IGST on Import - A Duty of Customs or Tax on Supply under GST

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Introduction

Import and Export are fundamental components of International trade. The Goods and Services Tax ('GST') was introduced subsuming major indirect tax legislations and is imperative for import and export related transactions as they involve supply of goods and services across national borders.

It is notable that Article 269A[1] of the Constitution deems Import of goods or services to be a supply in course of inter-state trade or commerce and subjects the same to levy of Integrated tax. The definition of import of goods under IGST Act[2], which is verbatim extracted from the Customs Act, 1962 emphasizes on the 'physical aspect' of bringing goods into India from outside India. The proviso to Section 5(1) of IGST Act, 2017 provides that IGST on import of goods shall be levied and collected in accordance with the provisions of S. 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.

Import of Goods: Genesis of the Concern

When a person imports a Good *via* outright sale, the provisions applicable are clear in themselves i.e., it is a transaction of 'import of goods' and 'supply of goods.' The importer shall be liable to pay Basic Customs Duty ('BCD') along with integrated tax valued in accordance with S. 12 of Customs Act read with S. 3(7) of the Customs Tariff Act. Irrespective of the nomenclature, in cases of outright sale whether one calls it a duty of custom (or) a tax on supply, there is no controversy in application since IGST is being paid only once.

However, concerns arise when one is importing goods on lease, rent, repairs, re-import or any other purpose which is not towards any supply of goods per se. Though for the purpose of levy of BCD, the physical bringing of goods into the country shall be treated as 'Import of goods' in the Customs Act, however the same may not amount to 'Supply of Goods'. It may be a case of supply of services where goods are imported in pursuance of a supply of services. For e.g. – Leased machinery is imported into the country which is a supply of service under GST law. The question arises whether IGST shall be applicable in such cases under Customs law as a 'Duty of Customs' or under GST law as 'Tax applicable on Supply' under GST law.

Duty of Customs vis a vis Tax on Supply

The nomenclature and classification are crucial in such cases where though one is importing goods, however, the classification in terms of supply is that of the services like import of goods under a lease or rent agreement. Now, if IGST is classified as a 'Duty of Customs' then, a person is importing Goods by way of a lease shall be liable to pay BCD per S. 12 of Customs Act on full intrinsic value & IGST will be levied under S. 3(7) of Custom Tariff Act. Apart from this, he shall also be liable pay IGST on Import of Services.

It can be seen that on this transaction apart from BCD, IGST is being made applicable twice. One tax is

payable as ‘Duty of Customs’ on full intrinsic value at time of ‘Import of Goods’ and another separately on lease charges on ‘Import of Services’ on monthly basis essentially leading to double taxation.

The Department has been mitigating the problem of this double taxation to a large extent by granting Exemption notifications i.e. Conditional Exemptions.[3] However, Conditional exemptions are to be undertaken with caution and can have serious repercussions on the Assessees. If an assessee fails to fulfil the conditions, he shall be subjected to double taxation, imposing a huge burden on the business exposing the transaction to unwarranted litigation.

However, if we consider IGST applicable on import of goods under GST law as ‘Tax on Supply’ then he shall be liable to pay only BCD at the time of import. The liability to pay IGST would arise under GST law only when there is supply of services and not at the time of import of Goods as there is no supply of goods.

Integrated Tax as ‘Duty of Customs’ under Customs Law

A view can be taken that what is collected under S.3(7) is a duty of custom on import of goods and not a tax on supply under the GST. The primary reason is that the said section does not make a reference to the word ‘Supply’ and thus what is collected is a duty of customs. Additionally, the proviso to S. 5(1) does not use the word ‘Supply’ and thus cannot be construed to be a tax on supply.

Integrated tax as ‘Tax on Supply’ under GST Law

The taxable event for GST is supply of goods, services or both and it is a well settled position of law, that if the chargeable event is not triggered, no tax can be lawfully levied. Thus, before even one refers the Customs Tariff Act, one has to identify where the transaction in consideration is a ‘Supply’ under GST. If it is a supply of services, there is no need to refer the Customs Act as, though for the purpose of BCD it may be Import of Goods, but for purposes of IGST it will be Supply of Services and not Goods, falling out of the proviso of S. 5(1).

Recently, the Hon’ble Tribunal of Delhi in the case of *Interglobe Aviation Limited v. Commissioner of Customs* observed that though integrated tax is levied under section 5 of the Integrated Tax Act, but it is collected in accordance with the provisions of section 3 of the Tariff Act on the value as determined under the Tariff Act and at the point when duties of customs are levied under section 12 of the Customs Act. Thus, integrated tax is levied under section 5(1) of the Integrated Tax Act and only the procedure for collection has been provided under section 3 of the Tariff Act.

Further, in authors view, the absence of the prefix ‘supply’ in the proviso cannot bring it outside the ambit of supply. The proviso and the section have to be read as a whole and harmoniously interpreted. The chargeability section 5(1) clearly uses the words ‘tax on all inter-State **Supplies** of goods and services or both.’ The absence of the word supply in the proviso cannot lead to a conclusion that supply is not a requisite for the levy of integrated tax on import. If the provision requires a supply, then proviso shall also require a supply.

Most importantly, as per the provisions of the Constitution, IGST is a Tax on Supply and not a Duty of Customs because, it does not fall under the central pool of taxes to be distributed to all states as per Article 270(1A) & 270(1B) of Constitution of India., but falls under a different bracket where it shall be apportioned to the respective state in lieu of place of supply provisions as per Article 269A of Constitution of India.. Tax covered by Article 269A will be apportioned in accordance with the formula applicable for GST made by a law of the Parliament under Section 17 of the IGST Act, 2017. It will not be distributed according to the formula applicable to all other central taxes per the recommendations of the Finance Commission. Article 270 expressly excludes tax covered by article 269A as a part of general pool of central taxes.

In other words, If IGST on import of goods is levied under Customs Laws as duty of Customs, it should be distributed as per recommendations of Finance Commission under Article 270(2) read with 270(1) & it not be distributed in accordance the formula for distribution of IGST contained in Section 17 of IGST act. However in practice, it is not being distributed on the basis applicable to Duties of customs, rather it is being distributed as a Tax on Supply on basis on apportionment under 269A(1) i.e. Law made by

Parliament under Section 17 of IGST Act.

Thus, if under the Constitution for distribution of revenue and other purposes, it is not a duty of customs but a tax on supply, then government needs to reconsider this issue. By any other interpretation, S. 17(1)(c), 17(1)(f), 17(2) is becoming a dead letter and an ornamental piece which is not permissible in taxing statues.

Conclusion

Similar concerns relating to import of goods have come up for consideration in other jurisdictions as well. For example, in Australia the transaction is treated as duty of customs and not as tax on supply. The Customs notifications are meticulously aligned with GST law to make the controversy irrelevant. In other words, by putting appropriate notifications in the correct place they have made this difference irrelevant. India can choose to follow a similar approach rather than opting to conditional exemption notifications, which neither covers all situation nor addresses the problem at a macro level.

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[1] Art. 269A, Constitution of India.

[2] Section 2(10), Integrated Goods and Services Tax Act, 2017.

[3]Exemption Notification No. **50/2017**- Customs issued under S. 25 of the Customs Act. E.g.,

Entry 547 A- Aircrafts, Aircraft engines and other aircraft parts imported into India under a transaction covered by item 1(b) or 5(f) of Schedule II of the Central Goods and Services Tax Act 2017 - effective from 08.07.2017.

Entry 557 A – Rigs and ancillary items imported for and or gas exploration and production imported under a transaction covered by item 1(b) or 5(f) of Schedule II of the Central Goods and Services Tax Act 2017 - effective from 13.10.2017.

Entry 557 B - all goods, vessels, ships [other than motor vehicles] imported under a transaction covered by item 1(b) or 5(f) of schedule II of the Central Goods and Services Tax Act 2017 - effective from 14.11.2017.