Dimensions – 50th Edition

Judgment under the GST regime:

1. Mohit Minerals Pvt. Ltd. v. Union of India[1]	
Issue for Consideration	Whether IGST can be levied, on Indian importer on ocean freight services, provided by a foreign shipper located outside India to seller of goods for transportation of goods to a customs station in India The issue before the High Court was validity of Notification No. 8/2017-Integrated Tax (Rate) and Entry 10 of Notification No. 10/2017- Integrated Tax (Rate) both dated June 28 2017) ('Notifications') and when concerned with CIF contracts.
Discussion & judgment	**Discussion:** • The Hon'ble High Court observed as follows: - The Importer of goods being subjected to levy of IGST is not the recipient of ocean freight services. Under section 5(3) of the IGST Act, only the recipient of supply can be made liable to pay IGST and a notification issued under section 5(3) of the IGST Act cannot exceed the authority conferred by the statute to impose IGST on anyone other than recipient of supply. Hence, the Notifications were held *ultra vires* the IGST Act; - As the Notifications were issued without the authority of law and in contradiction to Article 265 of the Constitution of India, such Notifications are *ultra vires* the Constitution as well; - The IGST Act contemplates transactions of intra-state, inter-state, export and import. Supply of ocean freight services under a CIF arrangement between overseas parties is not covered under any of these types / categories, thus, the place of supply and valuation of the subject transactions also cannot be determined under the IGST Act. Notably, the entire transportation of goods activity, originates and concludes beyond

[1] 2020-VIL-36-GUJ

	the taxable territory of India, resulting in the transactions being completely outside the purview of the IGST Act. - In terms of section 2(93) of the CGST Act, the importer cannot be regarded as 'recipient of supply' of ocean freight services. Thereby, the importer may not be able to avail the input tax credit, sought to be recovered under the Notifications. Therefore, the Notifications are not in conformity with the object of the GST law i.e. input tax credit shall be eligible at each stage; - The Notifications result in double taxation on the freight amount by considering importer as deemed recipient in India. Double taxable unless expressly provided by the statue is not permissible; - In the GST regime, the provisions relating to the filing of returns applies where the person is a supplier or recipient of supply. If a person is neither of them, then such provisions do not apply. The supply in the present case is neither an inward nor an outward supply for the Petitioner. **Judgment:** Notification No. 8/2017-Integrated Tax (Rate) and Entry 10 of Notification No. 10/2017-Integrated Tax (Rate) both dated Junes 28, 2017 are *ultra vires* the IGST Act and thus, IGST cannot be imposed on the Importer of goods in case of CIF contracts.
Dhruva Comments / Observations	• This judgment does not apply to FOB transactions. • Where the importers have discharged GST on reverse charge basis and such GST is not available as ITC importers may explore the option of filing refund applications of such tax paid. • The Notifications being declared as *ultra vires,* the position will apply across India, even to persons who are within jurisdiction of other High Courts, until a contrary view is expressed by any other High Court. • Similar judgment was passed by the Gujarat High Court in the case of SAL Steel Ltd.[2] whereby the levy of service tax on ocean freight under the reverse charge notification was also held to be *ultra vires* the Finance Act, 1994.

Judgment under the Pre-GST regime:

2. GE T & D india Limited v. Dy. Comm. of Central Excise, Large Tax Payer Unit, Chennai[3]	
Issue for Consideration	Whether notice pay recovery is leviable to service tax?
Discussion & judgment	**Discussion:** • The Petitioner had received certain amounts in lieu of notice period from its outgoing employees (notice pay recovery).

[2] TS-1244-HC-2019(GUJ)-ST
[3] 2020-VIL-39-MAD-ST

	• The department confirmed the demand of service tax on such notice pay recovery on the ground that the Petitioner had tolerated the act of immediate quitting of the employee from service and such an agreement / toleration would result in rendition of taxable service as per section 66(e) of the Finance Act, 1994 (Act) viz. *agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*. • The Petitioner filed a writ petition before the Hon'ble High Court and argued that no service tax was payable on such amount received. • The Hon'ble High Court after taking into account provisions of section 65B(44) and section 66(e) of the Act, observed as follows: - Para 2.9.3 of 'Taxation of Services: An Education Guide' states that no service tax is payable when an employee receives any amount from its employer by reason of premature termination of employment. The present transaction is contra to the clarification provided; - The employer has not facilitated / tolerated any act and has merely facilitated the exit of the employee upon imposition of a cost, for their sudden exit, and section 66(e) is not attracted; - A contract though is to be read as a whole, there are situations within a contract that constitute rendition of service such as breach of a stipulation of non-compete; - Notice pay recovery does not give rise to rendition of service either by the employer or the employee; **Judgment:** • Service tax is not payable on notice pay recovery. • Plea of availability of alternate remedy of statutory appeal, as raised by the Department, was rejected since the matter involved interpretation of statutory provision.
Dhruva Comments / Observations	• This is a welcome judgment providing the much-awaited clarification on whether notice pay recovery can be regarded as toleration of an act. • Recently, the CESTAT, Allahabad has also a passed similar judgment in the case of HCL learning Limited.[4] • The said judgment should also be equally applicable in the GST regime as the provisions remain the same. • It needs to be determined whether the said findings can also equally be applied to recovery of liquidated damages. Interestingly, the Appellate Authorities[5] and Authorities[6] for Advance Rulings under GST have consistently upheld the levy of GST on such charges

[4] Order no. 71950/2018 dated November 25, 2019
[5] Maharashtra State Power Generation Company Ltd. [2018 (17) GSTL 451 (App. AAR GST)]
[6] North American Coal Corporation India Pvt Ltd. [2018 (18) GSTL 525 (AAR – GST)]

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