5 CHAPTER

IMPORT & EXPORT UNDER IGST ACT

5.1 STATUTORY FRAMEWORK

India implemented Goods and Services Tax (GST) from 1 July, 2017. GST is a tax levied on all taxable supplies of goods or services or both. Supply is the taxable event in GST law and it has been defined in an inclusive manner. Sale, transfer, exchange, barter, license, rental, etc., are all covered under the term 'supply'. This definition has been provided in Section 7 of Central Goods and Services Tax Act, 2017 (CGST Act).

GST is governed by four legislations viz., CGST Act, 2017, Integrated Goods and Services Tax Act, 2017 (IGST Act, 2017), State GST Act (respective States) and Union Territory GST Act (UTGST Act, 2017). Another legislation viz., GST (Compensation to States) Act, 2017 seeks to levy Compensation Cess on specified goods and it is intended to compensate States for loss of tax revenue consequent to implementation of GST.

For the purpose of this book, IGST Act needs discussion. Before IGST Act was implemented, goods imported into India were levied a duty of customs which was termed as an additional duty and commonly referred as countervailing duty (CVD). This levy was equivalent to the Central Excise duty levied on like goods manufactured in India. In principle, the same regime continues after implementation of GST except for the fact that the legislation relevant is IGST Act instead of Central Excise Act. Customs Tariff Act provides the basis for levy and IGST Act refers to the same for import of goods.

For import of services, Customs Act has no direct role to play and therefore, IGST Act read with relevant notifications govern the GST levy on the same.

IGST Act is not a complete code in itself. Several provisions of CGST Act are borrowed for application in particular situations or for specific requirements like demand of tax, refund, appeal, etc.

In the pre-GST regime, for levy of service tax on import of services, provisions were contained in Finance Act, 1994 and the relevant rules. The statutory framework for taxation of services has undergone a sea change on implementation of GST as the States which were not empowered to levy tax on services have legislation to tax supply of both goods and services. The concurrent jurisdiction conferred on both Union and State legislatures to levy tax on supply of goods and services by inserting Article 246A by Constitution Amendment Act and by providing for GST Council as per Article 279A of the Constitution of India, comprising both Union and State Finance/Revenue/Taxation Ministers to recommend rates of GST, exemptions, changes in law and procedures, etc., have marked a historic change in the legal basis, structure and powers of taxing supply of goods and services under GST.

However, it should be noted that IGST Act which governs both import of goods and services for imposition of IGST is a Central legislation. On import, the tax levied is IGST (Integrated GST) and such imports are treated as inter-State supplies. Objects and reasons for introduction of IGST Bill primarily talks about inefficiencies in the then prevalent Central Sales Tax (CST) regime for taxing inter-State sale of goods as it was non-creditable and was creating a tax arbitrage with the value added tax (VAT) rates being different in States. It also mentions levy of tax on import of goods as per Customs Tariff Act read with Customs Act and on import of services under reverse charge basis.

Interface with Customs Tariff Act

In respect of import of goods, the levy of IGST is in the nature of countervailing levy as it is equal to the GST suffered by like goods manufactured and supplied in the domestic market. The policy thrust being on export of goods and not of taxes, exports are generally relieved of tax burden either by way of outright exemptions or refund of taxes embedded in export goods. Based on demand and supply conditions in the domestic market, export duty is imposed on exceptional basis and for obvious reasons, no IGST levy applies in such cases.

As IGST is levied at the time of import, such levy and collection are governed by Customs Tariff Act as per the proviso to Section 5(1) of IGST Act. Therefore, the value on which IGST is payable is the same value as provided in Section 14 of Customs Act *i.e.* transaction value or the same as arrived at as per Customs Valuation Rules. The above proviso also uses the expression "at the point when duties of customs are levied". This indicates that IGST is levied along with other Customs duties as applicable on import of goods which are assessed and collected at the time of import.

A fundamental issue relating to IGST pertains to its nature as to whether it is in the nature of GST or Customs duty. As the levy is derived from Section 5 of IGST Act and as per this provision, it is levied on inter-State supplies of goods or services or both, it can be said that it is in the nature of GST. It is for the purpose of collection, IGST gets the colour of Customs levy. For administration of IGST, the provisions of CGST Act and rules thereunder are borrowed as per Section 20 of IGST Act. Because it is collected as per Section 3 of Customs Tariff Act, the Customs department gets jurisdiction to collect the same.

IGST is not a duty of customs

In *Interglobe Aviation Ltd.* v. *CC, New Delhi*[1] the issue was the payment of IGST on cost of repairs wherein airline operators exported defective parts, engines, aircraft for repair and then re-imported them. Basic customs duty was paid on the fair cost of repairs and the cost of freight and insurance charges as per partial exemption granted to such re-imports under Notification No. 45/2017-Cus. The Customs authorities entertained a view that IGST is also payable on such cost of repairs along with Basic Customs Duty. The department argued that duty of customs is not only levied under the Customs Act and the Customs Tariff Act but also those levied under any other law and therefore, IGST would be a duty of customs. However, the CESTAT held that it is only the rates which can be specified under Customs Tariff Act or any other law but the meaning of "duties of customs" does not get expanded. Therefore, "duty of customs" as provided in the exemption notification refers to the same in Section 2(15) of Customs Act. According to it, even additional duty levied under Section 3 of Customs Tariff Act would not be duty of customs for the purpose of notifications under Customs Act. The Tribunal relied on Bombay High Court judgment in *CEAT Tyres of India Ltd.* v. *Union of India*[1a] wherein it was held that the expression "duty of customs" covered only BCD and not additional duty. The Tribunal also noted that IGST is levied under Section 5 of IGST Act and this is the charging section but it is collected as per Section 3 of Customs Tariff Act and therefore, the levy is under IGST Act while procedure for collection has been provided as per said Section 3 of Customs Tariff Act. Exemption from IGST and compensation cess were held to be available on such re-imports in respect of the cost of repairs and BCD alone would be payable on such component.

The importer had claimed IGST exemption but the same was sought to be denied and tax was demanded on the ground that exemption

1. [2020] 121 taxmann.com 70/43 GSTL 410 (New Delhi - CESTAT).

1a. 1991-VIL-14-BOM-CU/[1991] 1991 taxmann.com 62.

was applicable to fresh dates and not wet/processed dates. The order denying exemption and demanding IGST was passed under section 28 of Customs Act. Writ petition was filed assailing the order having been passed by Customs authority and it was argued that the authority under IGST Act should be the proper officer and Customs authority was not the empowered assessing authority. The High Court in this case of *Ajwa Dry Fruit Impex* v. *Union of India*[1b] noted that Section 2(*2*) of Customs Act defines assessment and it covers determination of tax payable under "any other law" besides Customs Act or Customs Tariff Act and Section 28 not only covers customs duty but also other duties applicable on imported goods. It held that Customs authority is empowered to make assessment regarding exemption claim from IGST under section 28 of Customs Act.

Principles of statutory interpretation require harmonious interpretation. While proviso to Section 5(1) of IGST Act prescribes the value as per Customs Act as the basis for levy of IGST, Section 20 of IGST Act makes provisions on value of supply as contained in CGST Act applicable to IGST. There cannot be two different laws or provisions applicable for the same purpose *i.e.* for determination of value for levy of IGST, neither both Customs Act and CGST Act will form the basis nor such applicable law can be at the option of the parties involved. The proviso is unambiguous *i.e.* for valuation of goods for levy of IGST, it is Customs Act that will be applicable.

5.2 IMPORT AND EXPORT OF GOODS UNDER IGST ACT

"Export of goods" has been defined in Section 2(*5*) of IGST Act as taking goods out of India to a place outside India. This is the same definition as contained in Customs Act. As IGST Act in respect of goods is levied and collected as customs duty, "import of goods" is defined in IGST Act in the same manner as it has been defined in the Customs Act, 1962. Bringing goods into India from a place outside India has been defined as import. The definition is apparently very frugal but we have seen jurisprudence on import in the chapter on customs valuation wherein the term 'import' was interpreted differently in various judgments.

As per Section 2(*24*) of IGST Act, words and expressions not defined in IGST Act shall have the meaning provided in CGST Act [or as contained in UTGST Act or GST (Compensation to States) Act]. Therefore, definition of 'India' has to be taken from CGST Act. According to Section 2(*56*) of CGST Act:

1b. 2023-VIL-768-KER/[2023] 156 taxmann.com 448 (Ker.).

> '"India" means the territory of India as referred to in Article 1 of the Constitution, its territorial waters, seabed and sub-soil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air space above its territory and territorial waters.'

Upto twelve nautical miles from the appropriate baseline will come under territorial waters as per the above statute and India's sovereignty extends to such territorial waters. Continental shelf extends beyond territorial waters and covers upto a distance of 200 nautical miles. Such area is also covered under exclusive economic zone.

Taking note of the applicable statutes and notifications, the Supreme Court in the case of *Aban Loyd Chiles Offshore Ltd.* v. *Union of India*[1c], held that India's jurisdiction extends to the continental shelf and exclusive economic zone and if mineral oil was extracted or produced in the exclusive economic zone (EEZ) or continental shelf and brought to the main land, the same would not be treated as import and no customs duty would be leviable. It further held that goods supplied to a place in the EEZ or continental shelf would not be treated as export. If this judgment is to be applied to GST, it can be said that supplies made in such continental shelf or EEZ will be subject to levy of GST like any other domestic transaction and IGST as per Customs Tariff Act will not be applicable. It should be noted that high seas are not covered here over which all countries enjoy rights as per international law.

Relevance of place of supply in GST

GST is destination-based consumption tax. Therefore, the place where the supply (of goods or services or both) is used or consumed becomes important for determination of the jurisdiction or the State which will get the right to tax in case of local supply involving SGST portion and right to share in respect of inter-State supply leviable to IGST. In cross-border transactions this assumes great importance. For a transaction to be treated as export of service, one of the conditions to be satisfied is that the place of supply should be outside India. Exports are allowed without payment of tax and to enjoy such benefit, satisfying the condition on place of supply is primary. Similarly, if the place of supply is in India, even if other conditions like receipt of consideration in foreign exchange is satisfied, the same will be considered as import of service. This means the person in India will be required to pay tax.

Indian GST law has been drafted on the lines of EU VAT provisions to a great extent. Place of supply provisions in IGST Act have also been

1c. 2008 (227) ELT 24 (SC).

modelled on EU VAT Directive [Articles 44 to 59]. In so far as place of supply of services between businesses is concerned (B2B supplies), tax is charged based on customer's place of establishment. When services are supplied to individuals (B2C supplies), tax is levied at the place of supplier's establishment. This is the general rule and it has been incorporated in Section 12(2) of IGST Act. Like EU VAT, IGST Act also contains particular provisions to cover specific situations whereby place of supply is expressly defined separately for such situations or rather supplies. However, this is applicable only in respect to services. For goods, the provision is straight forward.

Section 10 of IGST Act provides for place of supply of goods in situations not involving import or export of goods. For the present discussion, therefore, Section 10 is not relevant. Section 11 deals with place of supply of goods imported into India and goods exported from India. Clause (*a*) of Section 11 states that the place of supply of goods imported into India shall be the location of the importer. As goods are brought into India, the person who undertakes such activity being the purchaser of goods from the foreign seller, is in India and place of supply will be in India.

On imports, IGST is levied along with other customs duties at the time and place of importation. Place of importation denotes the customs port where goods are unloaded and entered into India by filing bill of entry. The importer may not possess GST registration in the State where the goods are imported. In such case, location of the importer will be in a different State. The State's share of IGST revenue accrues to such State where the importer is located. Place of supply takes the tax revenue (State's share) to that State where the goods are ultimately used.

Location of importer and place of delivery different

It may so happen that the importer may be in State B, imports may take place in a port in State A and goods may be used in a factory in State C. In this case also, the location of the importer will be considered as the place of supply as clause (*a*) of Section 11 uses the words "location of the importer" and not "location of the recipient".

In the above situation, the importer will have to pay IGST at the time of import and send the goods from the port to the factory on appropriate endorsement of place of delivery. It may seem to be an anomaly that when goods are actually used in a different State *i.e.* State C, IGST is paid in State B where the goods have not even been received. In such cases, the importer in State B will be treated as having received constructive possession i.e. documents of title to the goods while the physical or actual possession is received by his factory in State C. Typically,

such transactions are covered under 'bill-to-ship-to' concept but the same will not be applicable here. Such concept as provided in Section 10 requires 3 persons - a seller, a buyer and a recipient and all of them located in India since Section 10 covers place of supply not involving import or export. Neither 3 persons are involved in this transaction nor does Section 10 apply. Therefore, the importer in State B will be required to issue a tax invoice to his factory in State C charging IGST, treating the same as inter-State supply of goods.

To avoid such double payment of tax or objections from the tax department if tax is not paid, it will be prudent to make the factory in State C as the importer by filing bill of entry in such name without involving the location in State B.

Registration not mandatory in State of import

When goods are imported through a particular port, the importer may not have GST registration in that State of import. His location may be in a different State or land-locked State. He has the option of moving the goods to dry port i.e. inland container depot (ICD) and then clearing the goods from Customs at ICD. Alternatively, he may clear the goods from the port using his GST registration in the State where he is located and transport the goods by generating e-way bill using the bill of entry. Registration under GST in the State where such Customs port is located is not required.

In a situation where the goods are imported in a port in State A by the importer located in State B but undertaking sale of imported goods from State A to buyers directly after clearance from Customs bonded warehouse, the Advance Rulings Authority, Maharashtra held that separate registration in State A was not required [In Re: *Sonkamal Enterprises Pvt. Ltd.*[2]]. The applicant had submitted that they do not have godown or other place of business or establishment in State A. Section 22 of CGST Act (as applicable to IGST Act) requires supplier to get registered in the State or Union Territory from where taxable supply is made. As per Section 2(*85*) of CGST Act, place of business includes a warehouse or godown where the goods are stored. In this case, the goods were stored in Customs bonded warehouse and the importer did not have a place of storage in State A. The AAR further ruled that the importer can supply (sell) the goods directly from State A using his GST registration in State B with GST invoice of State B and using the same in e-way bill even when goods move from State A. Same position was adopted by AAR in *Aarel Import Export Pvt. Ltd., In re*[3] and *Gandhar Oil Refinery* (*India*) *Ltd. In re*[4]

2. [2018] 100 taxmann.com 213 (AAR - Maharashtra).
3. [2019] 106 taxmann.com 292/74 GST 662 (AAR - Maharashtra).
4. [2019] 106 taxmann.com 291/76 GST 446 (AAR - Maharashtra).

Imports are treated as inter-State supplies and the applicable tax is IGST. When the imported goods are sold from CFS or on DPD basis before they are cleared for home consumption, place of supply will be the place from where the goods are supplied. Therefore, it has been held by AAR that the importer registered under GST in Maharashtra is not required to obtain GST registration in a different State where the port is located. The importer can use such Maharashtra GST registration to issue IGST invoice for supply (sale) of the imported goods [*Kamdhenu Agrochem Industries*[4a]].

IGST not payable when goods sold but not imported

The heading may appear strange as the goods sold by the foreign party to an Indian buyer will generally be brought to India. But there may be cases of mould, tools and dies which are manufactured by the foreign party for use in further manufacture of components which are then exported to India. As per Rule 10 of Customs Valuation Rules, value of such tools, dies and moulds supplied free of charge or at reduced cost by the buyer is required to be included in transaction value for the purpose of customs duty. Such inclusion is with respect to use of these tools to manufacture those goods which are imported. However, tools which are developed by the foreign party but not imported by the Indian buyer cannot be assessed to customs duty. As IGST is collected as per Customs Act at the time of importation, even if such tools are sold to Indian party, IGST is not payable as they have remained with the foreign party and do not enter India.

The above position was upheld by AAR in *INA Bearings India Pvt. Ltd. In re*[5]. In this case, the Indian buyer of tools had further sold them to his Indian buyer for whom the bearings were manufactured. Even if the parties are related payment of customs duties including IGST will not arise in such cases. However, when payments are made to overseas associated enterprise, transfer pricing (TP) provisions will apply to determine arm's length price and import of goods is immaterial for such purpose.

Supply by duty free shops

Duty free shops are located in international airports selling goods to outbound passengers and such supplies (sale of goods) are treated as exports. The goods are stored in specially bonded warehouse from where they are brought to DFS which are also considered as warehoused goods. Refund of input tax credit is available when the same gets accumulated due to exports on which tax need not be paid (zero-rated). DFS is part

4a. LLP, *In re* [2021] 132 taxmann.com 273/88 GST 973 (AAR - Maharashtra)

5. [2019] 101 taxmann.com 149 (AAR - Maharashtra).

of customs area and therefore, they are not treated as imported into India when goods are sold to arriving passengers.

The tax department did not accept the above view and demanded IGST on sale by DFS and also denied refund of tax credit (input tax credit - ITC) on the grounds that the goods were not sold outside the taxable territory (India) as the DFS and the airport are within India and that the goods sold to outbound passengers could not be considered as export. In this case of *Sandeep Patil* v. *Union of India*[6], the Bombay High Court held that as per Section 2(*4*) of IGST Act, customs frontier means customs area and DFS being located in customs area, goods in such DFS do not cross such frontier and thus will be covered as inter-State supply as per Section 7(2). It further held that bill of entry for warehousing does not trigger customs duty liability and therefore, DFS is not liable to pay customs duties including IGST.

The High Court took note of the amendment made to CGST Act in 2018 which was brought into force from February, 2019. Schedule-III to CGST Act treats certain transactions as neither supply of goods nor supply of services. In this Schedule, a new entry was inserted "8(*a*) Supply of warehoused goods to any person before clearance for home consumption". In the case of DFS, bill of entry for home consumption is not filed and they remain warehoused, therefore, sale in DFS is not supply.

The above amendment was, however, made to contain disputes over payment of IGST when in-bond sale of warehoused goods is made. The person filing into-bond bill of entry deposits the goods in customs bonded warehouse and while the goods remain warehoused, they are sold to a buyer who files ex-bond bill of entry to clear the goods for home consumption. CBIC clarified by Circular No. 3/1/2018-IGST, dated 25-5-2018 that IGST will be levied and collected at the time of clearance from warehouse and such goods will not be subject to levy of IGST before. This was made applicable to supplies made on or after 1st April, 2018 (in respect of such warehoused goods). For the period before, the department had entertained the view that IGST was payable twice [Circular No. 46/2017-Customs, dated 24-11-2017].

Supply from Security Hold Area is within taxable territory

Sale of sunglasses from a retail outlet in the Security Hold Area (SHA) on crossing the Customs & Immigration and was held to be not an export in *Rod Retail (P.) Ltd., In re*[6a]. The applicant contended that the SHA should be held as outside territory of India. However, as per the ruling, since customs frontiers of India includes customs area which means the area of a customs station or a warehouse and includes any

6. [2019] 110 taxmann.com 155 (Bom.).

6a. [2022] 141 taxmann.com 345 (AAAR-Delhi).

area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities and therefore, SHA cannot be held as located outside India.

High Sea Sale

It is a common practice in international merchandise trade to sell the goods when they are being transported/shipped to the destination. Such sale takes place by conveying documents of title to the goods. The ultimate buyer in the destination country files bill of entry and clears the goods for home consumption. Such transaction termed as high sea sale was subject of doubt at the time of introduction of GST in 2017 as to whether IGST is payable when high sea sale is made.

CBIC clarified this issue by Circular No. 33/2017-Customs, dated 1-8-2017 based on GST Council's deliberations and recommendations to the effect that IGST shall be levied and collected only at the time of importation i.e. when the import declarations are filed for customs clearance. This circular further clarified that value addition accruing in high sea sale (whether one or more of such sale) shall form part of the value on which IGST is collected at the time of clearance.

To provide statutory basis to the above clarification, Schedule-III to CGST Act was amended with effect from February, 2019 by inserting the entry

> "8(*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."

The consignee is the buyer who purchases the goods from the foreign seller and he supplies to another person by endorsing documents of title in favour of his buyer who gets into his shoes and becomes the importer. Though the common parlance term of 'high sea sale' has not been used, the description in this entry covers the same. CBIC clarified the proposed amendment (before the amendment was carried out) that this change was to ensure that there is no double taxation of transactions where supply of goods occurs in the course of high sea sale.

Ship stores - IGST liability

Ship stores are those goods which are supplied to ships on foreign run. As per Section 88(*a*) of Customs Act, goods taken on board any foreign-going vessel or aircraft as stores are treated as export goods. The provisions of Sections 85 to 88 confer duty free status to the imported goods supplied from a warehouse to a foreign going vessel or aircraft. Based on CBIC clarification, the applicant had contended that the supply in their case was export. The applicant was supplying imported cosmetics, toiletries and food products which were supplied to ocean-going merchant ves-

sels on foreign run, Indian Naval ships and Indian Coast Guard ships. The Advance Ruling Authority (Andhra Pradesh) held that the outward supplies made would be treated as exports [*Fairmacs Shipstores Pvt. Ltd. In re*[7]]. This means that IGST will not be payable.

The above was not agreed with by West Bengal AAR in *Shewratan Company Pvt. Ltd. In re*[8] on the ground of factual difference. The AAR held that in Fairmacs case, the supplies were made to merchant ships on foreign run on the condition that they were not to be consumed till the vessel crossed the territorial waters which was not the case before it. The applicant was supplying ropes, paint, electronic equipment, etc., to foreign going vessel while it was anchored in India and supply of such goods sourced from inland and consumed or used for repair or servicing of vessel while in India cannot be treated as export and GST would be payable.

The above mentioned rulings indicate that there is lack of clarity on the issue of goods supplied as stores to foreign going ships as to whether they are treatable as exports providing the option to the supplier of non-payment of GST and claim refund of input tax credit as available for zero rated supplies or pay the tax and obtain refund.

Generally, Customs exemption is provided to such stores which are meant for consumption when the vessel is in international waters. IGST Act also adopts the meaning of export as taking goods out of India to a place outside India. Therefore, as long as ship stores are meant for use or consumption in foreign-going vessel, IGST should not be payable considering the special dispensation provided for such supplies under the Customs Act. However, corresponding amendment in IGST Act may be required to avoid disputes.

5.3 PLACE OF SUPPLY

As noted in the previous portion, place of supply in respect of imported goods and export goods is not complicated or does not involve many situations. However, the provisions on place of supply in respect of services present a different picture and mount considerable challenges. The statute covers two situations:

(1) Both supplier and recipient are located in India

(2) Either supplier or recipient is located outside India

The first situation does not involve cross-border transactions and it is an intra-country affair. Section 12 of IGST Act providing for place of supply in such case is not relevant for the present discussion. Section

7. [2018] 99 taxmann.com 108 (AAR - AP).

8. [2019] 111 taxmann.com 230/[2020] 77 GST 304 (AAR - W.B.).