GST on Import of Services

Understanding of Law:

As per Sec. 5(3) of the IGST Act, 2017 provides that the Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of the Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

By virtue of the said provision, **Notification No. 10/2017-Integrated Tax (Rate)** has been issued wherein at Sr. No. 1 it is provided that tax in respect of any service supplied by any person who is located in a non-taxable territory to any person, other than non-taxable online recipient, shall be payable by the person located in the taxable territory. ***In other words, tax on import of services shall be paid by the recipient.***

- **Special Case of Import of Services and applicability of GST under RCM**

  1. **Fees paid to Foreign Government to get our project/product registered in Foreign Countries:**

     Scope of Services: It includes regulating certain product categories which includes drugs and medicines. To fund its expenditure and to fulfill its mission of protecting the public health and accelerating innovation in the industry, various Countries charges certain fees in respect of various activities which includes product approvals/registrations/facility inspection, etc?

     Services: As per section 2(102) of the CGST Act, 2017 "(102) "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged".

     Above definition is wider and it includes anything which is not in the nature of goods as services. Whether any activity done by the Government under a sovereign function for a fee can be regarded as a "service"?

     Sovereign functions –History:

     To appreciate this issue we have to understand the clarification provided under Service tax Law as follows:

Before the passage of the Finance Act, 2015 the scope of taxable services provided by the Government/Local Authority to business entities was restricted to only "support services"

"Support services have been defined in section 65B of the Act as 'infrastructural, operational, administrative, logistic marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of movable or immovable property, security, testing and analysis.

Thus services which are provided by government in terms of their sovereign right to business entities, and which are not substitutable in any manner by any private entity, are not support services.

However Vide Finance Act, 2015 term "support services" in Section 66D(a)(iv) was omitted and replaced by "any service" vide the Finance Act, 2015 and corresponding amendments to Rule 2(1)(d)(i)(E) of the Service Tax Rules, 1994 (vide Notification No. 05/2015- S.T. dated March 01, 2015) and Clause (I)(A)(iv)(C) and S. No. 6 of Table of Notification No. 30/2012 – S.T. dated June 20, 2012 (vide Notification No. 07/2015 – S.T. dated March 01, 2015) were also undertaken. Consequent to this, in the Budget of 2016-17, both the amendments were brought into force from April 01, 2016 through Notification No. 17/2016 – S.T. dated March 01, 2016 and Notification No. 16/2016 – S.T dated March 01, 2016 respectively.

Hence a clear indication to bring to tax all the services provided by the Government (whether sovereign function, mandatory function or otherwise) was manifested. Only taxes, cesses or duties levied which are not a consideration against a particular service shall not be leviable to tax. ***Hence tax shall be payable on any amount collected by the Government where a service is provided in return subject to any express exemptions granted under the law.***

Applying the same to GST regime, we are of the view that the distinction of not subjecting to tax those activities which are performed out of sovereign function and at the same time subjecting other activities (not out of sovereign function) to tax is not supported by the language as well as clarification in the earlier regime. Hence all the activities, which are not in the nature of goods, rendered for a fee shall be regarded as services.

Seven judges' Bench of the ***Hon. Supreme Court in the case of Bangalore Water Supply and Sewerage Board v. A. Rajappa, [1978] 2 SCC 213*** There was a difference of opinion in the said case between the Judges as to what can be considered as a "sovereign function". By majority a restricted meaning was given to the said term to only specified categories of so called 'inalienable functions' like defense, making peace or war, foreign affairs, acquisition of a territory and the like where the State is not answerable to the Courts. After more than 27 years from the said decision, in 2005 ***Hon. Supreme Court in the case of State of UP v. Jai Bir Singh (Appeal (Civil) 897 of 2002)*** expressed doubts on the earlier decision and observed as under:

"We also wish to enter a caveat on confining 'sovereign functions' to the traditional so described as `inalienable functions' comparable to those performed by a monarch, a ruler or a nondemocratic government. The learned judges in the Bangalore Water Supply and Sewerage Board case seem to have confined only such sovereign functions outside the purview of 'industry' which can be termed strictly as constitutional functions of the three wings of the State i.e. executive, legislature and judiciary.

Import of services:

Next question to examine is whether the payment of such Government fees shall tantamount to "import of services" so as to subject the same to tax under reverses charge mechanism?

Import of services is defined u/s 2(11) of the IGST Act, 2017 as under:

"(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"

In the given case, supplier (i.e. authorities) is clearly located outside India. Recipient is located in India. Now to determine place of supply one needs to refer to Sec. 13 of the IGST Act, 2017. Default rule (as applicable to the present case) provides that the place of supply shall be the location of the recipient of services (i.e. India).

Conclusion: Hence said payment of Foreign Government agency shall be regarded as "import of services" subject to tax under reverse charge mechanism.

2. **Professional Fees: (Fees paid to foreign consultants)**

   In case of Professional/Consultancy services, the place of provision of services is where customer is located. Kollektivavtalstiftelsen TRR vs. Shatteverket (2012) 37 STT 172 = 26 taxmann.com 116 (ECJ).

   In case of Indian Companies customer of service is Indian Company itself. Hence, Place of provision of service shall be India. ***And therefore GST under RCM shall be Payable.***

<u>DISCLAIMER:</u>

The conclusions reached and views expressed in the memorandum are matters of opinion. Our opinion is based on our understanding of the law and regulations prevailing as of the date of this memorandum and our past experience with the Revenue Authorities. However, there can be no assurance that the Revenue Authorities may take a contrary to our views.

Legislation, its judicial interpretation and the policies of the regulatory authorities are also subject to change from time to time, and these may have a bearing on the advice that we have given. Accordingly, any change or amendment in the law or relevant regulations would necessitate a review of our comments and recommendations contained in this memorandum. Unless specifically requested, we have no responsibility to carry out any review of our comments for changes in laws or regulations occurring after the date of issue of this memorandum.