

TAX FLASH NEWS

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Indian importers not liable to pay IGST on ocean freight in CIF contracts – Supreme Court of India

Supreme Court of India has upheld¹ the decision of the Gujarat High Court which held that no tax is payable under IGST Act, 2017 by the Indian importer on reverse charge on ocean freight paid by foreign seller to a foreign shipping line.

Facts of the case

- Assessee-importers are engaged in import of goods from various countries on CIF basis. Customs duty (including IGST) is discharged at the time of import on value as determined under section 14 of Customs Act, 1962 (i.e. transaction value). The assessable value for the purpose of payment of duty includes ocean freight in terms of Customs Valuation Rules.
- Assessee-importers are liable to pay IGST on ocean freight by virtue of notifications² under IGST Act, 2017 leading to double taxation on the component of ocean freight.
- Assessee filed writ application before the Gujarat High Court challenging the legality and validity of the notifications (which deems importers as the 'recipient of service' of transportation of goods by a foreign shipping line for the purpose of payment of IGST under reverse charge) as ultra-virus to IGST Act, 2017 and hence unconstitutional.
- Gujarat High Court pronounced the judgement in favour of the Assessee stating that :
 - in a case of CIF contract, the buyer (i.e. the importer) is not the recipient of the service of transportation of the goods;

- no tax is payable under IGST Act, 2017 by the Indian importer on reverse charge on ocean freight paid by foreign seller to a foreign shipping line.

- Aggrieved by the decision, Union of India filed an appeal before the Supreme Court.

Revenue's contentions

• Charging section

- The charge created by section 5(1) of the IGST Act can extend to an ocean freight transaction to be taxed in the hands of the importer since four fundamental principles of taxing enactments i.e. (1) the taxable event; (2) taxable value; (3) tax rate (4) taxable person are fulfilled.

- Service recipient can be identified through a notification.

• Reverse charge and place of supply

- Presently, neither the provisions nor the rules have identified the taxable persons for reverse charge. Hence, the impugned notifications are a legitimate exercise of delegated legislation.

- Although the contracting parties are foreign, the critical limb of the transaction happens in the taxable territory i.e. in India.

• Composite supply

- CIF transaction and IGST on ocean freight are two independent transactions and do not qualify as a composite supply.

¹ Union of India & Anr. v. Mohit Minerals Pvt. Ltd Through Director [Civil Appeal No. 1390 of 2022]²

² Notification No. 10/2017-Integrated Tax (Rate) dated 28 June 2017 read with Notification No. 8/2017-Integrated Tax (Rate) dated 28 June 2017

- What is sought to be taxed on the supply of goods on CIF value basis is traceable to the Customs Tariff Act while what is sought to be taxed under IGST on RCM is under CGST/IGST Act and the notifications thereon.

- **GST Council recommendations**

Principal function of the GST Council is to take decisions, which are conveyed as recommendations (i.e. recommendations are binding).

Assessee's contentions

- **Charging section**

- Section 5(1) is the charging section and sections 5(3) and 5(4) are only machinery provisions.
- Section 5(1) and proviso thereto provide for levy of IGST on supply of goods by way of import. There cannot be a levy without a supply since there is no deeming fiction in GST Law to disintegrate CIF contract into one for goods and another for services.
- Section 5(3) clearly stipulates that (i) the tax shall be paid on a reverse charge basis and (ii) the tax is payable by the recipient.
- In case the Parliament desired the tax to be collected from a person other than a supplier or recipient, it would have expressly provided so in the legislation.

- **Inter-state supply**

Whether a supply of service is an 'inter-state supply' or 'intra-state supply' depends on the location of the supplier and the place of supply.

- **Recipient vis-à-vis importer**

- The scheme of IGST Act does not envisage a person other than the 'supplier' or the 'recipient' as a person liable to pay tax.
- In case of CIF contracts, the customer contracts for a supply of delivered goods at the port of destination. The contract for transportation of goods is entered into by the foreign exporter with the foreign shipper. Thus, the person liable to pay consideration to the foreign shipper is the foreign exporter. The customer in India is not the recipient as it is not the one liable to pay consideration for any transportation service.

Supreme Court's decision

Supreme Court dismissed the appeal of Union of India. Below is the gist of the important inferences pronounced by the Court:

- **Recommendation of GST council**

- Recommendations of GST Council are not binding on the Union and States. They only have persuasive value.
- If the GST Council was intended to be a decision-making authority whose recommendations transform to legislation, such a qualification would have been included in Articles 246A or 279A of Constitution of India.

- **Territorial nexus**

The destination of goods is India and the services are rendered for the benefit of the Indian importer.

- **Charging section**

- Section 5(3) of IGST Act empowers Government to specify categories of goods or services (or both). It does not empower the Government to specify the recipient of the supply of goods or services.
- Government by notification did not specify a taxable entity different from that which is prescribed in section 5(3) of the IGST Act for the purposes of reverse charge.

- **Place of supply**

- Section 13(9) of the IGST Act creates a deeming fiction of place of supply of transportation services to be in India when the destination of goods is in India.
- Foreign shipping line, located outside India is the supplier of service and the place of supply is India.

- **Composite supply**

Since the Indian importer is liable to pay IGST on the 'composite supply', comprising of supply of goods and supply of services of transportation, insurance, etc. in a CIF contract, a separate levy on the Indian importer for the 'supply of services' by the shipping line would be in violation of section 8 of the CGST Act.

Our comments

This is one of the most awaited judgement as several litigations were going on in regard to applicability of service tax and GST on Ocean freight. This judgment has finally rested all the disputes and held that GST is not payable under reverse charge. This will surely have revenue implications for the Government as well the importers who have been paying IGST on ocean freight on reverse charge basis. It further needs to be evaluated whether refund can be filed especially in cases where credit was not eligible and if yes, whether limitation period will apply. Government has said that they shall take legal view before taking the next steps. We need to await whether Government accepts this and close the litigation or bring in new twist to the subject.



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