full meaning must be given by following the rules of English grammar. In that sense, the word: "intermediary" being an adjective of services, in section 13(8) (b), the defined word: "intermediary" cannot be brought-in to inject the concept of services relating to goods.

(c) The expression, "intermediary services" had acquired definite connotation when the POPS Rules, 2012 were brought in to play, namely, the service s differentiated from the "main services". Since the term "intermediary services" is nomen juris, the GST Law when it uses it, then it must be understood in that sense only.

It therefore, follows that the section 13(8) (b) cannot be held as taking away the benefit of export service to Midas as the supplier of service is in the Taxable Territory and the recipient is in the non-taxable territory . Therefore section 7 (5) (a) of the IGST Act:

(5) Supply of goods or services or both, -

(a) when the supplier is located in India and the place of supply is outside India;

Will apply, and consequently "zero-rated tax" benefit under section 16 would be available.

29. Therefore, there will be no CGST/SGST applicable on the services provided by the Intermediary (Midas) acting as a Broker to facilitate Imports of goods by the Indian Customer from the Seller-supplier (M/S Fisher & CO., France) under the cross-border transaction.

As the answer to the first question is in the negative, there is no need to examine further related questions. So, far as the procedural requirements like issuance of tax invoice/Debit Note is concerned, these issues can be sorted out under the existing guidelines of the CBEC/Department.

30. If the view taken in the preceding paragraphs is not the true legal position, then CGST + SGST aggregating to 18% will apply making a mockery of "zero-rated Export of goods/Services" concept enshrined in Section 16 of the IGST Act (supra).

Further, a representation may have to be made to the Central Government/ CBEC/GST Council requesting that either amendment in law be carried out, or give relief to eliminate 18% tax incidence, and to avoid the violation of Article 14 of the Constitution of India, or the discriminatory treatment to intermediary facilitating Export/Import of goods and bringing in valuable Foreign Exchange. If the situation remains ambiguous or unclear, the possibility of litigation cannot be rules out.

As the Central Government has the responsibility to ensure seamless implementation of the new GST Regime, it is felt that the Government must iron out creases as soon as possible and relieve the avoidable burden on the overloaded judiciary.
