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GST

GST ON SHIPPING SERVICES - THE UNWARRANTED TURMOIL

Contributed by CA Sri Harsha & CA Manindar

Introduction:

Under the erstwhile service tax regime, the services by way of transportation of goods by vessel or aircraft from a place outside India up to the Customs Station of Clearance in India were originally covered under the Negative list as given under section 66D. With effect from 01.06.2016, these services are taken away from section 66D. While the transportation services by air remains exempted, services of vessel are made taxable. Doubts have been expressed by the industry and tax experts about the vires of taxing such services as the said services are subject to customs duty as part of the value of goods imported. These doubts continued even under GST regime also.

Governments have subjected these services to tax even under GST regime, without appreciating the reasons for levy under erstwhile Service tax regime and examining whether levy of GST on such services is really warranted in view of those reasons.

OBJECTIVE AND MANNER OF TAXATION UNDER SERVICE TAX REGIME

In terms of section 66B of the Finance Act, 1994, a service becomes taxable in India if it is not covered by negative list of services specified under Section 66D and the said services are provided in India. Whether a particular service is said to be provided in India or outside India shall be determined in terms of Place of Provision of Services Rules, 2012.

The transportation services provided by vessels up to the Customs Station of clearance in India were initially covered under Negative list and were exempt from service tax. On the other hand, the transportation services provided by vessels for taking goods from India to a foreign destination is also not taxable in India for the reason that in terms of Rule 10 of the Place of Provision of Services Rules, 2012, the place of provision of service is outside India (foreign destination). Therefore, the transportation services provided by vessels to and from India were not subject to service tax in India.

As a result of this non-taxable position, Indian shipping companies were at losing end because they were required to absorb a lot service tax and excise duty paid on their expenditure in India as a cost while the foreign shipping companies operate outside India need not pay such taxes. In order to ensure proper level playing field between the Indian and foreign shipping companies, amendments were brought in to remove the shipping services out of Negative list.

As a result of this amendment, with respect to transportation services for bringing goods into India, service tax is required to be paid. This will allow the Indian Shipping Companies to avail CENVAT Credit of service tax and excise duty paid on their expenditure .In case of transportation services provided by Indian Shipping companies for taking goods from India to a place outside India, the place of provision of service is said to be outside India. Hence no, service tax is required to be paid as the said service will not be subject to service tax in terms of section 66B.

However, the said services will qualify as export of service in terms of Rule 6A,only when the service recipient is located outside India. When service recipient is located in India, the services will not qualify as exported and hence CENVAT Credit cannot be availed on the expenditure relating to the said services provided to service recipients in India. In order to overcome this impediment, the definition of 'exempted service' under Rule 2(l) of CENVAT Credit Rules, 2004 is amended to exclude shipping services from the meaning of exempted service. Thereby, CENVAT Credit can be claimed on all inputs, input services and capital goods used in providing the shipping services for taking goods outside India, even though no service tax is required be paid. This will allow the shipping companies to use the entire CENVAT Credit for payment of service tax on the shipping services provided for bringing goods to India. This intent has been clarified by Central Government in Page 58 of Explanation Memorandum to Finance Bill, 2016. The relevant extract is reproduced as under;

IV	Relief Measures		
1	To provide level playing field to Indian Shipping lines vis-a-vis foreign shipping lines, it is being proposed to:		
	a) zero rate the services provided by Indian Shipping lines by way of transportation of goods by a vessel to outside India with effect from 1st March, 2016, and	No credit	Inputs, input services & capital goods credit
	b) impose Service Tax on services provided by them by way of transportation of goods by a vessel from outside India up to the customs station in India with effect from 1st June, 2016 so as to complete the credit chain and enable Indian Shipping Lines to avail and utilize input tax credits.	Nil	14%

However, Central Government has subsequently noticed that Indian companies are charging and paying service tax on all services provided by them towards transportation of goods to India irrespective of whether the shipping services are provided to an Indian entity or to a foreign entity. Whereas in case of foreign shipping companies, with respect to goods transportation to India under a contract with Indian importer, the importer in India is paying service tax under reverse charge mechanism. In cases where the goods are imported into India under CIF basis, the foreign supplier is arranging transportation by directly contracting with foreign shipping companies. Though the goods are destined to India and place of provision of service is in India, no service tax is being paid in India under this scenario. To this extent, the level playing field is not maintained.

To overcome this loophole and to ensure fairness in service tax levy, certain changes are made in Finance Act, 1994.Initially, Notification 3/2017-ST dated 12.01.2017 is issued to amend Notification 30/2012-ST dated 20.06.2012. As per the said amendment, with effect from 22.01.2017, in case of transportation services provided by a foreign vessel to a person located outside India for transport from a place outside India to customs clearance station in India, it is the responsibility of the person in charge of such vessel to pay the service tax in India.

Subsequently, vide Notification 15/2017-ST dated 13.04.2017, another amendment has been made to Notification 30/2012-ST dated 20.06.2012. As per the said amendment, instead of the person in charge of the foreign vessel, it is the importer who is liable to pay service tax with respect to the services provided by a foreign vessel to a person located outside India.

In case of CIF contracts, it is not the responsibility of Indian importer to pay freight charges to the vessel. It is the responsibility of the foreign supplier to arrange freight also. Therefore, the services of foreign vessel is said to have been received by foreign supplier. The price paid by Indian importer is all inclusive. Therefore, the Indian importer is generally not in a position to know the exact amount of freight charged by the foreign vessel. It is because of this reason, alternative tax payment mechanism has been prescribed by inserting sub-rule (7CA) in Rule 6 of Service Tax Rules, 1994. According to this rule, the Indian importer is given an option to pay service tax at 1.4% of the CIF value of the imported goods.

Apart from valuation, the point of taxation aspect is also critical in this situation, as no payment is being made directly by Indian importer to foreign vessel. Rule 8B is inserted in the Point of Taxation Rules, 2011 to provide that point of taxation for these services shall be the date of bill of lading of such goods in the vessel at the port of export.

Taxation under GST Regime:

Under the GST regime, the same taxation mechanism is prescribed. Sl. No. 9 of Notification 8/2017-IGST(Rate) dated 28.06.2017 prescribe the rate of GST as 5% for these services with a condition that no input tax credit shall be availed on goods other than ships, vessels including bulk carriers and tankers shall be allowed. This implies that input tax charged on services, ships or vessels being capital goods can be availed without any restriction.

Sl. No 10 of Notification 10/2017-IGST(Rate) dated 28.06.2017 provides that in case of services supplied by a person located in non- taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, GST is required to be paid by an importer of the said goods located in India.

Explanation 4 to Notification 8/2017-IGST(Rate) dated 28.06.2017 provides that the value of transportation services provided by a foreign vessel for bringing goods from a place outside India up to the Customs station of clearance in India shall be deemed to be 10% of CIF value of the imported goods.
With the above understanding of tax implications on services by way of transport of goods by Vessel both under erstwhile Service Tax Regime and under current GST Regime, let us look into the legal complications that may arise out of this levy.

Legal Complications on Sustainance of levy:

a) Validity of Levy as Government is taxing the activity as 'Import' under Customs:

In terms of section 14 of Customs Act, 1962 read with Rule 10(2) of Customs Valuation (Determination of Price of imported Goods) Rules, 2007,the cost of transport, loading, unloading and handling charges associated with the delivery of the imported goods to the place of importation and the cost of insurance to the place of importation shall be included in the value of goods imported for the purpose of computation of basic customs duty.

Under the pre GST regime, there will be a levy of counter veiling duties equivalent to excise duty and VAT under section 3(1) and Section 3(5) of the Customs Tariff Act, 1975.Thus, the value of transportation services is included in the value of goods and accordingly are subject to basic and counter veiling duties. In such a case, the issue that emanates is that whether there is any requirement to pay service tax on the transportation services provided? The said issue was considered by Mumbai CESTAT in the case of United Shippers Limited vs. CCE, 2015(37)STR1043(Tri-Mumbai) in connection with the Revenue proceeding to levy service tax on barge charges incurred for bringing the goods from mother vessel to jetty at the time of import of goods. It was held vide para 3.2-*"Further, it is submitted that this activity of transportation of goods from the mother vessel to the jetty is earned out before the goods crosses the customs frontier of India, and consequently, will be construed to be undertaken while the goods are still in the import stream and prior to the successful completion of the process of importation of the goods into India. [Garden Silk Mills v. Union of India, [1999 (113) E.L.T. 358 (S.C.)]. Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of Hotel Ashoka v. Asst. Commr. of Commercial Taxes [2012 (276) E.L.T. 433 (S.C.)], wherein it held that an activity of sale of items in the duty free zone of an airport will not attract the levy of VAT, even though such sale is actually taking place within the physical territory of India, as such goods had not crossed the customs frontier of India to form a part of the mass of goods meant for consumption in India, and had therefore not been imported into India. It is therefore, submitted that taxing the transshipment of the goods in the present case will be tantamount to levying Service Tax on an activity of import of goods, which is impermissible in law"*

The above decision was upheld by Supreme Court in the case of Commissioner v. United Shippers Ltd. - 2015 (39) S.T.R. J369 (S.C.). In view of the ratio laid down by Mumbai CESTAT, any activity associated to bringing goods into India before the goods cross the customers frontiers of India will be part of importation and subject to customs duty. In such a case, levy of any tax other than customs duties would not be permissible.

b) Double Taxation under Integrated Goods and Services Tax Act, 2017

Section 5(1) of Integrated Goods and Services Tax Act, 2017 is the charging section for levy of integrated tax on inter-state supply of goods or services. The said section is reproduced as under;

5. (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975.) on the value as determined under the said Act at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962. (52 of 1962.)

Section 5(1) provides that integrated tax shall be levied on inter-state supply of goods or services. While proviso to section 5(1) provides that integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975. This integrated tax shall be levied on the value and at the point when duties of customs are levied under section 12 of Customs Act, 1962. In view of this proviso, the levy of integrated tax on goods imported into India will only be at the time of clearance from customs authorities.

Further, the term 'import' is defined under section 2(10) of Integrated Goods and Services Tax Act, 2017 which mean bringing into India from a place outside India. Thus, all services if any involved in import of goods into India would be considered as importation and gets covered by proviso to Section 5(1).

In so far as levy of service tax on transportation services by vessel is concerned, the levy being 'service tax' is different from counter veiling duties equivalent to excise duty and VAT that are levied on goods imported. Whereas under GST regime, the counter veiling duty is only integrated tax that is leviable on importation of goods. The tax that is independently sought to be levied on transportation services of vessels and the tax that is going to be levied on the value of transportation services embedded in the cost of imported goods is one and same. This may amount to double taxation. One at the rate that is applicable for services by way of transportation of goods by vessel and second at the rate that is applicable for imported goods.

Double taxation is not barred by Constitution. However, the same should not be by necessary implication. In the case of Jain Brothers v. Union of India - (1970) 77 ITR 107, the aspect of double taxation was considered wherein it was held that it is not disputed that there can be double taxation if the legislature has distinctly enact edit. It is only when there are general words of taxation and they have to be interpreted, they cannot be so interpreted as to tax the subject twice over to the same tax.

There is no express intention made by Parliament in the Integrated Goods and Services Tax Act, 2017 for double taxation with respect to transportation services that are required for importation of goods into India. Instead, it has been expressly clarified that the levy pertaining to importation of goods shall be at the value and at the point as specified in Customs Act, 1962.It is only the Government, in the delegated legislation, has sought to notify the rate of tax separately for these services. In view of this reason, levy of integrated tax on services of transportation of goods by vessel may not be considered as valid by necessary implications of section 5(1) ignoring the proviso.

c) Tax shift to importers may not hold good under GST Regime:

Section 68(2) of Finance Act, 1994 provides that with respect to such taxable services as may be notified by Central Government, the service tax payable on such services shall be paid by such person and in such manner as may be prescribed. Thus section 68(2) empowers the Central Government to shift the responsibility to pay service tax to any other person connected to a transaction and it need not be service receiver alone.

In view of the reason, the amendment made in Notification 30/2012-ST vide Notification 15/2017-ST dated 13.04.2017 to shift the responsibility to pay service tax on to the importer in case of services by way of transportation of goods by vessel, when provided by a foreign entity located outside India to another entity located outside India is absolutely valid.

Coming to GST regime, section 9(3) of Central Goods and Services Tax Act, 2017 and Section 5(3) of Integrated Goods and Services Tax Act, 2017 empowers Central Government to notify on the recommendations of the council, the categories of supply of goods or services, tax on which shall be payable on reverse charge basis by recipient of such goods or services. Further, section 9(5) and section 5(5) of the said Acts expressly empowers the Central Government to notify categories of supply of services for which e-commerce operator (not a receiver of service) be made responsible to pay GST to Government.

In view of the express provisions of charging section, the responsibility to pay GST can only be shifted to service recipient. However, Sl. No 10 of Notification 10/2017-IGST(Rate) dated 28.06.2017 provides that in case of services supplied by a person located in non- taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, GST is required to be paid by an importer of the said goods located in India. Therefore, in cases of transportation services provided by vessels of foreign entity, Central Government has shifted the tax payment responsibility to an Indian importer who is never ever be considered as service recipient. In view of this reason, it appears that Central Government has excess utilised their delegated power of legislation in shifting the tax responsibility to importer which may be held as legally not valid by courts.

In view of the above discussion, various legal complications are arising on validity of levy of service tax/GST on the services of transportation of goods from outside India to India. This will lead to unnecessary litigation. The matter is already taken up by Gujarat High Court in the case of Mohit Minerals Private Limited vs. UOI, 2018(2) TMI-770-Gujarat and is pending for final disposal.

The Missing Rationale in the Present Taxation Approach:

As discussed above, it was the policy of the Legislature to exempt the services relating to transportation of goods by vessel and air from the scope of service tax. However, the amendments were brought in erstwhile Service Tax law to bring services of transportation of goods by vessel within the tax net for definite objective of level playing between Indian shipping companies and foreign shipping companies.

Though it is said that under GST regime, exemptions are to be restricted to minimal, it can still be concluded that the policy of Legislature to exempt these services may continue to hold as transportation of goods by air continues to be exempt under GST regime.

As stated above, even if we exempt the services of transportation by vessel under GST regime, still tax is going to be collected on these services by way of inclusion in value of imported goods. The applicable rate of GST on these services is only 5%. This implies that Government is getting much higher rate of tax by taxing these services as part of the value of imported goods. If this is the situation, it would be prudent on the part of the Government to exempt these services as a step towards better administration of law. Further, in most of the situations, what ever the tax paid on these services would be available as input credit to the importers.

If these services are exempt from payment of GST, the issue that arises is level playing field for Indian shipping companies as compared to foreign companies. This can be easily achieved by notifying these services as 'Zero-Rated Supplies' under section 16 of Integrated Goods and Services Tax Act, 2017. By doing so, the Indian shipping companies can claim input tax credit of all inputs, input services and capital goods used in providing services for transportation of goods from India and to India. The said input tax credit can be claimed as refund section 54 of the Central Goods and Services Tax Act, 2017. This will lead to absolute level playing field between Indian and foreign shipping companies and at the same time, there is no loss of revenue to Government as tax is collected by including the value of these services as part of the value of imported goods.

Conclusion:

In view of the above discussion, it can be seen that levy of erstwhile service tax on shipping services was to ensure proper level playing field between the Indian and Foreign shipping companies by bringing the services within tax net. The same position was adopted in GST regime also. However, the methodology adopted to tax these services will pave way to many legal complications as discussed above and encourage unworthy litigation. On the other hand, Government can still protect the interests of the Indian shipping companies without bringing these services into tax net under GST regime, by simply notifying these services under zero-rated supply. This will allow them to claim refund of input tax credit availed and there will be level playing field between Indian and foreign shipping companies. Therefore, Government is required to rethink their policy of taxing these services as the same has turned out to be an unwarranted turmoil.

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INTERNATIONAL TAXATION

MF COMPLICATIONS AND TRANSFER PRICING UPDATES

Contributed by CA Suresh Babu S

Applicability Criteria for Master File compliance:

PART A of Form 3CEAA (Masterfile) – **ALL COMPANIES part of the MNC group and that satisfy the definition of constituent entity as per Sec 286,** shall mandatorily file Part A of the Master File irrespective of whether they meet the below threshold limits or not. The due date for filing the same for Financial Year 2016-17 is **31st March, 2018.**

PART A and PART B of Form 3CEAA (Masterfile) – An entity satisfying the below mentioned monetary ceilings have to mandatorily file both the parts of Master File i.e., Part A as well as Part B.

- Consolidated Group Turnover > 500 Cr "AND"
- International Transactions with AE's > 50Cr
  Or Any Sale/ Purchase/ Lease/ Transfer/ Use of Intangible Property (IP's) > 10Cr

I. Complications ensued while filing Master File in March 2018:

i) International Transactions inclusion:
The regulations/provisions are silent on the definition of international transactions (whether to include outstanding receivables/payables and loan account transactions) and accordingly many entities were in a dilemma whether Part B of Master file is applicable or not. Since, the Master file compliance is being done for the first time; many entities to be on safe side have filed both the Parts of Master file.

ii) Errors encountered while filling information in Master File templates:
It has been observed that the country code has to be entered while filling in the csv format. For Eg: the countries having its PE in United Kingdom have to be given a code of UK but the utility was not accepting the same code and there was an error dialog box.

iii) Word Restrictions:
Since the utility had some character restrictions (1000 to 3000 character restriction in few clauses), the entities were required to maintain a full length Master File separately and accordingly information had to be cut short and then uploaded into utility.

iv) Transfer Pricing Policies:
Out of many entities that have filed Master File, most of the entities have filed, stating that there is no transfer pricing policies. However, all entities have to include general operational arm's length policy statements pertaining to the respective clauses even though there were no such formal/written policies.

v) Patent, Copy rights vs Intangible Properties:

Many entities were in a dilemma whether to include patents, copy rightsetc in the list of ownership of intangibles since there was no clear definition of Intangible Property. Further, the companies also had data security issues as they did not want to list out their IPs and business secrets.

vi) Transactions pertaining to the group entities:

Master file is filed on the behalf of the entire group. Accordingly, the agreements/ transactions occurred in between the group entities (between AEs) have to be listed and reported. But many entities have considered only Indian entity transactions same and filed Master file.

II. TP Updates – March 2018

1. Amendments in Singapore's Transfer Pricing Guidelines:

i) Threshold for Maintaining TPD (Transfer Pricing Documentation):
- ❖ All entities whose turnover exceeds more than S $ 10 Million have to mandatorily maintain TPD and
- ❖ The turnover exceeds S $ 10 Million in the preceding two years of FY 2018

ii) Exemption from Maintaining TPD:
- ❖ If the gross revenue for prescribed period is not more than USD 10 million;
- ❖ Specified transactions mentioned in Rule 4 of the TP documentation rules

iii) Maintenance of 3 tiered documentation:
- ❖ documentation at the group level,
- ❖ documentation at the entity level; and
- ❖ Country-by-country report

iv) Penalties for Non-Maintaining of TPD:
- ❖ Entities which does not comply with the Provisions of SITA (Singapore Income Tax Act, 2017) will be penalized by penalty of S$ 10,000

v) A surcharge of 5% shall be imposed on the companies who are not preparing of TPD or maintaining improper TPD

vi) A new section 34F is introduced in SITA, entities shall now be required to maintain TPD under this section.

2. Clarification for furnishing Country by country reporting:

Section 286(2) – All entities shall file Master File/ CbC Report within due dates under Section 139(1).

Section 286(4) - An entity of an international group resident in India shall furnish the report if the parent entity is resident of a country or territory,—

(a) With which India does not have an agreement providing for exchange of the report.

(b) There has been a systemic failure of the country or territory for exchange of report.

Clarification w.r.t Section 286(4):

The CBDT had clarified that the due date of 31st March, 2018 applies for furnishing of CbC report under sub-section (2) of section 286 only and not under sub-section (4) of the said section. It is further stated that the Finance Bill, 2018 (as passed by the Lok Sabha) has proposed that the due date for furnishing of CbC report under sub-section (4) of section 286 shall be as prescribed. Accordingly, the time for furnishing of CbC report under sub-section (4) of section 286 of the Act is proposed to be prescribed after the enactment of Finance Bill, 2018.

3. OECD's additional guidance on attribution of Profits to Permanent Establishment:

As to the profit attribution rules, the report concluded the changes to the definition of PE in Article 5 of the OECD Model Tax Convention did not require substantive modifications to the existing rules and guidance on attribution of profits to PEs under Article 7 of the OECD Model Tax Convention. However, the report did mandate the development of additional guidance on how the existing rules of Article 7 would apply to PEs resulting from the changes in the report (in particular for PEs outside the financial sector), taking into account the revised guidance contained in the Report on Aligning Transfer Pricing Outcomes with Value Creation (Actions 8-10 Report, OECD 2015).

Under this mandate, the Committee on Fiscal Affairs issued two public discussion drafts on the attribution of profits to permanent establishments (in July 2016 and June 2017).

Interested parties were invited to comment on the proposed additional guidance regarding the application of the rules in Article 7 of the OECD Model Tax Convention to PE's resulting from the changes to Article 5 of the OECD Model Tax Convention. The guidance contained in this report, which has been prepared considering the comments received, sets out high-level general principles outlined in paragraphs 1-10 and 26-44 for the attribution of profits to permanent establishments in the circumstances addressed by the Report on BEPS Action 7. Importantly, countries agree that these principles are relevant and applicable in attributing profits to permanent establishments.

In particular, the additional guidance covers permanent establishments arising from Article 5(5), including examples of a commissionaire structure for the sale of goods, an online advertising sales structure, and a procurement structure. It also includes additional guidance related to permanent establishments created as a result of the changes to Article 5(4), and provides an example on the attribution of profits to permanent establishments arising from the anti-fragmentation rule included in Article 5(4.1).

4. India Signs first bilateral agreement with USA:

I ndia has signed the first bilateral agreement with USA. This APA was in respect of IT/ ITES sector and involved in determining a cost-plus markup for transactions of an Indian captive service provider. The Central Board of Direct Taxation has indicated that there are many more bilateral APAs with the United States pending, and certain of these bilateral APAs could possibly be concluded in 2018.

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