

EY Tax Alert

HC holds IGST is not leviable on inbound ocean freight in case of FOB contracts

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Executive summary

This Tax Alert summarizes a recent judgment¹ of Bombay High Court (HC). The issue involved was whether Integrated Goods and Services Tax (IGST) is payable on inbound ocean freight services in case of FOB (free on board) imports i.e., where the Indian importer hires the overseas shipping line.

HC observed that:

- ▶ In Mohit Minerals case before Gujarat HC², the petitioner was importing coal from various countries on FOB and CIF basis, as clearly set out in paragraph 15 of the said decision. The decision has been upheld by the Supreme Court³.
- ▶ Delhi HC⁴ in taxpayer's own case had held that no tax is leviable under the Integrated Goods and Services Tax Act, 2017 on ocean freight for services supplied by 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. Similar view was taken by the Madhya Pradesh HC⁵
- ▶ Once the notification itself has been declared as ultra vires and the same has been upheld by the Supreme Court, the notification in no manner was available to the State Authorities to be applied as it would amount to applying an illegal notification.

Accordingly, HC held that IGST is not leviable on ocean freight services in case of FOB contracts.

¹ TS-199-HC(BOM)-2024-GST

² 2020 (33) G.S.T.L. 321 (Guj.)

³ 2022 (61) G.S.T.L. 257 (SC)

⁴ Writ Petition (C) No. 8720/2017

⁵ Writ Petition No. 19382 of 2017

Background

- ▶ The taxpayer was importing goods from outside India on FOB (Free on Board) as well as CIF (Cost, Insurance and Freight) basis.
- ▶ SCN was issued demanding tax on ocean freight in case of FOB contracts.
- ▶ Taxpayer challenged the SCN before Bombay HC.

Taxpayer's argument

- ▶ Notification No. 8/2017-Integrated Tax (Rate) (prescribing rate of tax), basis which SCN is issued, has been struck down by the Division Bench of Gujarat HC in case of Mohit Minerals⁶.
- ▶ The HC decision was carried in appeal before the Supreme Court⁷ wherein a three Judges Bench has upheld the decision.

Revenue's argument

- ▶ SC decision in Mohit Minerals needs to be applied only in respect of CIF contracts and not FOB contracts.
- ▶ In the present case, SCN has been issued referring to Notification No. 8/2017-Integrated Tax (Rate) as the contract was a FOB contract.

HC Ruling

- ▶ In Mohit Minerals case before Gujarat HC, the petitioner was importing coal from various countries on FOB and CIF basis, as clearly set out in paragraph 15 of the said decision. The decision has been upheld by the Supreme Court.
- ▶ Delhi HC⁸ in taxpayer's own case disposed the writ in favour of taxpayer and concluded that:

"Accordingly, the impugned Notification No. 8/2017-Integrated Tax (Rate) dated 28th June, 2017 and entry 10 of the Notification No. 10/2017- Integrated Tax (Rate) dated 28th June, 2017 are quashed as being ultra vires the Integrated Goods and Services Tax Act, 2017 and it is held that no tax is leviable under the Integrated Goods and Services Tax Act, 2017 on ocean freight for services supplied by 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."

- ▶ Similar view was taken by the Madhya Pradesh HC in case of Agarwal Fuel Corporation Pvt. Ltd.⁹
- ▶ This Court in case of Liberty Oil Mills¹⁰ dealt with the similar issue and after relying on SC and HC rulings in case of Mohit Minerals, set aside the SCN.

- ▶ Once the notification itself has been declared as ultra vires and the same has been upheld by the Supreme Court, in our opinion, the notification in no manner was available to the State Authorities to be applied as it would amount to applying an illegal notification¹¹.
- ▶ Accordingly, HC held that IGST is not leviable on ocean freight services in case of FOB contracts.

Comments

- It is relevant to note that Gujarat HC had struck down the RCM notification on the ground that Indian importer is not the recipient in case of CIF imports and thus, levy cannot be imposed on Indian importer through RCM mechanism.
- SC concluded non-levy of IGST on the basis that tax separately cannot be levied on a component of a composite supply. Further, in the judgment, SC noted that the taxpayer is not disputing the liability of integrated tax on FOB contracts.
- The businesses may need to evaluate the impact of this decision and take necessary actions.
- For the past period, the importers, who are outside the GST credit chain, may consider claiming refund of tax paid under RCM. While doing so, it would be relevant to analyze the applicability of two years limitation period, since it can be argued that the levy of tax per se was not proper.

⁶ 2020 (33) G.S.T.L. 321 (Guj.)

⁷ 2022 (61) G.S.T.L. 257 (SC)

⁸ Writ Petition (C) No. 8720/2017

⁹ Writ Petition No. 19382 of 2017

¹⁰ 2023 (72) G.S.T.L. 305 (Bom.)

¹¹ AIR 2004 S.C. 2321

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