

Ocean Freight and GST- Are We Missing Something?

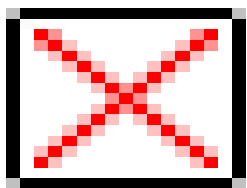
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"There is in all visible things - A hidden wholeness"

Thomas Merton



THERE

have been a lot of discussions, debates, Rulings ('AAR') on the levability of Goods and Services Tax ('GST') on the freight component of CIF imports. Various writ petitions too are pending before the High Courts. Apparently, there are few arguments and counter-arguments which the taxpayers as well as the Revenue have probably missed on their respective sides and consequently, can take the fight to an extra bout in the Court.

In this article, we shall inter alia discuss the intensity of such arguments to finally conclude on how the taxpayers should go about the question in hand. The ensuing paragraphs shall explain the scuffle between two different sets of contentions on the same point.

Extra-territorial operations vis-À-vis Place of supply

Extra-territorial Operations

Article 245(1) of the Constitution of India read with Article 245(2) solely authorises Parliament of India to make laws that have extra-territorial operations. At the same time, it imposes restrictions to make laws which have no nexus with the territory of India.

The levability of GST on ocean freight has also been challenged on the premise that such levy has no territorial nexus with the supply under consideration because the contract undertaken, service being executed, location of the supplier and location of the recipient all are outside India.

Revenue, on the other hand, has plenty of jurisprudence to establish a nexus. Tax on ocean freight is being carried forward from the erstwhile Service Tax regime to bring a level playing field for domestic shippers and foreign shippers. Also, the service is ultimately delivered in India.

The Supreme Court ***GVK Industries Limited v. ITO, (2011) 4 SCC 36 ('SC') = [2015-TIOL-10-SC-IT](#)***

has held that the extra-territorial aspect or cause must have or expected to have any direct or indirect nexus with the interests of India or Indians. There must be a real or expected to be a real relation to India whether or not the relation is 'sufficient' or 'significant'.

The ***SC Khyerbari Tea Co. v. State of Assam AIR 1964 SC 925***

, in holding the tax valid, observed that the State of Assam has a nexus with the movement of goods where the goods carried, though both starting and the destination points were in West Bengal, had to traverse for a mile and half in the State of Assam.

Another case ***Tata Iron and Steel Co. v. Bihar State AIR 1958 SC 45***

where SC observed that although the tax was on a completed sale, one or more of the ingredients of a sale like the delivery of goods could

furnish the connection between the taxing State and the sale.

Place of Supply and Levy

Even though the presumption would be in favour of extra-territorial operation and the nexus may be established too, the Parliament's intention to have an extra-territorial operation of GST law on the given facts must be the prime question for analysis.

Section 9 of the Central Goods and Services Tax [Act, 2017](#) ('CGST Act') and Section 5 of the Integrated Goods and Services Tax [Act, 2017](#) ('IGST Act') levy GST on an intra-state supply and inter-state supply respectively. Section 7 and 8 of the IGST Act provide the scope of inter-state and intra-state supply respectively.

In one case *M/s Indian Potash Limited- AAR AP, AAR No. 08/AP/GST/2019-dated February 22, 2019* = [2019-TIOL-472-AAR-GST](#), AAR held that the given transaction falls under Section 7(5)(c) of the IGST Act which reads as 'supply of goods or services or both in the taxable territory, not being an intra-state supply and not covered elsewhere in this section' and hence, liable to Integrated GST.

Now, the moot question here is whether the expression '**in the taxation territory**'

be read in exclusive terms or merely going through Indian waters for delivery of goods would also amounts to supply of services in the taxable territory.

Further, it is to be seen that except Section 7(5)(c) of the IGST Act, whether or not any other provision shall apply to attract levy. This question has its answer in another question which is the applicability of Section 13 on the given transaction.

Section 13 of the IGST Act applies only to supplies where the supplier or the recipient is outside India. It is to be analysed with the help of jurisprudence on whether 'or' can be read as 'and' or not.

It is well settled

Municipal Corporation of Delhi v. Tek Chand Bhatia, AIR 1980 SC 360, State (Delhi Administration) v. Puran Lal, AIR 1985 SC 741 that 'or' cannot be read as 'and' unless obliged to read so because 'or' does not generally mean 'and'. However, to give effect to the clear intent of the legislature, 'or' or 'and' can be used interchangeably *State of Bombay v. RMD Chamarbaugwala, AIR 1957 SC 699*.

Therefore, the two questions raised above vis-à-vis the applicability of Section 7(5)(c) and Section 13 to the given transaction need to be analysed in greater details considering the intent of GST law.

GST payable by a person other than the 'Recipient'- Position post February 1, 2019

Period upto January 31, 2019

RCM Notification [Notification 10/2017-Integrated Tax \(Rate\)](#) dated June 28, 2017

issued under Section 5(3) of the IGST Act provides that importer, located in India, shall pay the GST on services supplied by a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India.

It is true that the notification goes beyond Section 5(3) of the IGST Act read with definition of 'recipient' given under Section 2(93) of the CGST Act.

Post February 1, 2019 Refer IGST (Amendment) Act, 2018 with effect from February 1, 2019 vide Notification No. 01/2019- Integrated Tax dated January 29, 2019

New Section 5(4) of the IGST Act reads as under:

"(4) The Government may, on the recommendation of the Council, by notification, specify a class of registered persons who shall, in respect of supply specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services of both, and"

In the given transaction, the class of registered persons is 'importers', specified category of service is 'specified transportation service', unregistered supplier is 'foreign shipper' and the expression 'as the recipient' can cover the persons who are not the actual recipient as well. Therefore, it may not be said that the Government has no legal backing in IGST Act to collect tax from importers who are not the recipient of services.

Now, the moot question which needs due attention is whether amended Section 5(4) gives legal backup to or ratify the entry in RCM Notification which is specifically issued under Section 5(3) of the IGST Act and which otherwise was ultra vires the Act prior to February 1, 2019.

Double taxation or overlapping of fiscal statutes

Another ground is levying tax twice on a single freight amount. Under the erstwhile regime, Tribunal in plethora of cases *Rahil Air Bubbles Pvt. Ltd. v. CCE*, - [2019-TIOL-3266-CESTAT-AHM](#), *United Shippers Ltd. v. CCE*, - [2014-TIOL-2500-CESTAT-MUM](#), *Suzlon Energy Ltd. v. CCE & ST*, - [2018-TIOL-1700-CESTAT-MUM](#)

held that once an amount is subject to Customs Duty, it cannot be exigible to service tax. Also, the Supreme Court *Imagic Creative Pvt. Ltd. v. CCT*, - [2008-TIOL-04-SC-VAT](#) once held that payment of services tax and value added tax are mutually exclusive.

Conversely, Tribunal *Oracle India Pvt. Ltd. v. CC* - [2013-TIOL-2284-CESTAT-DEL](#)

also rejected the appellant contention that customs duty and service tax are mutually exclusive. The decision was affirmed by the Supreme Court *Commissioner v. Oracle India Pvt. Ltd.*, 2017 (1) TMI 475- SC.

Further, Constitution Bench of the Apex Court *Federation of Hotel & Restaurant Association of India v. Union of India*- [2002-TIOL-699-SC-MISC-LB](#)

, observed that a law with respect to a subject might incidentally affect another subject in some way. There might be overlapping but the overlapping must be in law. If the taxes are separate and distinct imposts and levied on the different aspects, then there is no overlapping in law.

Therefore, the argument of double taxation would not be sufficient in isolation. It must also be proved to the Courts that the 'aspect theory' has no application as far as the GST law enacted under Article 246A vis-À-vis Customs laws are concerned. It is for the reason that Article 246A overrides the classification under List 1 of Seventh Schedule to the Constitution and the aspect of 'supply' covers in its ambit both 'import of goods' and 'provision of services as a part of import of goods'

Conclusion

It can be inferred from the above that it would not be easy to contend certain grounds without strong backing. The taxpayers who are comfortable with payment of tax and consequently availing input tax credit may pay GST under RCM.

The taxpayers disputing the matter may also establish the defence on the following grounds:

- Parliament had no intention to make extra-territorial operation of GST law to the transaction under consideration given the language of Section 7(5)(c) and Section 13 of the IGST Act
- Amended Section 9(4) may not be construed so as to ratify or give legal backing to the entry in RCM Notification which otherwise was ultra vires the IGST Act
- Lastly, tax may not be collected twice on the freight amount because 'aspect theory' may not apply to Article 246A vis-À-vis Entry 84 in the List I of the Seventh Schedule to the Constitution

Are we missing something?

Liability to pay GST under RCM is applicable on services supplied by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India.

Will the RCM still apply where the agreement between the foreign shipper and the exporter is for transportation upto the factory premise of the importer? What should be the value in such cases?

[The views expressed are strictly personal.]

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