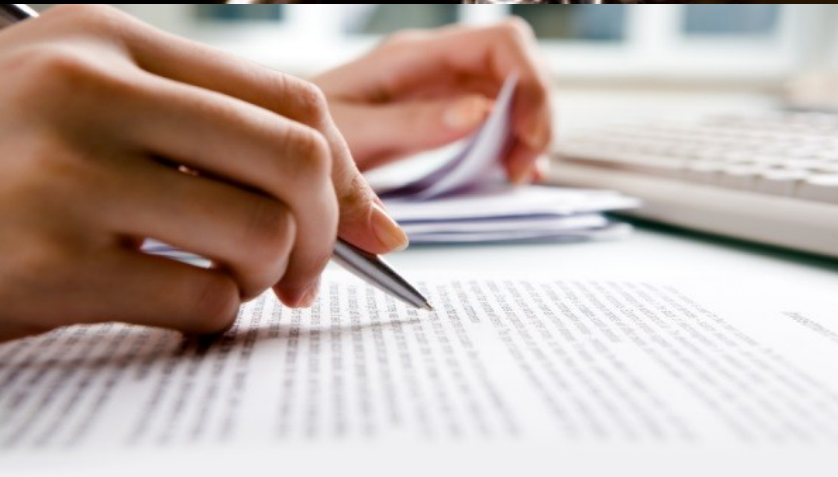


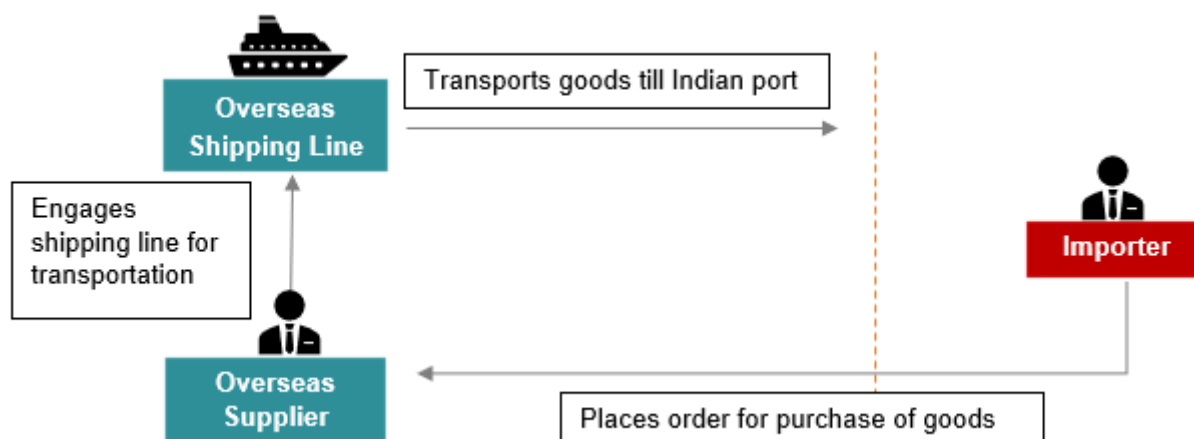


NITYA's Insight | Issue 96 | Judgment Update | Levy of IGST on ocean freight in case of CIF imports held unconstitutional

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Recent Gujarat High Court judgment in the case of ***Mohit Minerals Private Limited and Ors. v. UOI, 2020-VIL-36-GUJ*** wherein the High Court has held the levy of IGST on ocean freight charges (in case of CIF imports) as unconstitutional and ultra-vires the Integrated Goods and Services Tax Act, 2017 ('IGST Act').

Before discussing the judgment in detail, let us understand the transaction on which the judgment was pronounced:



Section 5(3) of the IGST Act empowers Central Government to notify services on which the recipient shall be liable to pay tax. **S.No.9(ii) of Notification No.8/2017-Integrated Tax (Rate)** (Services Rate Notification) prescribes rate of GST on services provided by overseas shipping line to overseas supplier. Further, **S.No.10 of Notification No.10/2017-Integrated Tax (Rate)** ('Reverse Charge Notification') places the liability to pay tax in such a case upon the importer of goods.

In case of CIF imports, the service of transportation of goods is provided by overseas shipping line to overseas supplier. The importer is neither the supplier nor the recipient of the service. Hence, the importer cannot be made liable to pay GST under Section 5(3) of the IGST Act.

The High Court acknowledged this vacuum in law and struck down the levy on the following grounds:

S.No.	Ground	Judgment
1.	Importer of goods is not the recipient of service	- Under Section 5 of the IGST Act, only a supplier or a recipient can be made liable to pay tax. In case of CIF imports, Importer is neither the supplier nor the recipient. - A taxing provision needs to be construed strictly and nothing should be read in or implied. Thus, Importer cannot be made liable to pay tax <u>on a supposed theory that importer is directly or indirectly the recipient of service</u>.
2.	Transaction does not attract levy under the GST law	Section 5(1) levies IGST on all <u>inter-state supplies</u>. Section 9(1) of the CGST Act levies CGST plus SGST on all <u>intra-state supplies</u>.

		- The instant transaction is clearly not an intra-state supply. Further, the transaction does not qualify as 'import of service' in terms of Section 7(4) of the IGST Act as one of the essential conditions of location of service recipient being in India, is not satisfied. - The Court also held that the residuary clause i.e. Section 7(5)(c) which <i>inter-alia</i> provides that '<u>supply of services in taxable territory</u>' not being an intra-state supply shall be treated as inter-state supply, to be inapplicable. The Court held that mere termination of goods in India will not mean rendition of services in India. Accordingly, the present transaction neither being an intra-state nor an inter-state supply, will not attract levy under GST law.
3.	Notifications are contrary to Article 265 of the Constitution of India	- Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. A delegated legislation (Notification, Rule or Regulation) cannot provide for levy or collection of tax not authorised by the parent statute. - Thus, impugned Notifications are bad in law and ultra vires of the parent statute.
4.	No provision to determine time and value of supply	- Section 13 of the CGST Act provides time of supply of services i.e. the time when a person is liable to pay tax. Section 15 of the CGST Act provides for determination of value of supply. - The Court held that in terms of these provisions, time and value of supply cannot be determined where a person is neither the supplier nor the recipient of service.
5.	ITC is available only to recipient of supply	- Section 16 of the CGST Act entitles a registered person to avail ITC on goods and services supplied to him. - The transportation service in the instant case, is not supplied to importer of goods. Thus, Importer cannot avail ITC on the same which is against the object of GST law.
6.	No provision for reporting in GST returns	- Provisions pertaining to filing of returns apply only to an inward supply or an outward supply. - The instant case not being an inward or an outward supply for Importer, cannot be reported in returns.
7.	Dual levy is against the settled principles of law	- It is a settled principle of law that if a statute leads to double taxation on same transaction, such construction shall be avoided. - The goods imported into India are subject to IGST under Section 5(1) of the IGST Act read with Section 3(7) of the Customs Tariff

		Act, 1975. In case of CIF imports, freight is part of value of imported goods on which IGST is paid. Thus, levy of IGST on freight by treating it as supply of service, will amount to double taxation.
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Basis above, the Court declared both Services Rate Notification and Reverse Charge Notification as unconstitutional and ultra-vires the GST law.

NITYA Comments

This is a landmark and a well-reasoned judgment on various counts. However, the issue will be finally settled by the Supreme Court.

The Government is likely to bring retrospective amendment in the GST laws to effectuate this levy and overrule the above judgment.

*In our view, a taxpayer can still challenge the levy of GST basis the Gujarat High Court judgment in the case of **Sal Steel Limited v. Union of India, 2020-TIOL-163-HC-AHM-ST** wherein the Court struck down the levy of Service Tax on identical transaction. One of the grounds adopted by the Court in this case is that in scheme of Service Tax law, levy can only be imposed either on the supplier or the recipient. A third person having no connection with a transaction taking place outside India, cannot be asked to pay tax.*

Taxpayers engaged in taxable business, can continue to pay tax on this transaction and avail ITC to avoid any litigation in future. Taxpayers engaged in exempt business (who are unable to avail full ITC) or having ITC accumulation, can choose to litigate the issue by filing writ petition in jurisdictional High Courts.

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Call us

+91 11 41091200-02



Mail us

updates@nityatax.com

info@nityatax.com



Send us a postcard

NITYA Tax Associates,
B-3/58, 3rd Floor,

Safdarjung Enclave,

New Delhi-110029

www.nityatax.com

