

## CROSS BORDER TRANSACTIONS - ISSUES UNDER GST LAW



CA Nirali Vora

Email : np.vora0402@gmail.com

The phrase “*Vasudhaiva Kutumbakam*”, which translates to "One Earth, One Family, One Future," gained its popularity during the Group of Twenty (G20) summit which was hosted in India in 2023. Under the Indian Presidency, the G20 in 2023 focused on the theme, 'One Earth, One Family, One Future'. The Foreign direct investments (FDI) & Climate change being few of the core topics of discussion of the summit, The G20 also helped to promote liberalisation by entering into Trade facilitation agreements.

As the world comes closure, there arises a need to assess its effects across various cross border segments. One such very crucial segment being indirect taxes of any economy for ease of global trade.

With the above backdrop, Let's discuss some of the key impacts from indirect tax perspective on cross border transactions:

### Global trading of goods

#### A. Importation of goods

Typically, Importation of goods are leviable to duties of customs upon clearance of goods in India by filing of bills of entries. As per proviso to section 5(1) stipulated under IGST Act, 2017, the importer of goods is required to discharge Basic Customs duty, applicable cess & Integrated Goods & Service Tax (IGST) as per applicable rate on the assessable value arrived in accordance with prevailing rules & provisions of Customs Law. IGST so paid on importation of goods can be claimed as input tax credit in GST returns by the importers subject to section 16 & Section 17 of CGST Act, 2017.

The rates of duties on imports of goods are subjected to exemption Notifications (conditional / non-conditional). Certain provisions of Foreign Trade Policies & other Foreign Trade Agreements also play pivotal role to determine the effective rate of duties on goods imported.

Additionally, in cases where the transaction involved procurement of goods from related parties located outside India, Special Valuation Branch (SVB) intervenes to assess the valuation and verify if the prices have been influenced due to the relationships. The given process of SVB is governed as per No 05/2016 dated 9th February 2016. Whilst there is a possibility of facing practical nitty-gritties in entire SVB investigation, however, the value is determined as per the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. As the term related parties has been defined in a different manner in various Indian Laws such as Income Tax, Companies Act, GST, Customs, SEBI etc., it becomes imperative to analyse the impact of all the laws including SVB applicability.

It is observed that in some cases, the foreign counterpart enters into an agreement with Indian entities for the exploitation of intellectual property rights such as licensed trademark, technical knowhow, patent & brand at the global level. If the consideration agreed is said to be linked to quantity of goods imported from foreign suppliers & if the consideration is a pre-requisite for importation of goods, then

as per Rule 10(1)(c) of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, such consideration being a condition of sale would be an addition to assessable value & would attract customs implications. As against that, wherever one can establish the payments are not pre-requisites & are linked with the event after importation of goods, it would be considered as an import of service (not part of import of goods) upon fulfilment of the condition stipulated in the definition of imports of services under GST Law and would attract implication of GST under reverse charge mechanism. Thus, there is an inter-play between Customs & GST Laws.

## **B. High Seas Sales, Warehoused Goods & Out & Out sales:**

In normal parlance, the term High Seas Sales (HSS) can be said to be defined as the sales of goods to the customers during the period when goods have been sailed from load port but have not reached the destination port i.e., sales in the transit.

In HSS, the goods are being sold before in transit i.e., before crossing the customs frontiers of India on a journey from foreign nation. The ownership & title is transferred high seas. Accordingly, the ultimate Indian customer undertakes entire customs clearance process.

In Central Sales Tax regime, as per section 5(2) of Central Sales Tax Act, 1956, HSS were neither treated as intra nor inter State sales, thereby not made exigible to tax under the State and CST Acts. However, upon implementation of GST, the question of applicability of GST remained unanswered. To clear the air around this, GST council initially issued circular in 2017 with respect to GST treatment on high seas sales. However, after a lot of hue & cry, at a later point in time, GST council made a retrospective amendment in GST Law by insertion of Entry 8(b) in Schedule III of GST Act, 2017 for HSS GST treatment. The extract of the schedule is captured below for reference.

### *Schedule III - ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES*

*7. Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India.*

*8. (a) Supply of warehoused goods to any person before clearance for home consumption.*

*(b) Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption.*

*Explanation 2. – For the purposes of paragraph 8, the expression "warehoused goods" shall have the same meaning as assigned to it in the Customs Act, 1962 (52 of 1962).*

As of today, HSS, warehoused goods and out & out sales are kept outside the purview of GST through afore stated entries of schedule III of CGST Act, 2017, it is given retrospective impact effective from 1<sup>st</sup> July 2017 with no requirement of Input tax credit reversals. It is worthwhile to know that historically HSS always mandates the companies to maintain robust documentation such as HSS agreement, Bills of Lading, Invoices etc. to substantiate the sales in transit to avoid any indirect tax implications in India.

## C. Exports of goods

The goods moved out of India are considered as an export of goods, resultantly, the exporters are entitled for the benefit of zero-rated supplies of goods by not attracting GST. The exports are also benefitted by refund of GST paid on input & input services used in exports of goods.

### Export & Import of services

#### A. Intermediary services:

The specific provision of place of supply of 'intermediary services' under section 13 of the IGST Act gets invoked only when either the location of supplier of intermediary services or location of the recipient of intermediary services is outside India. The circular has been issued in 2021 clarifying certain key aspects of intermediary provisions under GST. It emphasises on some pre-requisites for determination of intermediary services, which has to be considered as guidelines for determination of intermediary in line with the definition of intermediary covered in Section 2(13) of IGST Act, 2017.

Whilst the circular reduces considerable uncertainty of GST implications of intermediary services, however, the hot favourite "intermediary services" continues to remain in a grey area for many service providers.

#### B. Transportation services:

Logistics is the lifeblood of international trade, as it serves as the invisible force that ensures the effective movement of goods. The below tabulation can be referred for ease of understanding:

##### i. Indian Recipients of services:

##### ii.

Particulars	Import shipment	Export Shipment	Out & out shipment
Indian Shipping Lines	Taxable under forward charge @5% (subject to ITC on inputs disallowed)	Exempt till 30 <sup>th</sup> September 2022. However, w.e.f. 1 <sup>st</sup> October 2022, taxable under forward charge @5% (subject to ITC on inputs disallowed)	Taxable under forward charge @5% (subject to ITC on inputs disallowed)
Foreign Shipping Lines	Taxable under Reverse charge mechanism @5%	Taxable under Reverse charge mechanism @5% (Due to omission of section 13(9), place of supply is as per 13(2))	Taxable under Reverse charge mechanism @5% (Due to omission of section 13(9), place of supply is as per 13(2))

## iii. Foreign Recipients of services:

Particulars	Import shipment	Export Shipment	Out & out shipment
Indian Shipping Lines	Qualify for exports of services and considered as zero-rated supplies. (Due to omission of section 13(9), place of supply is as per 13(2))	Qualify for exports of services and considered as zero-rated supplies.	Qualify for exports of services and considered as zero-rated supplies.
Foreign Shipping Lines	Not taxable  The Apex Court judgment in case of Mohit Mineral Pvt Ltd. has deliberated on Non-levy of GST in case of CIF arrangements where transport services are procured from foreign shipping lines by foreign consignor.	Not taxable	Not taxable

(\* ) For Supplies to customers of Nepal & Bhutan, the applicability undergoes a change.

The above tabular explanation can be referred only for transportation services. There are many other services such as handling, loading, unloading etc., linked to transportation services. However, the GST treatment of such services depends upon the terms agreed by the supplier & purchaser of goods.

### **Indian establishment & Head quarter cross charges:**

#### **Analysis of Indian establishment & Head quarter cross charges:**

In case of supply of service by one branch or agency or any representation office of a foreign company to any establish of the said foreign company out of India would not qualify for exports of services since the supply would be treated as supply between establishments of distinct persons. This would be a violation of one of the conditions as provided in the definition of exports of services.

However, import of services between branches without consideration would be taxed based as per entry no.4 of Schedule I, which is read as "*import of services by a person from a related person or from any of his other establishments outside India, in the course or furtherance of business*".

The explanation 1 to section 8 of IGST Act, 2017 envisages the methodology to determine whether the branches / offices can be termed as establishments of distinct person. Whist, as per literal interpretation, the definition of import of services only covers judicial persons within its ambit, however, the deeming provision creates a charge to attract GST on the transactions between branches not being a separate person. On this aspect, as per news prevailing, the foreign Airline companies & foreign Shipping Line companies are under the radar from GST intelligence investigation wing. The outcome of which may turn out to be next iconic litigation in GST.

Any transactions between subsidiary & holding companies or related sister concerns would not directly get qualify as an export of services, the other conditions stipulated in the definition of exports of service need to be analysed. Any services & cost recharge by the Indian subsidiaries to outside holding companies / sister concerns would require to have a microscopic look of the definition of exports of services & relevant rules to determine GST applicability.

### **Secondment of Employees:**

Last year, The Supreme Court provided an important ruling in the case of CCE & ST vs. Northern Operating Systems Pvt. Ltd ("NOS judgment") which unsettled the position of law relating to applicability of indirect taxes to secondments. This mandated all the organisation to relook at their established service tax positions. Due to this judgement, DGGI & other officials started issuing numerous notices & summons to validate the issue of who would be the employer in a secondment arrangement through the judgement and its implications on GST on salary costs. In maximum cases, it is observed that the salaries are being paid to foreign expats from Indian companies, but certain social security cesses continued to be paid by foreign counter parts. It is said typically that deputed employees can be termed to be employees for entire group, however, various Show cause notice were issued challenging Non-levy of GST. Recently in some of the High courts, such SCNs have been stayed. CBIC has also issued instructions to the tax authorities to analyse the aspect of secondment on cases to case basis without following straight jacket formula by issuance of Notice u/s 74 of CGST Act. For future, the companies need to undertake a thread-bare analysis of these secondment contracts from overall perspective.

### **Corporate Guarantees:**

The term corporate guarantee was also much in news in last year from GST perspective. Considering latest amendment, in a scenario where the guarantee is given by the parent entity located outside India for a borrowing by its subsidiary in India, the transaction will qualify as 'import of services' under GST and would attract GST in the hands of subsidiary in India. However, the reverse scenario, where the Indian parent company would be providing such guarantees for foreign subsidiaries, it may not automatically qualify for exports of services due to absence of consideration flowing from foreign subsidiaries. There is still a space for GST council for further clarification.

### **Co-location services:**

The co-location services have gained its momentum currently due to the growth of Indian data centre market. In line with recent circular, co-location services (some of the services listed in the circular dated 27th October 2023) would be governed by default rule i.e., recipient based rule. Thus, any Indian data centre service provider providing the co-location services can explore the benefit of zero rating of exports of services.



### Online Information DataBase Access and Retrieval(OIDAR) Services:

With the rapid growth of current digital age and boom of social media platforms, the Government had to bring in the taxability on online services. OIDAR is a category of services provided through the medium of internet and received by the recipient online without having any physical interface with the supplier of such services. The definition of OIDAR as per IGST Act is an illustrative, however, it is indicative & not exhaustive. To determine if services are OIDAR, the two-fold test needs to be undertaken viz,

- (i) Whether Provision of service mediated by information technology over the internet or an electronic network,
- (ii) Whether it is impossible to ensure in the absence of information technology.

Particulars	Suppliers	
	Supplier located in taxable territory	Supplier located in a non-taxable territory
Taxable recipient	Taxable under forward charge	Taxable under reverse charge
Non-taxable online recipient (including for personal use)	Taxable under forward charge	Taxable under forward charge (through intermediary as per Section 14 of IGST Act, 2017)

The Finance Act 2023 removed the terms “minimal human intervention” and “essentially automated” from the definition of OIDAR services. Resultantly, this had widened the scope of OIDAR services. Further, the definition of Non-taxable online recipient has been amended to include recipient who are using the OIDAR service for personal usage, which was previously exempt.

With the above in-depth discussion on various points, we can surely conclude that the cross-border transactions would continue to evolve as the world grows whether in terms of acceptance of digital currencies for payments, evolution of tech-based platforms, steps towards carbon footprints of industries or any other manner. The change would undoubtedly entail all of us to be aware about the indirect taxability around the same.

