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STRICTLY CONFIDENTIAL AND LEGALLY PRIVILEGED

Mr. C. G. Balaji

General Secretary and South Region Executive

Association Australian Education Representatives in India (AAERI)

Subject: Opinion on 'Applicability of Advance Ruling' issued by the authority in the matter of an applicant, on the whole industry of Overseas Education recruitment Agents or Consultants

Dear Mr. Balaji,

In view of the background explained by you over the email dated 30 August 2024 and subsequent/ related discussions we had over the call; my summarised views with respect to queries raised by AAERI are as follows:

- A. 'Advance Ruling' shall be applicable and binding only for the applicant thereof and not to the entire industry of 'Recruitment Agents or Consultants'.
- B. Without a binding 'Advance Ruling' or a favourable order from the higher judiciary, the Revenue Authorities would continue to pursue the recovery of Goods and Services Tax at 18 per cent from a 'Recruitment Agent or Consultant'.

My detailed 'Opinion' and reasons for the same are as follows:

Background

After introduction of Goods and Services Tax¹ ('GST'), a lot of ambiguity was created by Revenue Authorities with respect to interpretation of term 'intermediary'² in the context of services provided by 'Recruitment Agents or Consultants' based in India and providing services to 'Foreign Universities and Colleges'. The delusion was further intensified by issuance of advance ruling by West Bengal Advance Ruling Authority in the case of Global Reach Education Service Pvt. Ltd.³

Owing to this understanding, the 'Recruitment Agents or Consultants' have been made to face multiple litigations or have been forced to pay GST at 18 per cent on services provided to 'Foreign Universities and Colleges'. This outlay is out of the profit margins of the 'Recruitment Agents or Consultants'. To overcome this situation, few of the 'Recruitment

¹ By way of introduction of Central Goods and Services Tax, 2017 alongwith Integrated Goods and Services Tax, 2017 w.e.f. 1 July 2017

² Defined in Section 2(13) of Integrated Goods and Services Tax, 2017

³ 2018 (12) G.S.T.L. 387 (A.A.R. - GST) further upheld by Appellate Authority for Advance Ruling in 2018 (15) G.S.T.L. 618 (App. A.A.R. - GST)





Agents or Consultants', who were part of AAERI, approached respective 'Foreign Universities and Colleges' to seek reimbursement of GST amount over and above the referral fee.

Lately, Advance Ruling in the case of Center for International Admission and Visa⁴ has reversed the law position in favour of 'Recruitment Agents or Consultants' holding the applicant not to be an 'intermediary' and thus, not liable to pay GST on services provided to 'Foreign Universities and Colleges'.

Given this, AAERI is desirous of obtaining my views of the issues enumerated below:

- (a) Is 'Advanced Ruling' applicable only for the applicant and not to the entire industry of 'Recruitment Agents or Consultants'?
- (b) Do other 'Recruitment Agents or Consultants' are still required to pay GST at 18 per cent on the consideration received by them from the 'Foreign Universities and Colleges'?
- (c) Whether Government of India continues to treat the services offered by the 'Recruitment Agents or Consultants' as 'intermediary' services and continues to levy GST at 18 per cent?

Brief legal framework and discussion thereon

The concept of 'intermediary' is not naïve to Indian Taxation Regime. Service tax law⁵ had introduced the hypothesis of 'intermediary' services through Place of Provision of Services Rules, 2012 whereby a person who acted as a facilitator between two other persons and worked in the capacity of an 'agent' was defined to be an 'intermediary' and was accordingly subjected to levy of Service tax. Definition of 'intermediary' in Service tax law⁶ read as follows:

"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"

The same concept was borrowed into GST, with slight modification in the definition of 'intermediary'. Definition of 'intermediary' under GST is as follows:

"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 Advance Ruling Authority of Telangana A.R. Com/11/2024 dated 9 May 2024

⁵ Applicable through Finance Act, 1994

⁶ Rule 2(f) of Place of Provision of Services Rules, 2012



The root of dispute raised by Revenue Authority lies in the interpretation of this new definition of 'intermediary' used in GST and presumed differentiation from the definition of 'intermediary' under Service tax law.

Advance Ruling in case of Global Reach Education Service Pvt. Ltd. further gaslighted this debate whereby the West Bengal Advance Ruling Authority held that the concept of 'intermediary' under GST is not borrowed from Service tax and thus, must be interpreted independently. The Authority further held that 'Recruitment Agents or Consultants' are acting as facilitators between the 'Foreign Universities and Colleges' and prospective students thereof and thus, qualify as 'intermediary' in GST. Therefore, the services by 'Recruitment Agents or Consultants' to 'Foreign Universities and Colleges' do not qualify as export⁷ and is subjected to levy of GST at 18 per cent. Based on this understanding, backed by pro-tax collection approach, Revenue Authorities issued notices to 'Recruitment Agents or Consultants' with respect to levy of GST on their services to 'Foreign Universities and Colleges' and even coerced recovery of GST in some cases.

Contrary to the belief of Revenue Authorities, Telangana Advance Ruling Authority in case of Center for Admission and Visa analysed the provisions law in light of the clarification from Central Government⁸ and judgments of various High Courts to held as follows:

- (i) 'Recruitment Agents or Consultants' have privity of contract only with 'Foreign Universities and Colleges' and have no arrangement or role towards prospective students of the 'Foreign Universities and Colleges'.
- (ii) No tripartite arrangement exists between 'Recruitment Agents or Consultants', 'Foreign Universities and Colleges' and its prospective students.
- (iii) 'Recruitment Agents or Consultants' provides independent services to 'Foreign Universities and Colleges'.
- (iv) Concept of 'intermediary' in GST has been borrowed from Service tax law and must be interpreted considering the decisions made by various authorities in Service tax law.
- (v) The payment terms between 'Recruitment Agents or Consultants' and 'Foreign Universities and Colleges' cannot be used to determine the classification of an activity.

Basis these points, Authority declared that the applicant shall not be considered as 'intermediary' for the purpose of GST and thus, will not be subjected to levy of 18 per cent of tax.

Given this backdrop, two contrary views exist as on date by two Advance Ruling Authorities. In order to understand the applicability of Advance Ruling, first and foremost reference should be made to provisions of Section 103⁹ of GST which reads as follows:

⁷ Section 2(6) of Integrated Goods and Services Tax Act, 2017

⁸ Circular No. 159/15/2021-GST dated 20 September 2021 issued by Central Board of Indirect taxes and Customs, generically explaining the concept of 'intermediary'

⁹ Central Goods and Services Tax Act, 2017



*“Applicability of advance ruling. — (1) The **advance ruling** pronounced by the Authority or the Appellate Authority under this Chapter **shall be binding** only —*

*(a) **on the applicant who had sought it** in respect of any matter referred to in sub-section (2) of section 97 for advance ruling;*

*(b) **on the concerned officer or the jurisdictional officer in respect of the applicant.***

*(1A) The **advance ruling pronounced by the National Appellate Authority** under this Chapter **shall be binding on -***

*(a) **the applicants, being distinct persons, who had sought the ruling** under sub-section (1) of section 101B **and all registered persons having the same Permanent Account Number issued under the Income-tax Act, 1961 (43 of 1961);***

*(b) **the concerned officers and the jurisdictional officers in respect of the applicants referred to in clause (a) and the registered persons having the same Permanent Account Number issued under the Income-tax Act, 1961.***

(2) The advance ruling referred to in sub-section (1) and sub-section (1A) shall be binding unless the law, facts or circumstances supporting the original advance ruling have changed.”

[Emphasis added]

As is seen, GST law specifically provides that an advance ruling shall be binding only on the applicant and its corresponding jurisdictional Revenue Authority. In other words, since the section uses the word ‘binding’, therefore irrespective of the contrary views in any other cases, advance ruling must be followed by the applicant and its jurisdictional Revenue Authority. To further highlight the meaning of a binding precedence, the following merits consideration:

- A decision has a binding precedent based on Article 141¹⁰ of the Constitution and the flowing judicial discipline therefrom. Further, a binding precedent also depends on the *ratio decidendi* of an order as well as whether the facts are *pari materia*. Thus, an Advance Ruling may have persuasive value but cannot be a binding precedent on account of its limited applicability by virtue of Section 103 of GST law¹¹.
- It is further a settled law¹² that in a taxing statute there is no scope for bringing in the *doctrine of equity* and one only has to go by the words of the statute. In view of clear statutory framework, no other person can derive any benefit out of these advance rulings¹³.
- Another important aspect of understanding the precedential value of a ruling or a decision is the involvement of ‘question of facts’ therein. Decisions of even the Supreme Court on questions which are essentially based on facts cannot be cited as precedents

¹⁰ Law declared by the Supreme Court shall be binding on all other courts within the territory of India.

¹¹ Authority of Advance Ruling in GST Madhya Pradesh, In Re: Madhya Pradesh Power Generation Company Ltd. 2022 (60) GSTL 257

¹² Justice G.P. Singh in Principles of Statutory Interpretation (8th Edn., 2001)

¹³ Customs Advance Ruling Authority Mumbai, Zaveri Enterprises 2021 (378) ELT 817



governing the decision of the other cases which must in the ultimate analysis rest upon their own particular facts¹⁴. The reason is that no case on facts can be on all four with those of another.

- There can be no precedent on facts. It is the legal proposition flowing from the judgement, termed as *ratio*, which has the binding effect. To make a provision of law or a judicial pronouncement applicable to a particular case, the factual aspects have to be firmly borne in mind¹⁵.

Thus, an Advance Ruling cannot be termed as a binding precedence by virtue of Section 103 of GST law. Though, at the same time, an Advance Ruling may have a persuasive value when the facts involved in the case are similarly placed. Applying the 'rule of comity', authorities or courts of equivalent or lower jurisdiction follow the *ratio* decided by an authority of higher or equivalent ranks, under the guide of the doctrine of persuasive or referential precedence.

Comments and conclusions

In view of the discussions made herein above, my comments and conclusions on the queries raised by AAERI are as follows:

- (a) Is 'Advanced Ruling' applicable only for the applicant and not to the entire industry of 'Recruitment Agents or Consultants'?

Applying the principles of interpretation stated above, an 'Advance Ruling' shall be binding only on the applicant therein and concerned jurisdictional officer in respect of the applicant only. *Any other applicant in the same jurisdiction of the applicant who has obtained an 'Advance Ruling' cannot state to avail benefit of the said 'Advance Ruling' merely being under the same jurisdictional officer.*

It is however pertinent to mention that an 'Advance Ruling' shall have a persuasive or referential value, more particularly where facts of a taxpayer transaction are identical to that of the applicant. In those cases, Revenue Authority shall be bound by the 'rule of comity' to apply the *ratio* decided in the 'Advance Ruling'.

Therefore, in my view 'Advance Ruling' either by West Bengal Advance Ruling Authority in case of Global Reach Education Service Pvt. Ltd. or by Telangana Advance Ruling Authority in case of Center for Admission and Visa, are not binding on any other 'Recruitment Agents or Consultants'. For having a persuasive value in case of any other 'Recruitment Agents or Consultants', where facts are similarly placed, the 'Advance Ruling' would still be subject to scrutiny of Revenue Authority and finality can be obtained only upon assessment.

¹⁴ Prakash Chandra Pathak v. State of UP AIR 1960 SC 195 (198)

¹⁵ Keval Chand Mimani v. S.K. Sen AIR 2001 SC 2569



- (b) Do other 'Recruitment Agents or Consultants' are still required to pay GST at 18 per cent on the consideration received by them from the 'Foreign Universities and Colleges'?

This query has a mixed question of law and facts.

In my view, 'Advance Ruling' by West Bengal Advance Ruling Authority in case of Global Reach Education Service Pvt. Ltd. is *per incuriam* as

- it is based on flawed understanding of 'intermediary' and ignores the basis ingredients of existence of principal and agency relationship between the parties to a contract for being an 'intermediary'.
- it perversely differentiates the concept of 'intermediary' in GST law from Service tax law. Central Government has clarified this position by way of clarification.
- it overreaches in reliance on payment mechanism to classify an activity, which is against the settled laws of interpretation.
- it is more particularly a non-speaking order, leaving out important discussions.

On the contrary, 'Advance Ruling' by Telangana Advance Ruling Authority in case of Center for Admission and Visa has catered to all the above issues and have been passed considering the decisions of various High Courts and clarification issued by Central Government. Therefore, though both the 'Advance Rulings' have no binding effect except on the respective applicants, 'Advance Ruling' by Telangana Advance Ruling Authority shall have a higher persuasive value.

Clubbed with the 'Advance Ruling' by Telangana Advance Ruling Authority, various precedents of Tribunals under Service tax law have a favourable view towards the 'Recruitment Agents or Consultants'. Thus, question of law is settled in favour of 'Recruitment Agents or Consultants' i.e. not to consider them as 'intermediary' under given set of facts¹⁶.

Therefore, in my view, 'Recruitment Agents or Consultants' are not required to pay GST at 18 per cent on the consideration received by them from the 'Foreign Universities and Colleges'. *However, this position would be subject to scrutiny by Revenue Authorities as they have a negative outlook on this issue and are continuing with litigation at various levels with 'Recruitment Agents or Consultants'.*

- (c) Whether Government of India continues to treat the services offered by the 'Recruitment Agents or Consultants' as 'intermediary' services and continues to levy GST at 18 per cent?

As discussed above, Government of India¹⁷ has broadly clarified its understanding on the concept of 'intermediary'. It is the Revenue Authorities who are entrusted with the

¹⁶ Factual position in most of the cases, as explained therein, is similar

¹⁷ Government of India/ Central Government is termed as 'Executive' and is placed higher in hierarchy to administrative authorities such as GST Revenue Authority.



job of tax administration in India, who have created the situation for recovery of 18 per cent from 'Recruitment Agents or Consultants' on consideration received from services provided to 'Foreign Universities and Colleges'.

The matter is yet to be placed before higher judiciary¹⁸, who is entrusted with the task of interpretation of law. Given that the higher judiciary has been in favour of the 'Recruitment Agents or Consultants' under Service tax law with respect to classification as 'intermediary' and Central Government alongwith High Courts have held that the concept of 'intermediary' in GST is same as was in Service tax law and have interpreted it in similar vein in respect of other transactions, the higher judiciary is likely to have a favourable view towards the 'Recruitment Agents or Consultants' once the matter is put before it for review.

In the meantime, Revenue Authorities would continue to press for recovery of 18 per cent GST from 'Recruitment Agents or Consultants' treating them as 'intermediary'¹⁹.

At this juncture, while digressing from the issue, I would wish to state that the 'Recruitment Agents or Consultants' who have not disputed or have rather admitted themselves as 'intermediary' before the Revenue Authorities would not be able to attain any benefits, either out of a binding precedent or out of a ruling having a persuasive value, for the tax period in which their position remained undisputed by them.

Advised accordingly*,

Akhil Gupta

Lawyer and Tax Jurist

D/2192/2016

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***Scope and quantification**

The views discussed in this 'Opinion' are subject to below qualifications:

- (a) This Opinion has been rendered solely on the understanding given to me by AAERI (*Background*) above by means of documents provided to me or through our telephonic discussions(s) and does not have any general application. I have assumed that there are no other facts which are relevant to our analysis for this Opinion which have not been disclosed by AAERI. I have relied on the facts represented and the documents provided to me and have not independently verified the veracity of the same. If there is any change in the facts, this Opinion may have to be revised on the basis of the changed facts.

¹⁸ Tribunals and High Court/ Supreme Court

¹⁹ Lately Directorate General of GST Intelligence and various Preventive/ Anti-Evasion Units of Revenue Authorities have issued Show Cause Notices and even Assessment Orders holding 'Recruitment Agents or Consultants' as 'intermediary'. However, as pointed out in main part of the Opinion, these Show Cause Notices and Assessment Orders are pending for review by higher judiciary.



- (b) This Opinion is limited to the issues set out in (*Queries*), and does not address or purport to address, and should not be read as addressing, any issue in addition thereto, including all requirements which are required to be complied with by the addressee.
- (c) This Opinion is rendered on the basis of Indian laws and regulations existing on 04 September 2024. Any changes in Indian law or judicial pronouncements after this date could have an effect on the validity of the conclusions stated herein.
- (d) This Opinion does not take into account views expressed by regulatory authorities unless the same have been specifically notified by them as law or regulation. My views stated herein will not be binding on an Indian court or any other governmental or statutory authority (including the Taxation Authorities or any assessment officer) and such court/authority would have to be independently satisfied of the legal provisions and the interpretations thereof in question.
- (e) My views expressed herein are only for the benefit of the addressee and should not be circulated or provided to any other person, authority or entity, without my prior written consent. The contents of this Opinion are not to be relied upon by any other person. My liability shall be limited to the fees charged for the issuance of this Opinion.
- (f) The delivery of this Opinion either by myself, or otherwise to any person other than the addressee, including by any such person shall not make such person or any such person a client of mine, and such person shall not be deemed to have received legal advice from me. In any event, I shall assume no liability whatsoever in relation to any disclosures and/or the contents of this Opinion towards any person other than the addressee, such person not being entitled to rely upon this Opinion.