

**KARNATAKA APPELLATE AUTHORITY FOR ADVANCE RULING
6TH FLOOR, VANIYA THERIGE KARYALAYA, KALIDASA ROAD,
GANDHINAGAR, BANGALORE – 560009**

**(Constituted under section 99 of the Karnataka Goods and Services Tax Act, 2017 vide
Government of Karnataka Order No FD 47 CSL 2017, Bangalore, Dated:25-04-2018)**

BEFORE THE BENCH OF

SHRI D.P.NAGENDRA KUMAR, MEMBER

SHRI M.S.SRIKAR, MEMBER

ORDER NO.KAR/AAAR-09/2019-20

DATE: 20.01.2020

Sl. No	Name and address of the appellant	M/s. Infinera India Pvt Ltd, Prestige Solitaire, Level 4-401, No 6, Brunton Road, Bangalore 560025.
1	GSTIN or User ID	29AABCI1411R1ZD
2	Advance Ruling Order against which appeal is filed	KAR/ADRG 31/2019 Dated: 12th Sept 2019
3	Date of filing appeal	23-10-2019
4	Represented by	Sri T.R. Venkateshwaran, Authorized representative
5	Jurisdictional Authority- Centre	Commissioner of Central Tax, Bangalore East Commissionerate
6	Jurisdictional Authority- State	LGSTO-020 Bengaluru
7	Whether payment of fees for filing appeal is discharged. If yes, the amount and challan details	Yes. Payment of Rs. 20,000/- made vide CIN NO. RBIS19102900407720 Dated 24-10-2019

PROCEEDINGS

(Under Section 101 of the CGST Act, 2017 and the KGST Act, 2017)

1. At the outset we would like to make it clear that the provisions of CGST, Act 2017 and SGST, Act 2017 are in *pari materia* and have the same provisions in like matter and differ from each other only on a few specific provisions. Therefore, unless a mention is particularly

made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the KGST Act.

2. The present appeal has been filed under section 100 of the Central Goods and Service Tax Act 2017 and Karnataka Goods and Service Tax Act 2017 (herein after referred to as CGST Act, 2017 and SGST Act, 2017) by M/s. Infinera India Private Limited, (herein after referred to as Appellant) against the advance Ruling No. KAR/ADRG 31/2019 Dated: 12th Sept 2019.

Brief Facts of the case:

3. The Appellant is a 100% Export Oriented Unit under the STPI scheme and is a wholly owned subsidiary of Infinera Corporation, USA. The Appellant is predominantly engaged in software development services for the products developed by Infinera Corporation. In addition, the Appellant also provides pre-sale and marketing services for the optical networking equipment developed by Infinera Corporation. The Appellant and Infinera USA have entered into a "Pre-sale and Marketing Services Agreement" dated 1st April 2011 whereby the scope of work involves:

- a) Assist Infinera USA through the coordination of sales promotion and advertising for its products in India;
- b) Conduct market research and keep Infinera USA advised and informed regarding all matters within India, which may be of reasonable business interest or concern to India, and
- c) Provide informational, educational and service programs in India, as may be requested by Infinera USA from time to time.

4. With regard to the pre-sale and marketing services, the Appellant filed an application for advance ruling on the question "*Whether the activities carried out in India by the applicant would render the applicant to qualify as an "intermediary" as defined under Section 2(13) of the IGST Act, 2017 and consequently be subject to the levy of GST?"*

5. The Authority for Advance Ruling vide order No KAR ADRG 31/2019 dated 12th Sept 2019 held that the activities carried out in India by the applicant in terms of the "Pre-sale and Marketing Services Agreement" qualifies the applicant as an "Intermediary" as defined under Section 2(13) of the IGST Act, 2017 and consequently by subject to the levy of GST.

6. Aggrieved by the said ruling, the Appellant has preferred this appeal before us on the following grounds:

6.1. The marketing support services provided by the Appellant are auxiliary in nature and the Appellant at no point of time has any authority to negotiate prices or to enter into / conclude contracts for or on behalf of Infinera USA. The Appellant is not executing end to end process but only executing specific task as per the agreement entered into with Infinera USA. There exists a principal-to- principal relationship between the Appellant and Infinera USA. The performance and remuneration of the Appellant is no way linked to the purchase prices or the prices at which the contracts are concluded by Infinera USA. The Appellant receives compensation on "cost plus basis" as per the Agreement. The Appellant provides services on its own account and not on behalf of Infinera USA or any other entity. Thus, the services provided by the Appellant are on a principal-to-principal basis and not in the capacity of an 'agent' or 'broker'. Although the term 'broker' has not been defined under the GST law, it finds place in the definition of an 'agent' provided under Section 2(5) of the CGST Act which reads as " agent' means person, including a factor, broker, commission agent....". Hence a conclusion shall be drawn that the terms 'agent' and 'broker' have been used interchangeably in the GST law to mean similar persons. By applying the principal of Noscitur a Sociis, the use of expression 'any other person, by whatever name called' limits the scope of 'intermediary' to apply only to an agent/a broker. The appellant does not qualify either to be an 'agent' or 'broker' of Infinera USA nor qualify as 'any other person' within the meaning assigned in Section 2(13) of the IGST Act by applying the above principle of interpretation.

6.2. The expression 'arranges or facilitate supply' as used in Section 2(13) of the IGST Act means to organize or support or assist in any manner the supply of goods or services or both in such a manner that such supply between two or more persons becomes easier or more convenient. A literal interpretation of the definition of 'intermediary' appears to require actual arrangement or facilitation of supply of goods and / or services by an intermediary. Mere undertaking of marketing or sales promotion by an entity without any role in the actual arrangement or facilitation (such as involvement in meetings between customers and suppliers, stages of purchase order submissions, negotiation of contractual terms, negotiation of price, logistics of the supply, post supply activities to fulfill the contract, etc) would not render such an entity to be an 'intermediary' in terms of the definition provided under Section 2(13) of the IGST Act. If the terms "arranges or facilitates" were to be given a wide unrestricted meaning, it could lead to absurd situations which are clearly unintended in the legislation. Facilitation

has to take colour from 'arrangement' and vice versa. Thus, the meaning of 'facilitation' cannot be extended to cover those cases where the intermediary undertakes the main service itself, though in the capacity of an agent. Further, the nature of the goods and services supplied by the intermediary must be the same as goods or services supplied by the principal. If the nature of supply of goods or services by some person is different from the supply of the principal, it cannot be said that the person is merely 'arranging or facilitating' supply of goods or services.

6.3. The Appellant submits that they only conduct preliminary market study/research and provide information of business concern to Infinera USA. Thereafter, Infinera USA team gets in touch with the prospective customers and carries out host of activities, which inter-alia includes the following: Requirement Analysis (assessment of the exact requirements of the customer), Request for Proposal (Infinera USA takes part in the bidding process), Supply of networking equipment (supply of goods to customers in India), Installation (by technical experts), Integration (integration of equipment to make it fully operational). All the above activities are performed by the Infinera USA team. No activities pertaining to installation / post-sales support or servicing of the optical networking equipment, etc would be carried out by the Appellant nor can the Appellant enter into any negotiation of contractual terms and price with respect to the Infinera USA products with any prospective customer. The pre-sales marketing services done by the Appellant has not resulted in sale of telecommunication equipment by Infinera USA to any customer in India till date. They placed reliance on the Advance Ruling given to M/s Tandus Flooring India Pvt Ltd under Service Tax wherein the Authority held that the scope of the services rendered qualifies as export of service.

6.4. They submitted that they are engaged in provision of pre-sale and marketing support services as well as software services on their own account. All activities carried out by the Appellant are done on a principal-to-principal basis with respect to Infinera USA. This is substantiated by clause 2.3 on page 3 of the Agreement wherein it has been clearly highlighted that IIPL agrees that its relationship is one of an independent contractor and it will not act or represent that it is acting as an agent of Infinera or incur any obligation on behalf of Infinera; that Infinera India shall not have the authority to enter into contracts with third party customers on behalf of Infinera USA, conclude contracts on behalf of Infinera and maintain stock of goods or merchandise of Infinera USA; that the Agreement specifically treats the Appellant as well as Infinera USA as Principals; that the Appellant receives consideration on cost plus basis and not related to the actual sales figures of the products; that the marketing services performed by

the Appellant are on their own account and hence they do not satisfy the requirement of definition of 'intermediary'. They relied on the Advance Ruling given by the Maharashtra Advance Ruling Authority in the case of Asahi Kasei India Pvt Ltd wherein it was held under similar circumstances that the services performed do not qualify as an intermediary service but are to be classified as 'market research services'.

6.5. The Appellant submitted that the Authority has erred in holding that the expression "or any other person, by whatever name called" in the definition of "intermediary" broadens the scope of intermediary rather than limiting it; that the phrase "any other person, by whatever name called" in the said definition shall not bear a wide or generic connotation. Instead, it shall be read in conjunction with the terms "an agent" or "a broker". Therefore, the scope of the term "intermediary" would include only such persons who act similar to an agent or a broker or such class of individuals. They submitted that the nature of services provided by the Appellant does not fall under the definition of the term 'agent' as it is not acting on behalf of Infinera USA; that the Appellant is not executing end to end process but only executing specific task as per the agreement with Infinera USA; that the Appellant provides support services to its parent company located outside India; that they do not participate or negotiate prices or conclude contracts for or on behalf of Infinera USA.

6.6. The Appellant submitted that the Authority had erred in holding that the ratio of the rulings given in the case of M/s GoDaddy India and M/s Universal Services India Pvt Ltd are not applicable to their case. They submitted that the services provided by the Appellant are very much similar in nature to the service provided by M/s GoDaddy India Web Services. They submitted that the definition of "intermediary" envisages an actual arrangement or facilitation of goods and services by an intermediary; and does not refer to merely persons who engage in the marketing of a product which is offered by a seller; that merely engaging in the promotion or marketing of a particular product does not, by any stretch of imagination, imply that there is an actual arrangement being made or a facilitation being offered with respect to the supply of such goods or services or securities; that the Appellant has always been solely conducting preliminary market study / research and providing such information to Infinera USA; that the appellant has always been responsible solely for following up with customer leads provided by Infinera USA; with no rights to enter into contracts on behalf of Infinera USA. They also submitted that the Authority has not considered their submission declaring specifically that the stated activity between the Appellant and Infinera USA has not resulted in sale of

telecommunication equipment by Infinera USA till date in India. Therefore, they submitted that they cannot be held to be supplying 'intermediary services'.

PERSONAL HEARING:

7. The Appellants were called for a personal hearing on 3rd Dec 2019 and were represented by Shri. T.R Venkateshwaran, Authorized representative who reiterated the written submissions. They drew attention to the activities performed by the Appellant as mentioned in Page 6 of their written submissions as also the Agreement entered into between the appellant and Infinera USA. On a specific mention by the Members that the activities mentioned at Page 6 of their submissions do not form part of the Agreement or Statement of Work (SOW) and that nowhere in the Agreement or SOW does the workflow mentioned in Page 6 appear, the representative agreed to provide additional information regarding the scope of their work to substantiate the submissions. Further, on a query by the Members regarding the manner and nature of billing done to Infinera USA, the representative agreed to provide the details. The Appellant was given time till 24th December to provide the said information.

7.1. The case was again posted for personal hearing on 24th Dec 2019 and the Appellant requested for an adjournment. Another opportunity was provided on 10th January 2020 for the Appellant to provide the additional information as requested. However, the Appellants again sought an adjournment. They were informed by the Bench that since the Appellate Authority is bound by law to pass the order within a specified time period, no further adjournments can be given and the Bench allowed the Appellant to submit additional documents if any, by the 16th Jan 2020.

7.2. The Appellant on 16th Jan 2020, submitted the relevant extract from the Bilateral Advance Pricing Arrangement ('BAPA') comprising the details of activities carried out by the pre-sales and marketing services team of the Company. They submitted that the above-mentioned relevant documentation evidences that the Company is not executing end to end process but only executing specific task as per the agreement entered with Infinera USA. The Company is engaged in provision of pre-sale marketing services for the optical networking equipment developed by Infinera USA and have contractual obligation only with Infinera USA. The Company at no point in time negotiates prices or conclude contracts for or on behalf of Infinera USA as the contracts would be concluded and executed by Infinera USA without involvement of the Company. No other information was submitted by them.

DISCUSSION & FINDINGS:

8. We have gone through the records of the case and considered the submissions made by the Appellant in their grounds of appeal and at the time of personal hearing. We have also gone through the additional information furnished by the Appellant on 16th Jan 2020.

9. The only point for determination by us is whether the activities carried out by the Appellant qualify to be termed as an 'intermediary'. The Appellant has placed before us the "Pre-Sales and Marketing Services Agreement" dated 1st April 2011 entered into between Infinera USA and the Appellant. We have gone through the contract in detail and the discussions made hereunder are keeping the terms of this contract in mind. As per the Agreement, Infinera USA appoints the Appellant to provide certain pre-sales and marketing services. The exact scope of the services required by Infinera USA to be performed by the Appellant is given in the Statement of Work (SOW) annexed to the Agreement and is as follow:

- a) Assist Infinera through the coordination of sales promotion and advertising for its products in India;
- b) Conduct market research and keep Infinera advised and informed regarding all matters within India, which may be of reasonable business interest or concern to India;
- c) provide informational, educational and services programs in India, as may be requested by Infinera from time to time.

10. The responsibilities of the Appellant are outlined in Para 2 of the Agreement in terms of which it is the responsibility of the Appellant to deploy suitable personnel to render the services listed in the SOW; the employees of the Appellant shall not be deemed for any purpose to be employees of Infinera and shall not be entitled to any benefits normally accruing to employees of Infinera; the Appellant's relationship with Infinera is one of an independent contractor and that it will not act or represent that it is acting as an agent of Infinera or incur any obligation on behalf of Infinera; the Appellant shall not have the authority to make any commitments whatsoever on behalf of Infinera as agent or otherwise, nor to bind Infinera in any respect; that the Appellant shall not have the authority to enter into contracts with third party customers on behalf of Infinera, conclude contracts on behalf of Infinera and maintain stock of goods or merchandise of Infinera. The Agreement further states that the Appellant will maintain adequate insurance to protect its employees and shall maintain reasonable and sufficient records of time spent on rendering the services under the SOW. Infinera USA shall

on its part, provide the Appellant with all such information and documentation as may be necessary and required by the Appellant to provide the services under the SOW and shall cooperate with the Appellant to enable the Appellant to render the services under the SOW.

11. It is seen from the Agreement that, in consideration of the Appellant rendering the services under the Agreement and the SOW, Infinera USA shall the Appellant, a consideration calculated in accordance with and on the basis of all costs of running the Appellant's unit in India at actuals plus 15%. The parties agree that the consideration payable to IIPL for the services rendered by it is subject to the results of transfer pricing study being undertaken by the Appellant and the consideration shall be revised in accordance with the results of the study, if so necessary. The amount so computed constitutes the Appellant's total fee for all services and includes all Appellant's costs (such as employee wages and payroll costs). The Appellant shall invoice Infinera for the services rendered on a monthly basis. Since the consideration payable for the services rendered by the Appellant is to be on a 'cost plus' basis, the appellant shall render clear accounts for all its expenses every month to Infinera with suitable justifications. In addition, the books of accounts and records of the Appellant shall be open for scrutiny to any employee/representative/nominee of Infinera at its option, at any time, whether with or without notice. In the event any member of the Appellant's staff is required to travel to Infinera's or a customer's work place whether it be to finalize specifications, for training, to hand over files or otherwise, then , in addition to the consideration specified above, Infinera shall be liable to pay for the following expenses:

- a) To and fro economy airfare for the staff member at actuals;
- b) Reasonable accommodation at actuals;
- c) Daily allowance per day to be paid directly to the Appellant's staff member to cover food and miscellaneous expenses;
- d) All local travel expenses within Infinera's or customer's place of work.

12. The terms of the Agreement also stipulate that the Appellant shall irrevocably assign and transfer and assign all rights, title and interest in, including any ownership of, any patent, copyright, trademark, trade secret, technology, ideas, know-how and other intellectual property rights in any material, information or software developed b the Appellant in the course of the performance of its obligations under the Agreement or SOW, to Infinera and the same shall be and remain the sole property of Infinera.

13. We have also gone through the extract from the Bilateral Advance Pricing Arrangement ('BAPA') comprising the details of activities carried out by the pre-sales and marketing services team of the Appellant company. The BAPA states that the products of Infinera India are conceptualized in the US and the marketing related materials for the potential customers are developed in the US and shared globally across the sales offices for marketing activities. Infinera India's role in the marketing and pre-sales activity is limited to give presentations on of Infinera US to the potential customers and take feedback from them so that Infinera India can inform Infinera US about the enhancements and improvements that the products need, to meet the requirements of the potential customers. Infinera India basically acts as a communication and coordination channel between potential customers in India and product line marketing team in the US. The potential customers of Infinera India are high scale service providers like Vodafone, Reliance, Bharti, Aircel, etc. A typical sales cycle for Infinera products ranges from 12 to 18 months. Infinera India also participates in industry related events so as to identify prospects. Also, Infinera India celebrates a specific day earmarked as "Infinera Day" wherein demonstration of the products happens to prospective customers. All the pricing decisions and negotiations with the customers are done by Infinera US. The contracts are agreed between Infinera US and the customers and Infinera India only plays the role of connect between Infinera US and the end customers. Once the contract is signed between Infinera US and the customer, the product deployment is done outside India and Infinera India does not play any role in the release or shipment of the products to the customers in India and the same is taken care of by the Infinera offices in US, London and Hong Kong. Infinera US has three sources from which they information about the Indian market scenario namely (1) through Infinera India's feedback regarding the technology and customer's requirements and preferences; 2) direct meets with the customers in India, and; 3) articles and industry reports published by competitors.

14. We now examine whether the above activities performed by the Appellant qualifies them to be an "intermediary". Section 2(13) of the IGST Act defines the term "*intermediary*" as - "*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.*"

15. From the above, it is evident that in order to be called an '*intermediary*' as defined under Sec 2(13) of the IGST Act, a person must satisfy the following conditions.

- (i) He must be a 'broker' or an 'agent' or 'any other person by whatever name called'.
- (ii) The supply of goods and services or both has to be 'arranged or facilitated' between two or more persons.
- (iii) He is not the person who supplies such goods or services or securities on his own account.

The term 'broker' has not been defined under GST. However, the term 'agent' has been defined in Section 2(5) of the CGST Act to mean *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*. Thus, while an agent includes a broker, it does not mean that every broker is an agent. The fundamental difference being that a broker is a middleman whose job is only to facilitate whereas an agent acts on behalf of the Principal. However, the definition of intermediary does not limit its coverage to a 'broker' and 'agent' but brings within its ambit even 'any other person, by whatever name called'.

16. The Appellant has argued that the expression 'any other person, by whatever name called' is to be interpreted by applying the principle of '*noscitur a sociis*' whereby the meaning of an unclear word or phrase should be determined by the words immediately surrounding it. By this, the Appellant has contended that the scope of 'intermediary' is limited to only a broker or agent. They have also argued that the principle of '*ejusdem generis*' would also be applicable in interpreting the definition of 'intermediary' whereby the phrase 'any other person, by whatever name called' should be read in conjunction with the terms 'an agent' or a 'broker' and hence the scope of the term 'intermediary' would get limited to only such persons who act similar to an agent or a broker or such class of individuals. We have considered this argument of the Appellant and find that neither of the two canons of statutory construction i.e '*noscitur a sociis*' or '*ejusdem generis*' are applicable in this case. '*Ejusdem generis*' is a canon of statutory construction where, when general words follow the enumeration of particular cases of things, the general words will be constructed as applying to things of the same general class as those enumerated. On the other hand, '*Noscitur a sociis*' is used for interpreting questionable words in statutes. It means that the questionable meaning of a doubtful word will be derived from its association with other words. The Apex Court in the case of State of Bombay V/s. Hospital Mazdoor Sabha, (AIR 1960 SC 610), has held that **noscitur a sociis** is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. In the

case of the definition of 'intermediary' as per Section 2(13) of the IGST Act, we have already mentioned that the terms 'broker' and 'agent' are fundamentally different. They do not form any category or class. When such is the case, the phrase 'any other person, by whatever name called' cannot draw its colour from the preceding words which are altogether different. The phrase cannot also be interpreted by applying the principle of *ejusdem generis* as the preceding words 'broker' and 'agent' do not form a distinct category or class to constitute a genus. Therefore, the phrase 'any other person, by whatever name called' will also include persons who are not necessarily similar to 'broker' or 'agent'. The words agent, and broker (used in definition of the word 'intermediary' in the IGST act) are only in the broad construct of being an intermediary or a representative but are not substitutes for each other. In addition, the third part of the definition expands rather than limits the meaning of who an intermediary is to one who is only an agent or a broker.

17. Coming to the second limb of the definition, the phrase "*who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons*" in the clause defining 'intermediary' gives a clear indication of intendment in as much as it ascribes a quality to the person who is to be construed as an intermediary. What can be inferred from this is that, it is not the type of person which determines whether one is an 'intermediary' or not. Rather it is the action of *arranging or facilitating the supply of goods or services or both, or securities, between two or more persons*, which qualifies a person as an 'intermediary'. An intermediary, thus can be a broker or agent or any other person and is only a facilitator for the supply of goods or services or both. The act of arranging or facilitation gives rise to two supplies: (1) Supply between the Principal and the third party (2) Supply by the intermediary to the Principal for a commission/fee. In other words, an intermediary is a person between the supplier and the recipient who arranges or facilitates the supply for a commission. The terms 'arrange' and 'facilitate' have not been defined in the Act. Merriam Webster Dictionary defines the two words as:

Facilitate: to make (something) easier; to help cause (something); to help (something) run smoothly and effectively.

Arrange: to bring about an agreement or understanding concerning; to make preparations; to move and organise (things) into a particular order or position; to organise the details of something before it happens; to plan (something).

Therefore, a general understanding of the term 'arranging' or 'facilitation' would cover a very wide range of activities ranging from marketing or sales promotion of the goods or services of the client, locating prospective buyers for the client's products or locating sources of supply of the goods or services required by the client, price negotiation with the prospective buyer/prospective supplier, procuring sales orders in respect of the goods or services of the client and like activities.

18. In the instant case, the activities performed by the Appellant, which have been enumerated in the earlier paras, show that they are facilitating the supply of optical networking equipment between Infinera US and the customers in India. The facilitation happens by way of the Appellant meeting the prospective customers in India, demonstrating the products of Infinera US, obtaining the feedback of the customers and passing on the same to Infinera US so that the necessary enhancements and modifications can be made to suit the customer's requirements. Although the pricing decisions and negotiations with the customers are done by Infinera US, the Appellants acts as a communication and coordination channel between their client (Infinera US) and the customers in India. This clearly amounts to facilitating the supply between the two parties i.e Infinera US and the customers in India.

19. The entire gamut of the activities performed by the Appellant viz. the act of identifying the prospective customers in India, promoting the products of the Principal to the prospective customers, addressing the queries of the prospective customers with regard to the Principal's products, communicating with the Principal about the comments and queries of the prospective customers are all part and parcel of facilitating the supply of products by Infinera USA to the customers in India. It is noticed that the Appellant carries out the activities as per the Pre-sales and Marketing Agreement in a "liaison capacity". A person acting in a liaison capacity is the person who has to act as the go between, is the emissary, the interceder, the intercessor, the intermediary, the medium, the representative for all proper purposes. He may be prohibited by the contract from entering into binding contracts but at the same time is authorised by it to act as the go- between the Principal's customers and prospects in India and the Principal itself.

20. The Appellant located in India, handles this function- broadly of sales promotion and advertising and market research for the foreign entity. Clearly, the engagement of the Appellant in the entire chain of sequence is with reference to the taxable territory and with reference only to such goods of the foreign entity that are intended to be sold in India. Devoid of the product and the taxable territory, there is no appreciation which can be had of the supply or the

engagement which the Appellant creates. When a similar activity is performed by a similarly placed entity in India who is acting to fulfill the same function for another Indian entity, the same would normally be exigible to GST. To hold otherwise in the case of this Appellant would go against the grain of the expressed intention of the legislature. This would happen only when we ignore the fundamental idea of GST being a destination based consumption tax and insist on applying the rule of *Noscitur a sociis* inappropriately to certain words/ phrases used in Section 2(13) of the IGST Act. It is an accepted fact that GST is destination based tax in the sense that it is levied on commercial activities and it is not a charge on the business but on the consumer.

21. Coming to the last condition, the definition of 'intermediary' as given in Section 2(13) of the IGST Act excludes a person who supplies such goods or services or both on his own account. It is the contention of the Appellant that the services of pre-sales promotion and marketing are being provided to Infinera US on their own account and they are not engaged in buying or selling or supplying goods on behalf of the Principal. It would be worthy to analyse the definition of the term "intermediary services" under the GST regime and pre-GST regime. Both the definitions have been mentioned below:

Under pre-GST regime	Under GST regime
<p><u>Rule 2(f) of the Place of Provision of Services Rules, 2012</u></p> <p>"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</p>	<p><u>Section 2(13) of Integrated Goods and Services Tax Act, 2017 (IGST Act)</u></p> <p>"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.</p>

22. From the above definitions, in essence, there does not seem to be any difference between the meaning of the term "intermediary" under the GST regime and pre-GST regime. In the pre-GST regime, an intermediary referred to a person who facilitates the provision of a

main service between two or more person but did not include a person who provided the **main** service on his account. Similarly, in the GST regime, an intermediary refers to a person who facilitates the supply of goods or services or both between two or more persons but excludes a person who supplies **such** goods or services or both on his own account. The phrase 'such goods or services' used in the definition of 'intermediary' implies that the person should not be supplying on his risk and reward entirely, the very goods or services whose supply he is arranging or facilitating. In the instant case, the Appellant is facilitating the supply of the products of Infinera US between the Principal in USA and the Principal's customer in India. He is not supplying the products of Infinera on behalf of the Principal. He is only arranging the contact between the Principal and the Principal's customer and the actual supply of the products is done by the Principal directly to the customer. The service of facilitating a supply of goods between the Principal and the customers is provided by the Appellant to the overseas client. The Appellant is not supplying such goods on his own account.

23. The argument of the Appellant that the pre-sales promotion and marketing services are supplied to the Principal on their own account and hence they fall within the exclusion clause of the definition of intermediary is not a correct interpretation of the law. The language of the exclusion clause is such that it is applicable to those persons who supply **such** goods or service (or both) on their own account. If a person either 'facilitates' or alternately 'arranges' any supply of goods or service (or both), between two or more persons, and does not supply such goods or service (or both) on his own account, he would be regarded as an 'intermediary'. At the risk of being repetitive, the Appellant is clearly facilitating the supply of the products of Infinera US (their overseas client) directly to the client's customers in the territory of India and is not supplying such goods on his own account. Therefore, the Appellant does not fall within the ambit of the exclusion.

24. The Appellant in his grounds of appeal has relied heavily on the ruling given by the Authority of Advance Rulings under the Service Tax provisions in the case of GoDaddy India Web Services (P) Ltd Ruling No AAR/ST/08/2016 wherein the Authority has ruled that pure marketing and promotion services would not be intermediary services. We have gone through the said ruling. The facts in the said case are that GoDaddy India provides a gamut of services to its client GoDaddy US and provides support services to assist GoDaddy US to develop its brand in India. A ruling was sought whether the various support services provided by GoDaddy India are naturally bundled as a single service being Business support service. The contention of the Revenue was that the various support services provided by GoDaddy India was not a

bundle of services but more appropriately covered under 'intermediary service'. The Authority in the said case, after taking note of the fact that the applicant (GoDaddy India) will not be engaged in arranging or facilitating provision of services by GoDaddy US to customers in India, will not secure orders from customers in India or arrange or facilitate the provision of any service by any third party service provider to GoDaddy US, held that the applicant is providing support services in relation to marketing, branding, offline marketing, etc on principal-to-principal basis to GoDaddy US which are a bundle of services naturally bundled in the ordinary course of business and accordingly is a single service being Business Support Service; that the business support service is the main service provided to GoDaddy US on their own account and hence is not an intermediary service. We find that the facts of the case before the Service Tax Authority for Advance Ruling, which are also briefly brought out above, are patently different from the facts in the case before us. As such the ruling given in the case of GoDaddy India does not buttress the case of the Appellant before us.

25. The Appellant has also relied on the Advance Ruling given under GST law, by the Maharashtra Authority for Advance Ruling in the case of M/s Asahi Kasei India Pvt Ltd in connection with the question whether the service supplied by the applicant under the service agreement would constitute "support service" or 'intermediary service'. The Authority after examining the provisions of law and the terms of the agreement, held that the activities of the applicant cannot be classified as 'intermediary service'. Notwithstanding the above, we find that the ruling given by the Authority at Maharashtra has examined the case of the applicant in the light of the terms of the agreement placed before it. The Authority in that case found favour with the terms of the agreement and held that the applicant in that case was not an 'intermediary'. Although the Pre-sales and Marketing Agreement in this Appellant's case does mention that they are independent contractors and are not to act as an agent of Infinera US in any manner, we find that the actual activity performed by the Appellant as outlined in the BAPA is one of facilitating the supply of goods by Infinera US to their customers in India. For the above reasons we are not inclined to give any weightage to the ruling given in the case of M/s Asahi Kasei India Pvt Ltd. In view of the foregoing discussions, we uphold the decision of the AAR that the pre-sale and marketing service provided by the Appellant of the products of the overseas client – Infinera US, is in the nature of facilitating the supply of the products of the overseas client and is appropriately classified as an 'intermediary service' as defined under Section 2(13) of the IGST Act.

26. In view of the above, we pass the following order:

ORDER

We uphold the Advance Ruling No KAR/ADRG 31/2019 dated 12-09-2019 and dismiss the appeal filed by M/s Infinera India Pvt Ltd on all counts.



(D.P.NAGENDRAKUMAR)

Member

Karnataka Appellate Authority
For Advance Ruling



(M.S. SRIKAR)

Member

Karnataka Appellate Authority
For Advance Ruling

20.01.2020

To,

The Appellant

Copy to

1. The Member (Central), Advance Ruling Authority, Karnataka.
2. The Member (State), Advance Ruling Authority, Karnataka
3. The Commissioner of Central Tax, East Commissionerate, Bangalore
4. The Assistant Commissioner, LGSTO-020, Bangalore
5. Office folder