

Intellectual Property Rights and Service Tax – An Analytical Approach

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Abstract – Moving in an era where the fruits or products of intellect are considered to be at a higher footage than any other form of material wealth, as when the intellectual ideas are converted from ideas to a perceptible form brings huge wealth, this form of intellectual wealth is protected by intellectual property rights/law. In present time the world economies are engaged in transforming themselves into knowledge based economies rather than just being a simple industrial one. Thus, the companies see this intellectual property as an asset capable of generating tonnes of capital & with tax authorities becoming aggressive in auditing, the intellectual property holder aren't spared & hence fixing liability to pay tax on it. In this article, authors have focussed specifically on service tax imposed on intellectual property services, basis of levying it, its incidence & implications.

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INTRODUCTION

The era of the intellectual property is an asset for generating the capital for the industries of the developing nations. The need for the lay person for the developments in tax policy structures have an impact for the developments integrated in the intellectual property dissemination. There have been radical changes in the taxation policies and amongst them are the need for the service tax on intellectual property rights. For the intellectual property, having either the rights or laws there is a need for the authorities to become aggressive in auditing the taxes paid by the companies. There have been considerable changes done in the existing laws related to the service taxes and introduction of new sections in the act. In this article, explains the service tax imposed on intellectual properties with the mind set to understand the pros and cons.

MEANING OF INTELLECTUAL PROPERTY

Intellectual Property Rights is an umbrella term which includes many types of intangible rights such as Patents, Copyrights, Trademarks, Geographical Indication, Integrated Semi-Conductor Circuit Layout Design, Industrial Design, Plants Varieties etc. India moving towards the developed economy from mixed economy in 1991, there has been a significant change in the foreign investments being made which has made strides in the world arena. The nation has changed and the time has come where we value more for ideas and knowledge more than the materialistic properties. The ever increasing horizon of the internet domain has created intellectual property dissemination to every individual and is no longer the citadel of great corporations. Nations have developed

the value to property through a copyright, patent invention or trademark.

Intellectual property has been able to communicate information related to the tangible property to any parts of the globe within no time.¹ The relevant statute defines the rights conferred on a particular species of intellectual property as the exclusive right to use the patent, apply the design, use the trade mark or commercially exploit the work in certain forms (as in copyright). In practice the statute tries the rightful owner from commercial exploitation, with their respective rights to the detriment of the owner of the property.[1]

One way to understand the value of intellectual property protection and its creativity is by means of looking at it with the eye of the author or the creator of it. At many times they are the authors or artists but they need to be treated equal as common human beings and having equal responsibility. The authors or the artists have also to look after their daily affairs along with paying their taxes. And for paying their taxes they should be benefited from their work. When there are new creations of the owners of the They have to pay for housing, send their children to school and pay taxes. In order to meet these responsibilities, they must benefit financially from their work. In many cases, creators entrust professional enterprises such as book publishers and record producers to bring their work to market. These enterprises make significant investments in the dissemination and marketing of works.[2]

The Government of India in chapter V of the Finance Act, 1994 has brought in a new means to

levy tax on services provided in the name of service tax. With effect from 10th September, 2004, the services rendered under the intellectual property were made taxable services by the government for the users. The word intellectual property rights have been defined as follows: intellectual property rights means any right to intangible property, namely trademarks, designs, patents or any similar intangible property, under any law for the time being in force, but does not include copyright". The definition specifically excludes copyright. The above rights should be right recognised by any law in force. Under the vide circular the intellectual property rights covered under Indian Laws at present, are chargeable under the service tax.[3]

Those intellectual property rights which are enacted by the Indian government are covered under an umbrella of service taxes and not of those which are not recognised by the Indian government. Thus, it is mandatory that the service taxes which are so levied need to be registered also in India and have to be enclosed within the preview of the intellectual property laws of India.

MEANING OF INTELLECTUAL PROPERTY SERVICES

Section 65(55b) defines "Intellectual property services" as under - intellectual property services means: - transforming or permitting the use of any intellectual property right.[4] Thus from the above section we can understand that Intellectual property right services permits the users to the enjoyment of Intellectual property rights or temporary transfer of the intellectual property right. The services which are rendered by the intellectual property right would include the two sides of the rights to the owners which is firstly the right to transfer an intellectual property right on a temporary base and secondly allowing the use of intellectual property right or the right to enjoy intellectual property right to someone else, which is other than the owner or holder of an intellectual property right.

MEANING OF TAXABLE SERVICE

Taxable Services has been defined under the Section 65(105) (zzr) as any service provided or to be provided to any person, by the holder of intellectual property right in relation to intellectual property services.[5]

Normally, the value of the service on which service tax is payable is the gross amount charged by the service provider. The government notification¹ has granted exemption from so much of the service tax liveable as is equivalent to the amount of cess paid towards the import of technology under the provision of Section 3 of the Research and Development Cess Act 1986 in relation to the intellectual property services.[6] For the reasons that the taxable services are liveable there is a need that the services

specified meet the prerequisite conditions. There is a need that the service provider should provide the service related to IPR to any person. The service to be provided should be by the holder of the IPR. The service should be of any service in relation to the PR. The IPR to be taxed should be transferred temporarily or permitted to use without the transfer. There should be no services to be taxed be pertaining to copyright. Lastly, Intellectual property rights which are recognised by the Indian Laws shall be validated.

DECLARED SERVICE

As per Section 66E of the act, temporary transfer or permitting the use or enjoyment of any intellectual property right, would constitute as declared service.[7]

The prerequisite for the transfer of any intellectual property right is that there should permission to use or enjoy the rights constituting the declared service should be of temporary nature.

EXPORT OF SERVICES

If the service of intellectual property is rendered by Indian resident and the recipient of the service is situated outside India, then the tax liability is governed by the provisions of the Export Services Rules 2005. Prior to the introduction of these rules, the service provider was able to prove export by showing that the consideration received was in convertible foreign exchange.[8]

For example, Mr. XYZ transfers the copyrights of the book published to Mr. ABC in USA for permitting it to sell and publish the books in USA. The place of provision of service will be governed by rule 3 and the place of provision of service shall be USA. If the payment is received in foreign currency the service will qualify for export of service.

Intellectual property service is placed in the third category where the IPR holder has to satisfy the following conditions, namely: the provision of service should be a person situated outside India if it is in relation to business or commerce. If it is not in relation to business or commerce, then the recipient should be situated outside India at the time of receiving the service. If the recipient of service has an office in India, then the IPR holder has to comply with the following additional condition, i.e., the of-der or provision for the service should have come from the office situated outside India.[9]

CESS PAID ON IMPORT OF TECHNOLOGY

The taxable service involving import of technology would be exempt from the service tax liveable" thereon under section 66B of the said Act, [10] as is equivalent to the amount of Cess payable on the - laid import of technology.[11] In many cases, point

of taxation is the date of payment or invoice issued by provider, whichever is earlier.[12]

So far as service tax is concerned, transactions involving temporary transfer of IPR and grant of license to use IPR, whether on exclusive or non-exclusive basis, are eligible to service tax. Service Tax is not levied on Intellectual property rights recognized under the Plant Varieties Act, the IC Design Act, the GIG Act, the Do Diversity Act and Copyright Act. Service Tax is also not levied on the IPR not recognized under the Indian law.

CASES RELATING TO IPR AND SERVICE TAX

In the case of Hero Honda Motors v. CST, the permission given to Oil Company to use his trade mark on oils, lubricants and greases manufactured by the oil company would be considered as the IPR service.[13] In the case of India Pistons Ltd. v. CCE, it was held that telegraph transfer is distinct and separate from engineering consultancy service. The royalty paid to foreign collaborators in terms of technical assistance agreement entered between them was not eligible to service tax as service received was different from engineering consultancy service.[14] In the case of R.M. Dhariwal (HUF) v CCE, it was held that the royalty as a consideration for transfer of trade name and formulae for manufacturer of pan masala, gutka, etc. was covered by intellectual property service rather than scientific & technical consultancy service.[15]

CONCLUSION

The effect of service tax levied by the government on the specified services are categorised on the situations and the liability for payment of tax to specific persons. Firstly, if the IPR holder is from India and the receiver is also from India he would be liable to pay taxes by the service provider. Secondly, if the IPR holder is from India and the recipient is situated outside India then the taxes are not required to be paid but there are situations stipulated under the Export of Service Rules which should be complied with. And lastly, if the IPR holder is situated outside India and the recipient is situated in India, it is the liability of the service recipient to pay service tax. Service tax on the intangible goods as of for the intellectual property rights should be liable for service tax. Hence, there would be good use of the IPR on transferring such rights.

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