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LEGAL PRECEDENTS

PART A: WRIT PETITIONS

Issue 1: Levy of GST on Ocean Freight service in CIF contracts

Ruling: In this case, validity of levy of GST on Ocean Freight service was in question. Earlier, the Gujarat High Court struck down this levy on multiple grounds. Now, the Supreme Court has also upheld non-levy of GST and held as under:

- Recommendations of GST Council are not binding on Centre or State Legislatures as there is no repugnancy provision envisaged in Article 246A of the Constitution of India.

- Vide Reverse Charge Notifications *viz.,* ***Notification No. 8/2017 – Integrated Tax (Rate)*** and ***Notification No. 10/2017 – Integrated Tax (Rate)***, both dated ***June 28, 2017*** ('Notifications'), the Legislature did not delegate essential elements of levy of tax *viz.* taxable event, valuation etc. Thus, Notifications treating importer of goods as recipient of service are not *ultra vires*.

- As per Section 13(9) of the IGST Act, place of supply of service is India being destination of goods. Reading this with definition of 'recipient' under Section 2(93) of the CGST Act, importer receiving goods through foreign shipping line is recipient for discharging GST liability under reverse charge in terms of Section 5(3) of the IGST Act. Hence, importer is liable to pay GST under reverse charge.

- Source of power to notify importer as recipient can also be traced from Section 5(4) of the IGST Act and incorrect mentioning of provision in Notification will not vitiate its exercise and application.

- Since place of supply of service is in India, there is sufficient territorial nexus for levy of GST.

- Levy of GST on service element of entire transaction violates concept of composite supply under Section 8 of the CGST Act as Indian importer is liable to pay IGST on 'composite supply', comprising of supply of goods and services of transportation, insurance, etc. in a CIF contract under Section 5(1) of the IGST Act.

UOI v. Mohit Minerals Private Limited, 2022-VIL-30-SC

NITYA Comments: *This ruling correctly concludes that GST is not leviable on Ocean Freight service. However, following reasonings adopted in this ruling are incorrect:*

- *The reasoning that importer is recipient is incorrect as Section 5(3) of the IGST Act is part of charging provision which deserves strict reading. The definition of 'recipient' of service under Section 2(93) of the CGST Act only covers person liable to pay consideration for service or person to whom service is rendered. There is no third category of person covered in definition of 'recipient'. Therefore, importer*

of goods can never qualify as recipient of Ocean Freight service being neither liable to pay consideration for such service nor recipient thereof.

- *The reasoning that Section 5(4) can apply to taxable persons other than recipients is incorrect. Again Section 5(4) being essential part of levying provision needs to be strictly interpreted. A plain reading of Section 5(4) clearly shows that it only encompasses recipient and not any other person.*

- *The reasoning that import of goods on CIF basis qualifies as composite supply is incorrect since it is single supply of goods from foreign exporter to Indian importer wherein ownership in goods gets transferred at Indian port. Further, two supplies in question (supply of goods by foreign exporter and supply of Ocean freight service by foreign shipping line) provided by separate persons to separate recipients can never be seen in conjunction nor qualify as composite supply.*

The conclusion that GST Council's recommendations are not binding on Centre or State Legislatures is correct interpretation of present Constitutional framework. However, many provisions under GST law presently mandate the same and therefore Centre and State are bound by GST Council's recommendations for making any changes under those provisions. Till now otherwise also, both Central and State Governments have consistently implemented all decisions relating to GST. After this ruling and based on media reactions of various State Governments, it needs to be watched out as to whether they will continue to work in tandem in future or not.

Given favorable ruling, taxpayers engaged in exempt business (where GST on Ocean Freight service becomes cost) or having ITC accumulation and who have paid GST in past, can contemplate issuance of Credit Notes or claiming refund subject to satisfaction of conditions like time limit, unjust enrichment etc. They can also consider discontinuing payment of GST in future. Other taxpayers can continue paying GST considering possibility of retrospective amendment in future and revenue neutrality. Such taxpayers can discontinue paying GST in case any clarification is issued from the Government's end stating no levy of GST on this transaction.

It is pertinent to highlight that similar challenge on levy of Service Tax on Ocean Freight service is still pending final adjudication before the Supreme Court.

Issue 2: Levy of Service Tax on secondment of employees

Ruling: In this case, levy of Service Tax on secondment of employees by foreign entity to Indian entity ('Respondent') was in question. The CESTAT held that Service Tax is not payable. The Supreme Court reversed the CESTAT's ruling and held that Service Tax is payable basis following observations:

- With passage of time, primacy of 'Direction and Control Test' to determine whether a person is employee or not has diluted. Now, a host of factors need to be weighed together for arriving at conclusion.

- The Respondent had 'operational or functional' control over seconded employees. Further, the Respondent assigned work to employees. Despite this, employees did not qualify as employees of the Respondent for following reasons:

- Multiple agreements entered between the Respondent and foreign entity
- Nature of work of foreign entity involved secondment of employees
- Employees possessed specialized skills and expertise
- Foreign entity was determining terms of employment of employees
- Salary to employees was fixed in foreign currency
- Respondent remitted salary of employees to foreign entity which in turn remitted to respective employees
- Return of employees to foreign entity on completion of secondment and re-secondment thereof

- The Respondent received manpower supply service from foreign entity and is liable to pay Service Tax thereon on reverse charge basis.

- The argument of revenue neutrality (availability of refund to the Respondent had Service Tax was originally paid) was rejected on the ground that the Court was posed with a limited question of nature and taxability of transaction and subsequent availability of refund is irrelevant detail.

The Supreme Court however held that extended period of limitation is not invokable as the Respondent entertained bona fide belief due to other favorable judicial precedents on this issue.

CC,CE&ST v. Northern Operating Systems Private Limited, 2022-VIL-31-SC-ST

NITYA Comments: *This ruling is fact-specific and distinguishable basis terms of employment of seconded employees. This ruling is likely to raise plethora of disputes specifically amongst MNCs wherein secondment of employees is a common practice.*

The ruling is also incorrect on merits as the Court totally disregarded employer compliances undertaken by the Respondent basis which the Respondent qualified as employer. The Court also failed to consider well settled concept of dual / joint-employment wherein one person can simultaneously become employee of two entities.

While this decision will directly impact ongoing Service Tax litigations, no fresh Service Tax proceedings can be initiated considering the Court's findings on extended period.

This ruling will be equally relevant under GST regime. Taxpayers need to analyze existing Secondment Agreements and determine applicability of GST under reverse charge. Taxpayers should consider filing representation before CBIC requesting clear tests for determination of employer-employee relationship vis-à-vis manpower supply service. In past, CBIC has considered similar representations of Industry and issued Circulars providing relief to taxpayers post Supreme Court decisions [Refer: ***Circular No.1065/4/2018-CX*** *dated* ***June 08, 2018*** *issued after judgment in the case of* ***CCEST v. Ultratech Cement Limited, 2018-VIL-03-SC-ST*** *and* ***Instruction No.01/2022 – Customs*** *dated* ***January 05, 2022*** *issued after judgment in the case of* ***Westinghouse Saxby Farmer Limited v. CCE, 2021-VIL-33-SC-CE****].*

Lastly, this ruling will have persuasive impact under Income Tax laws as well, on TDS and other aspects that taxpayers may analyze.

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