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Newsflash: Service Tax Liability Shifted on Importer in case of Ocean Freight

The Government of India had made significant changes with effect from 22 January 2017 vide Notifications 1/2017-ST and 3/2017 dated 12 January 2017 whereby if services are provided by a person located in a non-taxable territory to a person located in a non-taxable territory by way of transportation of goods by vessel from a place outside India upto the customs station of clearance in India, the person liable to pay service tax is the person in India who complies with Sections 29, 30 or 38 read with Section 148 of the Customs Act, 1962 with respect to such goods.

Section 29: The person-in-charge of a vessel or an aircraft entering India shall not permit the vessel or aircraft to land at any place other than a customs port or a customs airport.

Section 30: The person-in-charge of a vessel carrying imported goods shall deliver an import manifest within 12 hours after its arrival to the proper officer.

Section 38: The person in charge of any conveyance carrying imported goods or export goods shall produce any document and provide answers to any questions as required by the proper officer.

The amendments created some degree of confusion on account of identifying the person liable; the quantum of service tax in the absence of availability of value of freight; CENVAT credit eligibility debate with reference to importers.

The confusion created due to above amendments has been resolved to a large extent by the new set of changes.

- Rule 2(1) of the Service Tax Rules, 1994 is being amended with effect from 23 April 2017 whereby if services are provided by a person located in a non-taxable territory to a person located in a non-taxable territory by way of transportation of goods by vessel from a place outside India upto the customs station of clearance in India, the person liable to pay service tax is the importer as defined under Section 2 (26) of the Customs Act, 1962 of such goods.
- As per Section 2(26) of the Customs Act, “importer” in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer.
- A corresponding amendment has been made to Notification No.30/2012 -ST dated 20 June 2012 whereby in such cases, service tax has to be discharged by importer of such goods under reverse charge mechanism.
- One aspect which may be taken into consideration is that every importer who imports on his IEC number, whether import is for personal use or for business purposes has to discharge service tax under reverse charge where services are provided by the Foreign Shipping Companies to the person located outside India (the Supplier of Goods situated outside taxable territory from whom the importer has imported the goods).

RSM India Comment:

Challenges on the taxability of Service tax on the said services:

One of the basic fundamental of taxing Service tax is that there should be Consideration. While importing the goods on CIF basis, Consideration for Services by way of transportation of goods by vessel is discharged by the Supplier Located outside India and no part of the consideration is discharged by Importer. Further Services are provided by the Foreign Shipping Company to the Exporter Located outside India and no part of service is received by the Importer.

Further while importing the goods, Customs duty is already discharged on Cost + Insurance + freight (CIF), there is an overlapping where service tax is also leviable on the same freight amount.

Therefore the set of changes can create a lot of litigations for the leviability of Service Tax.

- Further Rule 6 of the Service Tax Rules, 1994 is also being amended, whereby an option is being made available to discharge service tax at an amount calculated at the rate of 1.4% of the sum of cost, insurance and freight (CIF) value of such imported goods. In addition Swachh Bharat Cess and Krishi Kalyan Cess each @0.05% of Custom Value of Goods shall be paid accordingly; the effective rate shall be 1.5% of the CIF value. The option has been made available with retrospective effect from 22 January 2017.
- In other words, for the period 22 January 2017 to 22 April 2017, the person who is liable to pay service tax namely the person filing the Import General Manifest has an option of discharging service tax at an identified rate i.e. 1.4% of the CIF Value. The said option provided now would create demand of the refund amount pertaining to service tax where service tax paid under the normal provisions is more than the service tax payable as per the option given under Rule 6 of the Service Tax Rules, 1994 for the period between 22 January 2017 till 22 April, 2017. **However there is no clarification in the said regard and we interpret that the option given under Rule 6 is only for those persons who have still not discharged the Service tax liability as on 22 April 2017 and not for the persons who had already discharged service tax.**
- It is also pertinent to point out here that under Notification No. 26/2012-ST dated 20 June 2012 (SI. No. 10), there is an exemption on 70% of value of services of transportation of goods in a vessel subject to the fulfillment of the condition that CENVAT credit on inputs and capital goods used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. The effective rate being 4.5% of the freight amount. Therefore the importer can either discharge service tax @ 1.5% of the CIF value or 4.5% of the Freight amount at his option.

Considering condition in above mentioned notification, foreign shipping company is eligible to take abatement benefit of 70% as they are not availing any CENVAT credit on inputs and capital goods used to provide taxable service. However, Circular no. 206/4/2017- Service Tax dated 13 April 2017 denies such benefit for foreign shipping company by giving following justification:

“In case of foreign shipping lines, their services being exports from their home country, are zero-rated in their home country and thus have suffered no taxes. Further the foreign shipping lines do not get registered in India and do not follow the provisions of CENVAT Credit Rules. Thus, the condition for availing exemption under notification No. 26/2012-ST dated 20.06.2012 (SI. No. 10) is not fulfilled by the foreign shipping lines. Hence, benefit of conditional exemption will not be available to them and service tax will be paid on full value of services.”

RSM India Comment

Literal interpretation of said abatement notification allows foreign shipping company to avail abatement of 70% on such services. Further, said circular is not in agreement with notification issued and it must be noted that circular cannot override notification.

Hon’ble Supreme Court in Union of India V/s Inter Continental (India) 2008 (226) ELT 16 held that Department by issuing a circular subsequent to notification could not add new condition to the Notification thereby restricting the scope of exemption notification or whittling it down.

Hon’ble Ahmedabad CESTAT in Hindustan Unileaver Ltd V/s CCE Bhavnagar 2010 (250) ELT 92 held that circular cannot override exemption notification.

Hence, in our view abatement may be admissible and said circular may be overlooked.

- With effect from 22 January 2017 by way of Notification No 14/2016-ST, Rule 8B has been inserted in Point of Taxation rules, 2011 where Point of taxation in case of services provided by a person located in non-taxable territory to a person 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, shall be the date of bill of lading of such goods in the vessel at the port of export.

Period Wise Chart

Sr. No.	Particulars	Before 22/01/2017	From 22/01/2017 Till 23/04/17	23/04/2017 & onwards
1.	Liability	Exempted – Mega Exemption Notification 25/2012-ST	Foreign Shipping Company	Importer
2.	Rate	N.A	4.5% of Freight Amount or 1.5% of CIF value	4.5% of Freight Amount or 1.5% of CIF value

(Notification No.13/2017-ST,14/2017-ST,15-2017-ST dated 13 April 2017)



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This newsflash is general in nature. In this newsflash, we have summarized Service Tax Rules 1994 with respect to Ocean Freight. It may be noted that nothing contained in this newsflash should be regarded as our opinion and facts of each case will need to be analyzed to ascertain applicability or otherwise of the said notification and appropriate professional advice should be sought for applicability of legal provisions based on specific facts. We are not responsible for any liability arising from any statements or errors contained in this newsflash.

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