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Decision on Ocean Freight & Co-operative Federalism

This article has been dealt independently while understanding Hon. Supreme Court decision on ocean freight in the case of M/s Mohit Minerals.

Hon Supreme Court has not only dealt with the above issues, but it has gone in-depth on each argument of Union Govt, who had issued the Notification No. 8/2017-Integrated Tax (Rate) dated 28th June 2017 & rationale behind that as well as arguments of a number of Senior Counsels on behalf of respondents and the grounds taken by them including but not limiting to taxability on extra-territorial issues, the binding impact of recommendations of GST Council, issues of the recipient, issues of consideration, issues of taxable event and notifications issued under different sections / sub-sections etc. etc. and hence, understanding of Supreme Court decision needs to be done in three parts with the background of the circulation and interpretation in print and social media.

- A. Background and preamble.
- B. Whether this judgment will imbalance the basic foundation of One Nation, One Tax considering all the decisions of GST Council are not binding on State & Central.
- C. Impact on Trade and Industry on reverse charge mechanism on account of ocean freight.

A. Background and Preamble:

Hon. Gujarat High Court allowed the petition filed by M/s

Mohit Minerals Pvt. Ltd under Article 226 challenging the Constitutionality of two notifications: **Notification No. 8/2017- Integrated Tax (Rate) dated 28th June 2017 and Notification No. 10/2017 Integrated Tax (Rate) dated 28th June 2017.**

The Division Bench of the Gujarat High Court held that the impugned notifications are unconstitutional for exceeding the powers conferred by the IGST Act and the CGST Act. The High Court held:

- i. The importer of goods on a CIF basis is not the recipient of the transport services as Section 2(93) of the CGST Act defines a recipient of services to mean someone who pays consideration for the service, which is the foreign exporter in this case;
- ii. Section 5(3) of the IGST Act enables the Government to stipulate categories of supply, not specify the third party as a recipient of such supply;
- iii. There is no territorial nexus for taxation since the supply of service of transportation of goods is by a person in non-taxable territory to another person in a non-taxable territory from a place outside India up to the Indian customs clearance station, and this is neither an inter-state nor an intra-state supply;
- iv. Section 2(11) of the IGST Act defines “import of service” to mean the supply of service where the supplier of service is located outside India, the recipient of service is located in India, and the place

of supply of service is in India;

- v. In this case, since the goods are transported on a CIF basis, the recipient of service is the foreign exporter who is outside India;
- vi. Section 7(5)(c) of the IGST Act dealing with intra-state supply cannot be read so extensively that it conflates the “supply of goods or services or both in the taxable territory” to “place of supply”;
- vii. Sections 12 and 13 of the IGST Act deal with determining the place of supply. Neither of them will apply if both the supplier and recipient of service are based outside India. The mere fact that the service terminates in India does not make the service of supply of transportation to be taking place in India;
- viii. The provisions regarding the time of supply, as contemplated in Section 20 of the IGST Act and applicable to Section 13 of the IGST Act dealing with supply of services, are applicable only vis-à-vis the actual recipient of the supply of service, which is the foreign exporter in this case;
- ix. Section 15(1) of the CGST Act enables the determination of the value of the supply only between the actual supplier and actual recipient of the service;
- x. Since the importer is not the “recipient” of the service under Section 2(93) of the CGST Act, it will not be in a position to avail ITC under Section 16(1) of the CGST Act; and
- xi. Since the importer pays customs duties on the goods, which include the value of ocean freight, the impugned notifications impose double taxation through delegated legislation, which is impermissible.

Provisions Deliberated:

1. Article 286(2) of the Constitution of India:

Parliament is empowered to formulate inter alia the principles for determining when a supply of goods or services takes place in any of the ways mentioned in Article 286(1), which includes imports;

2. Article 269A of the Constitution of India

Enables the Union Government to levy GST on interstate supplies. The explanation to Article 269A(1) creates a deeming fiction that a supply of goods or services in the

course of imports is to be considered as a supply of goods or services or both in the course of interstate trade;

3. Article 269A(5) of the Constitution of India

Enables Parliament to formulate the principles for determining the place of supply and when a supply of goods and services or both takes place in the course of inter-State trade or commerce. This constitutional mandate finds legislative effect in the IGST Act; The Union of India has challenged the same.

● Section 5(1) Levy & Collection of IGST :

● Section 5(3) & (4) Levy & Collection of IGST :

- (3) The Government **may, on the recommendations of the Council**, by notification, **specify categories of supply of goods or services or both**, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.
- (4) The Government **may, on the recommendations of the Council**, by notification, **specify a class of registered persons who shall**, in respect of the supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both. All the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.

● Section 2(5) of IGST Act 2017: Definition of Export of Goods

● Section 2(6) of IGST Act 2017: Definition of Export of Services

● Section 2(1) of IGST Act 2017: Definition of “Import of Goods.

● Section 2(11) of IGST Act 2017: Definition of Import of Services

● Section 2(14) of IGST Act 2017: Definition of Location of the recipient of services

● Section 2(15) of IGST Act 2017: Definition of Location of supplier of services



- Section 7 of IGST Act 2017: Determination of Nature of inter-State supply.
- Section 9 of IGST Act 2017: Supplies in Territorial Waters.
- Section 11 of IGST Act 2017: Place of supply of goods imported into or exported out of India.
- Section 12 of IGST Act 2017: Place of supply of services where the location of supplier and recipient is in India.
- Section 13 of IGST Act 2017: Place of supply of services where the location of supplier and recipient is outside India
- Section 2(98) of the CGST Act: Definition of Reverse Charge.
- Section 9(3) & (4) of CGST Act 2017:
 - (3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.
 - (4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of the supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both. All the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.
- Section 24(iii) of CGST Act 2017: Compulsory registration in certain cases
- Section 13 of CGST Act 2017: Time of Supply of Services
- Section 2(30) of CGST 2017: Definition of composite supply
- Section 2(93)(c) of CGST Act 2017: Definition of the recipient of supply of goods or services or both

- 2(31) of CGST Act 2017: Definition of consideration
- Section 2(107) of CGST Act 2017: Definition of the taxable person
- Sections 3(7) and 3(8) of Customs Tariff Act 1975: provision for charging IGST on import of goods and manner of calculation of IGST

The said decision is not only applicable for chargeability of reverse charge on ocean freight when imported on CIF basis or otherwise but will always be referred as a landmark judgment when other issues w.r.t. Powers & Role of GST Council, Powers of Central Govt & State Govt to make the provisions in the act & rules, Parliamentary / Legislative Powers as against recommendations of GST Council and contradiction therein between Central Govt & State Govt w.r.t. GST provisions. This judgment will have a far-reaching impact and almost will eliminate a number of disputes which otherwise might have arisen.

This judgment has to be understood by the depth, analysis & interpretation of all the provisions of the law, starting with the expert committee report, The Constitution (One Hundred and Fifteenth Amendment) 2011, Parliamentary Standing Committee, Report on the Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014, The Constitution (One Hundred and First Amendment Act) 2016, Parliamentary Debates and various decisions of Hon Apex Court on importance of legislative history and spirit of the law rather than only strict wording while drafting the law. Therefore, it is important to understand various ratios laid down in different decisions; the same was the basis for deciding the issue by the Hon. Supreme Court.

B. Whether this judgment will imbalance the basic foundation of One Nation, One Tax considering all the decisions of GST Council are not binding on State & Central.

1. Constitutional Architecture w.r.t. GST:

- Article 246A stipulates that both the Parliament and the State legislatures have the power to legislate on GST.
- Article 279A constitutes the GST Council which shall make recommendations to the Union and the States on a wide range of subjects relating to GST
- Both articles are independent and don't have abstaining clause or overriding clause over each other.



- Article 269A provides that GST on supplies in the course of inter-state trade or commerce shall be levied and collected by the Union Government. The manner of apportionment between the Union and the States has to be provided by Parliament on the recommendations of the GST Council. The explanation of Article 269A(1) states that the supply of goods or services in the course of import shall be deemed to be supply in the course of inter-State trade or commerce. Clause (5) provides that Parliament may by law formulate principles for determining the place of supply and when the supply of goods or services takes place in the course of inter-state trade or commerce.
- Article 286 (1) stipulates that the State shall not levy tax when the supply of goods or services takes place outside the State or in the course of import or export of goods or services from the territory of India. Clause (2) of Article 286 states that Parliament may by law formulate principles for determining when there is a supply of goods or services as prescribed by clause (1).

2. Legislative History of the Constitution Amendment Act 2016:

The Statement of Objects and Reasons and the debates and speeches in the legislature indicate the intent behind the introduction of the Bill as held in the case of **Abhiram Singh v. CD Commachen, (2017) 2 SCC 629**. The legislative history, the statement of objects and reasons for the Bill and the speech made when the bill was introduced indicates the mischief that Articles 246A and 279A to the Constitution sought to remedy, which is to simplify the indirect tax regime to prevent the complexities inherent in and the cascading effect of a diversity of taxes.

3. Simultaneous Legislative Distribution & Repugnancy Issues & Disputes :

The distribution of legislative power between federating units- the Union and the States, is among the main features of a federal Constitution as referred in H.M Seervai, Constitutional Law of India, (NM Tripathi Private Limited, 4th Edition, vol 1) 289; SR Bommai v. Union of India, (1994) 3 SCC 1.

The Court noted that the special power introduced by Article 246A allows Parliament and the State legislatures to ‘simultaneously’ make laws. Subsequently, while explaining the ‘simultaneous’ nature of power held by Parliament and

State legislature, it was observed that the power under Article 246A can be exercised simultaneously by the State legislature and Parliament, and none hold any ‘unilateral or exclusive legislative power in the decision of **Union of India v. Mohit Mineral Pvt. Ltd** [H.M Seervai, Constitutional Law of India, (NM Tripathi Private Limited, 4th Edition, vol 1) 289; SR Bommai v. Union of India, (1994) 3 SCC 1]and **Baiku v. State Tax Officer, GST [2019 SCC OnLine Ker 5362]**.

Hon. Supreme Court observed in the case of **VKC Footsteps** (supra) that

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“52. Article 246-A has brought about several changes in the constitutional scheme:

52.1. Firstly, Article 246-A defines the source of power and the field of legislation (with respect to goods and services tax), obviating the need to travel to the Seventh Schedule.

52.2. Secondly, the provisions of Article 246-A are available both to Parliament and the State Legislatures, save and except for the exclusive power of Parliament to enact GST legislation where the supply of goods or services takes place in the course of inter-State trade or commerce.

52.3. Thirdly, Article 246-A embodies the constitutional principle of the simultaneous levy as distinct from the principle of concurrence. Concurrence, which operated within the fold of the Concurrent List, was regulated by Article 254.”

Un-Quote

Further, Article 246-A needs to be appreciated differently from Articles 254, 248, and 353 since these articles provide a larger share of power to the central government as against the state government. Whereas Article 246-A provides simultaneous right to make the provisions in the law and share the equal power, and that is the reason Constitution does not envisage a repugnancy provision to resolve inconsistencies between the Central and State laws on GST, the GST Council must ideally function, as provided by Article 279A(6), in a harmonized manner to reach a workable fiscal model through cooperation and collaboration.

Further, Hon Supreme Court has implicitly explained the difference between un-cooperative federalism, competitive federalism, Dual Federalism, and cooperative federalism (marble cake federalism) and also made

observations derived from *State (NCT of Delhi) v. Union of India*⁷⁵ [(2018) 8 SCC 501] :

India follows the model of cooperative federalism where the Union and the State Governments need to iron out the differences that arise in the course of the path of development. Chief Justice Dipak Mishra elucidated the concept of cooperative federalism:

Quote

119. Thus, the idea behind the concept of collaborative federalism is negotiation and coordination so as to iron out the differences which may arise between the Union and the State Governments in their respective pursuits of development. The Union Government and the State Governments should endeavour to address the common problems with the intention to arrive at a solution by showing statesmanship, combined action and sincere cooperation. In collaborative federalism, the Union and the State Governments should express their readiness to achieve the common objective and work together for achieving it. In a functional Constitution, the authorities should exhibit sincere concern to avoid any conflict. This concept has to be borne in mind when both intend to rely on the constitutional provision as the source of authority. We are absolutely unequivocal that both the Centre and the States must work within their spheres and not think of any encroachment. But in the context of exercise of authority within their spheres, there should be perception of mature statesmanship so that the constitutionally bestowed responsibilities are shared by them. Such an approach requires continuous and seamless interaction between the Union and the State Governments.

Un-Quote

On the issues of conflict between state and central govt, the mechanism of resolving the disputes has been provided to consultative and collaborative approach in Article 279-A by way of providing constitutional status to GST council and therefore Hon Supreme Court observed in the aforesaid judgment that:

The States can use various forms of contestation if they disagree with the decision of the Centre. Such forms of contestation are also within the framework of Indian federalism. The GST Council is not merely a constitutional body restricted to the indirect tax system in India but is also an important focal point for fostering federalism and democracy.

One of the important features of Indian federalism is 'fiscal federalism. A reading of the Statement of Objects and Reasons of the 2014 Amendment Bill, the Parliamentary reports and speeches indicate that Articles 246A and 279A were introduced with the objective of enhancing cooperative federalism and harmony between the States and the Centre. However, the Centre has a one-third vote share in the GST Council. This, coupled with the absence of the repugnancy provision in Article 246A, indicates that recommendations of the GST Council cannot be binding. Such an interpretation would be contrary to the objective of introducing the GST regime and would also dislodge the fine balance on which Indian federalism rests. Therefore, the argument that if the recommendations of the GST Council are not binding, then the entire structure of GST would crumble does not hold water. Such a reading of the provisions of the Constitution will not diminish the role of the GST Council as a constitutional body formed to arrive at decisions by collaboration and contestation of ideas.

4. Parliamentary Debates & Indian Federalism: Dialogue of Cooperative Federalism

It is wrongly interpreted by some of the authors, broadcasters and esteemed lawyers that the GST council will have supremacy over state and central. The question was raised w.r.t. binding effect of recommendations of GST Council for making the rule. Therefore, issue of supremacy of parliamentary/legislative over GST Council is well-dealt in this decision by Hon Supreme Court, giving references of parliamentary debates, recommendation of the standing committee, recommendation of the select committee, reply by Hon Finance Minister Late Arun Jaitely and reference to Constitutional Amendment Bills. Some of the paras are very relevant and reproduced below:

“The Constitution confers autonomy on the Parliament and the State Legislatures to legislate within the respective fields assigned to them and the fact that a statute enacted by a competent Legislative body can be called into question on grounds of deviations from the recommendations of an essentially executive body, albeit Constitutional, is being construed as undermining the supremacy of the Legislature. Keeping in view the concerns expressed by the States and the fact that the proposed provision of GST Dispute Settlement Authority will affect the fiscal autonomy of the Parliament and the State Legislatures, the proposed Article 279B providing for GST Dispute Settlement Authority, may be omitted. However, any dispensation involving multiple partners does require a mechanism to resolve disputes. A



provision can be made in Article 279A itself, empowering the GST Council to decide about the mechanism to resolve the disputes arising out of its recommendations.

Once you enter the GST pipeline, the States and the Centre will have to interact. Once they interact together, the State of Tamil Nadu will be involved in determining and making decisions relating to the state. So, none of us will surrender his or her authority or autonomy. We are both going to be pooling our sovereignty together so that we are able to create a new taxation mechanism.

Article 246A vests Parliament and the State Legislatures with a unique, simultaneous law-making power on GST. In this context, the GST Council's role gains significance. The recommendations of the GST Council are not based on a unanimous decision but on a three-fourth majority of the members present and voting, where the Union's vote counts as one-third. In contrast, the States' votes have a weightage of two-thirds of the total votes cast. There are two significant attributions of the voting system in the GST Council. First, the GST Council has an unequal voting structure, where the States collectively have a two-third voting share, and the Union has a one-third voting share. Second, since India has a multi-party system, it is possible that the party in power at the Centre may or may not be in power in various States. Therefore, the GST Council is not only an avenue for the exercise of cooperative federalism but also political contestation across party lines. Thus, the discussions in the GST Council impact both federalism and democracy. The constitutional design of the Constitution Amendment Act 2016 is sui generis since it introduces unique features of federalism. Article 246A treats the Centre and States as equal units by conferring a simultaneous power of enacting a law on GST. Article 279A in constituting the GST Council envisions that neither the Centre nor the States can act independently of the other."

Even Hon Supreme Court has dealt with a different meaning of recommendation, and thereafter, it has been held all the recommendations of GST Council will not have a binding effect on State or Central Govt. However, both the govt have simultaneous power to make the provisions in law or enactment. Therefore, the foundation of the existing GST structure has been made stronger by this judgment, which will be appreciated from the various paragraphs of this order when dealing with Parliamentary Debates & Indian Federalism: Dialogue of Cooperative Federalism, Dispute Resolution, Recommendation etc. etc.

5. Role of the GST Council:

GST Council is the constitutional authority having a Chairman as Union Finance Minister and members consisting of Finance Ministers of all the States and Union Territories. The role of the GST Council has been well clarified as follows :

- a. Taxes, Cesses & Surcharges levied by Union, State, Local Bodies to be subsumed in the GST
- b. Goods and services that may be taxable or exempted
- c. Model GST Laws, principles of levy, apportionment of IGST and the principles that govern the place of supply
- d. Threshold limit of turnover for exemption
- e. rates including floor rates with bands of GST
- f. Special rate(s) for a specified period to raise additional resources during any natural calamity or disaster
- g. Special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur; Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and
- h. Any other matter relating to the goods and services tax, as the Council may decide.

The voting process has also been well designed so that there will be no supremacy either of States on Central or Central on States. Therefore, 1/3rd of voting right has been given to the Central Govt, and 2/3rd of voting right has been given to the State Govt. A resolution needs to be passed unanimously or min 3/4th majority on any recommendations given by GST Council. Further, in terms of CGST Act 2017 there are specific provisions in the CGST Act & SGST Act w.r.t. Administration, Levy & Collection, Exemption, Scope of Supply, Valuation of Supply, Registration, Returns, Input Tax Credit, Apportionment formula of IGST between Central & State and other provisions of GST as stipulated in Section 4, 5, 6, 17, 22 & 25 of IGST Act 2017 and Sections 6, 7, 9, 11, 15, 22, 23, 24, 25, 31A, 39, 44, 49B, 50, 51, 52, 54, 55, 56, 109, 110, 120, 128, 146, 147, 148, 150, 164, 168A, 172 of CGST Act 2017. No provision under the said sections and rules made thereunder can be made without the recommendations of the GST council. However, any recommendations other than as specified above will not be binding. It doesn't mean that it affects the foundation of the GST structure of One Nation, One Tax.

6. Statutory Provisions and Scheme of the IGST Act 84:

This judgement has opened the eyes of all the students of GST to appreciate rationale and pillars of GST, which are amendments made in The Constitution (One Hundred and First Amendment Act) 2016 read with aforesaid provisions of GST Act (CGST & IGST Act 2017).

The Pillars of GST can be elaborated as follows:

- Taxable event: There shall be levied a tax called integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption.
- Taxable value: On the value determined under Section 15 of the CGST Act
- Taxable rate: At such rates not exceeding 40% as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed
- Taxable person: Shall be paid by the taxable person

Hon Supreme Court has dealt in detail on “reverse charge” as well as recipient.

C. Impact on Trade and Industry on reverse charge mechanism on account of ocean freight :

Let's understand what recipient means - ---

Section 2(93) of the CGST Act defines the ‘recipient’ of supply of goods or services or both and provides:

“(93) “recipient” of supply of goods or services or both, means—

- (a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;
- (b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and
- (c) where no consideration is payable for the supply of a service, the person to whom the service is rendered,

and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;”

Thus, the language employed in Section 2(93)(a) of the CGST Act clearly stipulates that when consideration is payable for the supply of services, the recipient would mean the person who is liable to pay that consideration. However, when no consideration is payable for the supply of a service, Section 2(93)(c) states that the recipient shall be the person to whom the service is rendered. Further, Section 2(93) provides that “any reference to a person to whom supply is made shall be construed as a reference to the recipient”. Hence, where the statute refers to a person to whom a supply is made, it has to be construed as a reference to the recipient of service.

While referring to the definition of “Consideration” as well as provisions of Section 16, consideration can be paid / received on behalf of any person to the supplier. In the present case, even though the import in CIF contract is made by the exporter to a foreign shipping line, the importer pays the consideration, which is built up in the valuation of goods in terms of provisions of the Customs Act also.

Section 13(9) of the IGST Act appears to create a deeming fiction, where in case of a supply of services of transportation of goods by a supplier located outside India, the place of supply would be the place of destination of such goods. The supplier, the foreign shipping line, in this case, would be a non-taxable person. However, its services in a CIF contract for the transport of goods would enter Indian taxable territory as the destination of such goods. The place of supply of shipping service by a foreign shipping line would thus be India.

Hon Supreme Court also arrives to the conclusion based on the Act that the place of supply of transportation of goods by the ocean when imported is the final destination of the goods i.e., India and the beneficiary of such import is the importer. Therefore, the importer can be notified as person liable to pay the tax under reverse charge as the recipient. Interpreting the term “by the recipient” vis-à-vis the categories of goods and services identified in Section 5(3) of the IGST Act should necessarily be governed by the principles governing the definition of “recipient” under Section 2(93) of the CGST Act.

In such a scenario, when the place of supply of services is deemed to be the destination of goods under Section 13(9) of the IGST Act, the supply of services would necessarily be “made” to the Indian importer, who would then be considered as a “recipient” under the definition of Section 2(93)(c) of the CGST Act. The supply can thus be construed



as being “made” to the Indian importer who becomes the recipient under Section 2(93)(c) of the CGST Act.

Hon Supreme Court also clarified on the argument that in terms of Section 9 (3) of CGST Act 2017, Govt could specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both and in terms of Section 9(4) of CGST act 2017, Govt can specify a class of registered persons who shall, in respect of the supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both. All the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.

It is settled law that non-reference of the source of power may not vitiate its exercise and application in given facts and circumstances of a case. In Union of India v. Tulsi Ram Patel [1985 3 SCC 398], a Constitution Bench held that when a source of power legally exists, a non-reference or an incorrect reference during its exercise does not vitiate the action.

Therefore, it has been held that as long as a source of power to legislate or issue a notification is available, the lack of a mention, an incorrect reference or a mistake does not vitiate the exercise of such power.

However, Hon Supreme Court, while accepting the powers of issuing notifications for notifying transportation of goods by ocean as a category of service and recipient was required to pay the reverse charge and importer is notified as recipient in the aforesaid impugned notifications as stated above. However, Supreme Court emphasis in case of contract of importation of goods on CIF basis is in the nature of composite supply, and principal supply is the goods and hence importer imports the goods on CIF basis and pay the customs duty on importation on the value which includes freight and insurance and therefore, it is the composite supply and therefore, no GST is payable on reverse charge basis when goods are imported on CIF basis.

The following points need to be considered as aftermath of this decision on account of the applicability of GST on a reverse charge basis on transportation of goods through sea or ocean.

- 1) Those taxpayers who have discharged the GST liability even if goods are imported on a CIF basis and availed the ITC thereon need not bother much since such persons are the recipient of such service, and hence no ITC will be disallowed. There may be a possibility that the department will take the stand seeking the reversal of ITC availed, since service has not been availed on composite supply of imported goods when imported on CIF basis considering tax paid is “deposit.” In such case, there will be a necessity to apply for the refund of such amount deposited in terms of Article 265 of the Constitution of India. Still, interest will be required to be paid on the ITC availed and reversed subsequently.
- 2) Those taxpayers, who have paid the GST on a reverse charge basis on ocean freight when goods are imported on a CIF bas, is and they are supplying exempted goods and non-taxable goods, they are advised to file a refund claim of such amount paid within the period of limitation subject to fulfilment of condition of unjust enrichment.
- 3) Henceforth, no GST is payable on a reverse charge basis when goods are imported on CIF, C&F or door delivery basis, but in other cases like Ex-Works, FAS, C&I, FOB etc. in such case, GST is required to be paid on reverse charge basis.
- 4) There is a need to issue the clarificatory circular for field formation as well as trade and industries on the following transactions

a. When goods are imported and sold on a High Sea Sale basis:

In this case, in terms of the definition the of importer as per Section 2 (26) of Customs Act 1962 :

26) “importer,” in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes 22 [any owner, beneficial owner] or any person holding himself out to be the importer.

And in such cases, department may demand GST on a reverse charge basis if such imports are not on a CIF basis. It is advisable; while drafting the High Sea Sale Agreement, there should be a separate clause to mention the terms of pricing as

far as ocean freight, who is liable to pay any GST thereon, otherwise there is a possibility to collect the tax from the person who has availed the services from freight forwarder outside the territory of India as well as importer on high sea sale basis.

b. When goods are imported and kept in warehouse and after that supplied to another person from warehouse itself:

As stated above, the definition of “importer” who is filing the bill of entry for home consumption and in this scenario also the purchaser will be filing the bill of entry when goods are purchased from the warehouse. In this scenario also, the importer may be liable to pay GST on reverse charge basis if there is no clarity on the terms of purchase. It will be interesting to appreciate following definitions:

Notification No. 10 of IGST Rate

Sr	Category of Supply of Services:	Supplier of service	Recipient of Service
10	Services supplied by a person located in the 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.	A person located in a non-taxable territory	Importer, as defined in clause (26) of section 2 of the Customs Act, 1962(52 of 1962), located in the taxable territory.

In the case above, the category of service is the transportation of goods by a vessel from a place outside India up to the customs station of clearance in India. However, “Custom Station” means any customs port, customs airport, international courier terminal, foreign post office or land customs station; whereas “Warehouse” means a public warehouse licensed under section 57 or a

private warehouse licensed under Section 58 or a special warehouse licensed under section 58A and therefore, it is very important to draft agreement properly w.r.t. the terms of payment of ocean freight and applicability of GST thereof. In such scenario, it is preferable to mention CIF on the Bill of Entries to avoid any disputes in the future.

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