

BE IT CONTENDED THAT SINCE THE GOODS IN RESPECT OF WHICH PATENTS WERE USED WERE HIGH SEA SALES (FALLING IN SCHEDULE III) (PURCHASED FROM ONE COUNTRY AND SOLD TO ANOTHER COUNTRY WITHOUT BEING BROUGHT INTO INDIA), THEREFORE, ROYALTY PAID ON SUCH GOODS SHALL ALSO NOT BE TAXABLE.

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Let us analyze the scope of Non-GST supply and for that purpose, provision of Schedule III attached to the Goods & Service Tax Act, 2017 and more particularly Clause 7, which is reproduced below, may be seen.

Clause 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.

2. The above Clause 7 has been inserted by way of amendment carried out w.e.f. 1.2.2019 and whether it covers goods or service or both. From the language of Clause 7, it is manifestly clear that the Clause 7 specifically talks of only “goods”.

WHETHER ROYAL PAYABLE IS COVERED BY SAC 9973 I.E. TEMPORARY OR PERMANENT TRANSFER OR PERMITTING THE USE OF IPR.

3 Under Section 9 CGST Act, the rate of GST may be notified by the Government. The Notification 11/2017 – Central Tax (Rate) dated 28.06.2017 deals with the supply of services. In terms of the Table in the Notification, under Heading 9973, the ‘*Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right in respect of goods other than Information and Technology software*’ is taxed at 6% whereas, ‘*Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right in respect of Information and Technology software*’ is taxed at 9%. There is no doubt royalty on patent is covered by Heading 9973. Hence, rate of tax would be 12%.

WHEN SUPPLIER OF IPR IS BASED OUT OF INDIA AND RECEIPIENT IS IN INDIA AND PATENTS WERE USED FOR

GOODS SOLD ON HIGH SEA SALE BASIS AS EXPLAINED IN PRECEDING PARAS.

4: The Service Tax on Intellectual Property Rights was levied prior to 1.7.2017. Intellectual Property Rights were defined in Section 65(55a) of the Finance Act, 1994 (i.e. Service Tax Law) to mean any right to intangible property namely, trademarks, designs, patents or any other similar intangible property, under any law for the time being in force, but does not include copyright.

5: Under the present GST Law, the expression “Intellectual Property Right” has not been defined. It has to be understood as in normal trade parlance as per which intellectual property right includes the following:-

- a) Copyright viz.
- b) Patents viz. A document granting an inventor sole rights to an invention;
- c) Trademarks viz. A formally registered symbol identifying the manufacturer or distributor of a product;
- d) Designs viz. The act of working out the form of something (as by making a sketch, outline or plan)
- e) Design viz: The act of working out the form of some things (as by making a sketch, outline or plan)

6: If the supplier of service is located in a non-taxable territory and at the same time, the recipient of services is located in the taxable territory (i.e. in India), GST is liable to be paid under reverse charge. [Notification Nos. 13/2017-CT \(Rates\) and 10/2017-IT \(Rates\) dated 28-6-2017](#)

7: However, IGST is not payable on import of services under reverse charge if value of royalty and license fee was included in customs value of goods imported – ([Notification No. 6/2018-IT \(Rate\) dated 25-1-2018](#) and *FAQ issued by CBI&C on 15-12-2018.*)

Import of service

8: As per Section 2(11) of IGST Act, import of service means supply of service, where,

- a) Supplier of service is located outside India

- b) Recipient of Service is located in India
- c) The place of supply of service is in India.

Taxability of Import of Service under GST includes the following: –

- a) Import of service for a consideration whether or not in the course or furtherance of business [Section 7]
- b) Import of service without consideration by a taxable person from related person or from any of his establishment outside India, in the course or furtherance of business [Schedule I to CGST Act].

9: The Division Bench of Hon'ble Gujarat High Court in the case of Mohit Minerals Pvt. Ltd. vs. Union of India (23.01.2020 - GUJHC) : MANU/GJ/0046/2020, has interpreted what is meant by import of service:–

Sub-section (11) of Section 2 of the IGST Act defines the term 'import of services'. The relevant extract of the said section is reproduced as under:

Section 2(11) 'import of services' means the supply of any service, where(i) the supplier of service is located outside India; (ii) the recipient of service is located in India; and (iii) the place of supply of service is in India;"

10: Thus, the import of services means the supply of service where the supplier of service is located outside India, the recipient of services is located in India; and the place of supply of service is in India.

11: The CESTAT Delhi Bench in the case of Bharat Oman Refineries Ltd. vs. CCE and ST (21.03.2017 - CESTAT - Delhi) : MANU/CE/0206/2017 had observed and noted as under:-

The Tribunal had occasioned to examine similar issues involving technical collaboration and transfer of intellectual property right from foreign companies to Indian recipient. It was held that when the agreement is for transfer of exclusive/non-exclusive technical knowhow the consideration received cannot be taxed under consultancy service.

IMPORT OF SERVICE AND PLACE OF SUPPLY DEFINED.

12: As per Section 2(11) of IGST Act, import of service means supply of service, where,

- a) Supplier of service is located outside India
- b) Recipient of Service is located in India
- c) The place of supply of service is in India.

13: In view of the above discussions, there is absolutely no doubt that there is an import of service and the place of supply of service in India and GST is payable on Reverse Charge Basis.

WHETHER GST IS PAYABLE ON RCM BASIS:

14: In terms of [Notification no.10/2017-IT\(R\) dtd 28.06.2017](#), one of the notified categories on which GST is applicable under RCM is “any service supplied by any person who is located in a non-taxable territory to any person other than a non-taxable online recipient”.

15: IGST liability under RCM in case of Import of service has to be paid in cash/bank. GST ITC to the extent of IGST paid can be availed and utilized in the same month subject to ITC eligibility.

PLACE OF SUPPLY IN CASE OF IMPORT OF SERVICE

16: In case of import of service, if the nature of service does not fall under the one specified under Section 13(3) to 13(13) of IGST Act, then place of supply shall be the location of the recipient of service. Undisputedly, the import of service from a person outside India to a person located in India, does not fall under any of the sub-sections 13(3) to 13(13) of IGST Act. Therefore, there is no doubt, IGST is to be discharged under RCM when recipient is in India.

17: RCM would generally be applicable in the cases wherein the place of supply would be that of the recipient of service (generally located in India).

TO BE CONTINUED.....
