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GST on Ocean Freight held Unconstitutional!

Another retrospective amendment in the making...?

Introduction

Retrospective taxation is always distasteful. Often, a taxpayer interprets a provision, litigates the issue in Courts and gets a favorable verdict. Most of the times, the happiness is short lived, and the legislature annuls the judgments by making retrospective amendments. A classic example is the retrospective amendment in the Income Tax Act, 1961 pursuant to the landmark Supreme Court judgment in Vodafone's case. In this case, the retrospective amendment dated 60 years back to compel the taxpayer to pay tax along with interest and penalty.

Amendments like these often force the taxpayers to bow down to the will of the authorities and pay taxes, otherwise unconstitutional. With India whole-heartedly inviting global companies to set up operations in India, these amendments give a big blow to an investor's confidence.

The issue is equally relevant in GST regime wherein the High Courts are flooded with writ petitions challenging various statutory provisions, thanks to loosely drafted law and multifarious interpretational issues. The Courts have now started taking up these issues and pronouncing their verdicts.

The recent celebrated decision of Gujarat High Court in the case of ***Mohit Minerals Private Limited v. UOI, 2020-VIL-36-GUJ*** is a case on this point.

Decision of Mohit Minerals (Gujarat High Court)

The case relates to levy of IGST on ocean freight charges in case of CIF imports. The High Court held the levy to be unconstitutional and ultra vires the scheme of law. The Court reasoned its judgment on the following grounds:

- Under Section 5 of the Integrated Goods and Services Tax Act, 2017 ('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 statute needs to be read strictly and therefore, an Importer cannot be made liable to pay tax on a supposed theory that it is directly or indirectly the recipient of service.
- Importer not being the supplier or recipient, cannot determine the time or value of supply nor can report such transactions in its GST returns. Further, Importer (not being recipient) cannot avail Input Tax Credit which is against the object of GST law.
- Section 5 of the IGST Act levies IGST on all inter-state supplies. This transaction will not qualify as inter or intra-state supply under any clauses of Section 7 or 8 of the IGST Act.
- This levy is ultra vires the parent statute as Article 265 of the Constitution of India provides that levy or collection of tax can only be made 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.
- This levy will lead to double taxation on transportation service which already suffers tax as part of value of imported goods. It is a settled principle of law that unless a statute specifically provides for the same, a construction leading to double taxation shall be avoided.
- To sum up, the Court struck down the levy, primarily on the ground that GST law lacks powers to tax a person other than a supplier or a recipient.



Fallacies in the Decision

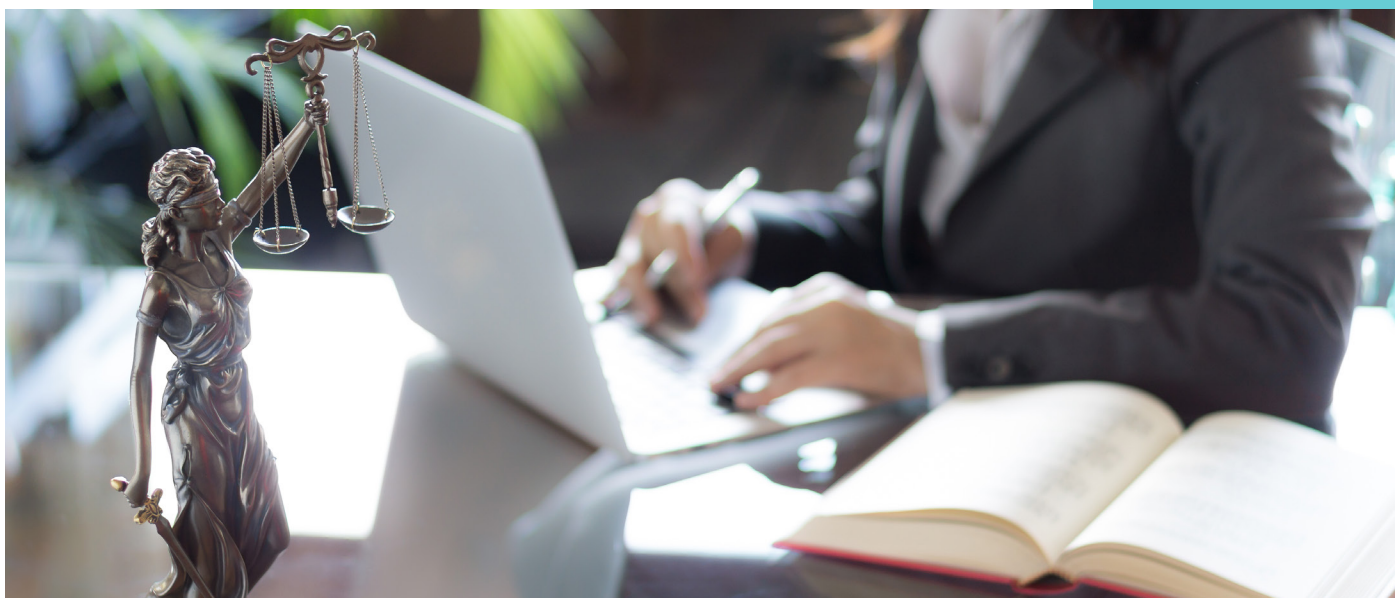
While principally agreeing with the judgment, the Authors respectfully differ with some of the reasons adopted by the Court while coming to its conclusion. The argument of double taxation is misconstrued as the subject matter of Customs law (levy on import of goods) and GST law (levy on supply of transportation service) are different. The power to tax different subject matters co-exists even if the value of one subject matter (transportation service) is included in the value of other (import of goods).

Similarly, the justification adopted by the Court to conclude that the transaction is not falling under Section 7 and 8 of the IGST Act, seems vague. Section 7(5)(c) of the IGST Act is wide enough to categorize all transactions as inter-state supplies (which are not intra-state). Assuming the levy was held valid, this transaction would have been an inter-state supply.

Possible Future

The revenue is likely to approach the Apex Court on this issue. It is highly plausible that the Supreme Court will decide the issue in favour of the taxpayer considering the legislative framework in place.

In all likelihood, the Government will retrospectively amend the GST law and attempt to remove the aforesaid incongruities to effectuate the levy. In such scenario, the present judgment will lose its relevance, being highly dependent upon the inadequate legal provisions in force.



In author's view, **a taxpayer can challenge the levy** on another ground (even if retrospective amendment is made). Considering the scheme of GST law, tax can be levied on either the supplier or the recipient. In this case, the **Importer has no nexus** with the transaction for the following reasons:

- Importer is not responsible to transport the goods from outside India to Indian port;
- Importer does not engage the shipping line;
- Importer is not a party to the contract of transportation; and
- In case of any non-performance or dispute, Importer cannot sue the shipping line

Hence, a third person (Importer in this case) having no connection with the supply in question, cannot be asked to pay tax on this transaction. Thus, even a retrospective amendment cannot validly fasten the liability of GST on a third person.

Concluding Remarks

While the judgment has pacified a class of Importers for the time being, it is just a beginning of a long journey. It will be interesting to chase this journey and see the final outcome out of this Pandora box.



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