Taxability of warehousing charges provided by FTWZ service provider and eligibility of the same

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Abstract
With the advent of GST in India, supply became the taxable event and this made the place of supply and time of supply particularly, and the act of supply in general significant. The GST laws mandate registration under section 22 of the Central Goods and Services Tax Act, 2017 (hereinafter referred as the CGST act, 2017) for all DTA (Domestic Tariff Area) business. Almost every realm of service is now covered under the scope of supply under section 7 of the CGST Act, 2017 and warehousing services is once such supply clearly covered within the scope of the said section. This service becomes a concern when it is provided or availed in the FTWZ (Free Trade Warehouse Zone). This paper attempts to analyze whether provision of renting service in FTWZ is a qualified service under GST laws? If yes, is it a taxable supply?

Keywords: supply, FTWZ, warehouse service

Introduction

The warehouse service providers located at FTWZ (Free Trade Warehouse Zone), provide services of receiving, storing, preserving and facilitating the sale by way of retrieving the right material, packing and loading. In availment of such services, a majority of the recipients who avail the warehousing service to store the goods imported at FTWZ invoice directly from the DTA to their destined third-party customer and make supplies from warehouse and raise invoice in their name as they are not registered under the FTWZ Provisions nor the GST Provisions for operating within FTWZ. Hence, in the normal business compliance they could not invoice from FTWZ and raise invoice from DTA.

In this context, it also significant to note that under the Sale of Goods Act, 1930 the transfer of property through an invoice executed by DTA Unit and the invoice raised by warehouse service provider in FTWZ is only treated as exporter invoice to an importer for the purpose of filing Bill of Exchange.

Research questions

In this background, this research paper aims to analyze, identify and determine

- Whether the warehouse service provided in the FTWZ area is supply of service under GST.
- Whether the levy of GST by unit located in FTWZ on the recipient for the value-added services provided in sale transaction b/w the recipient and the third party are justified.
- Whether the recipient is eligible for ITC on the services received with regard to supply of material to third party to warehouse.

Research methodology

This paper adopts doctrinal research to understand the of supply and the taxability of warehousing services provided in the FTWZ. The relevant Fiscal Legislations are used as the primary sources and to buttress the arguments made in this paper, secondary sources such as Judicial precedents, books and journal articles are used.

Legal analysis

The recipients generally avail the warehousing services at FTWZ to store the imported goods and sell them directly to the customers from the FTWZ to ease their business requirements and to avoid the additional import costs. In this premise, it is understood that all the sales from FTWZ area are non-taxable events in the hands of the recipient.

The warehousing service availed by the recipients from FTWZ area is a value-addition to the imported and warehoused goods that helps the recipient's business in terms of flexibility, to effect sale to all class of business.

Supply is a taxable event under GST and charge is fixed on the same. Section 7 (1) (b) of CGST Act, 2017 defines Supply as,

"Supply" includes Import of services for a consideration whether or not in the course or furtherance of business;

Section 7 is an inclusive definition which states supply should be of goods or services or both and must be made for consideration in the course or furtherance of business and includes import.

And, Section 2(11) of the Integrated Goods and Services Tax Act,2017 (hereinafter referred as the IGST Act, 2017) defines import of services and it means the supply of any service, where

- *the supplier of service is located outside India;*
- *the recipient of service is located in India; and*
- *the place of supply of service is in India;*

In the discussed supply, the Supplier of warehousing service is located in the FTWZ area and the recipient is located in India

(DTA) and hence the place of supply of service is deemed to be in India.

Import of goods is also dealt separately under the Customs Act, 1962, wherein IGST shall be levied as additional duty of customs in addition to basic customs duty under the Customs Tariff Act, 1975. Persons importing services for shall also be liable to GST on reverse charge basis. It should be noted that there is no threshold limit in reverse charge. This is an exception of supply in the course or furtherance of business.

As per section 2 (108) of CGST Act, 2017 *"Taxable supply" means a supply of goods or services or both which is leviable to tax under this Act;* In the current scenario, the activity of availing warehousing service to store the imported goods at the FTWZ for which a price is charged separately is very much a taxable supply.

And, as per 2(n) of SEZ Act, 2005 Free Trade Warehousing Zone (FTWZ) means *a Special Economic Zone wherein mainly trading and warehousing and other activities related thereto are carried on*. Warehousing is normally done on behalf of a third party while trading is done by the SEZ unit itself. These FTWZ's hold goods on behalf of suppliers and buyers subject to fulfilment of provisions of rule 18 (5) of SEZ Rules.

The Place of supply of warehousing services in this supply is the location of the recipient i.e., the Querist as per section 13(2) of the IGST Act, 2017. And, the price of the imported goods is inclusive of the warehousing service and the same is recovered from the customer in addition to the import cost and profit. The duty is paid by the importer for the whole charges.

Further, it is judicious to refer to the Doctrine of "Revenue Neutrality" which emerged from the larger Bench decision of the CESTAT in the case of *Jay Yushin vs CCE* 2000 119 ELT 718 (Tri-LB), wherein, it was held that, the existence of an alternate scheme would not be an acceptable defense and extended period of limitation shall not be invoked in cases of revenue neutrality. In addition, whatever duty payable by the assessee unit shall be allowed as a credit. And, later the same was upheld by the Hon'ble SC in the case of *CCE v Mahindra & Mahindra Ltd* 2005 179 ELT 21 (SC) by the three-member Bench, wherein it was held that if the credit is available to the other party and such a non-payment of tax is not caused by *mensrea* then the situation becomes revenue neutral.

In the instant Case, assuming that the transaction attracts GST and the SC decision in the case of *UOI vs Mohit Minerals pvt. Ltd.* 2022 (5) TMI 968 SC is not considered, the GST obligation fulfilled by the service provider located inside the FTWZ even though he is not obligated and GST obligation not fulfilled by the service recipient even though he obligated the Revenue is not under loss and in fact the revenue is receiving money in advance. Hence, the situation being revenue neutral, applying this doctrine where the *mensrea* is absent, the eligibility is unquestionable.

Determination of supply

In analysis of the all the above laws and judicial precedents it is clear that,

- Warehousing Service is a supply of service as per the relevant acts.
- The place of supply is determined as India.
- Applying the Principles of Mohit Minerals by the Hon'ble SC, the author opines that the warehousing charges attract GST neither in the hands of Warehouse service provider nor in the hands of the recipient of such service.
- Without prejudice to the SC decision, it is taxable only in the hands of the recipient located inside India and not by the service provider.

Thus, the author, discourses that the levy of GST by the warehouse service providers is incorrect as per law as it qualifies as an unauthorized collection of GST for the reasons that the services received are input services for the supply made from FTWZ to DTA.

The author also draws parallel to a situation where the DTA unit importing material and warehousing it for future clearance; later filing home clearance BoE and is eligible for ITC on the warehousing services which was received prior to clearance. In the instant case, the recipient is paying duty on warehousing charges also, but not directly and through the importer. In view of this, the warehousing services are included in the valuation and the duty has been paid accordingly give permission to the recipient of FTWZ warehousing services to avail credit.

Conclusion

Based on the above discussion, the author concludes that the Levy of GST by the Service Provider, located in FTWZ which is a foreign land for the purpose of levy of GST and Customs Duty, is unwarranted and unauthorized by the Provisions of Law. The transaction is not attracting GST in view of the decision by the Hon'ble SC in *Mohit Minerals*, the levy of GST on warehousing services in the hands of provider as well as the recipient is unwarranted in view of the duty paid by the importer on the value including warehousing charges.

With regard to eligibility of ITC, in case the above decision is not acceptable, the services received from TVS SCS are included in the valuation of Customs Duty and IGST and in view of that, the GST levied by the Service Provider in furtherance of taxable business to qualify as eligible credit. In case the above decision is distinguished applying the *doctrine of Revenue Neutral*, the levy by Service Provider and nonpayment by the Service Receiver is in the nature of Revenue Neutral.

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