

INTERPLAY OF

CUSTOMS



GST

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Organized by: Consultease

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Session Design



Constitutional aspects

Import – IGST Act viz-a-viz Customs Laws

Exports

Classification

Valuation

Place of supply

2

Out And Out transactions

CONSTITUTIONAL ASPECTS

Article 269A – COI – 101st amendment w.e.f. 16.09.2016

269A (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

Article 269A – COI – 101st amendment w.e.f. 16.09.2016

- **State Of Travancore-Cochin And ... vs Shanmugha Vilas Cashew Nut (SC) 1953 AIR 333**
- A sale in the course of export out of the country should be understood in the context of Article 286 (1) (b) as meaning a sale taking place not only during the activities directed to the end of exportation of the goods out of the country, but also as part of or connected with such activities
- A sale or purchase " in the course of " import or export within the meaning of (1) (b) includes (i) a, sale or purchase which itself occasions the import or export as already held by this court, (ii) a sale or purchase which takes place while the goods are on the high seas on their import or export journey. and (iii) the last purchase by the exporter with a view to export and the first sale by the importer to a dealer after the arrival of the imported goods

Import of goods under GST

**Kiran Spinning Mills vs. Collector of Customs
1999 (113) ELT 753 (SC)**

Import would be completed only when goods cross the customs barriers and that is the time when import duty has to be paid

“In the Course of” – Meaning

- Use of words “in the course of” in between the expression “supply of goods” and word “import” indicates that activity of supply of goods and activity of import are so integrally connected that they cannot be dissociated with each other

Provisions	Phrases used
Article 269A of COI	supply of goods or services or both in the course of import into the territory of India
Proviso to Section 5(1) of CGST Act	goods imported into India
Section 7(2) of IGST Act	Supply of goods imported into the territory of India, till they cross the customs frontiers of India
Section 3(7) of CTA	Any article imported into India

Freight – Double taxation?

In case of CIF Contracts, insurance and freight included in Customs Valuation

Ocean import freight also treated as import of service (Not. No. 10/2017-IGST (Rate) dated 28.06.2017)

Constitutionally such levy as import of service got challenged before Gujarat High Court on the grounds that

- There is double taxation
- Service provider and receiver, both are not in India
- 'importer' is not service receiver in such cases

The curious case of Mohit Minerals Pvt. Ltd. vs. Union of India 2020 (1) TMI 974 (Guj.)

- No tax is leviable under the IGST, 2017, on the ocean freight for the services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India and the levy and collection of tax is not permissible in law

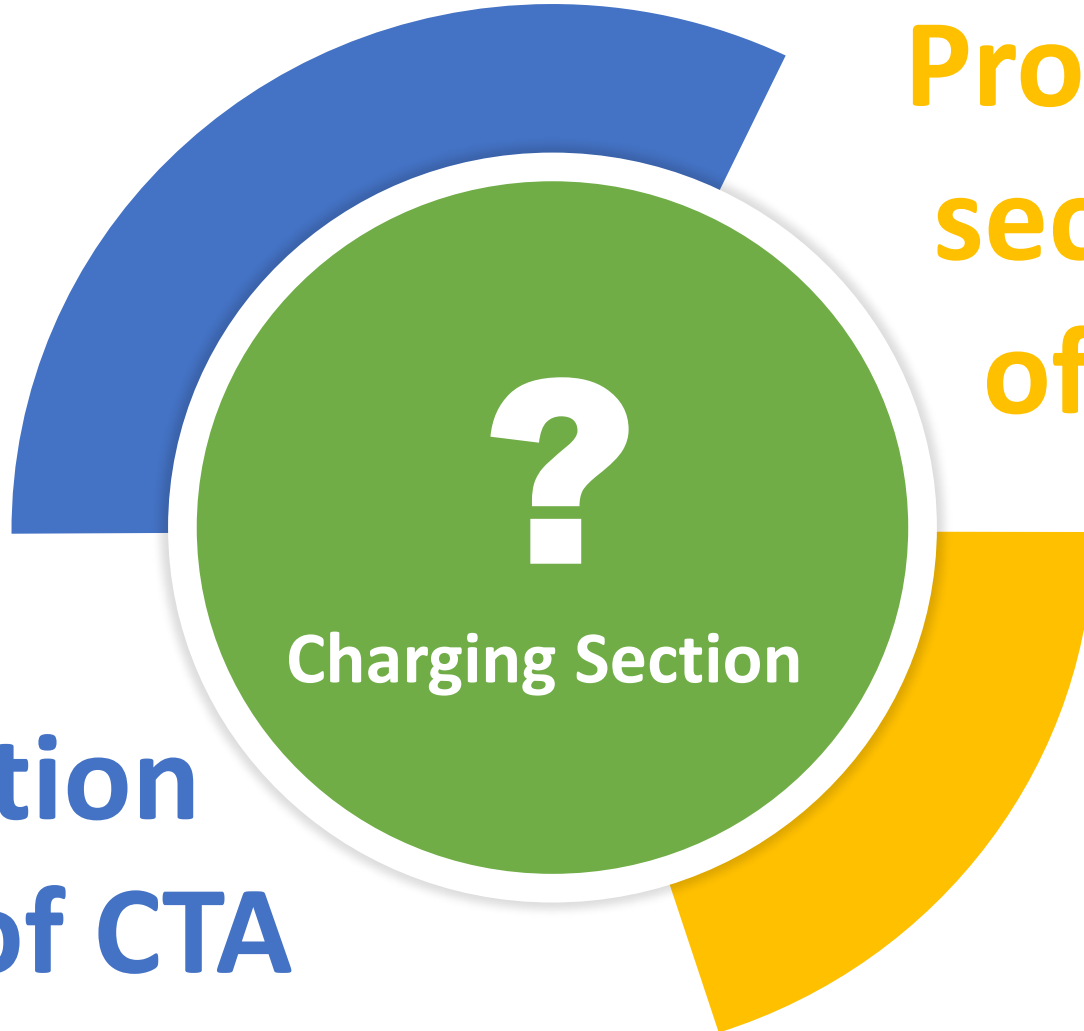
Power of Parliament to enact legislation with respect to extra territorial aspects

- In *GVK Industries Ltd. v. ITO* (MANU/SC/0163/2011) stated that “the Parliament may exercise its legislative powers with respect to the extra-territorial aspect, that too **when they have an impact on or nexus with India**. Therefore, it does not empower the delegated legislation to exercise such power and nor such power can be delegated by the Parliament”.

IMPORT - IGST ACT VIZ-A-VIZ CUSTOMS LAWS

CHARGING SECTION FOR IMPORT OF GOODS?

**Section
3(7) of CTA**



**Proviso to
section 5
of IGST**

PROVISO TO SECTION 5 OF IGST

5. (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, not exceeding forty per cent., 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:

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 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. (52 of 1962.)

SECTION 3(7) OF CTA

(7) 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

DUTY VS. TAX...

- Words used by section 3(7) of CTA – ‘integrated tax’
- Words used by section 3(1) of CTA – ‘a duty’
- Extract of section 3(1) of CTA, 1975
 - *“(1) Any article which is imported into India shall, in addition, be liable to a duty (hereafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India and if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable shall be calculated at that percentage of the value of the imported article :”*

EXEMPTION-GST

- Section 3(7) of CTA - Extract
 - *...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...*
- Thermax Private Limited 1992 (8) TMI 156 - SC
 - *That aspect is provided for by Section 3(1) of C.T. Act which specifically mandates that the CVD will be equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. In other words, we have to forget that the goods are imported, imagine that the importer had manufactured the goods in India and determine the amount of excise duty that he would have been called upon to pay in that event*

IMPORT OF SERVICES

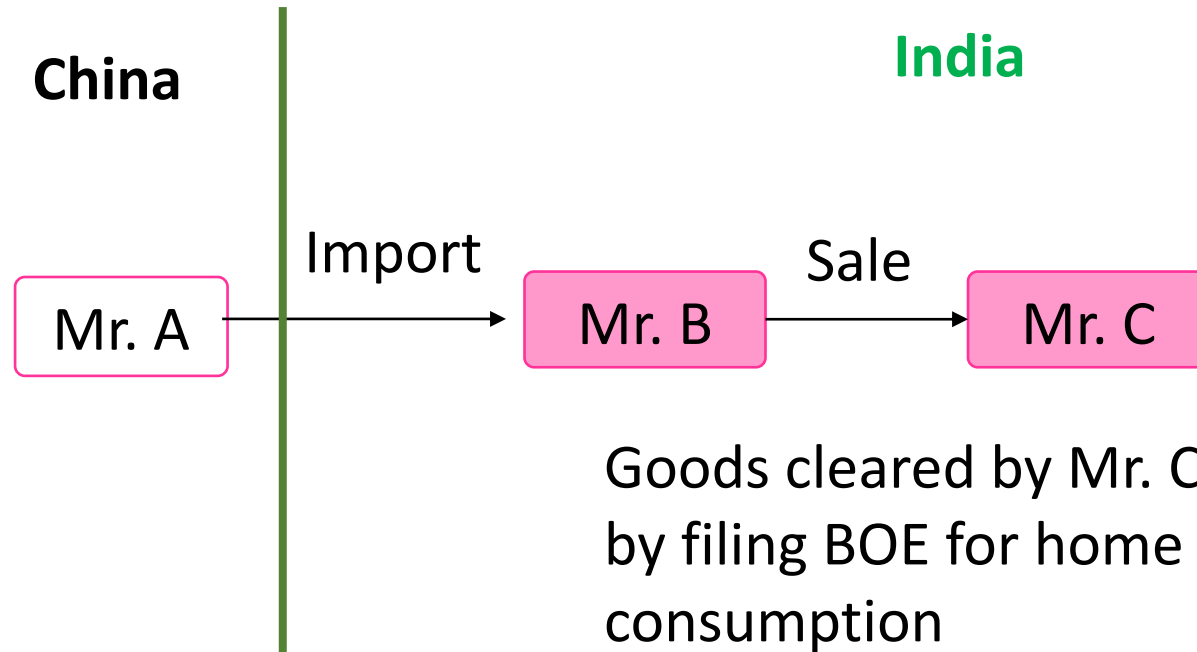
SCHEDULE I – ENTRY 4

- **Schedule I**

- 4. Import of services by a ~~taxable person~~ **person** from a related person or from any of his other establishments outside India, in the course or furtherance of business
- *Related persons*
 - *Explanation to Section 15 of CGST Act*
- *Establishment*
 - *Explanations to Section 8 of IGST Act*

SALE WHEN GOODS ARE IN BONDED WAREHOUSE

Sale when goods are within customs bonded warehouse



Whether IGST has to be paid two times in this transaction? Once by Mr. B under GST Law for sale of goods to Mr. C and another when goods are cleared by Mr. C from Customs Bonded Warehouse?

Definition of import of goods under GST

Section 2 (10) “import of goods”

with its grammatical variations and cognate expressions,

means bringing goods into India

from a place outside India

Above definition is identical with the definition given under the Customs Act, 1962

Definition of India as per CGST Act

Section 2 (56) "India" means the territory of India as referred to in article 1 of the Constitution,

its territorial waters,

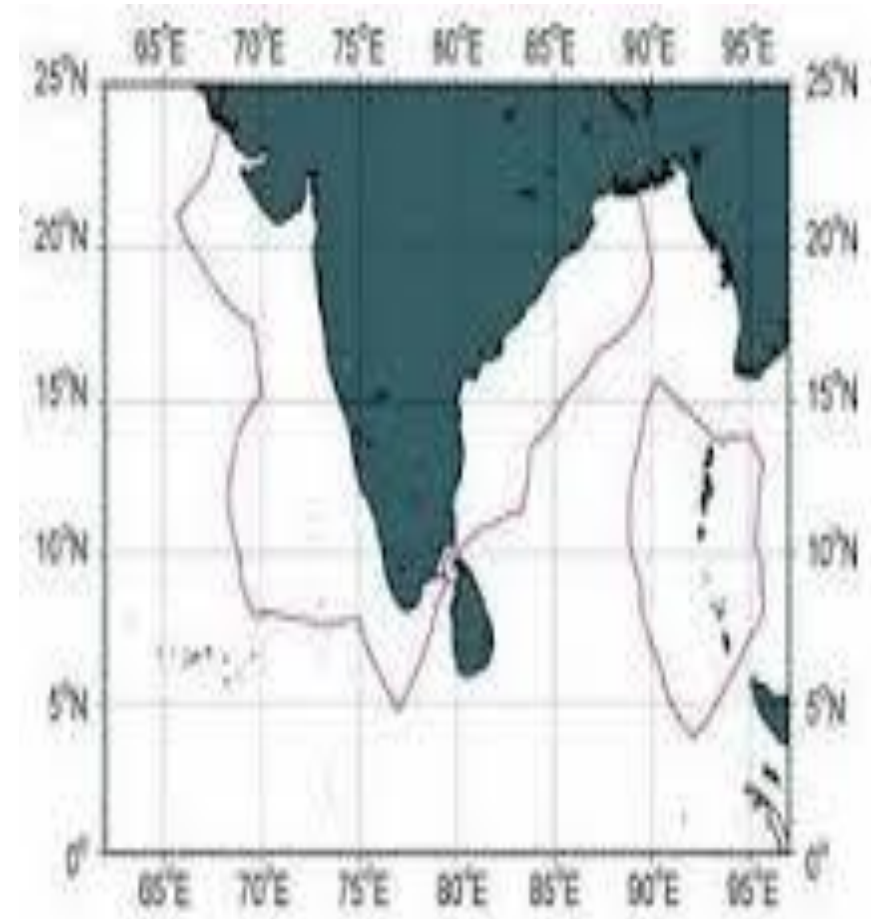
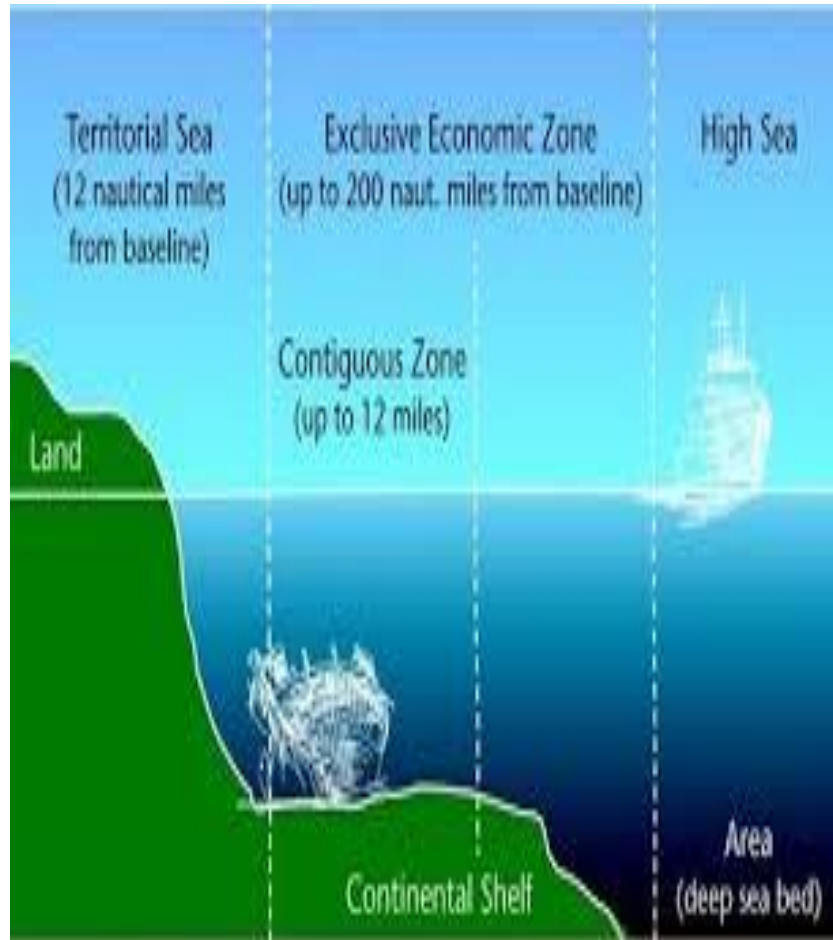
seabed and sub-soil underlying such waters,

continental shelf,

exclusive economic zone or

Any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and

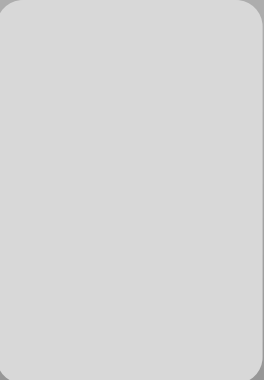
the air space above its territory and territorial waters



Import of goods under GST

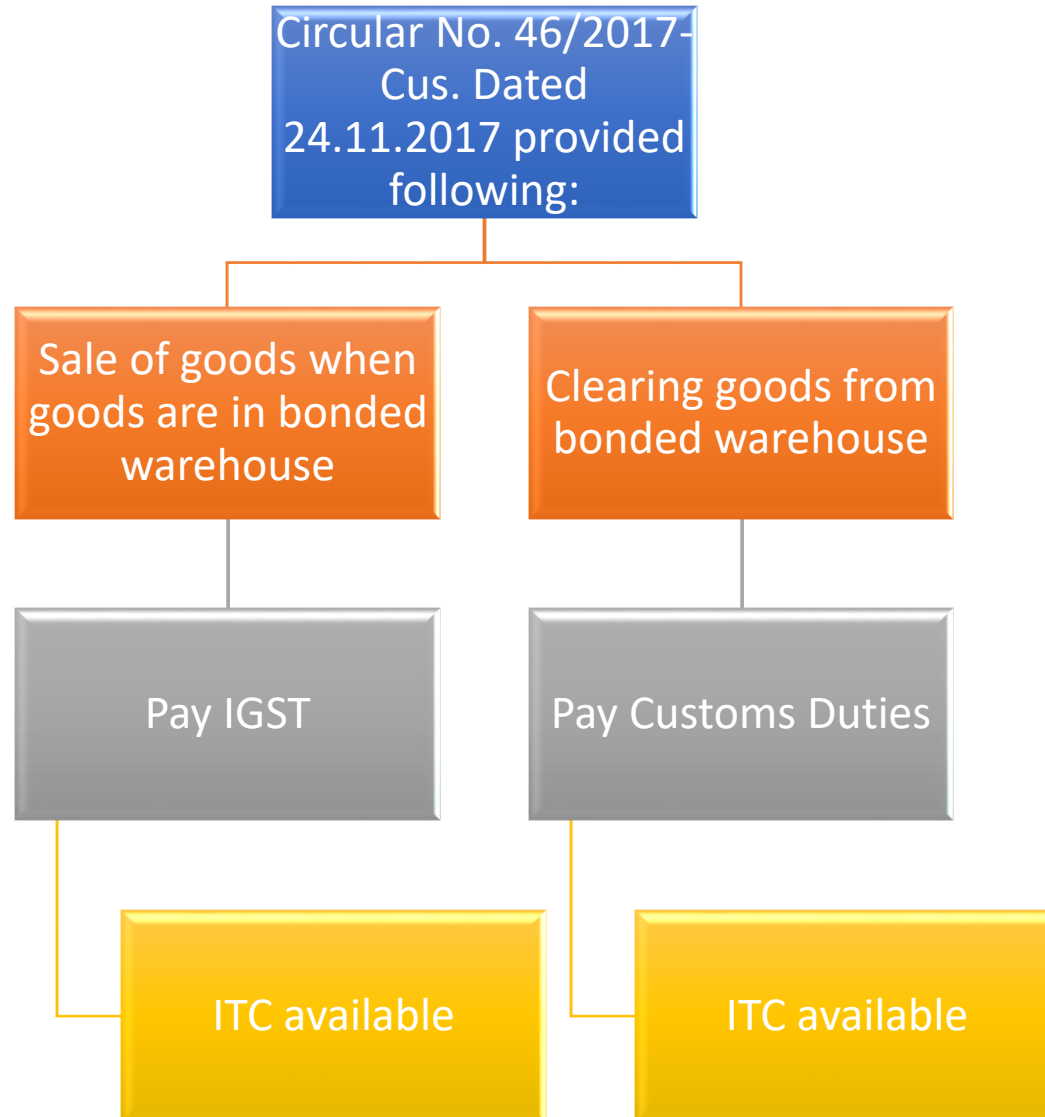


**Kiran Spinning Mills vs. Collector of Customs
1999 (113) ELT 753 (SC)**



Import would be completed only when goods cross the customs barriers and that is the time when import duty has to be paid

Sale of goods stored in Customs Bonded Warehouse



Definition of import of goods under GST

Circular No. 3/1/2018-IGST dated 25.05.2018 provides for payment of IGST only on final clearance of warehoused goods from the date of insertion of Section 3 (8A) in Statute

EXPORTS

Export of goods

- Section 2 (5) of IGST Act “export of goods” with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India
- Section 2 (18) of Customs Act 1962 export”, with its grammatical variations and cognate expressions, means taking out of India to a place outside India

Export of goods

- Article 286 (1) No law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place
- ...
- *(b) in the course of the import of the goods into, or export of the goods out of, the territory of India*
- Export of goods is not treated as inter-state supply under COI
- Therefore, one may argue that GST cannot be levied on export of goods constitutionally...

SUPPLIES IN TERRITORIAL WATERS

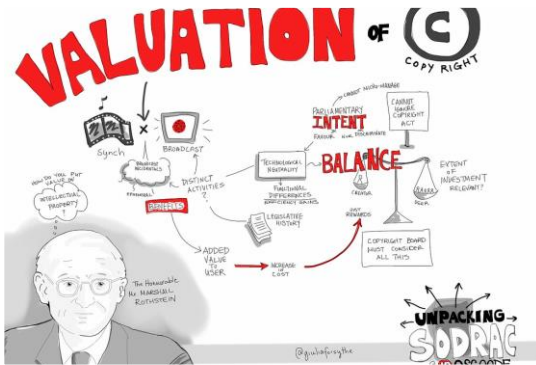
Supplies in Territorial Waters

- Location of Supplier in territorial waters
 - Location of such supplier
- Place of supply in territorial waters
 - Place of Supply

Deemed to be in the coastal State or Union Territory where the nearest point of the appropriate baseline is located

VALUATION

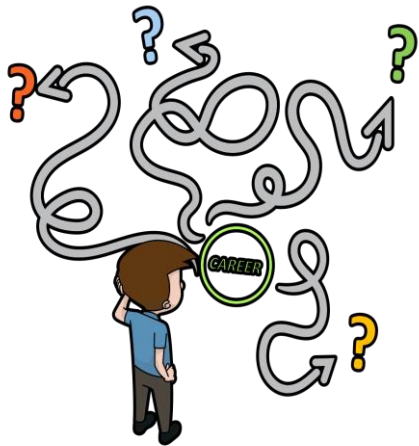
How to value imported goods?



For the valuation of

- Embedded software in the equipment
- Royalty paid to the Seller
- Pre-importation expenses
- Post-importation expenses

Whether follow GST or Customs?



Classification of Software and Royalty on IPR



Software and IPRs embedded in the goods imported

Position in Service tax regime

- **Definition of information technology Software [Section 65B(28)]**

In this Chapter, unless the context otherwise requires,--

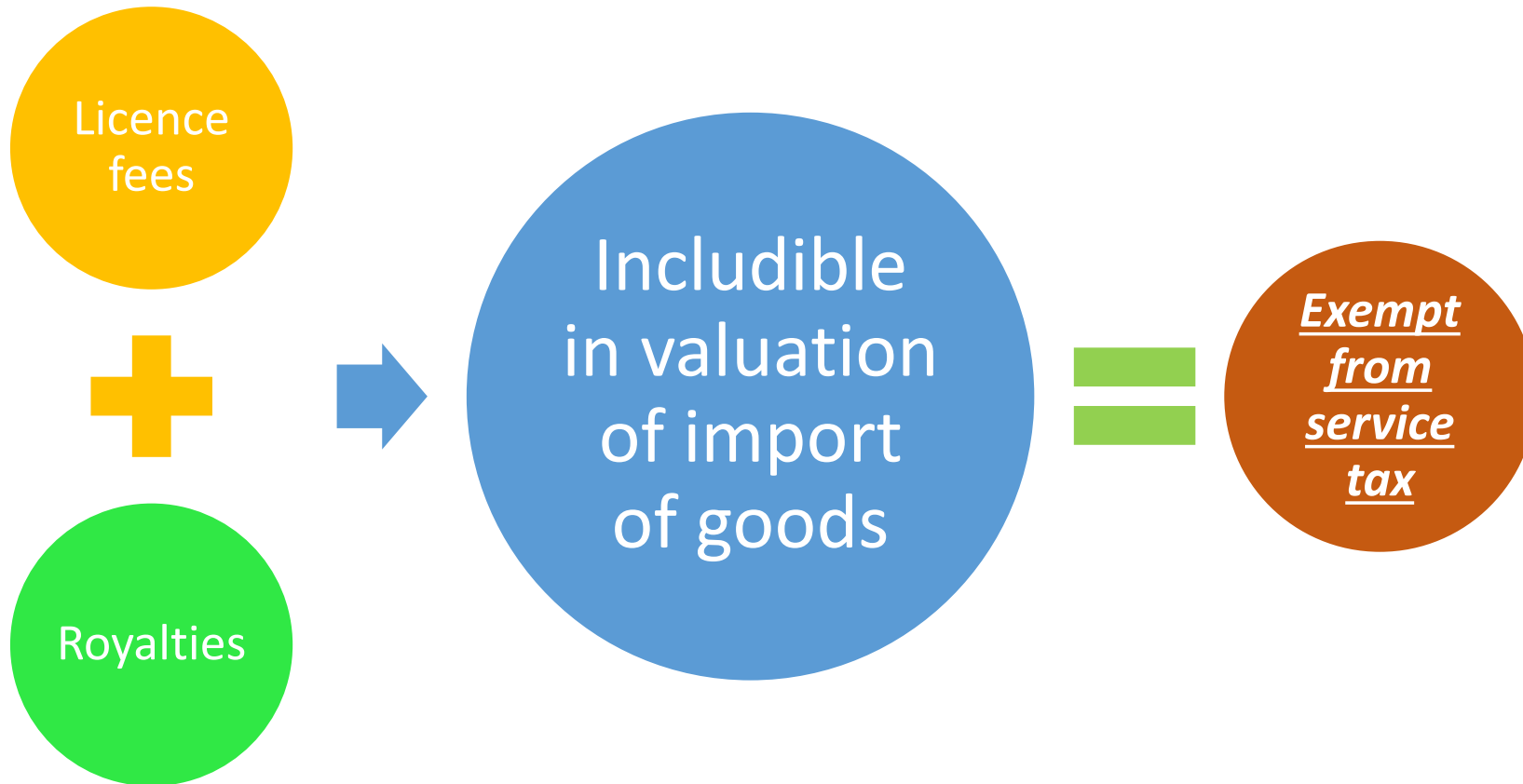
(28) "information technology software" means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment;

- **Declared services in relation to information technology Software [Section 66E(d)]**

The following shall constitute declared services, namely:—

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

Exemption



Land mark judgements

Case law	Held
Tata Consultancy Services vs State of Andhra Pradesh 2004(178)ELT22(S.C .)	<p>A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to</p> <ul style="list-style-type: none"> (a) Its utility; (b) capable of being bought and sold; and (c) capable of transmitted, transferred, delivered, stored and possessed. <p>If a software whether customized or non-customized satisfies these attributes, the same would be goods.</p>
Infotech Software Dealer Association V UOI, {(2010) 29 STT 132 Madras}	<p>Software in canned package or customised form subject to sales tax levy.</p> <p>Software downloadable from website through internet liable to service tax.</p>

Views

Software in general essentially bears characteristics of goods

Where the copyrights are retained by the supplier, software is supply of service

Where the software is downloadable from the website, the same amounts to service

Where the software is transferred without transfer of right to use, such transaction would amount to service

Development of software amounts to Service

Downloading software from internet is service

License fees and royalties taxability - under customs law

- *Rule 10(1)*

In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods, -

(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable.

License fees and royalties taxability - under customs law

Explanation.- Where the royalty, licence fee or any other payment for a process, whether patented or otherwise, is includible referred to in clauses (c) and (e), such charges shall be added to the price actually paid or payable for the imported goods, notwithstanding the fact that such goods may be subjected to the said process after importation of such goods.

License fees and royalties - taxability under GST Law

- Schedule II para 5 of the Central Goods and Services Tax Act, 2017

5. Supply of Services

The following shall be treated as supply of services, namely:-

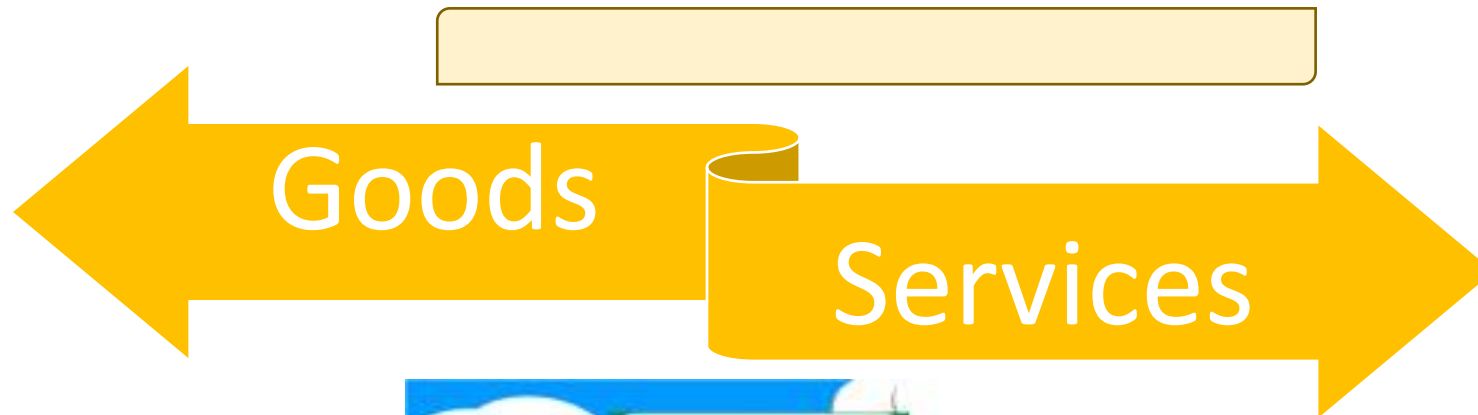
(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

License fees and royalties - taxability under GST Law

Notification No. 6/2018- Integrated Tax (Rate) dated 25.01.2018

*In exercise of the powers conferred by sub-section (1) of section 6 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), hereinafter referred to as the said Act, the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, **hereby exempts the integrated tax leviable under section 5 read with section 7 of the said Act on the supply of services, imported into the territory of India, covered by sub-item (c) of item 5 of Schedule II to the Central Goods and Services Tax Act, 2017 (12 of 2017) as made applicable by section 20 of the said Act, to the extent of the aggregate of the duties of Customs leviable under sub-section (7) of section 3 of the Customs Tariff Act, 1975 (51 of 1975), on the consideration declared under sub-section (1) of section 14 of the Customs Act, 1962 (52 of 1962) towards royalties and license fees included in the transaction value as specified under clause (c) of sub-rule(1) of rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 on which the appropriate duties of Customs have been paid.***

Issues in valuation of goods



Software and IPRs embedded in the goods imported

CLASSIFICATION

Reference to Customs Tariff provided in GST Law

Explanation to Notification No.1/2017-Integrated Tax (Rate) dated 28.06.2017-

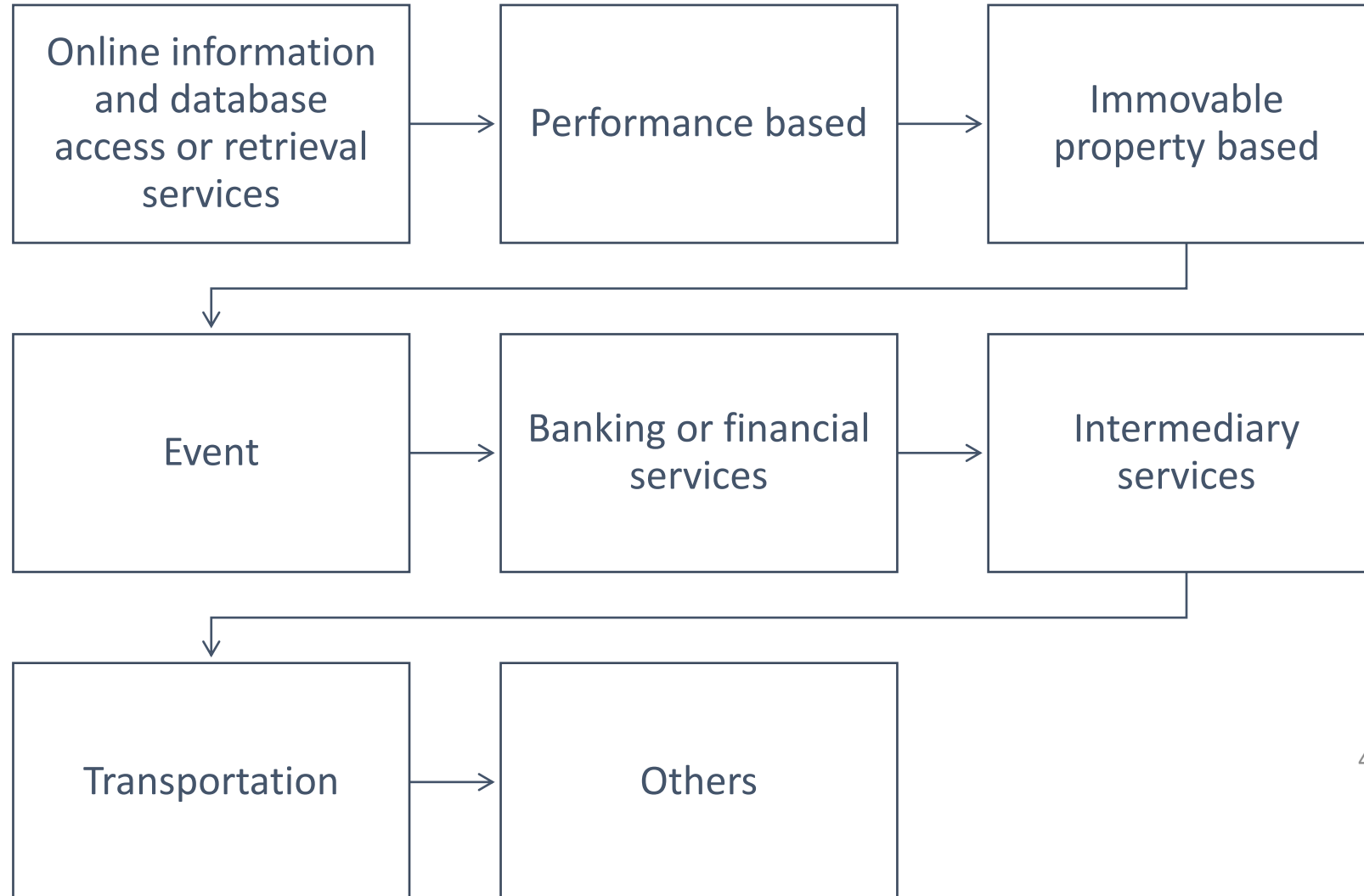
...

(iii) “Tariff item”, “sub-heading” “heading” and “Chapter” shall mean respectively a tariff item, sub-heading, heading and chapter as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).


(iv) The rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of this notification.

PLACE OF SUPPLY

If location of supplier or location of recipient of service is outside India – Place of supply



Services supplied at more than 1 location

Nature of service	Multiple location services
Section 13 (6) for performance based, immovable property based and event based	<p>More than 1 Countries: <u>Location in the taxable territory</u></p> <p>More than 1 State/UT (for import or export of services only):</p> <p>Proportionate basis as per value separately collected or contract</p> <p>If no contract: On the basis as may be prescribed</p>
<p>Example</p> 	<p>'A' has provided management consultancy service to the extent of 20% in Delhi, 30% in Mumbai and 50% in Bangkok. The Place of Provision is Mumbai since ⁴⁸ greatest proportion of service is provided in the Mumbai i.e. taxable territory</p>

Place of effective use and enjoyment of services

To prevent double
taxation or non-
taxation or for
uniform
applicability of
rules

CG to notify
services or
circumstances in
which the place of
supply shall be the
place of effective
use and
enjoyment of a
service

OUT AND OUT TRANSACTIONS

OUT & OUT TRANSACTION



SCHEDULE III

- **Schedule III: Activities or transactions which shall be treated neither as a supply of goods nor a supply of services**

...

- *7. Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India.*
- *8. (a) Supply of warehoused goods to any person before clearance for home consumption;*
 - (b) Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption.*
- *Explanation 1.—For the purposes of paragraph 2, the term "court" includes District Court, High Court and Supreme Court.*
- *Explanation 2.—For the purposes of paragraph 8, the expression “warehoused goods” shall have the same meaning as assigned to it in the Customs Act, 1962.’*

Schedule III

- As per Section 1(2) of IGST Act, 2017:
(2) It shall extend to the whole of India
- Whether amendment to Schedule III is prospective or retrospective amendment?
 - Circular No. 03/01/2019 dated 25.05.2018 clarified that IGST shall be paid once i.e. on final clearance of WHed goods. Now, vide Circular No. 04/01/2019 dated 01.02.19, Circular of May, 2018 is rescinded
- CGST and SGST discharged/reported for supply of warehoused goods while being deposited in customs bonded WH from July, 2017 to March, 2018 would be accepted as one-time exception due to non-availability of appropriate facility on GSTIN portal (Circular No. 91/10/2019 dtd. 18.02.19)

SCHEDULE III – Not an Exempt Supply for ITC

- *The following explanation added in 17(3):*
- *(3) The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.*
 - *Explanation.—For the purposes of this sub-section, the expression “value of exempt supply” shall not include the value of activities or transactions specified in Schedule III, except those specified in paragraph 5 of the said Schedule.*

Clarification:

1. Where an exporter of services located in India is supplying certain services to a recipient located outside India, either wholly or partly through any other supplier of services located outside India, the following two supplies are taking place:-
 - i. Supply of services from the exporter of services located in India to the recipient of services located outside India for the full contract value;
 - ii. Import of services by the exporter of services located in India from the supplier of services located outside India with respect to the outsourced portion of the contract.

Thus, the total value of services as agreed to in the contract between the exporter of services located in India and the recipient of services located outside India will be considered as export of services if all the conditions laid down in section 2(6) of the Integrated Goods and Services Tax Act, 2017 (IGST Act for short) read with section 13(2) of the IGST Act are satisfied.

- **What is export of services?**

- As per Section 2(6) of IGST Act, 2017:

"export of services" means the supply of any service when,-

(i) the supplier of service is located in India;

(ii) the recipient of service is located outside India;

(iii) the place of supply of service is outside India;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange or in Indian rupees wherever permitted by the Reserve Bank of India; and

(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;

2. It is clarified that the supplier of services located in India would be liable to pay integrated tax on reverse charge basis on the import of services on that portion of services which has been provided by the supplier located outside India to the recipient of services located outside India. Furthermore, the said supplier of services located in India would be eligible for taking input tax credit of the integrated tax so paid.
3. Thus, even if the full consideration for the services as per the contract value is not received in convertible foreign exchange in India due to the fact that the recipient of services located outside India has directly paid to the supplier of services located outside India (for the outsourced part of the services), that portion of the consideration shall also be treated as receipt of consideration for export of services in terms of section 2(6)(iv) of the IGST Act, provided the:

- (i) Integrated tax has been paid by the supplier located in India for import of services on that portion of the services which has been directly provided by the supplier located outside India to the recipient of services located outside India; and
- (ii) RBI by general instruction or by specific approval has allowed that a part of the consideration for such exports can be retained outside India.

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