

# TAX FLASH NEWS

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## Levy of IGST on Ocean Freight unconstitutional – Gujarat High Court

In a landmark judgement, the Gujarat High Court<sup>1</sup> has held that no tax is leviable on the ocean freight for services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.

### Brief facts of the case

The applicant was engaged in importing coal from various countries. The applicant discharges the customs duty at the time of import on the value as determined under section 14 of the Customs Act, 1962. The value includes Ocean freight.

In addition to the levy of duty and IGST at the time of import, by virtue of notification no. 10/2017-Integrated Tax (Rate) read with notification no. 8/2017-Integrated Tax (Rate), the applicant as an importer was also required to pay IGST on ocean freight, leading to double taxation on the ocean freight amount.

Aggrieved by the fact that ocean freight is being taxed twice the applicant had filed a writ before the Gujarat High Court seeking quashing of the aforementioned notifications, by declaring that the same lack legislative competency and is ultra vires the IGST Act.

### Contentions of the applicant

Primary contention of the applicant is summarised as under:

1. The provisions contained in the IGST Act, applies only for supplies made within the taxable territory. In case of ocean freight, since both the service provider, i.e. shipping line as well as the service recipient, i.e. exporter are located outside India, IGST cannot be levied.

2. In light of the fact that IGST were paid at the time of import on the freight components (ocean freight), the notifications requiring the importer to once again pay IGST on the same components tantamount to double taxation and thus is illegal and unconstitutional.
3. By virtue of section 5(3) of the IGST Act, the liability to pay tax can be shifted from the 'provider of supply' to the 'recipient' on reverse charge basis. However, as per the impugned entry no. 10 of the notification no. 10/2017 – Integrated Tax (Rate), the liability has been shifted on the importer and not on the recipient and thus the entry is ultra vires to section 5(3).

### High Court order

The key observation and findings of the Court is summarised as under –

#### A. On delegated legislation

- Meaningful reading of the charging section (section 5 of the IGST Act), would entail that the person who is neither the supplier nor the recipient of the supply cannot be made liable to pay tax under IGST Act
- The applicant is importing goods on CIF basis. The transportation of goods in a vessel is the obligation of the foreign exporter. The applicant is not at all concerned with how the foreign exporter delivers the goods at the Indian port or whether the consideration of the shipping line is paid by the foreign exporter or not. Thus, the applicant could be said to have neither availed the services of transportation of goods in a

<sup>1</sup> Mohit Minerals Pvt. Ltd. [TS-29-HC-2020(GUJ)-NT]

vessel nor he is liable to pay consideration for such services, hence the applicant is not the 'recipient' of the transportation of goods in a vessel service

- Applicant cannot be made liable to pay tax on some supposed theory that the importer is directly or indirectly receiving the services
- The impugned notifications have been issued in exercise of the powers conferred by section 5(3) of the IGST Act. The said section empower the government to specify categories of supply on which the tax shall be paid by the recipient of the supply. The section does not provide that the government may also specify a person other than the recipient of supply liable to pay tax
- If a delegated legislation goes beyond the power conferred by the statute, such delegated legislation has to be declared ultra vires.

## B. On Inter-state supply and Intra-State Supply

- Import of services means the supply of service, where the supplier of the service is located outside India, the recipient of services is located in India, and the place of supply of service is in India
- Provision relating to 'Place of supply' under section 10 to 13 of the IGST Act does not determine where the supply takes place in its ordinary sense. They are artificial provisions enacted for fixing the situs of supply to determine the nature of supply as inter-state or intra-state and has to used only where provided by the Act, i.e. section 7(1), 7(2), 7(5)(a) and section 8. The said section cannot be applied to residual section i.e. section 7(5)(c)
- For the residual section, the phrase 'supply of goods or services or both, in the taxable territory' shall mean a supply, when all the aspects, or a majority of the aspects, of which takes place in the taxable territory and which cannot be covered under the rest of the provisions of section 7 of the IGST Act. However, where none of the aspects of supply or only a minuscule part of supply takes place in India, such supply cannot be said to be in the taxable territory

- There is no provision for determining place of supply where both location of supplier and location of the recipient are outside India
- In the instant case, the entire transaction takes place outside the taxable territory i.e. outside India
  - The supplier is outside India;
  - The recipient is outside India;
  - The contract for supply has been entered outside India;
  - The payment of supply has been made outside India;
  - Goods has been handed over to the supplier outside India; and
  - The transportation, for the most part, takes place outside India

The mere fact that the transportation of goods terminates in India, will not make such supply of transportation of goods as taking place in India

- A supply where both supplier and recipient are outside India can be made leviable to tax only under section 7(5)(c) of the IGST Act provided that the supply is in taxable territory.

In light of the above, the Court held that

- No tax is leviable under the IGST Act on Ocean Freight for the services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.
- The aforementioned notifications are declared ultra-vires the IGST Act, as they lack legislative competency.

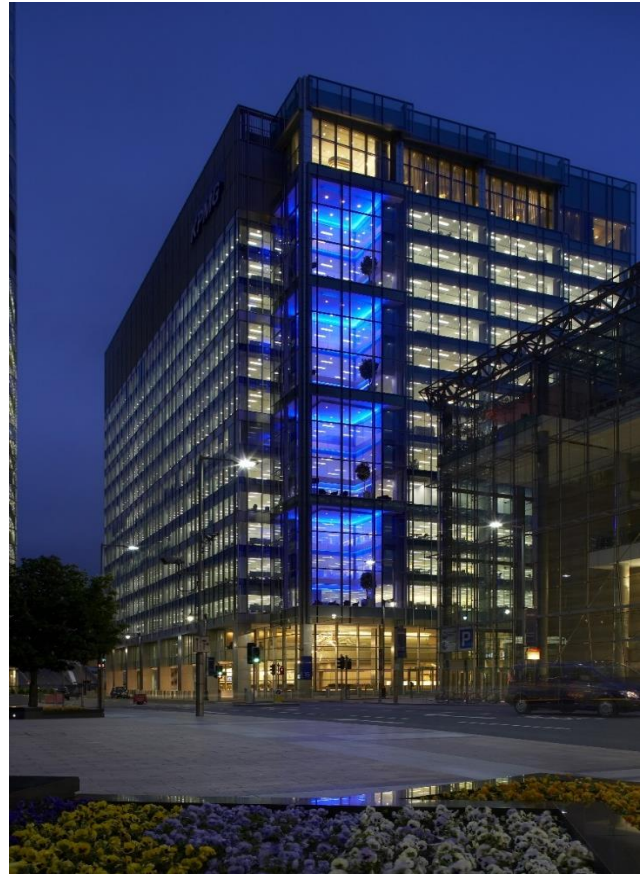
## Our comments

The Court in its order has analysed the dispute relating to Ocean freight from the time the same was introduced in the erstwhile service tax regime and have accordingly dealt with both the aspects of double taxation as well as the fact that the transaction takes place outside the taxable territory. However, it needs to be evaluated whether the ruling can be applied in case of FOB transaction.

One of the important observation/ruling made by the Court is with respect to non-availability of input tax credit when payment is made by a person other than the recipient of supplies. The said pronouncement is prone to invite litigation.

Another important facet which has been touched upon by the ruling is on the scope of the residual provision, section 7(5)(c), where the Court has held that none of the place of supply provision, i.e. section 10 to 13 of the IGST Act can be applied in determining the place of supply. In such cases, the place of supply shall be determined basis the facts of each case and the location where the majority aspects of the transaction are undertaken.

Though the ruling provides a much needed relief to the industry, however, one can expect the order to be challenged before the higher authority.



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### Ahmedabad

Commerce House V, 9th Floor,  
902, Near Vodafone House, Corporate  
Road,  
Pralhad Nagar,  
Ahmedabad – 380 051.  
Tel: +91 79 4040 2200

### Bengaluru

Embassy Golf Links Business Park,  
Pebble Beach, 'B' Block,  
1st & 2nd Floor,  
Off Intermediate Ring Road, Bengaluru –  
560071  
Tel: +91 80 6833 5000

### Chandigarh

SCO 22-23 (1st Floor),  
Sector 8C, Madhya Marg,  
Chandigarh – 160 009.  
Tel: +91 172 664 4000

### Chennai

KRM Towers, Ground Floor,  
1, 2 & 3 Floor, Harrington Road,  
Chetpet, Chennai – 600 031.  
Tel: +91 44 3914 5000

### Gurugram

Building No.10, 8th Floor,  
DLF Cyber City, Phase II,  
Gurugram, Haryana – 122 002.  
Tel: +91 124 307 4000

### Hyderabad

Salarpuria Knowledge City,  
6th Floor, Unit 3, Phase III,  
Sy No. 83/1, Plot No 2,  
Serilingampally Mandal,  
Ranga Reddy District,  
Hyderabad – 500 081.  
Tel: +91 40 6111 6000

### Jaipur

Regus Radiant Centre Pvt Ltd.,  
Level 6, Jaipur Centre Mall,  
B2 By pass Tonk Road,  
Jaipur – 302 018.  
Tel: +91 141 - 7103224

### Kochi

Syama Business Centre,  
3rd Floor, NH By Pass Road,  
Vytilla, Kochi – 682 019.  
Tel: +91 484 302 5600

### Kolkata

Unit No. 604,  
6th Floor, Tower – 1,  
Godrej Waterside,  
Sector – V, Salt Lake,  
Kolkata – 700 091.  
Tel: +91 33 4403 4000

### Mumbai

1st Floor, Lodha Excelus,  
Apollo Mills,  
N. M. Joshi Marg,  
Mahalaxmi,  
Mumbai – 400 011.  
Tel: +91 22 3989 6000

### Noida

Unit No. 501, 5th Floor,  
Advant Navis Business Park,  
Tower-A, Plot# 7, Sector 142,  
Expressway Noida,  
Gautam Budh Nagar,  
Noida – 201 305.  
Tel: +91 0120 386 8000

### Pune

9th floor, Business Plaza,  
Westin Hotel Campus, 36/3-B,  
Koregaon Park Annex,  
Mundhwa Road, Ghorpadi,  
Pune – 411 001.  
Tel: +91 20 6747 7000

### Vadodara

Ocean Building, 303, 3rd Floor,  
Beside Center Square Mall,  
Opp. Vadodara Central Mall,  
Dr. Vikram Sarabhai Marg,  
Vadodara – 390 023.  
Tel: +91 265 619 4200

### Vijayawada

Door No. 54-15-18E,  
Sai Odyssey,  
Gurunanak Nagar Road, NH 5,  
Opp. Executive Club, Vijayawada,  
Krishna District,  
Andhra Pradesh – 520 008.  
Tel: +91 0866 669 1000