

## **GST on Ocean Freight – Ultra Vires!!**

1. The Central Government had issued **Notification No. 8/2017-Integrated Tax (Rate), dated 28.06.2017**, notifying the rate of IGST for the services described therein and also the conditions in certain cases.
2. Section 9(3) of the **CGST Act, 2017** and 5(3) of the **IGST Act, 2017** empowers the Central Government, on the recommendation of the GST Council, may notify the supplies which are liable for payment of GST under RCM by the recipient.
3. **Notification No. 10/2017-Integrated Tax (Rate), dated 28.06.2017** was issued notifying the categories of supplies which are liable for payment GST under Reverse Charge Mechanism (RCM). The entry number 10 of the said notification provides for payment of GST on ocean freight by the importer (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).
4. This had created lots of hardship to the taxpayers on account of double taxation on the same transaction. IGST is to be paid on the imported goods, the value of which includes the ocean freight and again on ocean freight under RCM. Fixing the liability on the importer who is not the recipient of supply was also questioned. Further, it was also doubted that where the IGST has been paid as per the above notification, whether the input tax credit (ITC) of the same is available?
5. A number of petitions were moved to Gujarat High Court on the said issue. Interim relief was given to petitioners. Finally, a landmark decision in the case of **Mohit Minerals vs. UOI & Others** **was pronounced on 23.01.2020**. A salient feature of the decision is as under;
  - a. The charging section provides for payment of GST by person who is making supplies and in certain notified cases, payment of GST by the recipient of supply. Thus, GST is not payable by a person who is neither a supplier nor a recipient.
  - b. Importer has neither availed the ocean freight service nor he is liable to pay the consideration, hence is not the recipient.
  - c. In a taxing statute one has to merely look at what is clearly said. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied.
  - d. There is no 'scheme of classification of services' or 'description of services' in the Act. The 'scheme of classification of services' or 'description of services' etc. are essential functions of the Parliament, which are neither delegated nor could have been delegated but assumed by the Central Government while issuing the **Notification no. 8/2017-Integrated Tax (Rate)**. Thus, the Notification is beyond the scope of the Act and do not conform to the provisions of the statute under which these are issued.
  - e. If the importer is held to be recipient of supply of ocean freight service, then he shall also be the recipient of various other inward supply of goods and services received by the exporter of goods with regard to said imported goods. Such interpretation is unwarranted especially when the term recipient is defined under the Act.
  - f. The provisions of section 5(3) does not provide for fixing the liability on any person other than the recipient.
  - g. It is a settled principle of law that if a delegated legislation goes beyond the power conferred by the statute, such delegated legislation has to be declared ultra vires.
  - h. Provision of ocean freight service by a non-resident person to another non-resident person is neither an intra-State supply nor an inter-State supply. Tax can be levied only on intra-State supplies and inter-State supplies.
  - i. Section 8 of the IGST Act is applicable where the location of the supplier and place of supply are in the same State/UT of India. The supply of ocean freight service by a non-resident person is not an intra-State supply.

j. Provisions of Section 7(3) is applicable where both the supplier and the recipient are in India. Provisions of section 7(4) is applicable of import of service. Import of service means supply of service where the supplier of service is located outside India, place of supply and location of the recipient of supply is in India. In case of ocean freight service by non-resident, the location of the recipient is outside India hence, it is not import of service. Section 7(5) is a residuary provision to prevent evasion of tax and should be applied where it is not possible to ascertain whether the supply is an inter-state supply or intra-state supply in cases of investigation etc.

k. There is no provision to determine the place of supply in case where both the supplier and the recipient are located outside India.

l. Ocean freight service is neither covered under section 7 nor covered under section 8 of the IGST Act, 2017, hence not leviable to tax. Granting exemption from tax does not arise.

m. There is no provision to determine the time of supply of the ocean freight service. The person other than the recipient of supply cannot determine the time of supply as provided under section 13 of the CGST Act, 2017.

n. Section 15 of the CGST Act, 2017 provides that value of supply is the price actually paid or payable for the said supply and where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

o. Thus, a person other than the supplier or the recipient of the supply will not be able to determine the value of supply as such person will not be knowing the price actually paid or payable for the ocean freight.

p. Input tax credit can be availed only by the recipient of supply. Since the importer is not the recipient of ocean freight service, he is not eligible for taking ITC.

q. The returns under the provisions of GST shall be filed inward and outward supplies. Since the ocean freight is neither inward supply nor outward supply to the importer, return cannot be filed by him for such services. Further, provisions of return are applicable to the supplier and the recipient. It cannot be made applicable to a person who is neither a supplier nor a recipient.

r. The GST can be levied only on outward supplies, inward supplies, import and exports and collected from the supplier or the recipient.

s. A delegated legislation, i.e. a rule, regulation or notification, cannot provide for levy or collection of tax which is not authorized by the parent statute. The delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power.

t. Thus, the impugned notification levying the tax on supply of ocean freight service and making the importer liable for paying the tax are also unconstitutional as there is no statutory sanction for levy and collection of such tax.

u. IGST is paid along with customs duty on import, the value which includes ocean freight. Dual levy of the IGST cannot be imposed on the same freight amount by treating it as supply of service.

6. In view of the above, the Hon. Gujarat High Court held that **Notification No. 8/2017 – Integrated Tax (Rate) dated 28th June 2017** and the Entry 10 of the **Notification No.10/2017 – Integrated Tax (Rate) dated 28th June 2017** are ultra vires the **Integrated Goods and Services Tax Act, 2017**, as they lack legislative competency. Both the Notifications are declared to be unconstitutional.

7. Applicability of writ jurisdiction on the validity of a notification issued under central Act – As per the settled legal precedents, unless the jurisdictional court holds otherwise, the decision of any high court would be binding throughout India.

8. Impact of the said decision – Since the **notification No. 8/2017** and **notification No. 10/2017** are held to be unconstitutional, the IGST paid on ocean freight is not amounting to payment of tax which govt. may have to refund. The Hon. High Court categorically held the ITC of tax paid on ocean freight cannot be taken by the importer since he is not the recipient. Whether the Govt. would deny the ITC already taken by the obedient taxpayer who had paid the GST on

ocean freight under RCM? Need to watch for the next move by the Govt. by way of appeal to Hon. Supreme Court or retrospective amendments etc.

9. Far reaching implication is that since the Hon. High Court has held that both the said notifications are unconstitutional, it may have impact on the description of service, its classification, rates specified and conditions specified therein.

**Disclaimer:** The views expressed herein are the views of the article writer and cannot be used in framing of opinions or devising methodologies for the purpose of compliance without an independent evaluation.