

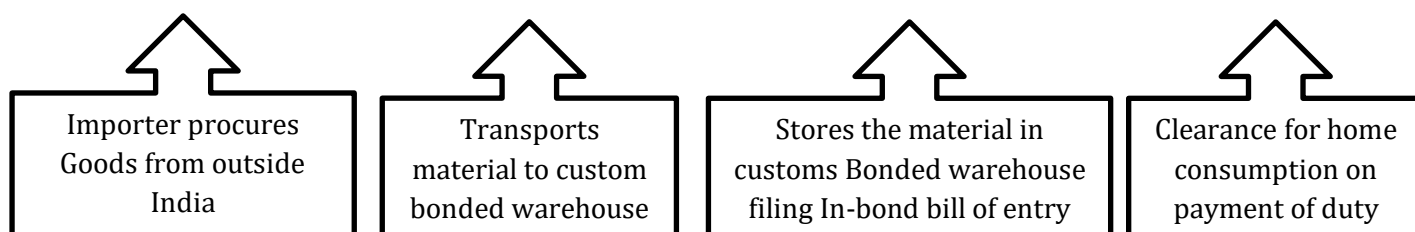
GST ON SALE FROM "BONDED WARE HOUSE" - ISSUES

(April, 2018)

INTRODUCTION:

During the VAT regime, the statutory provisions of the act were never appreciated but the circulars from the department officials were considered conclusive for levying taxes on a particular transaction. GST is not an exception to this as the law is being superseded by clarifications from various statutory officials through circulars, tweets in twitter, Press Information Bureau, etc. Because of this, tax payers' are perplexed with regard to the provisions of law. As a matter of this concern, the Author has analysed issues created by a circular for taxing transactions of sale from Bonded warehouse.

TRANSACTION OF SALE FROM BONDED WARE HOUSE:



Warehousing the imported goods are followed as a trade practice where the importer does not want to clear the goods immediately:

- a) Due to lack of storage facilities or
- b) To avoid local State levies or
- c) Due to prior arrangement with Buyer
- d) Due to working capital issues

When goods are stored in customs warehouse, no customs duty is payable during their period of storage. Initially, the importer has to file an Into-bond bill of entry (Bill of entry for Warehousing) and the goods are assessed to customs duty based on value at the time of warehousing. However, Custom duties for the warehoused goods will be actually collected only when they are cleared for Home consumption.

During this period of storage, the importer identifies the buyer and transfers the title of goods warehoused for a consideration generally more than the assessed value of imports. The ultimate buyer will file the ex-bond bill of entry and pay customs duty on the originally assessed value while they clear the goods for home consumption.

TAXATION OF THIS TRANSACTION UNDER PRE GST ERA:

The transaction value charged by the importer to the ultimate buyer would not be subject to customs duty as the assessable value under Customs Tariff Act is the value at the time of warehousing. This was even acknowledged by the customs department in its circular no.11/2010 dated 3rd of June 2010 wherein it was stated that, *“in the case of sale of imported goods after they are warehoused on Indian territory, the value at which such transaction took place will not qualify as the transaction value, as per Section 14”*. In other words, it is the value at the time of bonding and not the value at the time of removal for home consumption that is reckoned for customs duty.

There was however a controversy under Central Sales Tax and the Commercial Tax department of the States claimed CST on clearance for Home Consumption by the initial importer to the ultimate buyer. However the matter has since been settled by the Apex Court in M/s. Hotel Ashoka Vs. Assistant Commissioner of Commercial Taxes reported in 2012 (276) ELT 433, in which the court held as under:

- I) *When the goods are kept in the bonded warehouses, it cannot be said that the said goods had crossed the customs frontiers of India*
- II) *since duty free shops were located in the customs airports of the country, sales there from to both inbound & outbound passengers were made before the goods had crossed the customs frontiers and hence such sales were exempt from tax under the CST Act*

Therefore it was a settled law that the import is said to be completed only when the goods cross the customs barrier in India. Hence CST was not exigible on sale from Bonded Warehouse for Home consumption. Consequentially, the margin made by the importer on sale to the ultimate buyer would not be subject to CST.

TAX IMPLICATION IN GST REGIME:

During the initial few months of GST, the importers were following the same trade practice of not charging GST on sale made from bonded warehouse. It should be noted that GST law empowered the Customs to handle the leviability and collectability of GST on import of goods. The Customs Act was equipped to deal with this situation by collecting IGST on the **Into-Bond Value**.

Much to the dismay of tax payers, the Customs department issued a Circular 46/2017 directing the tax payers to charge GST on sale of goods made from bonded warehouse. This has resulted in a situation of double taxation wherein the ultimate buyer was forced to pay GST twice as below:

- 1) Pay GST directly to customs when they clear goods from warehouse for Home consumption on the **Into-bond value**– which is perfectly fine in terms of proviso to Sec 5 of IGST Act; and
- 2) Pay GST to the supplier (initial importer) on sale of goods for home consumption (**ex-bond value**);

Owing to this, in many cases, the ultimate buyer accumulated large input credits compared to their output liability.

Circular No. 46/2017-Customs: Doubtful validity

The Author is of the opinion that the circular is invalid for the following reasons:

- 1) Taxing transactions that have happened before the goods cross the customs frontier of India, is prima facie extra territorial and hence not within the taxing reach of India;
- 2) Therefore, charging IGST on the final sale value even if consistent with Sec 7(2) of IGST may fail on grounds of unconstitutionality.
- 3) Since sale during bonded warehouse not involving movement into India, is also sale before crossing customs frontier of India, there can be no levy of taxes or duties.
- 4) As such it is only the Customs department that can levy IGST and that too, only when the goods are physically moved from the Bonded Warehouse to the territory of India by the ultimate buyer.
- 5) Interestingly CBEC, vide circular No. 33/2017-Cus dated 1-8-2017 had clarified that in case of **high seas sale**, IGST is not leviable. IGST will be levied only when the goods are cleared from customs. The importer, i.e. last buyer will be required to furnish the entire chain of documents such as original invoice, high seas sale contract, details of service charges/commission etc. In so far as Sale in customs bonded warehouse is also sale before crossing customs frontier of India, the aforesaid CBE&C, circular No. 33/2017-Cus dated 1-8-2017 fully applies to sale during storage in customs bonded warehouse also.
- 6) The view expressed by CBE&C in Circular No. 46/2017-Customs dated 24-11-2017 is clearly against its own earlier circular No. 33/2017-Cus dated 1-8-2017.

Union Budget 2018:

In the recent Union Budget, 2018, a new sub section (8A) to Section 3 of Customs Tariff has been proposed to deal with valuation of goods sold from bonded warehouse for levy and collection of

IGST. Without going into technicalities, the provision seeks to reckon the final sale value for home consumption for collection of IGST.

Consequent to this new provision, the Customs department is now empowered to collect IGST on the sale value involved in the last leg of the supply chain. This means that IGST will be collected henceforth not only on the Into-Bond value but on the final value including margin if any.

The insertion of subsection 8A ensures that the Government gets its share of IGST on the entire sale value. Therefore, IGST Act should be suitably amended to clarify that transactions that take place outside India shall not be included under the term "Supply".
