

GST ON SALE OF SPACE FOR ADVERTISEMENT IN FOREIGN MAGAZINES

1. Taxation History

- The history of selling of space for advertisement in print media in a foreign country under services tax law has always been seen wandering in the court of law where various facets has been analysed till date. There are several judgments that are essentially associated with the nitty-gritty of this taxation rather cogent judgment of Hon'ble CESTAT, Mumbai in case of *Fertiplant Engg. Co. Pvt Ltd. Versus Commissioner of Central Excise, Raigad*¹ wherein it has been held that magazine is covered under the definition of “book” and an advertisement placed by the appellant in the magazine being in print media is excluded from the service tax liability under the category of “sale of space or time for advertisement”.
- It may be noted that the service of sale of space or time for advertisement was brought to indirect tax levy vide Finance Act, 2006 w.e.f. 01.05.2006 by way of inserting clause (zzzm) in section 65(105) of the Chapter V of Finance Act, 1994. However, said category of service was not exigible to service tax except for the period 01.06.2007 to 01.07.2012; 06.08.2014 to 30.06.2017, when selling of space for advertisement in business directories, yellow pages and trade catalogues which are primarily meant for commercial purposes was made taxable. An overview of taxability in services tax regime is tabulated below:

Selling of space for advertisement in	Period			
	01.05.2006 TO 01.06.2007	01.06.2007 TO 01.07.2012	01.07.2012 TO 06.08.2014	06.08.2014 TO 30.06.2017
Print media	Not Taxable	Not Taxable	Not Taxable	Not Taxable
Business directories, yellow pages and trade catalogues which are primarily meant for commercial purposes	Not Taxable	Taxable	Not Taxable	Taxable

¹ 2017 (3) TMI 866

2. Taxation at Present

With the introduction of GST on 01.07.2017, the provisions regarding this taxability has not been free from dispute. In this article, we are analysing the issue concerning said taxability under GST law on a country specific product exported by an Indian dealer.

1. Supply

The term “supply” has been defined under section 7 of the CGST/SGST Act. Clause (a) of Section 7 (1) recognizes the forms of transactions by which a supply is effected, it presupposes an agreement between the two transacting parties to engage in the dealings, and the condition that such a dealing in course of furtherance of business, and not otherwise. **Clause (b) recognizes imports of services for a consideration to an activity that would be construed as a ‘supply’ even if it is not made in course of furtherance of business.** Clause (c) lays down that the activities that are classed in Schedule I would be deemed to be falling within the meaning of ‘supply’ even when such a transaction is made or agreed to be made without a ‘Consideration’. Sub-section (1A) refers to Schedule II which lays down the activities to be treated as supply of goods or supply of services.

2. Supply of goods or services?

The assessee approaches a publisher of international magazine, say in England, to publish advertisement of his product in the magazine for which he will pay in foreign currency. The assessee here is not paying for the magazine (a movable property). Rather, it is paying for the advertisement. The publisher is not supplying goods to the assessee. Therefore, the transaction of selling space for advertisement falls under “supply of services”.

3. Levy of GST

Section 5 of the IGST Act is the charging section which provides for the levy and collection of the integrated tax on the inter-state supply. It is to be noted that by virtue of Section 7(2) of IGST Act, supply of services imported into the territory of India shall be treated in the course of inter-state trade or commerce. Vide Notification Number 10/2017-IGST (Rate) dated 28.06.2017, “*import of services*” has been notified under reverse charge mechanism where the tax shall be payable by the recipient of supply.

4. Import of Service

The expression, import of service has been defined under section 2(11) of IGST Act, 2017 which reads as under:

“import of services” means the supply of any service, where–

- (i) *the supplier of service is located outside India;*
- (ii) *the recipient of service is located in India; and*
- (iii) *the place of supply of service is in India.*

Undoubtedly, the publisher is located outside India and Indian dealer is located in India. Therefore, in present case, first two conditions of the definition are satisfied. Now, we need to determine, whether place of supply of service is in India or not.

4.1 Place of supply is in India

Looking at the provisions of section 13 of IGST Act, it provides for place of supply of services where location of supplier or location of recipient is outside India. Sub-section (2) thereof provides that place of supply shall generally be the location of recipient of services. Reading of provisions encapsulated above gives a reflection that place of supply of services falls in India and therefore, it satisfies all requirements of being “import of service” and thereby covered under notification number 10/2017-IGST (Rate) dated 28.06.2017.

4.2 A second view: Place of Supply is not in India. Therefore, impugned transaction is neither an inter-state supply nor an intra-state supply and hence, not taxable.

- In our view, Indian dealer cannot be taxed merely on a supposed theory of place of supply. Merely in the absence of specific provision, it cannot be interpreted that the contours of general provision would be so extended to allow an extra territorial operation. This is because of the following reasons:
 - (i) The magazine has circulation in foreign country only;
 - (ii) The target customer reach is also country specific;
 - (iii) The product is also country specific.
- For being exigible to tax, a supply has either to be an inter-state supply or intra-state supply. For Section 8 to apply, both the location of the supplier and the place of supply should be in India. In the present case, the location of the supplier, i.e. the foreign publication house is outside India. Thus, the impugned transaction is not an intra-state supply under Section 8 of the IGST Act.
- Now, Section 7 provides for what is an inter-state supply. Sub-sections (1) and (2) of section 7 deal with the supply of goods and are not relevant for the present purpose. The provisions of sub-section (3) only applies when both the supplier and the place of supply are in India (i.e. either in a State or Union Territory). In the present case, the location of the supplier, i.e. foreign publication house, is outside India. Thus, sub-section (3) will also not apply in the present case.
- Sub-section (4) of section 7 provides that the supply of services imported into the territory of India shall be treated as inter-state supply. In the present case, the place of supply of service can never be said to be in India because of following reasons:

- How can supply of service in foreign country which has been consumed thereat can be taxed in India? Any provisions which seeks to tax such transaction has to be *manifestly arbitrary*.
- As per Section 1(2) of the Act, the provisions of the Act apply to the whole of India. As per Section 2(24) of the Act, the words and the expression used and not defined in the IGST Act but defined in the CGST Act, shall have the same meaning as assigned to them in the CGST Act. As per Section 5(1) of the Act, the Integrated Tax is levied on all the inter-state supplies. As per Section 2(108) of the CGST Act, 'taxable supply' means a supply of goods or service or both which is leviable to tax under this Act. As per Section 2(109) of the CGST Act, the 'taxable territory' means the territory to which the provisions of the Act applies, i.e. the whole of India. It is submitted that the combined reading of the aforesaid provisions indicates that the supply made within the 'taxable territory' is leviable to tax.
- In case advertisement is given in a magazine printed as well as circulated outside India which is meant only to the foreign country, the service is said to be consumed only in that foreign country. By no stretch of imagination, it could be accepted that said service has been consumed in India merely because the Indian dealer is paying for the same and is located in India.
- There are three clauses in sub-section (5) of Section 7. Clause (a) applies in case where the supplier is located in India and the place of supply is outside India. In the present case, the supplier of service, i.e. the publication house, is located outside India. Thus, the present case is not covered within the ambit of clause (a). Clause (b) is also not applicable in the present case as it only applies to supplies made to or by a Special Economic Zone developer or a Special Economic Zone unit.
- Clause (c) provides that the 'supply of goods or services or both in the taxable territory', not being an intra-state supply and not covered elsewhere in Section 7, shall be treated as inter-state supply. The phrase 'supply of goods at services or both in the taxable territory' is nowhere defined in the Act. The provisions related to place of supply cannot be equated with section 7(5)(c) of IGST Act, as upheld by Hon'ble Gujarat High Court² in following words:

“167. At the outset, the phrase 'supply of goods or services or both in the taxable territory' cannot be equated with 'place of supply' in India. If the intention of the legislature was to cover all the supplies where the 'place of supply' is in India within the ambit of the IGST Act by virtue of clause (c) of sub-section (5) of Section 7,

² Mohit Minerals Private Limited Versus Union of India and 1 other, reported as 2020 (1) TMI 974

nothing prevented the legislature from expressing its intention in clear words as used elsewhere in Section 7 and Section 8. Further, it is submitted that the provisions relating to the 'place of supply' under Sections 10 to 13 of the IGST Act does not determine where the supply takes place in its ordinary sense. They are artificial provisions enacted for fixing the situs of supply to determine the nature of supply as inter-state or intra-state and has to be used only where provided by the Act, i.e. under Sections 7(1), 7(2), 7(5)(a) and Section 8. The said provisions cannot be applied to Section 7(5)(c) of the IGST Act.

.....

175. It is submitted that the phrase 'supply of goods or services or both in the taxable territory' under Section 7(5)(c) of the IGST Act has been enacted to cover the transactions of tax evasion. Thus, in a case where the factum of supply has been proved, either by way of inquiry, investigation or audit, but it is not possible to ascertain whether the supply is an inter-state supply or intra-state supply, the law enacts a deeming fiction and treats such supply as an inter-state supply. It is a residual category and it cannot be so broadly construed to cover a substantial transaction, as in the present case, which is not expressly covered by the rest of the provisions of Section 7.”

- In the above High Court decision, levy of GST on Ocean Freight was turned down on account of lack of legislative competence and court used the following words to struck down the relevant notification:

“177. In the present case, the entire transaction takes place outside the taxable territory, i.e. outside India. The supplier is located outside India, the recipient of the supply is located outside India, the contract for the supply has been entered into outside India, the payment for the supply has been made outside India, the goods have been handed over to the supplier outside India and the transportation, for the most part, takes place outside India. The mere fact that the transportation of goods terminates in India, will not make such supply of transportation of goods as taking place in India.”

Not only this, attention is also invited to section 13(13) of IGST Act which provides power to Central Government to notify certain activities whose place of supply shall be the place of effective use and enjoyment of a service. Since impugned transaction has never been subjected to taxes under erstwhile law, a representation can be made to CBIC to this effect.

5. Classification of Service

Notification Number 08/2017 – IGST (Rate) dated 28.06.2017 has provided list of services which are exigible to rates of taxes as mentioned therein. The tax rates provided therein is as under:

Table

SI No.	Chapter, Section or Heading	Description of Service	Rate (per cent.)	Condition
(1)	(2)	(3)	(4)	(5)
21	Heading 9983 (Other professional, technical and business services)	(i) Selling of space for advertisement in print media.	5	-
		(ii) Other professional, technical and business services other than (i) and (ia) above and serial number 38 below.	18	-

The phrase “selling of space for advertisement” and “print media” are not defined under GST law. Therefore, reference would be made to the meanings defined under erstwhile law. In services tax regime, clause (zzzm) of section 65(105) defines it as under:

65. Definitions. – In this Chapter, unless the context otherwise requires, -

(105) “taxable service” means any service provided or to be provided, -

(zzzm) to any person, by any other person, in relation to sale of space or time for advertisement, in any manner; but does not include sale of space for advertisement in print media and sale of time slots by a broadcasting agency or organisation.

Explanation 1. - For the purposes of this sub-clause, "sale of space or time for advertisement" includes, -

- (i) providing space or time, as the case may be, for display, advertising, showcasing of any product or service in video programmes, television programmes or motion pictures or music albums, or on billboards, public places, buildings, conveyances, cell phones, automated teller machines, internet;*
- (ii) selling of time slots on radio or television by a person, other than a broadcasting agency or organisation; and*
- (iii) aerial advertising.*

Explanation 2. - For the purposes of this sub-clause, "print media" means, -

- (i) "newspaper" as defined in sub-section (1) of section 1 of the Press and Registration of Books Act, 1867 (25 of 1867);*
- (ii) "book" as defined in sub-section (1) of section 1 of the Press and Registration of Books Act, 1867 (25 of 1867), [but does not include*

business directories, yellow pages and trade catalogues which are primarily meant for commercial purposes;]

[Note: The exclusions in brackets above were made w.e.f. 01.06.2007 vide Finance Act, 2007]

As per section 65 (2) Advertisement includes any notice, circular, label, wrapper, document, hoarding or any other audio or visual representation made by means of light, sound, smoke or gas;

As noted above, print media means “books” and “newspaper” as defined under sub-section (1) of section 1 of the Press and Registration of Books Act, 1867 (25 of 1867). Having understood the domain of taxation and exclusion of print media, it is germane to equip ourselves with the meaning of terms “book” and “newspaper” as defined in sub-section (1) of section 1 of the Press and Registration of Books Act, 1867 (25 of 1867). These are as under:

Press and Registration of Books Act, 1867

An Act for the regulation of Printing-presses and Newspapers, for the preservation of copies of books and newspapers printed in India, and for the registration of such books and newspapers.

1. Interpretation clause. (1)

Book includes every volume, part or division of a volume, and pamphlet, in any language, and every sheet of music, map, chart or plan separately printed;

.....

newspaper means any printed periodical work containing public news or comments on public news;

Though the Act applies to books and newspapers printed in India, it has been seen that judicial pronouncements on the subject taxation has considered foreign magazine published in foreign country as “book” being defined under aforesaid Act and thereby have considered the same as “print media”. If for a moment, it is opined that foreign magazines are not covered under the phrase “print media” for the reasons that magazines are not printed in India and because of the reason that impugned trade catalogue has not been circulated for commercial purposes, the rate of tax applicable is 18% but not 5%.

6. CONCLUSION

As discussed above, impugned transaction has never been subject to taxation till 30.06.2017, a representation should be made to CBIC to notify impugned transaction under Section 13(13) of

IGST Act so that tax cannot be levied thereon. Also, there is a need to clarify the classification of these services as the word “print media” has been defined to cover publications printed in India.