

[2023] 147 taxmann.com 181 (Article)

**Claim refund, if excess tax paid on Royalty****ANSHUL MITTAL**

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With the advent of Globalization, the interaction among general masses has become possible at one touch, so is carrying out businesses & professions by using advance technologies even from the distant nations.

One of such arrangements is sharing of technical know-how, patents, trademark, franchisees etc. and are compensated to the owners via payment of royalties, fees for technical know-how, for using the trademarks and franchises, for using Intellectual property rights of other Business house, professionals etc. These arrangements have to pass through the taxing statutes of the different nations differently.

Such kind of arrangements are very technical, and the interpretation of agreements requires knowledge of law as well as knowledge of such businesses. It is a quite common and old practice that the foreign companies allow the Indian companies to use their technical know-how for the production of goods and in return charges a license fee in the name of royalties' etc. These royalties are paid for using the intellectual property created by those foreign companies, as they would have carried out various R&D activities to invent that knowledge.

License is a permission given to a person to do or enjoy something that otherwise he does not have the legal right to do or enjoy. Therefore, a licensor does not transfer any proprietary interest to the licensee but he is only allowed to use IPR. The same is considered as service and payment is made in terms of the royalties.

Import of service: As per Section [2\(11\)](#) of IGST Act, import of service means supply of service, where, a) Supplier of service is located outside India b) Recipient of Service is located in India c) The place of supply of service is in India.

Place of Supply in case of Import of Service: In case of import of service the place of supply shall be the location of the recipient of service except the case where the nature of service falls under the one specified under Section [13\(3\)](#) to 13(13) of IGST Act. Hence, IGST is to be discharged under RCM when recipient is in India.

In the concerned situation, the service will be qualified as import of service and therefore, GST on the same is payable under reverse charge mechanism as per the Notification no.10/2017-IT(R) dtd 28.06.2017. In the

said notification one of the notified categories on which GST is applicable under RCM is "any service supplied by any person who is located in a non-taxable territory to any person other than non-taxable online recipient".

It is not a new concept that would need further deliberation. Such transfer of IP rights has to be classified as per the SAC provided under the classification of scheme for Services published by CBIC.

<b>Group 99733</b>		<b>Licensing services for the right to use intellectual property and similar products</b>
	997331	Licensing services for the right to use computer software and databases.
	997332	Licensing services for the right to broadcast and show original films, sound recordings, radio and television programme etc.
	997333	Licensing services for the right to reproduce original art works
	997334	Licensing services for the right to reprint and copy manuscripts, books, journals and periodicals.
	<b>997335</b>	<b>Licensing services for the right to use R&amp;D products</b>
	997336	Licensing services for the right to use trademarks and franchises
	997337	Licensing services for the right to use minerals including its exploration and evaluation
	997338	Licensing services for right to use other natural resources including telecommunication spectrum
	997339	Licensing services for the right to use other intellectual property products and other resources n.e.c

During the course of various departmental GST audits, this is being observed that the officials are unnecessary misclassifying these services as technical services and stressing on classifying the same under 9983 which provides for "Other professional, technical and business services". This is due to the reason that the GST rate under the correct classification i.e. 997335 was 12% till Oct 2021 and on the other heading i.e. 9983 it has always been 18%. The reliance is being place on the Advance ruling laid by Gujarat Authority for Advance Ruling in the matter of *Tea Post Pvt. Ltd.*, Inre [\[2021\] 123 taxmann.com 281/86 GST 726 \(AAR-Guj.\)](#). Basis the stand taken by the department the companies under disguise are paying the differential tax of 6% along with interest and sometimes penalties as well. The tax under RCM is being paid in cash and the scope for taking ITC related to the old period i.e. before Oct, 2021 is meagre. These payments of tax, interest and penalties are therefore, converting into a huge cost for the company for which they had never provisioned, and which actually are wrongly being deposited on the mis-understanding of the departmental officials. Let's analyze with the help of explanatory notes and some court rulings issued in the previous regime.

Under GST, temporary transfer or permitting the use or enjoyment of any IPR has been treated as 'supply of services' in terms of entry 5(c) to Schedule II of Section 7 of the CGST Act and is leviable to GST@ 12% (6% CGST + 6% SGST) provided such IPR is not in respect of Information Technology (IT) Software. The SAC code that is applicable in case of royalty fee payment in relation the IPR products is 99733.

The right to use the Intellectual property and similar products is grouped under SAC 99733. The technical

know-how is in itself an R&D product and therefore, classifiable in the specific head provided in this regard, and not under the residuary heading as is being suggested by the officers in various cases during audits.

In fact, the explanatory notes provided at <https://cbic-gst.gov.in/> also provides following:

**99733 Licensing services for the right to use intellectual property and similar products:**  
*This group includes permitting, granting or otherwise authorizing the use of intellectual property products and similar products*

*Note: This covers rights to exploit these products, such as licensing to third parties; reproducing and publishing software, books, etc.; using patented designs in production processes to produce new goods and so on. Limited end user licences, which are sold as part of a product (e.g., packaged software, books) are not included here.*

The explanation itself clarifies that the license to other person for right to use intellectual property is grouped under 99733 SAC.

There are several case laws supporting the proposition that royalties paid for allowing the use of technical know-how is an IPR product. In the case of **B.E. Gelb Consultancy Services v. CCE**, [2009] 19 STT 61, the Chennai CESTAT observed the following:

*I find that the agreement envisages provision of technical know how to manufacture automotive chains and ancillary equipment for the purpose. In order to effectuate the object of the agreement BEGELB also trained LGB's staff and visited its factory for supervision. Appellant is compensated through royalty payments and payment of technical know how fees. All the various activities BEGELB undertook were to achieve the basic purpose of the contract, namely, manufacture of automotive chains. Therefore, the service provided was "Intellectual Property service" (IP Service).*

The similar view was taken in the case of **L.G. Balakrishnan & Brothers Ltd. v. C.C.E. & S.T.**, [2010] 24 STT 349 (Chennai-CESTAT).

In the light of above explanation and case laws it should be crystal clear that the services imported are basically IPR related services which is classifiable under SAC 99733.

Further, the rate notification prior to 1st Oct 2021 provided two rate for SAC 99733 i.e.:

- (i) Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right in respect of goods other than Information Technology software.  
Rate prescribed: 6% CGST
- (ii) Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right in respect of Information Technology software. [Please refer to Explanation no. (v)]  
Rate prescribed: 9% CGST

So, the rate of GST on royalty payment was 12% (for IPR in respect of goods other than IPR related to software). However, w.e.f. 1st Oct, 2021, vide the Notification No. 06/2021-CGST(R) dated 30.09.2021, the rate of GST has been increased from 12% to 18% for following supplies i.e., royalty payments and both above entries got merged into the one entry i.e.:

"(ii) Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP) right."

Thus, the applicable IGST rate on royalty payment:

1. For the period prior to 1st Oct, 2021 – 12%; and
2. W.e.f. 1st Oct, 2021 – 18%

However, the reliance of department on the ruling laid by Gujarat Authority for Advance Ruling in the matter of M/s Tea Post Pvt. Ltd. is in itself unrelated and ambiguous. The Honorable authority in that ruling rejected the contention of the Applicant for classifying the fees for Franchise under the Service code 997336 where applicable rate was 12%.

<b>Group 99733</b>		<b>Licensing services for the right to use intellectual property and similar products</b>
	997336	Licensing services for the right to use trademarks and franchise

Explanatory note explains the same by defining the scope "This service code includes licensing services for the right to use trademarks and to operate franchises"

Since the SAC 99733 also cover fee for licensing or renting of trademark and franchise, etc., in its scope, the classification done by the AAR under Chapter Heading 9983 as "Other professional, technical and business services" and Service Code (Tariff)- 998396-Trademarks and franchises, attracting GST @ 18% is itself unfound. Due to the specific facts of the matter, it might have been observed so, by the Authority, however, to expect one size to fit all is wrong expectation and applying such interpretation on all the cases of IPRs is also unfounded and shall be reconsidered.

## Conclusion

Transfer, by way of licensing the right to use the Intellectual Property, shall be classified under 99733. The department cannot change the classification just to gain some extra tax. Though, the government has increased the GST rate from 12% to 18%, which shows its intention to give no relaxation under GST to such services, still for the impugned period till it was 12%, such misclassification proposed by the departmental authorities is ethically wrong and legally challengeable. **In case under the disguise of the departmental officer or otherwise, if any registered person has paid such excess tax of 6%, they are under their right to claim refund of the same.**

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