News & Publications

PUBLICATIONS
ARTICLES
NEWSLETTERS
HANDBOOKS
NEWS
EVENTS
ARCHIVES
SUBSCRIBE
OTHER LINKS

# Ocean Freight under GST – A Sea Change

*By* S Rahul Jain and R. Sahana

*Introduction*

In the landmark decision of *Govind Saran Ganga Saran* v. *Commissioner of Sales Tax* [1985 AIR1041]. the Hon'ble Supreme Court held that one of the canons of taxation is that there must be a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax. If this component is not fulfilled, the Apex Court stated that "*it is difficult to say that the levy exists in point of law".*

The intention of this article is to identify whether the GST law clearly and definitely indicates the person who is obliged to pay tax in a transaction involving services provided by a shipping line located outside India to an exporter located outside India for the purpose of transporting goods to an importer located in India. In other words, upon whom does the liability to pay GST vest when ocean freight is paid in case of CIF ('Cost-Insurance-Freight') import.

S. No. 8 of Notification No. 8/2017-Integrated Tax (Rate) dated 28th June, 2017 prescribes a rate of 5% for services provided or agreed to be provided by a person located in non-taxable territory to 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. Thus, *prima facie* it seems as though ocean freight in case of CIF import will be subject to GST.

*Service Tax v. GST*

We shall proceed to summarise the evolution of the law relating to ocean freight from the erstwhile Service tax regime up to the latest GST law in the following manner: -

*Service Tax (Pre-2017) [10-5-2013 - 21-1-2017]*

· Services by way of transportation of goods by an aircraft or a vessel from a place outside India to the customs station of clearance in India was specified in the negative list which thereby, exempted the service from Service tax. - Section 66D(p)(ii).

· The said entry under the Negative list was omitted with effect from 1-6-2016 and a *pari materia* provision was incorporated in the Mega Exemption Notification No. 25/2012-ST, dated 20-6-2012 *vide* Entry 53. Resultantly, the benefit of the exemption continued.

*Service Tax (Post 2017) [22.01.2017 - 1.07.2017]*

· The Mega Exemption Notification was amended *vide* Notification No. 1/2017-ST, dated 12-1-2017 and a proviso was inserted excluding from the ambit of the exemption services by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India received by a person located in a non-taxable territory.

· Further, Notification Nos. 2/2017-ST and 3/2017-ST, both dated 12-1-2017 were introduced and the same entrusted the liability to pay tax on the person in India who complied with Sections 29, 30 or 38 or their agent under Section 148 of the Customs Act, 1962, i.e., the foreign liner or steamer agent and not the service provider.

· This position was amended with effect from 23-4-2017.

· Notification Nos. 15/2017-ST and 16/2017-ST, both dated 13-4-2017 introduced amendments that made the importer located in India fully liable


SEARCH PEOPLE

Alphabetical by First Name
A | B | C | D | E | F | G | H | I | J
K | L | M | N | O | P | Q | R | S | T
U | V | W | X | Y | Z

Enter at least a name or a keyword to search
Start typing name
Keyword
Choose Practice
All Location
SEARCH

for paying Service tax in case of services provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel. The notifications did not provide for differential treatment for imports on CIF or FOB basis.

*GST (1.07.2017 – Current date)*

· Notification No. 8/2017-Integrated Tax (Rate) dated 28-6-2017 prescribes a rate for 5% for the services in question, as elucidated above.

· Notification No. 10/2017-Integrated Tax (Rate) dated 28-6-2017 prescribes the services in relation to which the recipient of service is liable to pay GST under reverse charge.

·S. No. 10 of the said Notification provides that liability to pay 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 up to the customs station of clearance in India would vest on the importer, located in India.

Under Service Tax, it is clear that the service of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India became taxable only with effect from 22-1-2017 *vide* Notifications dated 12-1-2017 until which time, the service was exempted by way of the Negative list or the Mega Exemption Notification.

For the period between 22-1-2017 and 23-4-2017, the taxability shifted from one hand to another and the same can be summarized as follows:-

| Situation | Period | Tax Liability |
|---|---|---|
| A | Prior to 22-1-2017 | Not Taxable |
| B | Between 22-1-2017 to 22-4-2017 | Taxable at the hands of **Foreign Liner** or **Steamer Agent** |
| C | After 23-4-2017 | Taxable at the hands of **Importer** |

*Comparison of relevant provisions*

Section 68 of the Finance Act, 1994 stipulates the person liable to make the payment of Service tax. Section 68(2) empowered the Central Government to notify the person other than the service provider, who would be liable to make payment of Service tax in respect of certain specific taxable services. The *pari materia* provision under GST that empowered the Central Government to issue Notification No. 10/2017- Integrated Tax (Rate) is Section 5(3) of the IGST Act, 2017 which provides that levy of GST shall be under reverse charge on the recipient of the supply for all those services notified by the government.

Although, the intention of both Section 68 and Section 5(3) is to levy tax on a person other than the supplier/service provider, it is to be noted that Section 5(3) specifically states that tax would be payable under reverse charge by the **'recipient'** of a supply. The term 'recipient' has been defined by Section 2(93) of the GST Act as the person liable to pay the consideration. Since the GST Act specifically recognizes 'recipient', only such person is liable under Section 5(3) to pay tax on reverse charge basis.
**No other person, other than the recipient of the supply will be liable to pay tax under reverse charge.**

This statement can be contrasted with Section 68(2) which states that the Central Government can notify a person other than the service provider who would be liable to discharge Service tax in respect of certain services. Unlike the GST Act, the liability to pay tax under Section 68(2) would vest on any person that the Government notifies. By virtue of the same, a person other than the recipient of the supply, i.e., even a third party can be made liable to discharge the Service tax under reverse charge.

*Impact under GST*

It is also relevant to consider the relevant entry in Notification No. 10/2017-Integrated Tax (Rate) which states that on specified categories of supply of services, IGST
*shall be paid on reverse charge basis by the recipient of such services'.*

Although, the notification, under S. No. 10, vests the liability on the importer to pay GST, it is noted that the said notification also stipulates that payment

under reverse charge would be payable by the 'recipient of the service'. The question that arises then is how the term 'recipient' as employed by said Notification should be understood.

In this regard, reliance is placed on the case of *Collector of Central Excise* v. *Parle Exports (P) Ltd*. [1988 (38) E.L.T. 741 (S.C.)] where the Hon'ble Supreme Court held that a Notification issued under Rule 8 of the Central Excise Rules and should be read along with the Act. Similarly, the Constitution Bench of the Apex Court in the case of *Orient Weaving Mills (P) Ltd*. v. *Union of India* [1978 (2) E.L.T. 311 (S.C.)] has held that rules and notifications issued by the Central Government shall have effect as if being enacted in the Central Excises and Salt Act, 1944, itself and can be said to have become part of the taxing statute.

Relying on this understanding, it can be said that Notification No. 10/2017- Integrated Tax (Rate) has to be read along with the GST Act which means that the definition of the term 'recipient' as detailed above will be borrowed for the purpose of the said Notification as well.

A conjoint reading of Section 5 of the IGST Act and Notification No. 10/2017- Integrated Tax (Rate) clearly indicates that the **liability to pay GST under reverse charge would vest only in the recipient of the service.**

When services are provided by a person located outside India by way of transportation of goods for an importer located in India who receives the services and pays consideration for the same, it can be said that it is the importer who is the recipient of such a service and it is he who would be liable to pay tax under reverse charge basis.

However, in the scenario envisaged in the current article, where the goods are transported on CIF import basis, it is the exporter located outside India who is liable to pay the shipping line for the service of transportation. Thus, it is the foreign exporter who has in fact received the service and is the recipient of the supply of the shipping line as per the definition under GST. In such a scenario, the importer located in India is not the recipient of the supply and the liability to pay GST cannot be vested on him for the reason that the charging section as well as Notification No. 10/2017- Integrated Tax (Rate) vest the liability to pay GST only on the recipient of the supply.

It can also be contended that the notification cannot impose a liability on a person other than the recipient of the supply. In other words, there is no legal standing to impose the liability to pay tax on the importer located in India when the services rendered by the shipping line are in fact received only by the exporter located abroad.

*Conclusion*

In conclusion, it can be said that it is not clearly and definitely ascertainable on whom the liability to pay tax arises in the subject matter of this Article. Even though the aforementioned Notification No. 10/2017- Integrated Tax (Rate) provides that the liability to pay tax would vest on the importer, the researchers are of the view that the levy does not exist for the reason that there exists no power to issue a Notification imposing a liability on any person, other than the recipient of the supply. Therefore, it can be contended that there exists no liability at all on the importer to pay GST in case of CIF import. Nevertheless, it is to be noted that the views expressed may be contested by the Department and are subject to litigation.

**[The authors are Joint Partner and Associate, respectively, Lakshmikumaran & Sridharan, Chennai]**