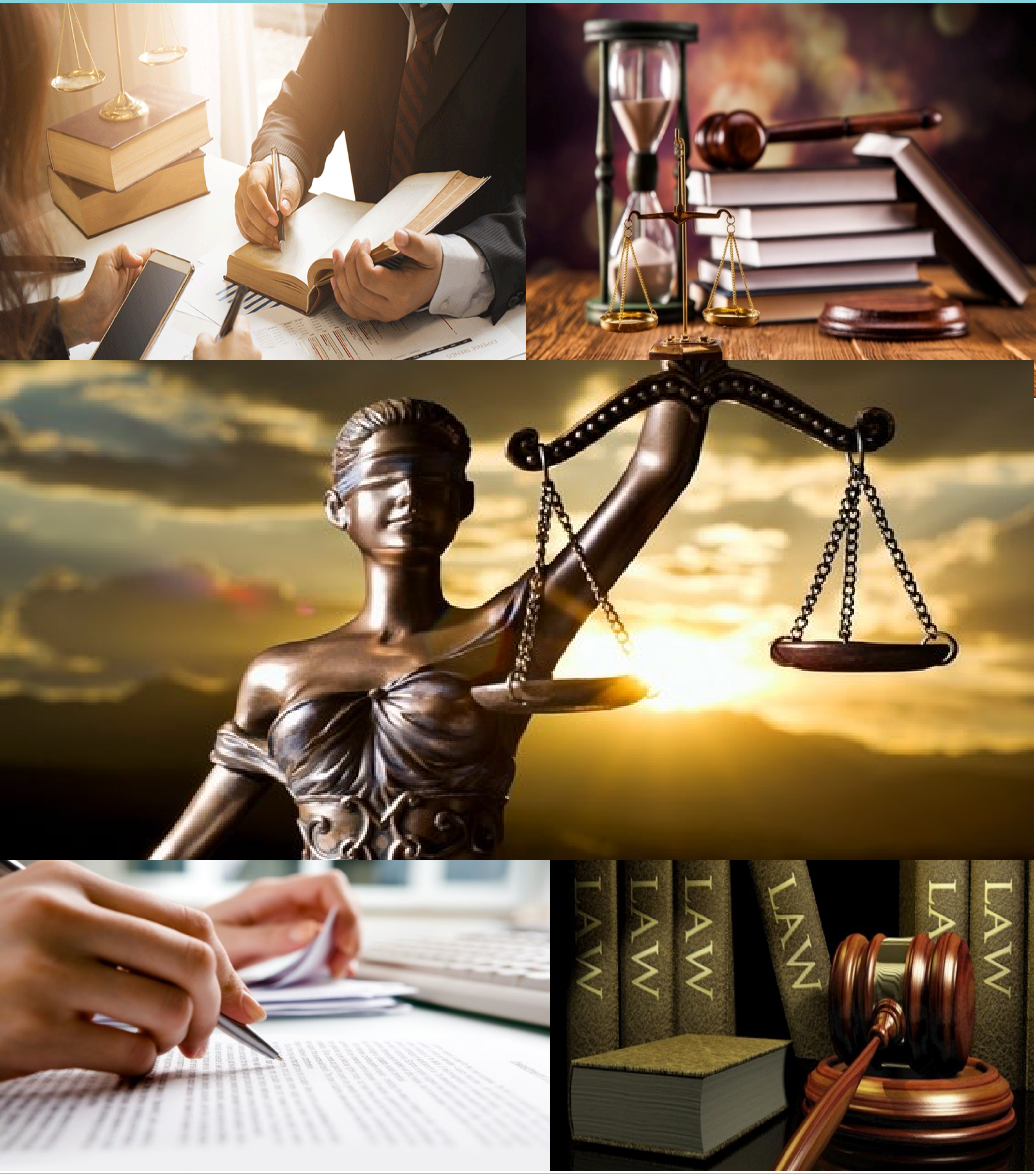


NITYA tax associates

NITYA's Outlook | Issue 37 |

Intermediary Service: Key tests for determination

January 6, 2020

The vexed issue of intermediary service where lot of confusion persists in the industry as well as the tax authorities on its coverage. We attempt to lay down relevant tests to determine when will a service qualify as intermediary service.

Relevance

The issue as to whether a service qualifies as intermediary service or not, is relevant for the following reasons:

- Place of supply being outside India, is one of the essential conditions for export of service;
- Place of supply of intermediary service is the location of service provider while place of supply of other services (not otherwise specifically provided) is location of service recipient *[Refer Section 13 of the Integrated Goods and Services Tax Act, 2017 ('IGST Act')]*;
- Where the service provider is located in India and service recipient is located outside India, the following situations may arise:
    - If the service qualifies as intermediary service, export of service criterion will not be met. Consequently, GST shall be payable; and
    - If the service does not qualify as intermediary service, export of service criterion will be met (provided not covered under any other clause to Section 13). Thus, no GST shall be payable.

Circulars issued under GST

The Central Board of Indirect Taxes and Customs ('CBIC') issued ***Circular No.107/26/2019 - GST dated July 18, 2019***, clarifying the applicability of GST on supply of Information Technology enabled Services ('ITeS') and back-end support services. The Circular clarified following key issues:

- Services provided by the supplier (back end ITeS services) on his own account to recipients or customers of recipients, will not qualify as intermediary service; and
- Backend services for arranging or facilitating supply of goods or services like order placement and delivery and logistical support, obtaining relevant governmental clearances, transportation of goods, post-sales support and other services, etc., will qualify as intermediary service

In our earlier update **NITYA's Insight | Issue 38 | Recent changes and clarifications under GST Law**, we highlighted that the Circular ignored pre-GST regime jurisprudence on intermediary services.

After lot of hue and cry from the industry, the CBIC withdrew this Circular vide ***Circular No. 127/46/2019-GST dated December 4, 2019***. After withdrawal of this Circular, the industry is eagerly awaiting a fresh Circular containing clear guidelines on this subject.

Relevant tests to determine when will a service qualify as intermediary service

- IGST Act defines 'intermediary' as a person who arranges or facilitates the supply of goods or services or both 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. A similar definition of 'intermediary' was prevalent under the service tax law as well.

- Basis the various judgments of the Tribunals & Courts as well as Education Guide issued by CBIC in pre-GST regime and rulings of Authorities of Advance Ruling in GST regime, the following tests can be laid down.

Test 1: Facilitation of supply of goods or service between two or more persons

- The definition of intermediary covers persons (like broker or an agent) who facilities supply of goods or services between two or more persons. Thus, existence of two or more persons is a key element of intermediary service.

- Consequently, service provider's interaction with both the contracting parties, would be a primary criterion to determine the facilitation or arranging of supply between two or more persons. If the service provider does not engage with anyone apart from his customer, then there is no facilitation or arranging of supply between two or more persons nor service provider would be considered as intermediary.

- In case of ***Verizon India Pvt. Ltd. v CST, 2019-VIL-527-CESTAT-DEL-ST***, the Appellant was providing telecommunication services, market research, identifying customer, net pricing, billing and administrative support (main service). The Tribunal held that for a service to be considered as intermediary, three parties need to be involved while there were only two parties in this case. The Tribunal held that the appellant did not act as an intermediary between two persons and was supplying services on a principal to principal basis.

Test 2: The service of intermediary should be ancillary to a main service

- ***Para 5.9.6 of Education Guide*** explained that for existence of intermediary, there needs to be two supplies:

  - Supply between the principal and the third party (main supply); and
  - Supply of own service (agency service) to principal for fee or commission.

- Thus, interaction with third party must be for supply of goods or services. In the absence of such facilitation or interaction, service would not qualify as intermediary service. For example, in case of interaction with third person for data collation or market research, there is no supply of goods or services by principal to participants. Hence, service provider cannot be said to be providing an intermediary service to principal.

- In case of ***Chevron Philips Chemicals India Pvt. Ltd. v Commissioner of CGST & Central Excise, Mumbai East, 2019-VIL-763-CESTAT-MUM-ST***, the Tribunal was assessing whether sales promotion services rendered by the appellant to its overseas group company amounted to intermediary service or not. The Tribunal noted that the appellant had no role in fixation of price or negotiation with the clients of group company or any third party. Further, the agreement did not encompass interaction or rendition of service to the clients of group company or any third party. Basis the above and after placing reliance on similar ruling in the case of ***Lubrizol Advanced Materials India Pvt. Ltd. v Commissioner of Central Excise, 2019 (22) GSTL 355 (Tri. - Mumbai)***, the Tribunal ruled that the instant services did not qualify as intermediary service.

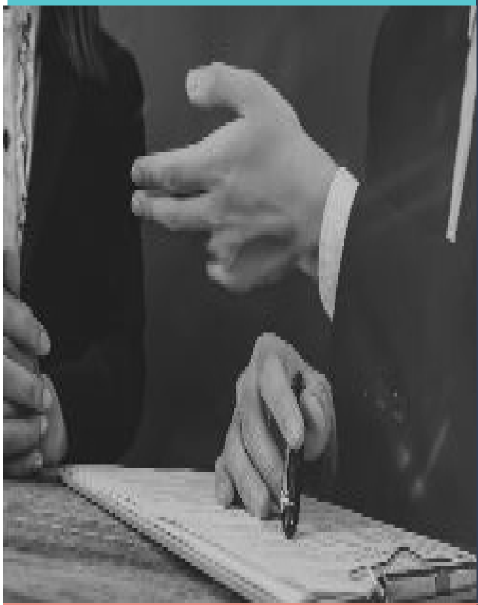
Test 3: Supply of goods or services on own account

- The third and an equally important test is that the definition excludes person who supply goods or services on its own account. In other words, intermediary will only be a service provider who acts as an agent before a third party to facilitate supply or procurement of goods or services of the principal. Hence, a service provider who provides services on its own account for further supply to the service recipient, will not be covered under the ambit of intermediary.

- In the case of ***Re: GoDaddy India Web Services Private Limited, 2016 (46) STR 806 (AAR)***, the Applicant intended to provide various services viz. direct marketing, branding services and offline marketing, to GoDaddy US. In terms of the Service Agreement, the applicant was required to undertake various activities including advising GoDaddy US regarding various aspects of market situation, upcoming festivals, holidays for timely rolling out of campaigns etc. The authority held that since the above activities will be provided by applicant on its own account, it did not form an intermediary.

- In the case of ***Re: Universal Services India Private Limited, 2016 (42) STR 585 (AAR)***, the applicant was engaged in processing of payments on behalf of a foreign client. The authority observed that the applicant was engaged in providing main services on its own account. Hence, the services provided by applicant did not qualify as intermediary service.

NITYA
tax associates



Call us

+91 11 41091200-02

Mail us

updates@nityatax.com

info@nityatax.com

Send us a postcard

NITYA Tax Associates,
B-3/58, 3rd Floor,

Safdarjung Enclave,

New Delhi-110029

www.nityatax.com