

GST: Constitutional Perspective

V. Sridharan, Senior Advocate, Bombay High Court

Government of India Act, 1935

- ▶ Section 100 – Subject matter of Federal and Provincial laws
 - ▶ (3) ~~Subject to the two preceding subsections,~~ the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the Provincial Legislative List).

Position pre-1950

- ▶ Entry 48 of List II of Seventh Schedule of the Government of India Act, 1935–
 - ▶ Taxes on the sale of goods and on advertisements.
- ▶ Sales tax was a state subject. A state could make law for that state.
- ▶ No entry in the List I (Federal Legislative List) for tax on sale of goods.
- ▶ Further, no restriction on states' power to levy tax on sale of goods.
- ▶ State sales tax law will say it will levy tax on sale within the state.
- ▶ Each state sales tax law had its own definition of sale within the state.
- ▶ A transaction of sale having some nexus with the state was defined as sale within the state.

Position pre-1950

- ▶ The King v. Dominion Engineering Co. Ltd. (AIR 1947 PC 94)

“5. In imposing a sales tax one of the difficulties which confront the Legislature lies in the selection of the point of time at which the tax shall attach and become due. In the case of an ordinary retail sale for cash across the counter of a shop, the stages of agreement, appropriation of the goods to the contract, delivery, payment of the price and passing of the property are all practically simultaneous. But in more complicated transactions for the sale of goods to be produced or manufactured these stages may be spaced in time in various ways.”

- ▶ In across the counter sale, there is no complexity as all the elements of a sale are within the state.
- ▶ However, complexity arises where different elements of sale are situated in different states.

Position pre-1950

- ▶ Consider a sales transaction where –
 - ▶ Seller is in Maharashtra
 - ▶ Buyer is in Uttar Pradesh
 - ▶ Agreement is entered in Madhya Pradesh
 - ▶ Goods are within Gujarat
 - ▶ Payment is made in Madras.

Suppose sale tax law of each state defined a sale as within the state if, (a) seller is in the state or (b) buyer is in the state or (c) Agreement is made in the state or (d) Goods are within the state or (e) payment is made within state.

One single sale can be taxed by each of the above five states.

Position pre-1950

- ▶ Further, in case where –
 - ▶ Goods are sold/imported from London to Maharashtra – Purchase Tax was levied by Maharashtra state on import of goods on the purchaser.
 - ▶ Goods are sold/exported from Maharashtra to London – Sales Tax was levied by Maharashtra state on export of goods on the seller.

Constitutional Provisions (as introduced)

- ▶ Entry 54 of List II–
 - ▶ Taxes on sale or purchase of goods.
- ▶ No entry in List I (Union List) for levying tax on sale of goods.

Constitutional Provisions (as introduced)

- ▶ Article 286 – Restriction as to imposition of tax on the sale or purchase of goods
 - 1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place
 - a) outside the State; or
 - b) in the course of the import of the goods into, or export of the goods out of, the territory of India

Constitutional Provisions (as introduced)

- ▶ *Explanation to clause (1) of Article 286–*
 - ▶ ~~For the purpose of sub-clause (a), a sale or purchase shall be deemed to have taken place in the state in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that state, notwithstanding the fact that under general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another state.~~

Constitutional Provisions (as introduced)

- ▶ Article 286 (2) -

- ▶ ~~Except in so far as parliament may by law otherwise provide,~~ no law of a state shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-state trade or commerce.

Interpretation of Article 286

- ▶ *State of Bombay v. United Motors (India) Ltd: (1953) 4 S.T.C. 133 (S.C.)*
 - ▶ Sub-clause (a) and the explanation in clause (1) of article 286 prohibited the taxation of a sale involving inter-State elements by all States.
 - ▶ However, the State in which the goods were delivered for the purpose of consumption therein, can tax that sale even though it is inter-State sale.
 - ▶ For example, seller of Bombay sells goods to a buyer of Bihar for consumption in Bihar. This is an inter state sale. In this case, seller of Bombay will be subjected to Sales Tax levied by Bihar State authority.
 - ▶ **This is because Supreme Court said that by virtue of fiction of explanation to Article 286(1), such sale will be treated as a local sale in Bihar, though otherwise it is an inter-state sale.**

Interpretation of Article 286

- ▶ *Bengal Immunity Company Ltd. v. State of Bihar: (1955) 6 S.T.C. 446 (S.C.) overruled United Motors on this point.*
 - ▶ The State of Bihar cannot impose Sales Tax on out of State dealers. This is because sales has taken place in the course of inter- State trade or commerce. This is so even though the goods have been delivered as a direct result of such sales for consumption in Bihar.
 - ▶ A transaction may be inside the state as per Sub-clause (a) and the explanation in clause (1) of article 286 still, it can in the course of inter-state trade or commerce as per clause (2) of article 286. Such a sale cannot be taxed by consumption state.
 - ▶ Thus, a single transaction may be covered by more than one provision of Article 286(1)(a) or 286(1)(b) or 286(2).
 - ▶ **Each prohibition is an independent prohibition. Unless, all of them are overcome, state cannot tax a sale.**

Consequences

- ▶ Sale involving inter-state elements – No state legislature was able to levy sales tax
- ▶ Consider a sale transaction -
 - ▶ Suppose A in Maharashtra wants to sell the goods to C in Maharashtra,
 - ▶ A in Maharashtra will first sell the goods to B in Delhi,
 - ▶ B in Delhi will in turn show sale to C in Maharashtra,
 - ▶ Thus, parties were able to evade tax by making even an intra-state sale as two inter-state sale.

6th Constitutional Amendment Act, 1956

- ▶ Substituted Entry 54 of List II –
 - ▶ Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I
- ▶ Inserted Entry 92A in List I –
 - ▶ Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.
- ▶ Inserted clause (3) in the article 269 –
 - ▶ Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in the course of inter-state trade or commerce.

6th Constitutional Amendment Act, 1956

- ▶ Article 286 as amended by 6th Constitutional Amendment Act, 1956
- Restrictions as to imposition of tax on the sale or purchase of goods
- 1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods, where such sale or purchase takes place -
 - a) outside the State; or
 - b) in the course of the import of the goods into, or export of the goods out of, the territory of India

.....
 - 2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

Inter-state sale

- ▶ Section 3 of Central Sales Tax Act, 1956

When is a sale or purchase of goods said to take place in the course of inter-State trade or commerce

A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase

- (a) occasions the movement of goods from one State to another; or
- (b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Sale or Purchase Outside the State

▶ Section 4 of Central Sales Tax Act, 1956

When is a sale or purchase of goods said to take place outside a State

(1) Subject to the provisions contained in section 3, when a sale or purchase of goods is determined in accordance with sub-section (2) to take place inside a State, such sale or purchase shall be deemed to have taken place outside all other States.

(2) A sale or purchase of goods shall be deemed to take place inside a State, if the goods are within the State—

(a) in the case of specific or ascertained goods, at the time the contract of sale is made; and

(b) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale by the seller or by the buyer, ~~whether assent of the other party is prior or subsequent to such appropriation.~~

Import or Export of Goods

▶ Section 5 of Central Sales Tax Act, 1956

When is a sale or purchase of goods said to take place in the course of import or export

(1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

...

Central Sale Tax Act, 1956

- ▶ Section 6 - Liability to tax on inter-State sales (Charging Section)
 - ▶ Every dealer shall be liable to pay tax under this act on all sale of goods effected by him in the course of inter-state trade or commerce.
- ▶ Section 9 – Levy and collection of tax and penalties
 - ▶ The tax payable by any dealer under this act on inter-state sale is assessed, collected and retained by the despatching state.
 - ▶ “Origin based tax”

Some Points Worth Noting

- ▶ Article 269(3): Parliament will define inter-state sale (Section 3 of CST Act, 1956)
 - ▶ No State legislature can tax inter-state sale because Entry 54 of List II is subject to Entry 92A of List I
 - ▶ Parliament alone can tax inter-state sale (Entry 92A of List I)
- ▶ Article 286(2): Parliament will define inside the state sale and outside the state sale (Section 4 of CST Act, 1956)
 - ▶ Parliament will not levy tax on outside the state sale
 - ▶ State Legislature can levy tax on inside the state sale (Entry 54 of list II)
- ▶ Article 286(2): Parliament will define sale in the course of import or export (Section 5 of CST Act, 1956)
 - ▶ State Legislature cannot tax sale in the course of import or export because of restrictions under Article 286(2)(b)
 - ▶ Parliament also cannot levy sales tax on sale in the course of import or export as Parliament can levy tax only on inter-state sale under Entry 92A of List I (If we do not consider Entry 97 of List I)

Overlap

- ▶ **Goods sold from Maharashtra to London (F.O.B. Bombay) –**
 - ▶ Property passes in Maharashtra – Therefore, sale inside Maharashtra.
 - ▶ Movement of goods out of the territory of India – Simultaneously, sale in the course of export.
 - ▶ Therefore, Maharashtra cannot levy tax because of restrictions under Article 286(1)(b)
- ▶ **Goods sold from London to Maharashtra (C.I.F. Bombay) –**
 - ▶ Property passes in Maharashtra – Therefore, sale inside Maharashtra.
 - ▶ Movement of goods into the territory of India – Simultaneously, sale in the course of import.
 - ▶ Therefore, Maharashtra cannot levy tax because of restrictions under Article 286(1)(b)
- ▶ **Sale of an identified car by a seller in Maharashtra to a buyer in Gujarat**
 - ▶ Ascertained goods – Property passes in Maharashtra. Therefore, sale within Maharashtra.
 - ▶ Require movement of goods to Gujarat – Simultaneously, inter-state sale.
 - ▶ Section 4 of CST Act is subject to section 3 of CST Act. Therefore, Maharashtra cannot levy local sales tax. CST will be assessed, collected and retained by Maharashtra.

Passing of property is not relevant in context of section 3 and 5 of CST Act, 1956.

Constitution (101st Amendment) Act, 2016

Constitution (101st Amendment) Act, 2016

- ▶ 286. Restrictions as to imposition of tax on the sale or purchase of goods
 - 1) No law of a State shall impose, or authorise the imposition of, a tax on the supply of goods or of services or both, where such supply takes place -
 - a) outside the State; or
 - b) in the course of the import of the goods or services or both into, or export of the goods or services or both out of, the territory of India
 - 2) Parliament may by law formulate principles for determining when a supply of goods or services or both takes place in any of the ways mentioned in clause (1).

Constitution (101st Amendment) Act, 2016

- ▶ 246A. Special provision with respect to goods and services tax.
 - 1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.
 - 2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.”.

Constitution (101st Amendment) Act, 2016

▶ 269A. Levy and collection of goods and services tax in course of inter-State trade or commerce

1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation.—For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

...

5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce."

Position in GST Regime

- ▶ Position in pre-GST regime
 - ▶ Parliament could, and States Legislature could not, levy tax on inter-state sale. However, CST is assessed, collected and retained by the despatching state by virtue of section 9 of CST Act.
 - ▶ Neither Parliament nor State Legislature could levy tax on sale in the course of import or export.
- ▶ Issue in post-GST regime – Whether Parliament can levy tax on supply in the course of import?
 - ▶ Article 286 does not bar Parliament from levying tax on supply in the course of import.
 - ▶ Power to levy tax on sale in the course of import – Whether under Article 246A(1), 246A(2) or 269A(1)?

Position in GST Regime

- ▶ Lack of precision in drafting the Constitution (One Hundred and First Amendment) Act, 2016.
- ▶ Transition from VAT to GST -
 - ▶ Earlier, there was no provision to tax sale in the course of import.
 - ▶ Substantial provision is required in the Constitution to tax supply in the course of import under GST regime.

Position in GST Regime

- ▶ Error in understanding is reflected by Statement of Objects and Reasons of Integrated Goods and Services Tax Act, 2017 which is the cause of imprecision in drafting the Constitution (101st Amendment Act) -
 - ▶ Presently, **article 269** of the Constitution empower the Parliament to make law on the taxes to be levied on the sale or purchase taking place in the course of inter-state trade or commerce. Accordingly, Parliament has enacted the Central Sales Tax Act, 1956 for levy of central sales tax on the sale taking place in the course of inter-state trade or commerce. The central sales tax is collected and retained by the exporting states.
- ▶ Power to levy Central Sales Tax is under Article 246(1) read with Entry 92A of List I of Seventh Schedule of the Constitution.
- ▶ Article 269 is not the source of power to levy Central Sales Tax. It only provides for assignment of revenue to the states.

Position in GST Regime

▶ Government's View–

- ▶ Power to levy tax on intra-state supply – Article 246A(1).
- ▶ Power to levy tax on inter-state supply – Article 246A(2).
- ▶ Power to levy tax on supply in the course of import – Article 269A(1).

This gives an impression that there is no article which permits tax on supply in the course of export.

▶ Our View –

- ▶ Power to levy tax on supply in all cases is under Article 246A(1).
- ▶ Article 246A(2) does not give power to Parliament to levy tax on inter-state supply rather it bars state from levying tax on inter-state supply.
- ▶ Article 269A(1) provides for apportionment of GST collected on inter-state supplies between the Union and the States. It is not source of power for levy of IGST on inter-state supply.

Integrated Goods and Services Tax Act, 2017

Integrated Goods and Services Tax Act, 2017

▶ 5. Levy and collection -

- 1) ~~Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption,~~ on the value determined under section 15 of the Central Goods and Services Tax Act and at such rates, as may be notified by the Government ~~on the recommendations of the Council~~ and collected in such manner as may be prescribed and shall be paid by the taxable person:

Inter-state Supply

▶ 7. Inter-state supply

- ▶ (1) **Subject to the provisions of section 10**, supply of goods, where the location of the supplier and the place of supply are in–
 - (a) two different States;
 - (b) two different Union territories; or
 - (c) a State and a Union territory,shall be treated as a supply of goods in the course of inter-State trade or commerce.

- ▶ (3) **Subject to the provisions of section 12**, supply of services, where the location of the supplier and the place of supply are in–
 - (a) two different States;
 - (b) two different Union territories; or
 - (c) a State and a Union territory,shall be treated as a supply of services in the course of inter-State trade or commerce.

Intra-state Supply

- ▶ 8. Intra-state supply –
 - ▶ (1) **Subject to the provisions of section 10**, supply of goods where the location of the supplier and the place of supply of goods are in the same State or same Union territory shall be treated as intra-State supply:

 - ▶ (2) **Subject to the provisions of section 12**, supply of services where the location of the supplier and the place of supply of services are in the same State or same Union territory shall be treated as intra-State supply:

Import of Goods and Services

- ▶ Is an inter-state supply [Section 7 of IGST Act]
 - ▶ (2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.
 - ▶ (4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.
- ▶ Not an intra-state supply [Proviso to Section 8(1) of the IGST Act]
 - Provided that the following supply of goods shall not be treated as intra-State supply, namely:–
 - (ii) goods imported into the territory of India till they cross the customs frontiers of India; or

Export of Goods and Services

- ▶ 7. (5) Supply of goods or services or both,-
 - ▶ (a) when the supplier is located in India and the **place of supply is outside India**;
...
shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.
- ▶ 11. Place of supply of goods,-
 - ▶ (b) exported from India shall be **the location outside India**.
- ▶ Section 7(5)(a) enables taxation of supply in the course of export.
- ▶ Merchant Trading transaction - Indian supplier purchases goods from a Foreign vendor and sells the goods directly to a Foreign customer without bringing them to India. Whether covered by section 7(5)(a)?

Supply in the Taxable Territory

- ▶ 7. (5) Supply of goods or services or both,–
 - ▶ ...
 - ▶ (c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section,
shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.
- ▶ All elements or majority of elements of supply should be in the taxable territory
 - ▶ Only one element of supply will not make a supply in the taxable territory
- ▶ Section 7(5)(c) is required for –
 - ▶ Clandestine removal – Once supply is proved, no need to further prove whether it is an intra-state or an inter-state supply.
 - ▶ Goods imported on lease and later outrightly purchased by the importer.
 - ▶ Goods imported and sold in exhibition in India.

Supplies in Territorial Waters

Supplies in Territorial Waters

- ▶ Section 9 of IGST - Notwithstanding anything contained in this Act –
 - (a) where the location of the supplier is in the territorial waters, the location of such supplier; or*
 - (b) where the place of supply is in the territorial waters, the place of supply,*

shall, for the purposes of this Act, be deemed to be in the coastal State or Union territory where the nearest point of the appropriate baseline is located.
- ▶ Explanation to Section 25 of the CGST Act—

Every person who makes a supply from the territorial waters of India shall obtain registration in the coastal State or Union territory where the nearest point of the appropriate baseline is located.

Supplies in Territorial Waters

▶ Section 2(114)

- ▶ “Union territory” means the territory of—
 - ▶ (a) the Andaman and Nicobar Islands;
 - ▶ (b) Lakshadweep;
 - ▶ (c) Dadra and Nagar Haveli;
 - ▶ (d) Daman and Diu;
 - ▶ (e) Chandigarh; and
 - ▶ (f) **other territory**.

▶ Section 2(81)

- ▶ “other territory” includes territories other than those comprising in a State and those referred to in sub-clauses (a) to (e) of clause (114)

Supplies in Territorial Waters

- ▶ Power of States to levy SGST on transactions falling in territorial waters near the baseline of a State.
- ▶ Centre can levy CGST on supplies made in territorial waters.
- ▶ Strictly speaking territorial waters forms part of Union territory. However, section 9 of IGST Act will prevail. Therefore, center cannot levy UTGST on supplies in territorial waters.
- ▶ Section 9 applies only to territorial waters and not Exclusive Economic Zone (EEZ). Therefore, EEZ will be part of other territory only. Supplies made within EEZ will be leviable to CGST + UTGST.

Distribution of Revenue

Distribution of Revenue (Pre-2000)

- ▶ Article 268 – Duties levied by Union but collected and appropriated by the States
 - ▶ Will go directly to the States.
 - ▶ Stamp Duty
 - ▶ Excise Duty on medicinal and toilet preparations
- ▶ Article 269 – Taxes levied and collected by the Union but assigned to the States
 - ▶ Collected all over the country by the Union, and
 - ▶ Distributed in accordance with the law made by the Parliament
 - ▶ For example
 - ▶ Succession Duty
 - ▶ Estate Duty
 - ▶ Central Sales Tax (added in 1956)

Distribution of Revenue (Pre-2000)

- ▶ Article 270 – Taxes levied and collected by the Union and distributed between the Union and the States
 - ▶ Based on recommendations of the Finance Commission
 - ▶ President passes Distribution of revenue order, _____
 - ▶ Personal Income Tax
- ▶ Article 271 – Surcharge on duties or taxes referred to in Article 269 and 270
 - ▶ Surcharge will be exclusively for the purpose of Union
- ▶ Article 272 – Union duties of Excise – Money will be paid to the states as per the law made by the Parliament
 - ▶ In practice, distribution though as per the law made by Parliament is based on recommendations of the Finance Commission
 - ▶ For example - The Union Duties of Excise (Distribution) Act, 1979

Collected by Union and retained by Union (Pre-2000)

- ▶ Customs Duty
- ▶ Corporate Income Tax
- ▶ Gift Tax
- ▶ Wealth Tax
- ▶ Service Tax (since 1994)

Constitution (Eightieth Amendment) Act, 2000

- ▶ Article 268 and 269 – Practically no change.
- ▶ Article 270 – All central taxes formed one central pool and distributed between the Union and the States as per the recommendation of the Finance Commission
 - ▶ Income Tax
 - ▶ Wealth Tax
 - ▶ Customs Duty
 - ▶ Excise Duty
 - ▶ Service Tax

14th Finance Commission recommended that the States' share in the Net Proceeds of Union Tax revenue will be 42%. (Operational Period – 2015-2020)

Constitution (Eightieth Amendment) Act, 2000

- ▶ Article 271 – Surcharges on duties and taxes referred to in Article 269 and 270
 - ▶ Surcharge is solely for the purpose of Union.
 - ▶ Form part of Consolidated Funds of India.
- ▶ Article 272 – Union Duties of Excise
 - ▶ Repealed

Constitution (One Hundred and First Amendment) Act, 2016

- ▶ Article 271 – Surcharge on certain duties and taxes for the purpose of Union
 - ▶ Except on Goods and Services Tax under Article 246A.
 - ▶ Thus, surcharge on GST for the purpose of Union is not possible.

Constitution (One Hundred and First Amendment) Act, 2016

- ▶ 269A. Levy and collection of goods and services tax in course of inter-State trade or commerce

1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation.—For the purposes of this clause, supply of goods, or of services, or both **in the course of import into the territory of India** shall be **deemed** to be supply of goods, or of services, or both in the course of **inter-State trade or commerce**.

Integrated Goods and Services Tax Act, 2017

▶ 17. Apportionment of tax and settlement of funds

(1) Out of the integrated tax paid to the Central Government,–

...

- ▶ (d) in respect of **import of goods** or services or both by an unregistered person or by a registered person paying tax under section 10 of the Central Goods and Services Tax Act;
- ▶ (e) in respect of **import of goods** or services or both where the registered person is not eligible for input tax credit;
- ▶ (f) in respect of **import of goods** or services or both made in a financial year by a registered person, where he does not avail of the said credit within the specified period and thus remains in the integrated tax account after expiry of the due date for furnishing of annual return for such year in which the supply was received,

the amount of tax calculated at the rate equivalent to the central tax on similar intra-State supply shall be apportioned to the Central Government.

Integrated Goods and Services Tax Act, 2017

▶ 17. Apportionment of tax and settlement of funds

(2) **The balance amount of integrated tax** remaining in the integrated tax account in respect of the supply for which an apportionment to the Central Government has been done under sub-section (1) **shall be apportioned to the,**–

- ▶ (a) **State where such supply takes place;** and
- ▶ (b) Central Government where such supply takes place in a Union territory:

Distribution of Revenue

- ▶ Article 270: Taxes levied and distributed between the Union and the States
 - ▶ (1) All taxes and duties referred to in the Union List, except the duties and taxes referred to in articles 268, 269 and **269A** respectively, ~~surcharge on taxes and duties referred to in article 271 and any cess levied for specific purposes under any law made by Parliament~~ shall be levied and collected by the Government of India and distributed between the Union and States in the manner provided in clause (2).

Apportionment of IGST is not covered by Article 270(1).

Distribution of Revenue

- ▶ Article 270: Taxes levied and distributed between the Union and the States
 - ▶ (2) Such percentage, as may be prescribed, of the net proceeds of any such tax or duty in any financial year shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax or duty is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed in the manner provided in clause (3).
 - ▶ Clause (3) - "Prescribed" means prescribed by the President by order after considering the recommendations of the Finance Commission.

Distribution of Revenue

- ▶ Article 270: Taxes levied and distributed between the Union and the States
 - ▶ (1A) The tax collected by the Union under clause (1) of article 246A shall also be distributed between the Union and the States in the manner provided in clause (2).
 - ▶ (1B) The tax levied and collected by the Union under clause (2) of article 246A and article 269A, which has been used for payment of the tax levied by the Union under clause (1) of article 246A, and the amount apportioned to the Union under clause (1) of article 269A, shall also be distributed between the Union and the States in the manner provided in clause (2).

Summary: Distribution of Revenue

- ▶ Article 269A - Levy and collection of goods and services tax in course of inter-State trade or commerce
 - ▶ Clause (1) - IGST (including IGST collected at the time of import of goods) apportioned as per method prescribed under section 17 of the IGST Act.
 - ▶ Finance Commission has no role in apportionment of IGST.

- ▶ Article 270 – Distributed of taxes between the Union and the States as per the recommendation of Finance Commission
 - ▶ Clause (1) - All central taxes (except those referred to in articles 268, 269, **269A** and surcharges and cesses)
 - ▶ Income Tax
 - ▶ Basic Customs Duty
 - ▶ Excise Duty on Non-GST products
 - ▶ Clause (1A) - CGST collected by the Union under Article 246A(1)
 - ▶ Clause (1B) - Central portion of IGST
 - ▶ Clause (1B) - Amount of IGST which has been used for payment of CGST



IGST on Imported Goods : Duty of Customs or Tax on Supply

Import of Goods

▶ **Proviso to Section 5(1) of IGST Act**

- ▶ Provided that IGST on **goods imported into India** shall be levied and collected in accordance with provisions of Sec 3 of Customs Tariff Act on value as determined under said Act at the point when custom duty is levied on the said goods under section 12 of the Customs Act, 1962.

▶ **Section 3(7) of the Customs Tariff Act**

- ▶ Any article which is imported into India shall, in addition, be **liable to integrated tax** at such rate, not exceeding forty per cent as is leviable under section 5 of the Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of the imported article as determined under sub-section (8) or sub-section (8A), as the case may be.

Why confusion? – Absence of word “supply” in proviso to section 5(1) of the IGST Act.

Relevance of the Issue

- ▶ Schedule II of the CGST Act –

- ▶ Para 5 - Supply of Services

The following shall be treated as supply of services

...

(f) Transfer of right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or any other valuable consideration)

Relevance of the Issue

▶ Goods taken on lease

- ▶ Domestically – A in Bombay supplies a photocopier on lease to B in Delhi. The transaction will be treated as inter-state supply of services. IGST will be payable as supply of services
- ▶ Imported –
 - ▶ Basic Customs Duty (Section 12 of Customs Act) – Import of goods even though no transfer of property in goods.
 - ▶ IGST levied under proviso to section 5(1) of IGST Act read with section 3(7) of Customs Tariff Act –
 - If duty of Customs – IGST to be paid on full intrinsic value. Further, IGST to be paid on supply of services by way of lease.
 - If tax on supply – No tax payable at the time of import. IGST payable only once on supply of service.

Relevance of Issue

- ▶ Machine exported and re-imported after repair –
IGST levied under proviso to section 5(1) of IGST Act read with section 3(7) of Customs Tariff Act –
 - ▶ If tax on supply – IGST payable only on repair charges.
 - ▶ If duty of customs – Subject to any exemption, IGST will be payable on full intrinsic value.

Understanding of Government

- ▶ Initial understanding of the government was that IGST payable at the time of import is a tax on supply.
- ▶ Notification for Exemption for goods and services imported by SEZ unit or developer -
 - ▶ Exercise of power under IGST Act - Notification No. 15/2017-Integrated Tax (Rate) dated 30.06.2017
 - ▶ Rescinded vide Notification No. 17/2017 -Integrated Tax (Rate) dated 05.07.2017
 - ▶ Exercise of power under Customs Act - Exemption for Import of Goods (Notification No. 64/2017-Customs dated 05.07.2017)
 - ▶ Exercise of power under IGST Act - Exemption for Import of Services (Notification No. 18/2017 - Integrated Tax (Rate) dated 05.07.2017)
- ▶ Government now believes that IGST paid at the time of import of goods is a duty of customs and is issuing notification for import of vessel/ rigs/ aircraft on lease basis accordingly.

Whether Correct?

- ▶ Whether Constitutional provisions support the understanding of the Government?
- ▶ Our View –
 - ▶ Provisions of the Constitution suggest that the IGST paid at the time of import of goods is a tax on supply and not duty of customs.

Taxable Event

- ▶ Tax can be levied on occurrence of taxable event –
 - ▶ Excise duty is a tax on **manufacture** of goods, and not on goods.
 - ▶ Sales tax is a tax on **sale** of goods, and not on goods.
 - ▶ Customs duty is a tax on **importation** of goods, and not on goods.
 - ▶ Octroi is a tax on **entry of goods into local area**, and not on goods.

Likewise, GST is a tax on **supply** of goods or services, and not on goods or services.

CVD & SAD subsumed in GST

- ▶ The Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014

Statement of Objects and Reasons

- ▶ 2. The proposed Bill, which seeks further to amend the Constitution, inter alia, provides for—
 - (a) subsuming of various Central indirect taxes and levies such as Central Excise Duty, Additional Excise Duties, Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Service Tax, Additional Customs Duty commonly known as Countervailing Duty, Special Additional Duty of Customs, and Central Surcharges and Cesses so far as they relate to the supply of goods and services;

Conclusion

- ▶ Indication that IGST paid at the time of import of goods is a tax on supply
 - ▶ Constitutional Provisions – Article 269A and 270
 - ▶ Section 17 of IGST Act
- ▶ Government's only contention, to say that IGST paid at the time of import of goods is a duty of custom, is absence of the word "supply" in proviso to section 5(1) of IGST Act.
- ▶ The absence of word "supply" is due to lack of imprecision and cannot lead to such a conclusion. Such imprecision is also found in other provisions of the GST Laws. For example -
 - ▶ Section 11(1) of CGST Act – "exempt ..., goods or services"
 - ▶ Section 12(1) of CGST Act – "liability to pay tax on goods"
 - ▶ Section 13(1) of CGST Act – "liability to pay tax on services"
 - ▶ Section 49(9) of CGST Act – "paid the tax on goods or services"

High Sea Sale & In Bond Sale

Relevance in pre-GST Regime

- ▶ Section 5(2) of Central Sales Tax Act, 1956

A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India.

- ▶ Section 2(ab) of Central Sales Tax Act, 1956

"crossing the customs frontiers of India" means crossing in the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by customs authorities.

Explanation—For the purposes of this clause, "customs station" and "customs authorities" shall have the same meanings as in the Customs Act, 1962 (52 of 1962);

- ▶ Section 2(13) of Custom Act, 1962 –

"customs station" means any customs port, customs airport or land customs station;

Relevance in pre-GST Regime

- ▶ J.V. Gokul and Company Private Limited v. Assistant Collector of Sales Tax (Inspection) and Others: **1960 AIR 595**

12.The legal effect of the transfer of a bill of lading has been enunciated by Bowen, L.J., in Sanders Brothers v. Madan & Co. (1) thus at p. 341

"The law as to the indorsement of bills of lading is as clear as in my opinion the practice of all European merchants is thoroughly understood. A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has, been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

High Sea Sales



Exporter A – USA

India

High Seas
Seller B
(Nagpur)

High Seas
Seller C
(Bhopal)

High Seas
Purchaser D
(Delhi)

Files Bill of Entry

Supply between A and B

- Import ?
- Import IGST?

Supply between B and C

- Import / Inter-state Sale?
- Import IGST / IGST?

Supply between C and D

- Import / Inter-state Sale?
- Import IGST / IGST?

High Sea Sales

Circular No. 33/2017-Customs dated 1.8.17 (Relevant Portion)

3. As mentioned earlier, all **inter-state transactions are subject to IGST**. High sea sales of imported goods are akin to **inter-state transactions**. Owing to this, it was presented to the Board **as to whether the high sea sales of imported goods** would be chargeable to IGST twice i.e. at the time of Customs clearance under sub-section (7) of section 3 of Customs Tariff Act, 1975 and also separately under Section 5 of The Integrated Goods and Services Tax Act, 2017

4.IGST on high sea sale (s) transactions of imported goods, whether one or multiple, shall be levied and collected only at the time of importation i.e. when the import declarations are filed before the Customs authorities for the customs clearance purposes for the first time. Further, value addition accruing in each such high sea sale shall form part of the value on which IGST is collected at the time of clearance.

5.The importer (last buyer in the chain) would be required to furnish the entire chain of documents, such as original Invoice, high-seas-sales-contract, details of service charges/commission paid etc, to establish a link between the first contracted price of the goods and the last transaction. In case of a doubt regarding the truth or accuracy of the declared value, the department may reject the declared transaction value and determination the price of the imported goods as provided in the Customs Valuation rules.

Practical Issue - Whether B & C also required to maintain entire chain of documents?

Supplies within Custom Bonded Warehouse

- ▶ **Section 7(2) of IGST Act**

Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.

- ▶ **Section 2(4) of the IGST Act**

"customs frontiers of India" means the limits of a **customs area** as defined in section 2 of the Customs Act, 1962;

- ▶ **Section 2(11) of Custom Act, 1962 –**

"customs area" means the area of a customs station **or a warehouse** and includes any area in which imported goods or export goods are ordinarily kept before clearance by customs authorities

Note: Highlighted in red – as amended by Taxation Amendment Act, 2017

Supplies within Custom Bonded Warehouse

Statement of Objects and Reasons – Taxation Amendment Bill, 2017 (Relevant Portion)

3. The Customs Act, 1962 provides for removal of goods from a customs station to a warehouse without payment of duty. It is proposed to amend the said Act to include 'warehouse' in the definition of "customs area" to ensure that an importer would not be required to pay the proposed integrated goods and services tax at the time of removal of goods from a customs station to a warehouse. ...

IGST on Import of Goods

- ▶ **Proviso to Section 5(1) of IGST Act**

- ▶ Provided that **IGST on goods imported into India shall be levied and collected** in accordance with provisions of Sec 3 of Customs Tariff Act on value as determined under said Act **at the point when custom duty is levied on the said goods** under section 12 of the Customs Act, 1962.

Supplies within Custom Bonded Warehouse

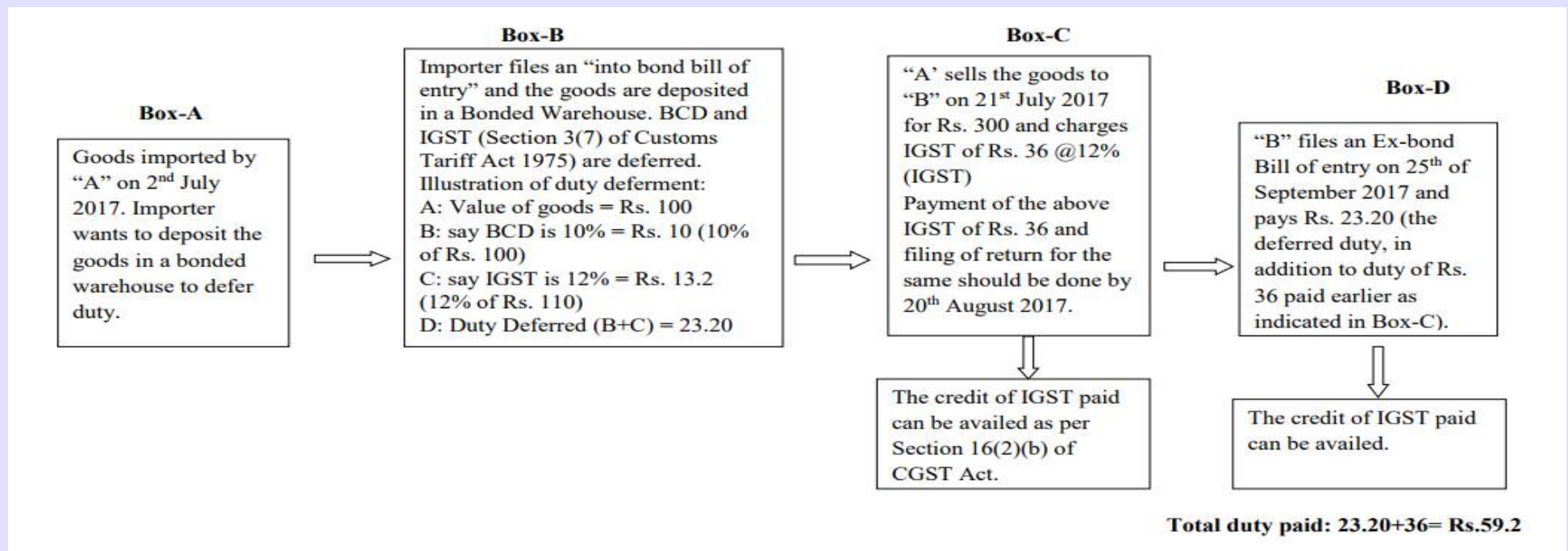
Circular 46/2017-Customs dated 24.11.2017 (Relevant Portion)

3. It is to be noted that the value of imported goods, for purposes of charging customs duty, is determined as per section 14 of the Customs Act, 1962 at the time of import i.e. at the time of filing of the into-bond Bill of Entry. Any costs incurred after the import of goods, such as, port charges / port demurrage charges or costs for customs clearing or transporting the goods from the port to the customs bonded warehouse or costs of storage at the customs bonded warehouse, cannot be added to the value of the goods, for the purpose of levy of duties of customs at the stage of ex-bonding.Therefore, duties of customs (BCD + IGST) shall be paid on the imported goods at the stage of exbonding on the value determined under section 14 of the Customs Act.

4. However, **the transaction of sale / transfer etc. of the warehoused goods between the importer and any other person may be at a price higher than the assessable value of such goods. Such a transaction squarely falls within the definition of "supply" as per section 7 of the Central Goods and Services Tax Act, 2017** (hereinafter referred to as, "CGST Act") and shall be taxable in terms of section 9 of the CGST Act read with section 20 of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as, "IGST Act"). It may be noted that as per sub-section (2) of section 7 of the IGST Act, any supply of imported goods which takes place before they cross the customs frontiers of India, shall be treated as an inter-State supply. Thus, such a transaction of sale/transfer will be subject to IGST under the IGST Act. The value of such supply shall be determined in terms of section 15 of the CGST Act read with section 20 of the IGST Act and the rules made thereunder, without prejudice to the fact that customs duty (which includes BCD and applicable IGST payable under the Customs Tariff Act) will be levied and collected at the ex-bond stage.

Supplies within Custom Bonded Warehouse

Circular 46/2017-Customs dated 24.11.2017 (Relevant Portion)



ITC of tax paid to seller of bonded goods cannot be used for payment of IGST at the time of filing of Ex-bond Bill of Entry.

Valuation of Goods: IGST on Imports

▶ Section 3(8) of Customs Tariff Act, 1975 -

For the purposes of calculating the integrated tax under sub-section (7) on any imported article where such tax is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962, be the aggregate of—

(a) the value of the imported article determined under sub-section (1) of section 14 of the Customs Act, 1962 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and

(b) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include the tax referred to in sub-section (7) or the cess referred to in sub-section (9).

Valuation of Goods: IGST on Imports

- ▶ Section 3(8A) of the Customs Tariff Act, 1975 (Inserted by Finance Act, 2018) -

(8A) Where the **goods deposited in a warehouse** under the provisions of the Customs Act, 1962 are sold to any person before clearance for home consumption or export under the said Act, the value of such goods for the purpose of calculating the integrated tax under sub-section (7) shall be,—

(a) where the whole of the goods are sold, the value determined under sub-section (8) or the transaction value of such goods, whichever is higher; or

(b) where any part of the goods is sold, the proportionate value of such goods as determined under sub-section (8) or the transaction value of such goods, whichever is higher:

...

Explanation.— For the purposes of this sub-section, the expression “transaction value”, in relation to warehoused goods, means the amount paid or payable as consideration for the sale of such goods.

Supplies within Custom Bonded Warehouse

- ▶ Proviso to Section 5(1) of the IGST Act –
 - ▶ “at the point in time” will mean at that point only and not at any other point.
- ▶ Query – Whether Circular 46/2017-Customs is relevant after insertion of Section 3(8A) in the Customs Tariff Act, 1975 by the Finance Act, 2018.



THANK YOU!