GST on services exported but consideration failed

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From time to time, the Indian government comes up with numerous schemes and incentives for exporters in order to enhance the market for Indian products and at the same time increase the forex inflows which helps the government to increase forex reserves. Exports play a pivotal role in contributing to the country's economy. The total export revenue for FY 2022-23 was around $770 billion from India.

In GST law, the benefit of zero rating has been provided for export transactions. As per section 2(6) of IGST Act 2017, one of the five conditions to be satisfied for export of services is that payment in convertible foreign exchange or in Indian rupee (wherever permitted) to be received within the specified time.

In recent times, the GST authorities have been demanding GST during departmental audits in cases where consideration is not received for export of services. In this article, we try to encapsulate the provisions relating to export of services and the taxability with some analysis.

Relevant provisions under GST

In terms of section 2(6) of IGST Act 2017, services would be 'export of services' where

- the supplier of service located in India,
- the *place of supply is outside India,*
- recipient is outside India,
- *payment in foreign currency or Indian currency wherever permitted is received within the specified time limit* and
- the supplier and the recipient are not merely an establishment of a distinct persons.

This definition is very similar to the definition provided in erstwhile Service tax law.

Further, Rule 96A of CGST Rules 2017 provides that the exporter of service who opts to export without payment of IGST needs to furnish a letter of undertaking binding himself to pay tax along with interest within 15 days if export proceeds are not received within 1 year from the date of export invoice.

The question which arises based on rule 96A is whether the department would be able to recover GST under rule 96A. The answer would be negative. There are always three stages in any statute, (1) Levy (2) Assessment and (3) Collection. Without the levy, the tax cannot be assessed and without assessment the same cannot be collected. In the case of ***Commissioner of wealth tax vs***

Ellis Bridge Gymkhana (1998) 1 SCC 384(SC), it was held that "if a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all". Since rule 96A is only about binding oneself through bond / letter of undertaking to pay tax and it's not a levy provision by itself.

Section 5 of IGST Act is the levy section specifying that the tax to be levied on all inter-State supply of goods and services. Exports are inter-State supplies. One may argue that supply of services, when not satisfying the conditions of 'export of services' would fail the test of 'zero rated supply' and therefore, liable for GST as inter-State supply.

Relevant provisions in erstwhile service tax law

In terms of section 66B of the Finance Act 1994, the service tax at fourteen percent was to be levied on all the services provided in the ***taxable territory.*** Therefore, services provided in a place other than taxable territory were not subject to service tax.

It is also interesting to note Rule 6(8) of Cenvat Credit Rules 2004 which provided for reversal of input credit when consideration when all conditions of export of services are satisfied except receipt of consideration. Rule 6(8) has been reproduced below:

Rule 6(8) of Cenvat Credit Rules 2004 :

For the purpose of this rule, a service provided or agreed to be provided shall not be an exempted service when:

(a) the service satisfies the conditions specified under rule 6A of the Service Tax Rules, 1994 and the payment for the service is to be received in convertible foreign currency; and

(b) such payment has not been received for a period of six months or such extended period as maybe allowed from time-to-time by the Reserve Bank of India, from the date of provision.]

Provided that if such payment is received after the specified or extended period allowed by the Reserve Bank of India but within one year from such period, the service provider shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier in terms of sub rule (3) to the extent it relates to such payment, on the basis of documentary evidence of the payment so received.

Note: In clause (b) above, the word 'not' added to confusion when the provision was introduced. However, the reading of proviso brings out the intention of the government expecting the reversal of credit when consideration not received towards export.

From the above discussion, it is very clear that the exports without consideration were treated as 'exempted services' in pre-GST regime. Credit was eligible for re-availment once the consideration received within one year from allowed period to receive consideration. This ensured that there was no burden of 14% service tax on exports where consideration failed but liability restricted to credit availed in such cases which could be very minimum.

Whether GST is payable in such cases now?

Though the answer to this question was very clear 'no' in pre-GST regime, the same is not so in GST. However, there are lot of arguments which can be in favor of 'no' in GST regime as well which have been discussed below:

a) Under GST regime, **taxable territory** means the territory to which the provisions of tax apply. The GST law applies to the whole of India and India means the territory as specified in Article 1 of the constitution which also includes the territorial waters, sea bed, and sub-soil underlying waters, continental waters, exclusive economic zone or any other maritime zone and the air space above its territory and territorial waters. Therefore, it can be argued that when services are received by customers outside India, GST cannot be levied. Place of supply provisions also can be relied upon for this. In case of services such as information technology, testing, design etc., the place of supply would be location of recipient which is outside India in case of exports.

b) In terms Article 245 (1) of the constitution of India, parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Article 245(2) states that no law made by the parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. Parliament's legislative powers constitutionally restricted from enacting legislation with extra-territorial aspects/ events. Article 245 (2) cannot be read as parliament has been granted powers to make laws for territories beyond India. Moreover, GST is a destination-based tax wherein the taxes should move along with goods and services.

c) There have been few important rulings in service tax regime wherein levy of service tax on extra-territorial events have been held invalid. In the case of ***M/s. SAL Steels Ltd. v. Union of India [2020-TIOL-163-HC-AHM-ST],*** it was held that the provisions of the Finance Act, 1994, which is an Act of the parliament for levy of service tax, do not permit nor empower the Central Government to collect service tax on extraterritorial events, and the services which are rendered and consumed beyond the land mass of the country. Similarly in case of ***Indian Association of tour Operators vs Union of India W.P. (C) No. 5267 of 2013, decided on 31-8-2017***, it was held that Section 94(2)(f) or (hhh) of the Finance Act does not empower the Central Government to decide taxability of tour operator services provided outside the taxable territory. They only enable the Central Govt. to determine what constitutes export of service, the date of determination of the rate of services or the place of provision of taxable service. Similar analogy can be taken in GST law as well as conditions with respect to export of services are similar. However,

major difference being adding of definition of 'export of services' in IGST Act 2017 in GST regime whereas in service tax regime, the definition was part of rules.

d) The condition as to receipt of export condition is not there for goods (except in case of refund claims). However, service exports should suffer GST in addition condition of receipt of consideration. Question which arises is if this is a violation of principle of equivalence as held in case of *AIFTP Vs. UOI-SC-2007 [appeal (civil) 7128 of 2001]*.

Conclusion

In order to encourage the service exporters, the government could come out with clarification on this matter as there are number of cases wherein GST is being demanded by the tax officers. Though it is possible to argue that GST is not payable for services delivered outside India, it is important to note that the services would not qualify to be zero rated supply when consideration not received. Therefore, the services provided may be treated as exempted or non-taxable supplies and ITC availed on inputs/ input services needs to be identified and reversed in terms of rule 42. There have been numerous clarifications in recent meetings of GST council. It is high time to clarify this issue as well.

The views expressed in this article are purely personal and authors could be reached for comments, suggestions at mahadev@hnaindia.com and cabhanuprakashls@gmail.com.