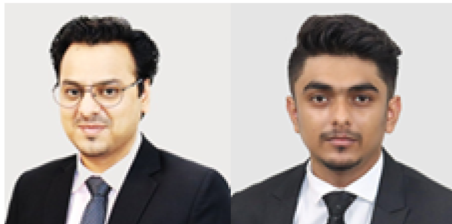
GST ARTICLE

The fall of the Intermediary Fiction: Omission, Legislative Intent, and the fate of pending GST Litigation

CA Rohit Kumar, Principal & CA Devansh Singhal, Managing Associate - Lex Taxient Advisors LLP

"The life of a statute lies not in the permanence of its words, but in the adaptability of its purpose."



Tax laws are far more than mere collection mechanisms, they are profound reflections of a State's governing philosophy. For years, the 'intermediary' provision within India's Goods and Services Tax (GST) framework served as a conscious safeguard. It was designed to ensure that simple facilitators could not use sophisticated contracts to claim tax benefits intended for genuine exporters. By labeling a provider as an intermediary, the State protected its domestic tax base and prevented domestic agents from masquerading as service exporters.

However, what began as a well-intentioned protection slowly devolved into a bureaucratic nightmare for the backbone of the Indian economy i.e. the high-value knowledge services sector. These providers found themselves caught in a 'middleman trap,' where sophisticated, value-added services were classified as mere facilitation. This classification stripped them of export benefits, leading to years of litigation and economic distortion. The Finance Act, 2026, marks the end of this era by omitting these provisions, signalling a strategic shift toward a more mature tax philosophy that prioritizes global competitiveness over rigid legal fictions.

Modern Business Outpaced Traditional Law

The intermediary construct was not an original GST invention, it was a legacy inherited from the 1990s Service Tax regime. Originally, Rule 2(f) of the Service Tax Rules was introduced to address a specific 'mischief,' brokers or agents structuring transactions to claim export benefits for services that were, in substance, performed and consumed within the domestic sphere.

While this logic held for traditional agency roles, it failed to account for the digital reality of the 2020s. Modern global service models, characterized by shared services, integrated value chains, and complex cross-border operations made it nearly impossible to distinguish between a 'main service' and mere 'facilitation.' By attempting to apply 20th century agency concepts to 21st century integrated knowledge services, the law created a friction point that blocked, rather than supported, genuine international trade.

Aligning with the 'Destination-Based' North Star

The Finance Act, 2026, restores the destination-based principle to the heart of the GST regime. GST is fundamentally intended to be levied where a service is consumed. Under Section 13(2) of the IGST Act, the default rule is that the place of supply is the location of the recipient. However, Section 13(8)(b) acted as a 'conceptual inconsistency' by creating a legal fiction that shifted the place of supply back to India if the provider was deemed an intermediary.

In its deliberations, the GST Council recognized that the principle of 'effective use and enjoyment', a concept that existed in a limited form during the Service Tax era, was missing from the GST place of supply rules. By omitting Section 13(8)(b), the government has acknowledged that intermediary services supplied

to foreign recipients are, in substance, enjoyed abroad. This alignment ensures the law finally matches the destination-based philosophy it was built upon.

Ending the Structural Disadvantage for Export-Oriented Sectors

The 'intermediary' label created an uneven competitive landscape that effectively penalized Indian service providers for being located in India. Indian companies providing high-value IT and IT-enabled services often saw their services taxed domestically, making the GST a direct cost that could not be recovered through zero rating. Meanwhile, foreign competitors providing similar facilitation often remained outside the GST net.

From a strategic policy perspective, the government determined that removing this provision would not lead to unchecked revenue leakage. The Law Committee noted that the State's interests remain protected through existing alternative mechanisms like Reverse Charge Mechanisms for services supplied to registered Indian recipients and Online Information Database Access and Retrieval provisions for digital services supplied to unregistered individuals. By utilizing these targeted safeguards, the Finance Act levels the playing field for the knowledge economy without sacrificing fiscal integrity.

The 'Omission' vs. 'Repeal' Technicality

The "omission vs. repeal" technicality centers on a legal debate regarding whether removing a statutory provision by 'omitting' it triggers different consequences for pending litigation and liabilities compared to 'repealing' it.

Historically, certain legal observations, such as those made in the ***Rayala Corporation (P) Ltd. v. The Director of Enforcement***, *MANU/SC/0645/1969* case, suggested there was a rigid distinction between an omission and a repeal. However, the Supreme Court clarified in the ***Fibre Boards (P) Ltd. v. CIT,***

2015-VIL-01-SC-DT case that these previous remarks were merely *obiter dicta* (non-binding incidental remarks). The Supreme Court firmly established that an 'omission' is, in substance, a form of 'repeal'. Therefore, the legal consequences of removing a statute should not be decided by terminological differences, but rather by examining the underlying legislative intent and any applicable saving provisions.

While the words 'omission' and 'repeal' are treated similarly in substance, a critical technical distinction remains based on the nature of the legislative instrument being removed. Section 6 of the General Clauses Act, 1897 ('GCA') which generally acts to preserve past rights, liabilities, and pending proceedings when a law is removed does not ordinarily apply to subordinate legislation. For instance, when rules like Rule 96(10) of the CGST Rules were omitted via notification without a savings clause, Courts[1] ruled that pending proceedings could no longer be sustained and effectively lapsed. In contrast, Section 6 of the GCA does apply to Central Acts enacted by Parliament. When a provision of a Central Act [such as Section 13(8)(b) of the IGST Act) is omitted], Section 6 typically steps in to preserve pending proceedings and past liabilities, unless a contrary legislative intention is evident. Therefore, the automatic lapsing of cases seen with omitted subordinate rules does not automatically apply when a Central Act provision is omitted.

Fate of Pending GST Litigation

The question whether pending intermediary disputes should continue must be examined not merely through the technical lens of saving provisions, but also in light of legislative intent, economic context, and constitutional principles governing fairness in taxation. While the law technically allows for the continuation of past disputes under the GCA, the transition toward the new regime suggests that courts may favour taxpayers in pending litigation for three primary reasons:

1. **Presumptive and uncertain revenue:** The GST Council explicitly noted that much of the projected revenue from intermediary cases was 'presumptive' and based on disputed interpretations rather than clear taxability. Courts are less likely to enforce a provision the legislature has admitted was based on uncertain grounds.

2. **Correction of structural inequities:** The Council recognized that the provision created a non-level playing field and distorted competition. Continuing to penalize Indian companies for past years under a provision now officially deemed 'distorting' and 'inconsistent' may be viewed as arbitrary and fundamentally unfair.

3. **Withdrawal of faulty machinery:** Section 13(8)(b) functioned primarily as a place of supply rule. A machinery provision designed to operationalize the tax, rather than an independent charging section. When the machinery used to determine the taxability of a transaction is withdrawn because it produces 'anomalous results,' courts often adopt a purposive interpretation to settle legacy cases in favour of the taxpayer.

Conclusion: A Policy of Progress

The omission of the intermediary provision is a calculated evolution of India's tax policy, not a rejection of its past. It represents a conscious decision to align the law with the economic reality of the knowledge economy, reduce the crushing burden of litigation, and support the nation's export-oriented sectors.

As the 'intermediary fiction' finally meets its end, it raises a broader question for the future of Indian jurisprudence. Are there other 'legal fictions' currently embedded in the tax code that have also been outpaced by the speed of modern

commerce, and are they similarly ripe for evolution to match the reality of 21st century trade?

[Date: 23/02/2026]

(The views expressed in this article are strictly personal.)

[1]. Sri Sai Vishwas Polymers v. UOI, *2025-VIL-491-UTR*, Hikal Limited v. UOI, *2025-VIL-959-BOM*, Messrs Addwrap Packaging Pvt Ltd. v. UOI, *2025-VIL-587-GUJ*