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GUJARAT HIGH COURT STRIKES DOWN LEVY OF IGST ON FREIGHT COMPONENT IN CIF IMPORTS

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In a landmark decision, the Gujarat High Court *vide* its order dated 23 January 2020, in *Mohit Minerals Private Limited v Union of India and Another* [Special Civil Application No 726 of 2018] and other connected petitions, has struck down two notifications: (i) No. 8/2017-Integrated Tax (Rate) dated 28 June 2017 and (ii) No. 10/2017-Integrated Tax (Rate) dated 28 June 2017 issued by the Central Government under the Integrated Goods and Services Tax Act, 2017 (IGST Act) (Notifications) which *inter alia* levied Integrated Goods and Services Tax (IGST) on services supplied by a person located in non-taxable territory to a person located in 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.

Background

In case of import of goods on Cost, Insurance and Freight (CIF) basis, the foreign supplier engages a foreign shipping agency to transport the goods to the destination port in India, and the freight is directly paid by such foreign supplier to such foreign shipping agency. Pursuant to the Notifications, IGST was sought to be collected from the Indian importer by declaring such Indian importer to be the "recipient" of services of transportation of goods by a vessel. The Indian importer was required to discharge IGST on reverse charge basis on the aforesaid services.

The Notifications further deemed the value of the freight component to be 10% of the CIF value of the goods imported, since the importer may not be in a position to ascertain the actual value of freight on account of it not being a party to the shipping contract.

Observations of the High Court

The High Court observed that the IGST Act casted an obligation on either the service provider or the service recipient to pay tax on inter-State supply of goods or services or both (except for e-commerce operators in certain cases). The expression "recipient of supply of goods or services", under the Central Goods and Services Tax Act, 2017 (CGST Act) has been defined to mean the person liable to pay consideration for such goods or services, in cases where consideration is payable. The High Court thus held that the Indian importer was not the "recipient" of services in the present scenario as the Indian importer was not the person liable to pay consideration to the foreign shipping agency.

The High Court held that the Notifications, insofar as they obligated the Indian importer to pay tax on the service of transportation of goods in a vessel, supplied by a foreign shipping liner, by terming such importer as the "recipient" of services were *ultra vires* the parent enactment *i.e.* the IGST Act.

The High Court held that the aforesaid service constituted neither an inter-State supply nor an intra-State supply and that there was no provision in the IGST Act for determining the "place of supply" for such a service.

The High Court held that section 7(5)(c) of the IGST Act, which provides that a supply in the taxable territory not being an intra-State supply and not covered elsewhere shall be treated as an inter-State supply, could not be so broadly construed as to bring under its ambit a supply, only a minuscule part of which (such as the destination of goods, in the present case) had taken place within India.

Aside from the above, the High Court in the course of its judgement, made the following further observations:

- That there was an apparent conflict with the provisions governing "time of supply" under the CGST Act. The CGST Act links the time of supply to the date of issuance of invoice by the supplier. However, the Indian importer would not know the details of invoice issued by the foreign shipping agency to the foreign exporter;

- That there was an apparent conflict with the provisions governing filing of returns which only mandated furnishing details of "inward" and "outward" supplies, under the CGST Act;

- That the importer was not in a position to determine the actual value of ocean freight included in the price of goods;

- That the importer, not being the "recipient" of services, was not entitled to input tax credit of the tax paid by it on the said services;

- That the importer was made liable to pay tax on the component of ocean freight twice *i.e.* under the IGST Act as also under the Customs Act and the Customs Tariff Act.

Basis the above, the High Court observed that the levy of tax sought to be brought about by the Notifications was in excess of the powers conferred by the parent enactment upon the delegated legislation, and finally held the Notifications to be unconstitutional on account of absence of statutory sanction.

Comment

The present decision is significant, since the High Court has held the Notifications to be not merely *ultra vires* the provisions of the IGST Act, but also the Constitution of India. Applying the ratio of the decision of the Supreme Court in the case of *Kusum Ingots & Alloys Limited v Union of India* [(2004) 6 SCC 254], a law declared by the High Court to be unconstitutional has effect throughout the territory of India and not just within the jurisdiction of the particular High Court. Considering that writ petitions challenging the validity of the Notifications are also pending before other High Courts in the country, it will be interesting to see how they are dealt with by the respective Courts.

It is pertinent to note that the Gujarat High Court, in *Messrs Sal Steel Limited & Another v Union of India* [Special Civil Application No 20785 of 2018] and other connected

petitions, has also struck down the relevant rules and notifications which sought to levy Service Tax on the aforesaid services (in the pre-GST regime), for being *ultra vires* the provisions of the Finance Act, 1994.

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