Do's & Don'ts of High Seas Sales

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The Fear

The complex legal structure, endless procedural formalities of Import trade coupled with big hue and cry by the Enforcement branch has created negative effect not only the minds of Tax authorities but also in the minds of Tax payers for High Seas Sales. The pitfalls are many but the shrewd taxpayer has learned to sail through rough seas. The law about High Seas Sales is as old as Industrial Civilisation and development of organized trade. The principals are settled. It is only the imperfect documentation that turns a genuine high seas transaction to in genuine one. It is at this juncture that the taxpayers go through the entire gamut of documentation and finds some solution. As long as a transaction is genuine one as also if buyer is available the supporting documents are invariably available.

1. Crossing the Customs Frontiers of India

This article is prepared on the hypothesis that the reader knows what is High Seas Sales. Shortly put, the concept of Sale in Course of Import is legal nomenclature for commercial parlance of High Seas Sales. I need not dwell upon the History of Sec. 5(2). The most significant effect is the amendment in Sec. 2 of the CST Act in 1976. By Act 103/1976 w.e.f. 7.9.96, the statute incorporated the definition of "Crossing the Custom frontiers of India". It reads as follows :

Crossing the Custom frontiers of India mean crossing the limits of the area of a custom station in which imported goods or export goods are ordinarily kept for clearance by custom authorities.

The explanation clarifies that for the purpose of this clause Custom Station and Custom Authorities shall have the same meanings as in the Customs Act, 1962.

This amendment along with the codification of territorial waters by a separate Act in 1976 has opened the gates for many intricate issues of High Seas Sales.

Sec. 5(2) of C.S.T. Act

Sec. 5(2) of the Central Sales Tax Act, 1956, permits Sale in course of Import only on two eventuality.

1. 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 occasion such Import.

2. A sale or purchase of goods shall be deemed to be take place in the course of Import if the sale is effected by a transfer of documents of title to the goods before the goods have crossed the Customs frontiers of India.

The High Seas Sales is covered by the second limb of Section 5(2) of C.S.T. Act. There should be 1). Sale 2). Effected by transfer, 3). Of documents to title to goods and most important 4). Effected before the goods cross the custom frontiers of India.

3. Bill of Lading :

In case of High Seas Sales, there is NEVER DELIVERY OF GOODS. What is given is symbolic delivery of documents of title to goods duly endorsed in favor of the Buyers. The most important document of title to goods in case of High Seas Sales is bill of Lading. Before we move further it is essential to know certain basic things about Bill of lading.

Many any not be aware of the existence of bill of Lading Act passed on the basis of International Convention. Bill of lading is document of title to goods, which can be transferred by endorsement or by a mere delivery as the case may be. The rights and liabilities of the endorsed consignee are also defined under the Bill of Lading Act, so also the rights and liabilities of Shipping Company issuing the bill of lading. The law relating to bill of lading is shortly summarized as follows for the simple reason that there are many misconceptions prevailing in the mind of tax payers as also tax uthorities.

a. A bill of lading is the most important document in international trade. The B/L attests to the carrier's assumption of responsibility for the goods and is evidence of the existence of a transport contract and of the conditions accepted. In addition it is a title of ownership, in the sense that only the person presenting it can take possession of the goods.

b. The bill of Lading is furnished by the ship owner or shipping company, and confirms that the named goods (nature, packages, marks) have been loaded or received for loading in a specified ship for carriage to and discharge at a specified point.

c. A part from the master Bill of Lading, two, three or four originals are signed and sealed by the carrier or his agent, as well as many non-negotiable copies as may be needed. The non-negotiable copies are not signed and have no legal value. The number of originals is shown on each Bill of Lading. The originals and copies make up the complete set of bills of lading.

d. An original copy of the Bill of Lading is equivalent to a title of ownership and enables its bearer to take possession of the goods by exchanging it with cargo agent who holds the master bill of Lading.

e. All the original have the same legal value.

f. After endorsement only the endorsed copy can be used to withdraw the goods.

g. The endorsed bill of Lading is said to be completed and unused originals have no further legal value.

h. There are three types of Bill of Lading;

i. A Bill of Lading made out to a named person; only the person named can withdraw the goods on production of an original copy of the Bill of Lading.

j. A bill of lading made out to bearer; the holder of the document is considered to be the legal owner of the goods and may take possession of the goods simply by presenting the Bill of Lading.

k. A bill of Lading made out to order; this means that the Bill of Lading is to the order of the shipper who must endorse it by signing it on the back.

4 Modus Operandi

Having understood in brief, the basic law let us look at the normal modus operandi and what are do's and what are don'ts

4.1 The first step is placing of Order on Foreign exporter. Tripartite agreements is the most common form of contract to prove inextricable link between the foreign Seller, importer and local buyer. Such transactions will be covered by the first limb of Sec. 5(2). However, even in such case if ultimately goods are delivered by way of symbolic delivery of document of title to goods. The transaction can be easily established as sale in course of Import.

Take for example

M/s. ABC Ltd., functions as canalizing agent for Import and Export of goods. M/s. XYZ Ltd., the actual users, requests M/s. ABC Ltd., to import raw material required for production in its own factory. The actual user, M/s. XYZ Ltd., opens Letter of Credit in favour of foreign exporter wherein M/s. XYZ Ltd., is shown as consignee of goods. Thereafter, M/s. ABC Ltd., places purchase orders on foreign exporter for and on behalf of M/s. XYZ Ltd. M/s. ABC Ltd., writes of M/s. XYZ Ltd., About placing of order on foreign buyer and further informs that the goods will be sold by M/s. ABC Ltd. to the actual users on High Seas basis only and M/s. XYZ Ltd., should make its own arrangement for clearing the Cargo, Custom Clearance, Payment of custom duty and port duty/charges etc. subsequent to High Seas Sales would be on M/s. XYZ's account only. The documents duly endorsed were sent by M/s. ABC Ltd. to M/s. XYZ Ltd. to clear the goods. When the ship arrived at the port all the above formalities were completed. The actual user, though its name was not mentioned in Bill of Entry, processes the Bill of Entry and cleared the goods.

4.2 If the chronology of events in any transaction is as per above example, even Supreme Court cannot deny that the sale is before the goods have crossed Custom Frontiers. But normally at the time of placing the order the Importer may not have ready buyer or he does not wish to disclose the indentity of his customer, in such eventuality the next step is entering into High Seas Sales Agreement. The Agreement is not a must. In the days of Internet, e-mail, fax and telephones the contracts need not be in the form of document made on stamp paper. The time is moving so fast that the businessman now a days believe in least formalities and best results. However, existence of Agreement does help in establishing the link. The date of stamp paper as also the date of Agreement is important. They can be of any date, may be before the goods are shipped. But in no case it should be after clearance of goods by custom authorities. Ideally, the Agreement should bear all the shipping details like ship name, quantity, description of goods as in the bill of lading. Bill of lading number, date of shipment etc. The Agreement invariably has a last clause put by way of abundant caution that the price is fixed treating the transaction as not liable to tax and in case of any future levy of tax interest and penalty, the same shall be recovered from High Seas Buyer. It should further confirm that the buyer will bear all the risk and cost of clearance of goods. The Agreement is normally prepared by Seller and Buyer signs the same as a mark of acceptance.

4.3 The documents are normally received through Bank. Procedure does take more time. However at times to save time and demurrage charges the process of submitting papers for Custom duty Assessment is started. As stated earlier any one copy of Bill of lading that is not marked as "not negotiable" can be endorsed. The copy is first endorsed by Bank, then by the importer.

4.4 One should refrain to write any thing more than required in endorsement. Putting some conditions in endorsement may make endorsement conditional. The intention must be to transfer unconditionally. The most debated issue is of putting the date on endorsement. The courts have in terms held that it is customary not to put date on the endorsement of bill of lading. The Courts have also observed that other corroborative evidences can prove the fact of transfer of documents of title to goods before custom clearance.

4.5 Once the Bill of lading is endorsed, all the import documents must be retired from Bank. Even the correspondence with Bank helps to establish the dates at times. All the documents along with original bill of lading duly endorsed should be handed over to the High Seas buyer under acknowledgement. This acknowledgement must have date. In fact, it is this date that is crucial. This date can be any date after the documents are retired and before the duty is assessed.

4.6 At times by way of abundant caution it is advised to take High Seas Purchase Confirmation letter from buyer along with copy of its RC certificate to prove genuine existence of buyer. Not to mention that even these are proved forged at times.

4.7 The next step is informing the Custom Authorities. Where the goods are purchased on OGL or when licensees are freely available this is strictly not required. However a formal letter addressed to Collector of Custom about High Seas transaction both by seller and purchaser separately is added feather in the cap. Such letters are never acknowledged by the custom officials as normally they are tendered as an attachment to Bill of Entry.

4.8 Preparation of Invoice by High Seas Seller at this juncture is ideal but not a must. In numbers of cases, Courts and Tribunals have held that date on which invoice is prepared is immaterial. However, whenever the invoice is prepared, it must specify that sale is by transfer of documents of title to goods. The quantity and description in the invoice must be same as in bill of lading. One sale bill can be made listing out more than one bill of lading but the converse is not permissible. The details about ship, B/L No. etc. must be mentioned in the invoice.

4.9 The next step is tendering of bill of entry. The custom authorities now a day allow the high seas buyer to submit Bill of Entry in his own name. This is an ideal situation but the mention of name of original Importer in Bill of Entry cannot deprive the importer of high seas claim. The details written in B/E about quantity, description import license number etc. is helpful in getting it tallied with other documents.

4.10 A bill of Entry can be either "for Home consumption" or "for Bonded warehouse". In both the types what is crucial is date of duty assessment or provisional duty assessment as the case may be. It is this date, which is the last date before which the document of title to goods is normally transferred to High seas buyer.

4.11 The Production of Bill of Entry for Bonded warehouse will put the assessing authority on his guard. It is often job of a claimant dealers to prove that the goods are put in bonded warehouse by the High Seas buyer and not by original importer. This in turn is proved by showing proof of payment of bonding by the High seas buyer or proof of warehouse keepers' receipt.

4.12 Alternatively, if bill of entry is prepared in the name of High seas buyer the it is a conclusive proof because the custom authorities allows production of Bill of entry in the name of person other then importer only upon satisfying themselves about sale of goods on High seas. This also further indicates that the custom duty will be charged on the higher amount i.e. on the sale price.

4.13 However there is no compulsion under the Custom Act to clear the goods in the name of High Seas Buyer. The fact that B/E is in the name of High Seas buyer prima facie proves that duty is also paid by the person named in Bill of Entry.

4.14 When the BE is not in the name of High Seas buyer, at times, the custom authorities may send notices claiming short levy of Custom duty as the same should have been paid on High Seas Sale price. Importer must never pay this short levy of custom duty even though the notice may be in his name. The payment must be by the High Seas buyer.

4.15 Next is appointment of clearing agent. This is always by High Seas Buyer. The importer may act as liaison officer.

4.16 Ideally once Bill of Lading duly endorsed is handed over to the Buyer, the seller need not have any further proof except proof of having delivered duly endorsed Bill of Lading and other import documents. Nonetheless, by way of abundant caution a copy of clearing agents bill should be kept on record.

4.17 Normally by way of identifying mark on all Import documents the name of Importer is written. Clearing agent's bill normally bear name of importer - on account of M/s. XYZ, High Seas Buyer. There is nothing illegal in this practice. However ideally clearing agent should address bill in the name of High Seas buyer. Other details like quantification of custom duty, date of payment of custom duty etc. helps in corroborating the same with other evidences. A copy of the letter addressed to clearing agent by the High Seas buyer is also one of the good evidence. At times dealers even obtain proof of payment of custom duty by High Seas Buyer, like certificate by Bankers of having issued bank draft of custom duty on behalf of High Seas buyer etc. The payment of Octroi, port charges etc. must be by High Seas buyer.

4.18 These are few out of many possible evidences. It is not necessary for a High seas seller to give or keep all the evidences. In fact, only limited evidences which are strictly required to prove the claim be submitted.

In case of doubt further proof as and when required can be submitted. The details above are given as guideline. Permutation and combination of documents to be submitted will differ from case to case.

5 Some highly debated issues

5.1 The first is import in bulk cargo and sale on high seas to more then one customer. Delivery/sale of goods to more then one customer from a single bill of lading is disastrous. Before the goods begin their journey, the shipping company should be requested to issue more the one bill of lading. Each such bill of lading can then be endorsed in favor of each buyers.

5.2 Whether goods put in bonded warehouse can be sold on high seas sales or not is highly sensitive and debatable issue. Going by the Supreme Court decision, the goods put in bonded warehouse continues to be within the area of custom station and should be allowed to be sold on high Seas. The document of title to goods in such case is not bill of lading, but warehouse keeper's receipt or delivery order issued by warehouse keeper, rest of the chronology remain the same.

5.3 Another sensitive issue is high seas sales of goods received by Air. Airway bill should not be endorsed. The airway bill is not a negotiable instrument. The importer can have delivery order issued by the Bankers and the delivery order is accepted as valid document of title to goods. Like in case of bill of lading, receipt of delivery of delivery order duly endorsed with other Import documents must be taken on a forwarding letter from high seas buyer. Unlike receipt of goods by sea receipt of goods by Air Cargo leaves very few days Margin to comply with the requirements of chronology of events. Nonetheless, they must be strictly followed.

6 Case Laws

I give herein below list of the few of the Important Tribunal decisions out of many decisions available for the simple reason that the later decisions have all followed, the earlier decisions. Some of the Supreme Court and High Court judgments are also listed below, interested readers may read the same.

6.1 Supreme Court and High Court

a. State of Tamilnadu V. TNN Mahalaxmi Textiles 113 STCI (SC)

b. Mineral and Metals Trading Corporation of India Ltd. V. Sales Tax Officer 111 STC 434 (SC)

c. Mineral and Metals Tr. Corporation V. State of Andhra Pradesh 110 STC 394 (AP)

d. State of Maharashtra V. Embee Corporation 107 STC 196 (SC)

e. Brijlal Tulsian V. CTO WBTT 107 STC 75 (WBTT)

f. K. Gopinath Nair V. State of Kerala 105 STC 580 (SC)

g. State of Andhra Pradesh V. Blue Star 96 STC 374 (AP)

h. Collector of Customs V. WBTT 113 STC 167 (SC)

i. Ramington Rand of India Ltd. 90 STC 323 (Delhi)

j. Commr. of Sales Tax V. Printers House 93 STC 94 (Delhi)

6.2 Some Important Tribunal Judgments

1. A Seventilal & Bros. SA 104/86 dt. 15.4.83.

2. Indotex Export Hs. Pvt. Ltd. SA 284-85/90 dt. 17.6.95

3. Pharma Sales Corp. SA 107 & 108/90 dt. 26.6.90

4. Janso Exports Pvt. Ltd. SA 271/86 dt. 23.4.87.

5. Vishnu Metal Industries SA 1217 of 85 dt. 9.3.89.

6. Bombay Metal Syndicate SA 1256-57/86 dated 23.4.87.

7. Agarwal Investments SA9416/86 dt. 26.6.87.

8. Simplex Woollen Mills SA 120/87 DT. 21.1.88.

9. B. Vijay Kumar & Co. SA 1249/88 dt. 11.10.89.

10. Vaghani Bros. SA 1541/91 dt. 21.6.91.

11. Bislery Beverages Pvt. Ltd. SA 835 of 1989 dt. 22.3.91 (Subsequently a consent decree is passed by Bombay High Court. The decision is therefore not a ratio any more).

12. Vadilal Embroidery Unit SA 74/1987 dt. 31.10.87.

13. Frescom Gum Pvt. Ltd. SA 55/88 dt. 30.11.91.

14. B. M. Shah SA 139/89 dt. 7.2.92.

15. C.J. Shah & Co. SA 664 to 667/1989 dt. 29.8.92.

16. Surlab Corporation SA 956 & 957/91 dt. 18.2.1993.

17. Ashapura Minechem SA 636/92 dt. 21.4.95

18. Fibro Plast SA 25 & 78/96 dt. Sept. 98