

GST Applicability on High Sea Sales and Bond-to-Bond Transfer of Goods



'High Sea Sales' is a common trade practice where the original importer sells the goods to a third person before the goods are entered into customs clearance i.e. before filing the first bill of entry, either for home consumption or for warehousing, as the case may be. Therefore, after the transaction of High sea sale of goods has taken place, the Customs declarations i.e. Bill of Entry etc. is filed by the person who buys the goods from the original importer during the said sale. Prior to GST, CBEC has issued various instructions regarding high sea sales appropriating the contract price paid by the last high sea sales buyer into the Customs valuation [Circular No. 32/2004-Cus. dated 11-5-2004 refers]. Such sale was considered as sale in the course of import into territory of India and was not subjected to sales tax. However, it is to be noted that if goods are cleared for warehousing and goods are sold from such warehouse, then such sale was not considered as High Sea Sales and were subjected to sales tax. However, buyer was required to file bill of entry from home consumption at the price at which bill of entry for warehousing was filed. Read on to know more...

Pre-GST Indirect Taxation Regime

Article 286 of Constitution of India governs this taxation. In pre-GST indirect taxation regime, no law of a State had authority to frame law with respect to sale or purchase of goods in the course of import of goods into the territory of India. Only Parliament had authority to formulate principles for

determining when a sale or purchase of goods takes place in the course of import into territory of India. Therefore, said expression was defined in CST Act, 1956.

Section 5(2) of CST Act defines 'Sale of goods in the course of import into territory of India.' As per Section 5(2) of CST Act, 1956 "A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India".



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As per clause (ab) of section 2 of CST Act, 1956 "*crossing the customs frontiers of India*" means *crossing the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by customs authorities.*

As per clause (13) of section 2 of Customs Act, 1962, "*customs station*" means *any customs port, customs airport, international courier terminal, foreign post office or land customs station.*

It may be noted that CST Act has restricted the customs frontier of India up to customs station only. Customs warehouse was not included within the said limits. Henceforth, a 'goods' is said to be covered under Section 5(2) of CST Act, if it is transferred before being removed from customs station.

CST is not leviable on high sea sales. CST Act has defined the three expressions:

- a) Sale or purchase of goods in the course of inter-state trade or commerce;
- b) Sale or purchase of goods outside a State;
- c) Sale or purchase of goods in course of import or export.

The levy of CST under Section 6 has only been placed on inter-state sale or purchase. Therefore, CST is not leviable on

- a) Sale or purchase of goods outside a State, and
- b) Sale or purchase of goods in the course of import into territory of India i.e. High Sea Sale.

Customs duties are not payable on High Sea Sale transaction. As per Section 2(23) of Customs Act, 1962 "Import" means bringing into India from a place outside India. Meaning thereby, import of goods into India would commence when the same enters into 'Exclusive Economic Zone (EEZ)' but continues and is completed when the goods become part of the mass of goods within the Country.

Case when goods are sold in 'High Seas' i.e. when these do not reach 'Exclusive Economic Zone'

As per Section 5(2) of CST Act, 1956, if an Indian buyer purchases goods from outside but sells them off to someone else in India before clearing them from customs, then such sale is treatable as 'sale in course of import' and thereby, impliedly, import cannot be said to be complete till the time goods are cleared for home consumption from customs. Henceforth, till this stage, custom duties are not at all payable

because, import has not been commenced and buyer of goods would file either the bill of entry for home consumption or warehousing when the goods would arrive at the Territorial Waters of India.

Case when person files 'Bill of Entry for Warehousing' and goods are sold from custom warehouse

Under Customs, warehousing is also allowed. Importer is allowed to transfer his goods from port to warehouse without payment of customs duty. He shall be liable to pay customs duty at the time of clearance of goods from warehouse. He can also sell goods from warehouse pending clearance. Section 5(2) of CST Act considers sale of goods before they clear customs station of India as sale in the course of import into territory of India. Therefore, if any goods are sold while in warehouse pending clearance, it is considered as sale of goods and is subject to sales tax. The buyer of such warehoused goods pending clearance files the bill of entry for home consumption at the time of clearance of such goods from warehouse. This bill of entry was filed at the price at which original bill of entry for warehousing was filed.

There is a difference between the expression 'Import of goods' and "Sale or purchase of goods in the course of import into territory of India". From the above discussion, it can be concluded that high sea sale i.e. sale or purchase of goods in the course of import into territory of India is different from "Import of Goods". Import of goods is subject to custom duties whereas high sea sales is not exigible to any type of tax.

GST Regime

Article 286 of Constitution of India governs this taxation. In GST regime, no law of a State has the authority to frame law w.r.t. supply of goods or services or both in the course of import of goods or services or both into the territory of India. Only Parliament has the authority to formulate principles for determining when supply of goods or services or both take place in the course of import into territory of India. Therefore, such expression could be explained in IGST Act and not in other GST laws.

'Customs Frontiers of India' include customs warehouse also as per IGST Act, 2017 – An extension in area from CST Act, 1956. As per

clause (4) of Section 2 of IGST Act, 2017 “customs frontiers of India” means the limits of a customs area as defined in Section 2 of the Customs Act, 1962 (52 of 1962.)

As per clause (11) of Customs Act, 1962 “*customs area*” means the area of a customs station or a warehouse and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities.

A probable reason to extend the coverage of ‘customs frontier of India’ in GST could be that, under CST Act, bond-to-bond transfer of goods was exigible to sales tax, because Section 5(2) *ibid* was applicable only on sale or purchase taken place before the goods crosses from customs station. Since sale or purchase covered under Section 5(2) *ibid* was high sea sales only which were not exigible to sales tax, in order to levy GST on bond-to-bond transfer of goods, the limits of customs frontier of India have been extended up to customs warehouse.

The expression ‘sale in the course of imports into territory of India’ as defined in CST Act is in conflict. Said expression as defined under CST Act extends the supplies made up to customs station within the meaning of term sale in the course of imports into territory of India. Further, said meaning is to be referred only for goods which are taxable under CST Act. As far as meaning of said term is concerned as far as supply is concerned, it is not defined under IGST Act.

Import is complete once goods clears customs frontiers of India. As per clause (10) of Section 2 of IGST Act, 2017 “Import of goods” with its grammatical variations and cognate expressions means bringing goods into India from a place outside India. Therefore, the analysis made in para “*Customs duties are not payable on High Sea Sale transaction*” in respect of meaning of import of goods, applies mutatis mutandis in GST regime also.

Case when goods are sold in ‘High Seas’ i.e. when these do not reach ‘Exclusive Economic Zone’ IGST Act imposes levy only on ‘Import of Goods’ as per Customs Tariff Act, 1975, not on ‘supply of goods in the course of import into territory of India’. 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 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. [*Proviso to sub-Section (1) of Section 5 of IGST Act, 2017*]

IGST Act nowhere defines taxation on supply of goods in the course of import into territory of India though Parliament has been authorised by virtue of article 286(2) of Constitution of India to formulate principles for determining this levy. Since levy has not been imposed on transaction of High Sea Sales in IGST Act, tax cannot be imposed on said transactions.

GST Council clarification on the issue: GST council has deliberated the levy of Integrated Goods and Services Tax on high sea sales in the case of imported goods. The council has decided that IGST on high sea sale(s) transactions of imported goods, whether one or multiple, shall be levied and collected only at the time of importation i.e. when the import declarations are filed before the Customs authorities for the customs clearance purposes for the first time. Further, value addition accruing in each such high sea sale shall form part of the value on which IGST is collected at the time of clearance. [*Para 4 of circular number 33/2017-Cus dated 01st August, 2017*]

Valuation of imported goods which have been sold in the course of import into territory of India: Value addition accruing in each such high sea sale shall form part of the value on which IGST is collected at the time of clearance. The above decision of the GST council is already envisioned in the provisions of sub-Section (12) of Section 3 of Customs Tariff Act, 1975 in as much as in respect of imported goods, all duties, taxes, cesses etc. shall be collected at the time of importation i.e. when the import declarations are filed before the customs authorities for the customs clearance purposes. The importer (last buyer in the chain) would be required to furnish the entire chain of documents, such as original Invoice, high-seas-sales-contract, details of service charges/commission paid etc., to establish a link between the first contracted price of the goods and the last transaction. In case of a doubt regarding the truth or accuracy of the declared value, the department may reject the declared transaction value and determine the price of the imported goods as provided in the Customs Valuation rules. [*Para 5 of circular number 33/2017-Cus dated 01st August, 2017*]

Conclusion

From the above discussion, it can be concluded that GST is not applicable on high sea sale transactions.

Case when person files 'Bill of Entry for Warehousing' and goods are sold from custom warehouse

It is a supply and taxable under GST Law. The transaction of sale/transfer etc. of the warehoused goods between the importer and any other person may be at a price higher than the assessable value of such goods. Such a transaction squarely falls within the definition of "supply" as per section 7 of the Central Goods and Services Tax Act, 2017 and shall be taxable in terms of Section 9 of the CGST Act read with Section 20 of the Integrated Goods and Services Tax Act, 2017. It may be noted that as per sub-Section (2) of Section 7 of the IGST Act, any supply of imported goods which takes place before they cross the customs frontiers of India, shall be treated as an inter-State supply. Thus, such a transaction of sale/transfer will be subject to IGST under the IGST Act. The value of such supply shall be determined in terms of Section 15 of the CGST Act read with Section 20 of the IGST Act and the rules made thereunder, without prejudice to the fact that customs duty (which includes BCD and applicable IGST payable under the Customs Tariff Act) will be levied and collected at the ex-bond stage. [Circular Number 46/2017-Customs dated November 24, 2017]

According to the author, *it is undisputed that bond-to-bond transfer of goods is exigible under GST law but it should be considered as inter-state supply by virtue of Section 7(5) of IGST Act and not by Section 7(2) ibid.* As discussed earlier, GST law does not define the expression 'sale in course of import into territory of India'. However, reading the definition of 'customs frontier of India' gives an impression that it intends to cover with the net of said phrase:

- High Sea Sales and
- Bond-to-bond transfer of goods

Further, considering the distinction between the terms 'goods imported into India' and 'supply of goods in the course of import into India' & on reading the term 'goods imported into India' under proviso to sub-Section (1) of Section 5 and in sub-Section (2) to Section 7 of IGST Act gives us an impression that bond-to-bond transfer of goods cannot be covered under sub-Section (2) of Section 7 of IGST Act. This is because the term 'goods imported into India' has been interpreted to mean 'imports' under proviso to

sub-Section (1) of Section 5 of IGST Act, therefore, it cannot be interpreted to mean 'bond-to-bond transfer' under sub-Section (2) of Section 7 *ibid.*

In case such an interpretation is to be adopted, then the term 'goods imported into India' shall mean 'goods being imported into India' for purposes of Section 7(2) and 'import' for the purposes of proviso to Section 5(1).

Illustrative Charts:

Illustrative Chart A: Goods imported, bonded and sold while in the Bonded warehouse and clearance thereof

Box-A

Goods imported by "A" on 2nd July 2017. Importer wants to deposit the goods in a bonded warehouse to defer duty.

Box-B

Importer files an "into bond bill of entry" and the goods are deposited in a Bonded Warehouse. BCD and IGST (Section 3(7) of Customs Tariff Act 1975) are deferred.

Illustration of duty deferment:

A: Value of goods = ₹ 100

B: say BCD is 10% = ₹ 10 (10% of ₹ 100)

C: say IGST is 12% = ₹ 13.2 (12% of ₹ 110)

D: Duty Deferred (B+C) = ₹ 23.20

Box - C

"A" sells the goods to "B" on 21st July 2017 for ₹ 300 and charges IGST of ₹ 36 @12% (IGST). Payment of the above IGST of ₹ 36 and filing of return for the same should be done by 20th August 2017.

The credit of IGST paid can be availed as per Section 16(2)(b) of CGST Act.

Box - D

"B" files an Ex-bond Bill of entry on 25th of September 2017 and pays ₹ 23.20 (the deferred duty, in addition to duty of ₹ 36 paid earlier as indicated in Box-C)

The credit of IGST paid can be availed.

Total duty paid: 23.20+36 = ₹ 59.20

Illustrative Chart B: Goods imported, bonded and cleared for home consumption and subsequent sale thereof

Box-A

Goods imported by "A" on 2nd July 2017. Importer wants to deposit the goods in a bonded warehouse to defer duty.

Box-B

Importer files an "into bond bill of entry" and the goods are deposited in a Bonded Warehouse. BCD and IGST (Section 3(7) of Customs Tariff Act 1975) are deferred.

Illustration of duty deferment:

A: Value of goods = ₹100

B: say BCD is 10% = ₹10 (10% of ₹100)

C: say IGST is 12% = ₹13.2 (12% of ₹110)

D: Duty Deferred (B+C) = ₹23.20

Box - C

"A" files an Ex-bond Bill of entry on 21st July 2017 and pays ₹23.20 (the deferred duty. The credit of IGST paid can be availed.)

Box - D

"A" sells the goods to "B" on 25th September 2017 for Rs. 300 and charges GST @ say 12% = ₹36 Credit of which can be availed.

Total duty paid: 23.20+36 = ₹59.20



Illustrative Chart C: Goods imported and cleared for home consumption and subsequent sale thereof

Box-A

Goods imported by "A" on 2nd July 2017. Importer clears the goods for home consumption.

Illustration of duty payment:

A: Value of goods = ₹100

B: say BCD is 10% = ₹10 (10% of ₹100)

C: say IGST is 12% = ₹13.2 (12% of ₹110)

D: Duty Deferred (B+C) = ₹23.20

Box - B

'A' can take credit of IGST paid at the time of clearance for home consumption.

Box - C

'A' sells the goods to 'B' for ₹300 on 25th September 2017 and charges GST. Value of goods = ₹300 GST (say 12%) = ₹36 Credit of which can be availed.

Total duty paid: 23.20+36 = ₹59.20

Concluding remarks

1. In case of bond-to-bond transfer of goods, last buyer in the chain should either be allowed refund of unutilised input tax credit to the extent as reflected in bill of entry for home consumption or be exempted from payment of customs duty i.e. IGST.

Hon'ble High Court, New Delhi in case of Devashish Polymers Private Limited vs. Union of India & Ors reported as 2018 (1) TMI 276 have entertained the writ petition filed on this point. Said petition have been listed for hearing on March 08, 2018 with a direction that in case the petitioner succeeds, the appropriate order shall be passed.

2. The expression 'supply in the course of import' shall be defined under IGST Act to mean
 - a) High sea sales
 - b) Bond-to-bond transfer

Wherein, high sea sales should be exempted or could be clarified in the manner that GST law does not apply on these transactions and bond-to-bond transfer should be exigible to GST.

OR

The expression 'supply of goods imported into the territory of India' appearing in sub-Section (2) of Section 7 of IGST Act, 2017 shall be substituted with 'supply of imported goods' where 'imported goods' shall have the same meaning as defined under clause (25) of Section 2 of the Customs Act, 1962. ■