

Service Tax on ocean freight – the recent changes

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The following services were kept in the negative list, when negative list based service tax levy was introduced from 01.07.2012.

services by way of transportation of goods—

(ii) by an aircraft or a vessel from a place outside India up to the customs station of clearance in India;

The above entry has been removed from the negative list, from 01.06.2016.

The following exemption has been introduced in Notification 25/2012 ST Dt. 20.06.2012, vide Notification 9/2016 ST Dt. 01.03.2016 with effect from 01.03.2016.

53. Services by way of transportation of goods by an aircraft from a place outside India upto the customs station of clearance in India.

As a result of the above changes, ocean freight for import consignments upto Indian sea port has become taxable, from 01.06.2016 while air freight for import consignments continue to be exempted.

As a consequence, if the services of a Freight Forwarder / Multimodal Transport operator / Shipping line located in India is availed by an importer in India, service tax would be applicable in the hands of the service provider on the ocean freight received by them. If the service provider is situated outside India, service tax is payable by the Importer, under reverse charge.

But if the foreign consignor, engages a foreign shipping line to transport the goods to an Indian Port, even though the place of provision of such service is India (destination of the goods – Rule 10 of the Place of Provision of Service Rules, 2012) no service tax is payable, as per the following Exemption available under S.No, 34 (c) of Notification 25/2012.

34. Services received from a provider of service located in a non-taxable territory by -

(c) a person located in a non-taxable territory

This seems to have created an anomalous situation whereby if transport is arranged by the Consignor based out of India through a shipping line based outside India, service tax would not be payable, whereas service tax would be applicable under reverse charge, if the Indian importer engages a shipping line based outside India.

In order to set right such anomaly certain amendments have been made vide Notifications 1/2017 ST and 3/2017 ST, dated 21.01.2017, with effect from 22.01.2017.

Vide Notification 1/2017, the following proviso has been introduced under S.No. 34 of Notification 25/2012.

"Provided that the exemption shall not apply to –

(i).....

(ii) services by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.

So, in the absence of any exemption if a foreign consignor engages a foreign shipping line to transport goods an Indian port, service tax is applicable from 22.01.2017.

Now the question is as to who is liable to pay such service tax.

Vide Notification 2/2017 ST Dt. 12.01.2017, in the definition of the term "person liable for payment of service tax" under Rule 2 (1) of the Service Tax Rules, 1994 the following clause has been added, with effect from 22.01.2017.

(EEC) in relation to 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, the person in India who complies with sections 29, 30 or 38 read with section 148 of the Customs Act, 1962 (52 of 1962) with respect to such goods.

Vide Notification 3/2017 ST Dt. 12.01.2017, Notification 30/2012 ST Dt. 20.06.2012 dealing with reverse charge liabilities, the following entries have been added.

(i) in paragraph I, in clause (A), after the sub-clause (vi), the following sub-clause shall be inserted, namely:-

"(vii) 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;"

(ii) in paragraph (II), in the Table, after Sl. No. 11 and the entries relating thereto, the following Sl. No. and entries shall be inserted, namely:-

"12.	<i>in respect of services provided or agreed to be provided by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India</i>	<i>Nil</i>	<i>100%".</i>
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(iii) after Explanation III, following Explanation shall be inserted, namely:-

"Explanation IV.- For the purposes of this notification, in respect of services provided or agreed to be provided by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, person liable for paying service tax other than the service provider shall be the person in India who complies with sections 29, 30 or 38 read with section 148 of the Customs Act, 1962 (52 of 1962) with respect to such goods.

As a result of the above amendments, in a situation where the foreign consignor himself engages the services of a foreign shipping line, to transport goods to an Indian port and pays freight, service tax on such freight is liable to be paid by the person in India, who complies with sections 29, 30 or 38 read with section 148 of the Customs Act, 1962.

For ready reference, the above said sections of the Customs Act, 1962 are reproduced below.

SECTION 29. *Arrival of vessels and aircrafts in India. – (1) The person-in-charge of a vessel or an aircraft entering India from any place outside India shall not cause or permit the vessel or aircraft to call or land -*

(a) for the first time after arrival in India; or

(b) at any time while it is carrying passengers or cargo brought in that vessel or aircraft;

at any place other than a customs port or a customs airport, as the case may be unless permitted by the Board.

(2) The provisions of sub-section (1) shall not apply in relation to any vessel or aircraft which is compelled by accident, stress of weather or other unavoidable cause to call or land at a place other than a customs port or customs airport but the person-in-charge of any such vessel or aircraft –

(a) shall immediately report the arrival of the vessel or the landing of the aircraft to the nearest customs officer or the officer-in-charge of a police station and shall on demand produce to him the log book belonging to the vessel or the aircraft;

(b) shall not without the consent of any such officer permit any goods carried in the vessel or the aircraft to be unloaded from, or any of the crew or passengers to depart from the vicinity of, the vessel or the aircraft; and

(c) shall comply with any directions given by any such officer with respect to any such goods,

and no passenger or member of the crew shall, without the consent of any such officer, leave the immediate vicinity of the vessel or the aircraft.

Provided *that nothing in this section shall prohibit the departure of any crew or passengers from the vicinity of, or the removal of goods from, the vessel or aircraft where the departure or removal is necessary for reasons of health, safety or the preservation of life or property.*

SECTION 30. Delivery of import manifest or import report. –

[(1) The person-in-charge of -

(i) a vessel; or

(ii) an aircraft; or

(iii) a vehicle,

carrying imported goods or any other person as may be specified by the Central Government, by notification in the Official Gazette, in this behalf shall, in the case of a vessel or an aircraft, deliver to the proper officer an import manifest by presenting electronically prior to the arrival of the vessel or the aircraft, as the case may be, and in the case of a vehicle, an import report within twelve hours after its arrival in the customs station, in the prescribed form and if the import manifest or the import report or any part thereof, is not delivered to the proper officer within the time specified in this sub-section and if the proper officer is satisfied that there was no sufficient cause for such delay, the person-in-charge or any other person referred to in this sub-section, who caused such delay, shall be liable to a penalty not exceeding fifty thousand rupees.

Provided *that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to deliver import manifest by presenting electronically, allow the same to be delivered in any other manner.*

(2) The person delivering the import manifest or import report shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

(3) If the proper officer is satisfied that the import manifest or import report is in any way incorrect or incomplete, and that there was no fraudulent intention, he may permit it to be amended or supplemented.

SECTION 38. Power to require production of documents and ask questions. – *For the purposes of carrying out the provisions of this Act, the proper officer may require the person-in-charge of any conveyance or animal carrying imported goods or export goods to produce any*

document and to answer any questions and thereupon such person shall produce such documents and answer such questions.

SECTION 148. Liability of agent appointed by the person in charge of a conveyance. — (1) *Where this Act requires anything to be done by the person in charge of a conveyance, it may be done on his behalf by his agent.*

(2) *An agent appointed by the person in charge of a conveyance and any person who represents himself to any officer of customs as an agent of any such person in charge, and is accepted as such by that officer, shall be liable for the fulfilment in respect of the matter in question of all obligations imposed on such person in charge by or under this Act or any law for the time being in force, and to penalties and confiscations which may be incurred in respect of that matter.*

It may be observed that these sections refers to the person in charge of the vessel, of any person authorised to file Import General Manifest of any agent appointed in India by the person in charge of the vessel (shipping agent).

Hence, where a foreign consignor has engaged a foreign shipping line to transport goods upto Indian Port, the person in charge of the vessel or his agent in India is liable to pay service tax.

It may be noted that this is a peculiar situation where the person liable to pay service tax is neither the service provider nor the service receiver, but the agent of the shipping line (service provider) {There are few such cases, where the aggregators are made liable to pay service tax and where the agent / representative of Online information and database access and retrieval service provider based outside India). So, the service for which the Shipping agent is made liable to pay service tax is neither an output service provided by him nor an input service received by him. Such shipping agent, while raising any bills on the Indian importer for any other clearance related service provided by him, shall also charge service tax on the freight paid by the foreign consignor to the foreign shipping line. It may be noted that he would not claim any freight but would only charge service tax on the freight.

One practical problem would be determination of the Point of Taxation for such cases. Rule 7 of Point of Taxation Rules, 2012 would apply only if the service recipient is liable to pay the service tax and the point of taxation in such cases would be the take of making payment (and if payment is not made within three months from the date of invoice, the date immediately following such three months). But in the instant case, the person liable to pay service tax is not the service recipient and hence Rule 7 would not be applicable. Further, even if it is assumed that Rule 7 would apply, the person liable for payment of service tax would not be making any payment towards freight.

Another issue could be, the person who is thus liable to pay service tax, can utilise the balance of cenvat credit available with him to pay this service tax? It may be noted that the person filing import manifesto, is made liable to pay service tax for the service provided and received by two foreign persons. This service is not an output service in the hands of the person liable to pay service tax. Hence, he

cannot utilise the cenvat credit balance to pay this liability and this has to be paid only in cash.

Can this service tax be collected from the Indian importer? The person who is paying service tax under these provisions, can collect the service tax from the Indian importer and there is no bar for such collection. It may be noted that he would not claim freight paid to the shipping line from the importer (as freight has been paid by the foreign exporter to the foreign shipping line) but would claim only service tax.

Can the Indian importer avail cenvat credit of the service tax thus charged? Yes. Subject to satisfaction of other conditions. But what is the document based on which such credit can be taken? The invoice raised by the person liable to pay service tax may not qualify as a valid document, as he is not the service provider. May be he has to furnish the challan evidencing payment also, based on which credit can be availed by the importer.

(Published in www.taxindiaonline.com on 30.01.2017)