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Litigation Alert

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No GST payable on ocean freight under reverse charge

UOI & Another vs. Mohit Minerals Pvt. Ltd.[1]

The controversy around levy of GST on ocean freight has been finally put to rest by the Supreme Court, which has dismissed the appeal filed by the Revenue against the order of Gujarat High Court ('HC') in case of ***Mohit Minerals Pvt. Ltd vs. Union of India & 1 Other, 2020(1) TMI 974 (Gujarat HC)***.

Gujarat HC, in case of Mohit Minerals (Supra), held that Entry 10 of the Notification No. 08/2017[2] imposing liability to pay GST on ocean freight in case of Cost-Insurance-Freight ('CIF') imports, under reverse charge on importer as unconstitutional and *ultra-vires* the IGST Act[3]. The said order was challenged by the Revenue.

Facts of the case:

- Mohit Minerals Pvt. Ltd. ('the Respondent') imported coke from overseas countries on a CIF basis. The overseas exporter was liable for transportation and insurance of goods up to customs station of India.
- The Respondent paid applicable duties of customs on the value of goods imported (which included the value of freight).
- The Respondent filed a writ petition in the Gujarat HC and challenged the Impugned Notification imposing liability to pay GST on ocean freight on the importer under reverse charge.
- Gujarat HC held the that the Impugned Notification is unconstitutional and *ultra-vires* the IGST Act on the following grounds:

  a) Section 5(3) of the IGST Act allows shifting liability to pay tax onto the recipient only. The recipient of transportation services in case of CIF imports is the foreign exporter.

  b) Underlying transportation services are extra-territorial since both the supplier and recipient are outside India and services are provided in non-taxable territory.

  c) Transportation services under CIF imports shall neither be inter-state nor intra-state supply.

  d) Since duties of customs have been paid on CIF value, imposing GST liability separately on ocean freight would lead to double taxation.

[1] *Union of India & Anr. Vs. M/s Mohit Minerals Pvt. Ltd., Civil Appeal No. 1390 of 2022*

[2] *Notification No. 08/2017 – Integrated Tax (Rate) dated June 28, 2017 ('Impugned Notification')*

[3] *Integrated Goods and Services Tax Act, 2017*

- The Revenue, in its appeal, contested that:

  a) Definition of recipient needs to be interpreted liberally to include the Indian importer as the recipient since he is beneficiary of the transportation services.

  b) Impugned Notification has been issued on the recommendation of the GST Council within the spirit of collaborative federalism.

  c) As Indian importer is the recipient of services, place of supply as per Section 13 of the IGST Act shall be the destination of goods i.e., India. Hence, the instant services shall be inter-state supply.

  d) Since transportation services are rendered up to India and consumed by the Indian importer, there is sufficient territorial nexus.

  e) CIF imports and transportation services are two separate aspects of the transaction. Since separate aspects are being taxed, there is no overlapping.

Judgement of the Supreme Court:

The Supreme Court comprehensively discussed the issue in two segments *viz.,* provisions imposing GST liability on ocean freight, and role of the GST Council's recommendations under GST regime:

a) <u>Provisions under GST Law:</u>

- Entry 10 of the Impugned Notification is within the authority of law since the term recipient, in a liberal sense, would include importer, as services are rendered for the benefit of such importer. Thus, the levy would not amount to excessive delegation.

- Under GST laws, the importer can be treated as recipient of services as the definition of 'recipient' under Section 2(93) of the CGST Act[4] enables the legislature to tax these transactions in the hands of the person to whom services are rendered (i.e., importer in the present case as he benefits from such services). Thus, the transportation services can be treated as inter-state supply.

- The said supply can be taxed under reverse charge on a conjoint reading of the definition of 'import of services' as per Section 2(11) read with Section 13(9) of the IGST Act, which defines the place of supply as the destination of goods i.e., India. Thus, the levy cannot be termed as extra-territorial.

- However, import of goods under CIF contract is a contract of composite supply of underlying goods and services such as freight, insurance etc. Thus, on import, IGST is automatically paid on the freight amount in terms of Section 8 of the CGST Act basis the principal supply and cannot be taxed again in the hands of the importer.

- Enforcing a deeming fiction to subsequently bifurcate the transaction into transportation services and re-imposing GST liability on the same would infringe the principal of composite supply and lead to double taxation.

- Thus, the Impugned Notification, to that extent, is in violation of Section 8 of the CGST Act and the overall scheme of GST.

- Given that, the Apex Court dismissed the appeal filed by Revenue against the order of Gujarat HC.

b) <u>GST Council's recommendations</u>

- The Court, while dismissing the appeal, also observed that the Parliament, vide amendments in the Constitution of India, 1949, intended GST Council's recommendations to only have a persuasive value.

- Mandating GST Council's recommendations would not only disrupt fiscal federalism, but also result into overshadowing the power of Centre and State to enact primary legislation.

- Further, even though GST provisions are bound by the recommendations of GST Council. It

[4] *Central Goods and Services Tax Act, 2017*

would, however, not make every recommendation binding.

Dhruva Comments:

The Supreme Court judgement brings relief to the industry (especially to those for whom IGST on ocean freight becomes a cost).

It is important to note that this conclusion is solely based on the premise that the importer cannot be taxed twice on the same transaction, once by labelling as a supply of goods (at the time of import for payment of duties of customs) and then again by labelling it is as supply of services.

Regarding the aspects of extra territorial jurisdiction and the meaning of recipient of supply, the Supreme Court has expanded the scope and power of the Government to levy tax on the premise that:

a) the services are rendered to the importer who ultimately benefits from such services

b) the place of supply of services is in India

It will be interesting to see how similar levy under the erstwhile Service Tax regime is considered by the Supreme Court (currently pending in the case of Asahi Songwon Colors Ltd.[5]), especially in the absence of provisions of 'composite supply' under the Finance Act, 1994.

The Supreme Court also held that recommendations of GST Council are not binding. This observation may lead to dissonance in the future, as it means that both Centre and States have independent powers to legislate respective GST Laws irrespective of such recommendations.

It will be critical to observe how the Centre and State proceed with this interpretation whilst deciding further amendments in GST Laws.

As a way forward, taxpayers should maintain the status-quo if GST is not paid on ocean freight on CIF imports made till date. Where GST had been paid and input tax credit was not available, taxpayers can file refund applications for such tax paid irrespective of the time limit of two years[6].

[5] *Union of India vs. Asahi Songwon Colors Ltd., 2021 (51) GSTL J14 (SC)*

[6] *Comsol Energy Private Limited vs. State of Gujarat, 2021(6) TMI 827 (Gujarat HC)*

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