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Mohit Minerals – Recipient of Service – To Be Revisited?

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Introduction:

In our 45th Volume (April 2018 edition) of our wiki, we have authored an article titled **"GST on Shipping Services— the unwarranted turmoil"** on GST implications over the services by way of transport of goods by vessel. It has been explained by us that the ocean freight and air cargo freight were not subject to tax for the reason that the tax is collected in the form of customs duties by including these costs in the value of goods. However, levy of service tax on services by way of transport of goods by vessel has been brought in with effect from 01.06.2016 in order to provide level playing field to Indian shippers compared to foreign shippers.

It was explained therein that the Indian importers are bearing the input tax burden on various goods and services received by them for providing their services and as a result of this, their cost of services has been increased compared to foreign suppliers. Accordingly, the levy was brought on these services so that they can collect tax from the customers and adjust the input taxes while paying the output tax.

It was also explained therein that upon introduction of service tax on services of domestic shipping lines, many of the Indian importers tried to reduce the incidence of service tax by converting FOB contracts into CIF contracts requiring the foreign suppliers to arrange for transportation as well by using the services of foreign shipping lines. In order to overcome this, service tax was introduced on services o foreign shipping lines also under reverse charge requiring the Indian importer to pay tax under reverse charge. Taxing of these services also continued under the GST regime as well.

The said article has explained the grounds on which the levy can be challenged which includes the double taxation aspect and reverse charge obligation on importer of goods. It was also explained therein that how the objective of level playing field between Indian and foreign shipping lines can be achieved without taxing these services.

Recently, the Gujarat High Court has struck down the levy of GST on ocean freight with respect to imports undertaken on CIF basis. In light of this judgment, let us have a look at the reasons on which the levy was struck down by the Gujarat High Court, the possible reasons on which the position laid down in the above decision can be overturned and the way forward for the Government to achieve level playing field between the services of domestic and foreign shipping lines.

Challenge on the vires of the levy in case of CIF Imports:

Under the **GST** regime, the imposition of tax under reverse charge on the importer of goods on CIF basis has been challenged before the Gujarat High Court in the case of Mohit Minerals Private Limited vs. UOI, 2020(1) TMI 974, Gujarat High Court. The relevant extracts are reproduced as under:

> *144. In the present case,* ***the writ-applicant is importing goods on the CIF basis, i.e. the contract is for supply of goods delivered at the Indian port. Thus, the transportation of goods in a vessel is the obligation of the foreign exporter. The foreign exporter enters into contract with the shipping line for availing the services of transportation of goods in a vessel. The obligation to pay consideration is also of the foreign exporter. The writ-applicant is not at all concerned with how the foreign exporter delivers the goods at the Indian port or***

whether the consideration of the shipping line has been paid by the foreign exporter or not. *Even in a case of non-payment of the consideration of the freight by the foreign exporter, the shipping line cannot recover the consideration from the writ-applicant.*

145. Thus, the writ-applicant could be said to have neither availed the services of transportation of goods in a vessel nor he is liable to pay the consideration of such service. Hence, the writ-applicant is not the 'recipient' of the transportation of goods in a vessel service as per Section 2(93) of the CGST Act.

146. We are construing the provisions of taxing statute and that too the charging section of a taxing statute. It is a settled principle of construction of tax laws that there is no room for any intendment or presumption in tax statutes and one has to look only at the language used.

147. ***The principle of construction in tax statutes is that if the person sought to be taxed comes within the letter of the law he must be taxed. In a taxing Act one has to merely look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.***

148. ***In our opinion, the writ-applicant cannot be made liable to pay tax on some supposed theory that the importer is directly or indirectly recipient of the service. The term 'recipient' has to be read in the sense in which it has been defined under the Act. There is no room for any interference or logic in the tax laws.***

254. In view of the aforesaid discussion, we have reached to the conclusion that no tax is leviable under the Integrated Goods and Services Tax Act, 2007, on the ocean freight for the services provided by a person located in a non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India and the levy and collection of tax of such ocean freight under the impugned Notifications is not permissible in law.

Thus, the levy of GST under reverse charge on the importer towards the services by way of transportation of goods by vessel has been struck down by the Gujrat High Court and held that the notifications requiring the importer to pay tax under reverse charge are ultra vires.

Observations in Mohit Minerals on the aspect of Double Taxation:

With respect to the imported goods, in terms of the proviso to section 5(1) of the Integrated Goods and Services Tax Act, 2017 (for brevity 'IT Act') read with section 3(7) of the Customs Tariff Act, 1975, the imported goods are subject to IGST at the time of clearance of goods when Basic Customs Duty (BCD) is levied under section 12 of the Customs Act, 1962.

Further, for levy of IGST on the imported article, in terms of section 3(8) of the Customs Tariff Act, 1975, the value of the imported article shall be the value as determined under section 14 of the Customs Act, 1962 or the tariff value of such article fixed at sub-section (2) of said section 14 and BCD chargeable under section 12 of the Customs Act, 1962. In terms of section 14 of the Customs Act, 1962, BCD shall be levied on the CIF value of the imported goods i.e. on the value of the goods including the cost of transportation, insurance, loading, unloading and handling charges for bringing the imported goods to the place of importation.

Thus, in the case of imported goods, the value of freight is included in the value of imported goods and the importer is paying BCD and IT. In addition to this, the Indian shipping line or the importer under reverse charge in a case where the imports are on a CIF basis are required to pay GST separately on these services. Thus, double taxation is evident and is not backed by GST laws anywhere. It is on the aspect of double taxation, the services of transportation of goods by vessel are exempted for the period prior to 01.06.2016.

Though the petitions in the above case approached the Gujarat High Court challenging the levy under reverse charge on the importer, the following observations made by the Gujarat High Court on the aspect of double taxation would equally apply to the case of direct charge on the services undertaken by the Indian shipping lines. The relevant extracts are reproduced as under:

*213. It is a fundamental principle of construction of tax statutes that **if the words of the Act on one construction results into double taxation of the same transaction, that result will be avoided by adopting another construction which may reasonably be open. Further, double taxation, by way of delegated legislation, when the statute does not expressly provide, is not permissible.***

214. In the case of United Shippers Ltd. v. CCE, 2015 (37) STR 1043 (T), the Tribunal held that there can be no levy of service tax on barge charges and the handling charges which is part of the import transaction into India and form an integral part of the transaction value on which the customs duty is leviable. The judgment of the Tribunal has been affirmed by the Supreme Court in the case of CCE v. United Shippers, 2015 (39) STR J369 (SC).

*215. Thus, having paid the **IGST on the amount of freight which is included in the value of the imported goods, the impugned notifications levying tax again as a supply of service, without any express sanction by the statute, are illegal and liable to be struck down.***

Thus, in the opinion of the paper writers, the above extracts of the judgement would equally apply to cases of direct charge by Indian shipping lines and the vires of such tax levy could also be questioned.

Suggested Way forward:

As discussed above, the objective of taxing the services by way of transportation of goods by vessel is to provide the level playing field to Indian shipping lines compared to foreign shipping lines by reducing the input taxes involved in the cost of transportation. Further, the services by way of transportation of goods by air continued to be exempt. By following the said practice, the problem of input tax cost burden is also prevalent on-air cargo operators as well.

In the opinion of the paper writers, Government have other options to achieve this objective of reducing the input tax cost. They need have to resort to taxing of output service. The Governments can declare all the international shipping or transportation services as zero-rated supplies under section 16 of the IT Act, 2017. As a result of this, these operators can claim a refund of the accumulated input tax. As a result of this, their cost of transportation is not burdened by input tax cost and they can continue to be competitive with foreign shipping lines. The Gujarat High Court in the above-referred decision has recommended for this.

Let us hope that the **GST council** and the Governments respond prudently in this regard and provide that extra boost to the Indian shipping lines and air cargo operators. This is very much required because of the current slowdown of the global economy.

Does Mohit Minerals require re-consideration?

In our opinion, an alternate perspective to the conclusions arrived in Mohit Minerals is also possible. With due respects, the Honourable High Court has not considered the core aspect in detail, which being the definition of 'recipient of supply of goods or services or both'. It appears that the discussion on the said aspect was carried on with a presumption that the levy does not exist and even existed, it would be ultra-vires. The reasoning as to why we have arrived at that conclusion is as under.

Importer as Recipient:

In our opinion, the definition of 'recipient of supply of goods or services or both' as laid down in Section 2(93) of **Central Goods & Services Tax Act, 2017** (for brevity 'CT Act') is wide enough to cover the 'importer' as recipient for the purposes of payment of tax under reverse charge. The said definition can be split into three compartments for better understanding.

2(93)	Covers	Instance	Recipient
(a)	Supply of goods or services or both	Where consideration is payable	person who is liable to pay consideration
(b)	Supply of goods	Where no consideration is payable	person to whom goods are delivered or made available or to whom possession or use of goods is given or made available
(c)	***Supply of services***	***Where no consideration is payable***	***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 supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied

The judgment in Para 144 states that a person who is importing goods on CIF basis, the contract is for supply of goods delivered at the Indian Port and the transportation of goods is an obligation of the foreign exporter. It continues to state that importer is not at all concerned with how the foreign exporter delivers the goods at the Indian Port or whether the consideration of the shipping line has been paid by the foreign exporter or not and holds that even in case of non-payment of consideration of freight by the foreign exporter, the shipping line cannot recover the consideration from importer. Accordingly, in Para 145 it was held that importer could be said to have neither availed the services of transportation of goods in a vessel nor he is liable to pay the consideration of such service and hence not a 'recipient'.

Now, we would like to raise few questions for which we elicit responses from the readers. The questions are as under:

- Is the shipping line does not know as to whom the delivery of consignment is being made?
- Will shipping line delivers goods to any person or only to an importer?
- When would be the obligation of shipping line terminates qua his contract with foreign shipper?
- Is shipping line allowed to dump the goods at the port without assigning them to a specific agent or importer?
- What would be shipping line state about importer in Import General Manifest which is to be filed by him?

An underlying response to all the above questions state that there exists a knowledge about the importer with the shipping line. In other words, even though the contract is entered between the foreign shipping line and foreign exporter, the shipping line is actually aware about the importer. Only out of this awareness, the goods are being delivered to him and the only exception to the normal rule of trade is, the freight is not paid by the importer but the foreign exporter. Except for this commercial term, for all other purposes, the importer and foreign exporter will be the recipient of services of shipping line.

The definition of 'recipient of supply of goods or services or both' has sub-clause (c), essentially to cover these instances. In cases of supply of services, where no consideration is payable, the person to whom the service is rendered is called as 'recipient'. The judgment only by reason that the contract is not negotiated by importer or consideration is not being paid by importer cannot rule out the possibility of importer as 'recipient', especially in view of the existence of sub-section (c) in the statue book.

The sub-section (c) can also be more understood in great detail when we read with sub-section (b). The sub-section (b) states that in case of supply of goods, where there is no consideration payable, the recipient would be **the persons to whom goods are delivered or made available, or to whom the possession or use of the goods is given or made available. If the same analogy is applied for the services also, the importer may be called as 'recipient' since the services of ocean freight are delivered or made available to him or use of such services is given or made available to him.**

Without this sort of a discussion or a perspective, the judgment went on more hypothetical basis and held that importer cannot be called as 'recipient'. In Para 149 of the judgment, it was stated that if the definition of 'recipient' is overlooked or ignored, then the importer would become recipient of all goods which goes into manufacture/production of goods and all the services which have been availed by the foreign exporter for such purposes and held that such reasoning leads to harsh and arbitrary result which has to be avoided.

In our opinion, the definition of 'recipient of goods or services or both' is to be understood based on the appropriate context. The said definition is in the statute book only for limited purposes, of which, paying tax under revere charge is one of them. The said definition has to be examined in the context of reverse charge which was not attempted by the Honourable High Court.

The legislature is well aware that there would be certain instances where consideration is not payable and still a person can be called as 'recipient' and accordingly inserted sub-section (b) and (c) in the above definition. If at all a person who pays consideration alone is to be called as 'recipient', then there would not be any necessity to come up with sub-section (b) and (c). Hence, in our opinion, the importer fits under sub-section (c), since he is said to receive the ocean freight services and he is not obliged to pay any consideration. Since, he satisfies all the conditions of sub-section (c), the importer squarely fits within the letter of law for being taxed under reverse charge and then the reverse charge is not based on supposed theory as envisaged by the Honourable High Court.

The above aspect is vital and judgment should have spent more time on to the reasons why the importer does not fit in sub-section (c). This being the foundation for the rest of the judgement, we opine that a proper reasoning has been done on this aspect which makes it fit for a re-consideration. All aspects like double taxation and others will fall in place if this vital aspect is seen from the above perspective.