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MEANING OF INTANGIBLE PROPERTY

- Features of Intangible Property
  - It has no physical substance.
  - It can not be seen or touched.
  - It can be owned.
  - It is transferrable.
  - It has exchangeable value.

- Issue

Intangibles - Indirect Tax Perspective
TYPES OF INTANGIBLE PROPERTIES:

- Copyrights
- Patent
- Trademark
- Design
- Goodwill
- Software
- Technical know-how
- Import / Export License
- Franchisee
- SIM Cards
DOUBLE TROUBLE FOR INTANGIBLE PROPERTY

• Why it is called goods?
  • Sale of Goods Act
    ‘goods’ means every kind of moveable property other than actionable claims and money

• Maharashtra VAT Act, 2002
  “goods” means every kind of movable property not being newspapers, actionable claims, money, stocks, shares, securities or lottery tickets and includes live stocks, growing crop, grass and trees and plants including the produce thereof including property in such goods attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;
DOUBLE TROUBLE FOR INTANGIBLE PROPERTY

• Why it is called goods? (Continued)
  • Tata Consultancy Services Vs State of Andhra Pradesh (2004) 24 PHT 581 (SC)(FB)
  Supreme Court observed that goods can be tangible or intangible, the test to determine whether property is goods is whether the concerned item is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed etc.

• Why it is called service?
  • Finance Act, 2004 - Intellectual Property Service
    Temporary transfer or permitting use or enjoyment of intellectual property
  • CBEC Circular 80/10/2004 ST dt 17.09.2004
    Intellectual Property means property which a person acquires due to application of intellect such as invention, design, product, process, technology, book, goodwill etc.
  • Intellectual Property Service is a declared service as per sec 66E
The Supreme Court in the case of BSNL vs. Union of India 2006 (2) S.T.R. 161 (S.C.) held that, to constitute a transaction under the term “Transfer of Right to Use Goods” following conditions must be satisfied:

a) There must be goods available for delivery;
b) There must be consensus ad idem as to the identity of goods;
c) The transferee should have a legal right to use the goods-consequently all legal consequences of such use including any permissions or licenses required therefor should be available to the transferee;
d) For the period during which the transferee has such legal right, it has to be for the exclusion to the transferor;
e) Having transferred the right to use goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others.
TRANSFER OF RIGHT TO USE V/S LICENSE TO USE

Intangible Property

If all 5 conditions are simultaneously satisfied
- Right to Use
  - VAT / CST

If any 1 condition is not satisfied
- License to Use
  - Service Tax
TRADEMARKS - INDIRECT TAX IMPLICATION

• **Meaning of Trademarks**

  Trademark is mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors.
TRANSFER OF RIGHT TO USE V/S LICENSE TO USE

Tata Sons Ltd Writ Petition No. 2818 of 2012 (Bombay High Court)

- Issue: Whether test of exclusivity as mentioned in the judgment of BSNL applies in case of intangible property?

- Petitioner’s Contentions

  - Permission to use trademark is given to multiple users simultaneously. Transfer is not exclusive but conditional.
  - Attribute of Exclusivity mentioned in BSNL judgment does not satisfies
  - Hence, it is service and not a deemed sale.

- High Court decision:

  - Bombay high court did not apply the test of exclusivity as it is intangible goods and hence the same was taxed under Sales tax.
DESIGN, TECHNICAL KNOW-HOW & PATENT - INDIRECT TAX IMPLICATION

• **Meaning of Design**
  - Design means only the features of shape, configuration, pattern, ornaments or composition of lines or colors applied to any article.

• **Meaning of Technical Know-How**
  - Knowledge which could enable a company receiving such know how to do the project.

• **Meaning of Patent**
  - Patent is granted for an invention of a new product or process involving an inventive step and capable of industrial application.
DESIGN, TECHNICAL KNOW-HOW & PATENT-INDIRECT TAX IMPLICATION

• I.W. Technologies Pvt Ltd v/s State of Maharashtra (SA 429 of 2004) dt 22.10.2008

• Issue: Whether consultancy service provided amounts to transfer of Technical Know How?

• Assesses Contentions

- Assessee is providing consulting services in respect of modification of effluent treatment plant.
- Job includes analysis, testing, designing, supervising of effluent treatment plant
- There is no transfer of goods and hence, the same can not be taxed under VAT

• Department’s Order

- Handing over designs is the dominant intention of the contract and all other activities are incidental.
- Hence, it is transfer of Technical Know-how and chargeable under VAT.
COPYRIGHTS - INDIRECT TAX IMPLICATION

• Meaning

  • Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings.

  • Copyright under Copyright Act, 1957 - Sec 13(1)
    a) original literary, dramatic, musical and artistic works
    b) cinematograph films
    c) sound recordings
COPYRIGHTS - INDIRECT TAX IMPLICATION

• Service Tax implication
  - IPR Service was introduced in 2004 but Copyrights were specifically exempted upto July 2010
  - From 01 July 2010 - Copyright service was introduced to tax temporary transfer or permitting use or enjoyment of copyrights with few exemptions
  - From 01 July 2012 - Copyrights other than sound recording were brought under negative list
  - From 01 April 2013 - Cinematographic films except for exhibition in cinema Hall or cinema theatre were brought under Service Tax net

• Sales Tax implication
  - Sale of copyright or transfer of right to use copyrights are taxable @ 5% vide Schedule Entry C-39
AGS Entertainment Pvt Ltd v/s UOI (2013-TIOL-521-HC-MAD-ST)

• Issue: Whether temporary transfer of copyrights by producer to distributor or
distributor to sub distributor or theater owner is service or deemed sale?

• Petitioner’s Contention:
  o Challenged constitutional validity of levy of service tax on temporary transfer or
    permitting the use or enjoyment of copyrights
  o Transfer of copyright is transfer of right to use goods which should be considered as
    deemed sale and not a service

• Conclusion:
  o In temporary transfers, owner of copyrights does not relinquish his rights.
  o It is transfer for specified use for a specified period
  o Hence, it is taxable under service tax.
FRANCHISE - INDIRECT TAX IMPLICATION

• Meaning of Franchisee

• An agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved;

• The franchisor provides concepts of business operation to franchisee
  - includes know-how, method of operation, managerial expertise,
  - marketing technique or training and standard of quality control
  - without transferring the ownership of any of the above

• Franchisee as a service

• Sec 65(105)(zze)
  Service provided or to be provided by a franchisor to a franchisee in relation to franchise
Smokin Joe's Pizza Pvt. Ltd. vs. State of Maharashtra 2008 (ST1)-GJX-0291-STMAH

• Issue: whether consideration charged from Franchisee for use of trade mark and other services shall be liable to tax under VAT

• The assessee provided various associated services which include providing know-how, training of employees, instructions to Franchisees about layout of premises, kitchen, instructing Franchisees for selection of raw materials and instructing the Franchisees about the method of delivery of pizzas, etc. besides allowing to use the trade mark

• The transaction is not liable to sales tax since there is no actual transfer of right to use the trade mark but it is mere license to use the same and consideration is not merely for the use of trade mark but is composite for various services besides allowing to use the trade mark and no separate consideration is provided for allowing the use of trade mark
Smokin Joe's Pizza Pvt. Ltd. vs. State of Maharashtra 2008 (ST1)-GJX-0291-STMAH

- The Hon'ble Tribunal held that to establish the transfer of Right to use, the transfer must be exclusively to the Transferee and the owner should not have right to transfer the same rights to others - relied on the observations of the Apex Court in leading judgment in the matter of Bharat Sanchar Nigam Limited 145 STC 91

- The Tribunal has held that impugned transaction does not involve transfer of Right to use trade mark. It is a License granted to use the trade mark simultaneously to various persons. It is a Composite Agreement of providing various services to ensure the standard and quality of the product in order to maintain the reputation of the Franchisor and permission to use the trade mark is an incidental.

- Therefore, it is liable to service tax.
Malabar Gold Pvt Ltd v/s Commercial Tax Officer Kozhikode [2013-TIOL-512-HC-Kerala-ST]

• Issue: whether consideration charged from Franchisee for use of trade mark and other services shall be liable to tax under VAT

• The company is engaged in marketing, trading, export and import of jewellery under the name of Malabar Gold.

• Transfer of trademark is not exclusive

• Franchisee’s rights are limited

• Frachisor retains right and effective control of trademarks

• Hence, Sales tax is not attracted.
IMPORT / EXPORT LICENSES - INDIRECT TAX IMPLICATION

- Import / Export License
  - License are issued under Foreign Trade policy for promoting export of goods or service.

- Whether transfer of import licenses constitutes sale of goods?

Vikas Sales Corporation v/s CCE [(1996) 102 STC 106]

- Import license are not actionable claims
- It has got a monitory value
- It is freely transferable
- Hence, the same are held as goods
SIM CARD - INDIRECT TAX IMPLICATION

• Whether supply of SIM card is sale or service?

- Sale of SIM card does not amount to sale of goods
- SIM card has no intrinsic value. It is not sold independently.
- Dominant Intention of the transaction is to provide service and supply of SIM card in incidental
- Therefore, it is liable under service tax and not VAT

Idea Mobile Telecommunication Ltd v/s CCE Cochin [2011-TIOL-71-SC-ST]
SOFTWARE - INDIRECT TAX IMPLICATION

• Meaning of Software
  - Software is a computer instructions or data capable of causing a computer to perform a specific task.

• Classification of Software
  - Packaged / Canned / Branded software
  - Customized / Uncanned / Un-branded software

• Sales Tax
  - Schedule Entry C- 39

• Service Tax
  - Sec 650(105)(zzzze) - Information Technology Software Service
Sale or Service – The never ending conundrum

What’s this overlap?

- Transfer involving IPR’s owned by the developer - Sale
- Development involving IPR’s originally with the customer - Service
- Transfer involving IPR’s transferred after development - Sale

Intangibles - Indirect Tax Perspective
## Taxability of Software under Service tax

<table>
<thead>
<tr>
<th>S No</th>
<th>Particulars</th>
<th>Reference</th>
<th>Whether Sale</th>
<th>Whether Service</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Sale of Pre-packaged or Canned software</td>
<td>Guidance Note 5.4.1</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>2</td>
<td>On Site Development</td>
<td>Guidance Note 5.4.2</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>3</td>
<td>Advice, consultancy and assistance on matters relating to information technology software</td>
<td>Guidance Note 5.4.3</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>4</td>
<td>Providing a license to use prepackaged software***</td>
<td>Guidance Note 5.4.4</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

***“Transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods” - Declared service as per sec. 66E (f)***
SOFTWARE - INDIRECT TAX IMPLICATION

• Sale or Rendering of Service

Tata Consultancy Services v/s State of AP
[(2004) 271 ITR 401 SC]

- Software is goods because it has attributes like utility, Capable of being bought and sold, capable of being transmitted, transferred, delivered, stored and possessed.

Infosys Technologies Limited
[2008-TIOL-509-HC-MAD-CT]

- High court relied upon judgment of TCS and held that customized software which is supplied on media are goods.
SOFTWARE - INDIRECT TAX IMPLICATION

• Sale or Rendering of Service

MVAT Trade Circular
47 T of 2007 dt 22.06.2007

• Paper license is nothing but software and hence liable under MVAT act.

• The position would not change even in respect of sale of software via internet or supply through e-mail.

Finance Act, 2008
Sec 65(105)(zzzze)

• ITSS service was introduced to bring under service tax net development, adaptation, upgradation, enhancement, implementation, consulting in relation to software, acquiring right to use of software

• TRU clarified that packaged software are goods not taxable under service tax
Software - Indirect Tax Implication

Sale or Rendering of Service

**Infotech Software Dealers Association (ISODA) [2011-VIL-12-HC-Mad-ST]**

- Even though software is goods, transaction may not amount to sale in all the cases. It depends upon end user license agreement. The judgement resulted into levy of service tax on sale of Microsoft products.

**Sasken Communication Technologies Ltd [2011-12 (16) KCTJ 303 (Kar HC)]**

- Whether development of software a works contract?
- The day when the agreement was entered into, there was no Software in existence.
- IPR belongs to customers
- Hence it is not a works contract, it is service contract
SOFTWARE - INDIRECT TAX IMPLICATION

Sale or Rendering of Service

In the course of ERP implementation even if any software comes into existence, the title of the software vests with the client and not with the assessee.

- Deliverables are not marketable products
- Coding is incidental activity
- Hence, it is pure service and not sale of goods

State of Karnataka v/s IBM India Pvt Ltd

[2015-TIOL-2298-HC-KAR-VAT]
<table>
<thead>
<tr>
<th>Sr No</th>
<th>Particulars</th>
<th>Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Packaged Software</td>
<td>Sales Tax</td>
</tr>
<tr>
<td>2</td>
<td>Customised software</td>
<td>Service Tax / Sales Tax</td>
</tr>
<tr>
<td>3</td>
<td>Maintenance / Update of Software</td>
<td>Service Tax</td>
</tr>
<tr>
<td>4</td>
<td>Consultation in respect of software service</td>
<td>Service Tax</td>
</tr>
<tr>
<td>5</td>
<td>License to use packaged software</td>
<td>To be checked whether it is transfer of right to use goods or license to use goods</td>
</tr>
</tbody>
</table>
SOFTWARE - INDIRECT TAX IMPLICATION

Import of Software

- Bought on physical medium
  - Goods
    - If covered under RSP basis
      - Dutiable
    - Not covered
      - Exempted
  - Electronic Download
    - Service
      - Service Tax under RCM
Export of Service

• With effect from 1 July 2012, new Rule 6A has been inserted in Service Tax Rules, 1994 in relation to Export of Services vide Notification No. 36/ 2012-ST dated 20 June 2012

• As the earlier Export of Services Rules, 2005 have been rescinded, the required provisions have been inserted in Service Tax Rules, 1994

• Rule 6A lists down the requirements of transaction to qualify as export of service
Export of Service

- As per Rule 6A, a provision of any service provided or agreed to be provided shall be treated as export of service when:
  
  - The provider of service is located in the taxable territory,
  - **The recipient of service is located outside India,**
  - The service is not a specified service in section 66D i.e. negative list
  - **The place of provision of the service is outside India,**
  - The payment for such service has been received by the provider service in convertible foreign exchange
  - The establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory are not treated as distinct persons
Issues arising out of the new rule for determining exports

- The Rule essentially mandates compliance with the Place of Provision rules and casts additional conditions for claiming export benefits. Hence it is possible that a service may be exempt but is not export of service. Let’s see an example:

- A ltd, Mumbai provides training services to employees of B ltd, Bangalore in USA. Let us map the conditions being fulfilled or otherwise:

<table>
<thead>
<tr>
<th>Condition</th>
<th>Whether Fulfilled</th>
</tr>
</thead>
<tbody>
<tr>
<td>provider of service is located in the taxable territory,</td>
<td>Yes</td>
</tr>
<tr>
<td>The recipient of service is located outside India</td>
<td>Yes</td>
</tr>
<tr>
<td>The service is not a specified service in section 66D i.e. negative list</td>
<td>Yes</td>
</tr>
<tr>
<td>The place of provision of the service is outside India</td>
<td>Yes</td>
</tr>
<tr>
<td>The payment has been received in convertible foreign exchange</td>
<td>No</td>
</tr>
<tr>
<td>The establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory are not treated as distinct persons</td>
<td>Yes</td>
</tr>
</tbody>
</table>
Rebates and Refunds

- Rebate on inputs and input services can be filed as per notification 39/2012 (ASTR -2 route). No option to claim cenvat and claim refund of tax on output service.
- Refund u/r 5 of the CENVAT credit rules still available as an option to claim refund on inputs/input services. Notification 27/2012 laying down conditions for this purpose. The most critical issue is the computation of 1 year period for claiming refund as per the new notification. Let's illustrate

<table>
<thead>
<tr>
<th>Month</th>
<th>Export Billing (Rs.’000)</th>
<th>Export Receipts (Rs.’000)</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 2012</td>
<td>100,000</td>
<td>80,000</td>
<td>Amount received is towards billing till June 2012</td>
</tr>
<tr>
<td>August 2012</td>
<td>100,000</td>
<td>50,000</td>
<td></td>
</tr>
<tr>
<td>Sept 2012</td>
<td>50,000</td>
<td>20,000</td>
<td></td>
</tr>
</tbody>
</table>

- As per the notification read with Rule 5 the refund needs to be computed based upon the payments received in the quarter (which is not the export turnover of the current period and has already been considered in the earlier quarters refund). Does the notification over-ride the law by ignoring the Point of Taxation rules? The anomaly for transition period is obnoxious
Rebates and Refunds - Further Issues

- Rule 5 of CCR, 2004 was amended from 1.4.2012 while the Rule 6A of STR defining exports and the refund notification 27/2012 were made applicable from 1.7.2012. Hence for 3 months the new CCR rule should be read with the Export of Service Rules, 2005 and old notification 5/2006.

- The transitioning position has been very difficult for all exporters converging 3 times
  - Old Rule 5 and old Notification - till 31.3.2012
  - New Rule 5 and new Notification - Post 1.7.2012

- Other issue is in relation to the calculation of “CENVAT availed” during the relevant period. The question that arises here is whether this would also include opening balance as on the first day of the quarter? Controversy under old law settled by various courts including Mumbai CESTAT in the case of Amdocs ltd based on circular of 2010 for 100% export oriented units - however what happens now is something we would have to wait and watch.
Is there a change in the way we would identify goods and services separately.

Would the overlapping stop??

How would the place and time of supply rules would be applied since these are different for goods and services...

How would the situs of sale be determined
Thank You!!!