

SHM Insights Indirect Taxation

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High Court holds no IGST would be leviable on ocean freight for both cost insurance and freight ('CIF') and free on board ('FOB') contracts



Summary

In a recent judgment¹, the Hon'ble Bombay High Court ('HC') addressed the question of whether Integrated Goods and Services Tax ('IGST') is applicable to inbound ocean freight services for Free on Board ('FOB') imports, where the Indian importer contracts with an overseas shipping line. This issue has garnered attention due to its implications for international trade and taxation. This tax alert summarizes the judgement and delves upon the crucial aspects as discussed by the HC.

Synopsis of the Judgement

The HC set aside a Show Cause Notice ('SCN') demanding GST on ocean freight for transportation of goods from outside India. The HC aligned with the Gujarat HC's decision in Mohit Minerals², endorsed by the Apex Court³, indicating that IGST is not applicable to ocean freight for FOB imports.

The Hon'ble Delhi High Court 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 also taken by the Hon'ble Madhya Pradesh High Court⁴.

Furthermore, the HC rejected Revenue's argument that the Mohit Minerals decision only applied to CIF contracts, clarifying that it encompassed both CIF and FOB contracts. The HC also noted applicability of Notification No.8/2017-Integrated Tax (Rate) as ultra vires of the IGST Act, emphasizing that such notifications cannot be applied once deemed illegal. Consequently, the HC deemed the SCN without jurisdiction, citing the precedent set in Kusum Ingots⁵. It allowed the taxpayer to seek a refund for payments made under protest, with interest at 7% p.a., upon application.

Brief Background

The taxpayer imported goods from outside India using both FOB and CIF contracts. Subsequently, a SCN was issued, demanding tax on ocean freight for FOB contracts. In response, the taxpayer challenged the SCN before the Hon'ble Bombay High Court.

Taxpayer's assertions before the HC

- Notification No. 8/2017-Integrated Tax (Rate), the basis for the Show Cause Notice (SCN), was struck down by the Division Bench of the Hon'ble Gujarat High Court in the case of Mohit Minerals. The taxpayer cited the said judgment to assert that the notifications had been invalidated by the Division Bench of the Gujarat High Court, a decision which was subsequently upheld by a three-judge bench of the Supreme Court.
- The taxpayer referred to its own case, filed before the Delhi High Court challenging the same notification. In this instance, the Division Bench of the Delhi High Court, drawing upon the Supreme Court decision in the Mohit Minerals case, ruled that the notifications were invalidated as they contravened the IGST Act, 2017. Consequently, the court disposed of the writ petition in favor of the petitioner.
- Furthermore, the taxpayer cited a petition filed by one of its group companies before the Madhya Pradesh High Court. Here, the Madhya Pradesh High Court, also relying on the judgment in the Mohit Minerals case, deemed the notifications ultra vires and subsequently nullified them.
- Regarding the decision of the Bombay High Court, the petitioner relied on the judgment in the Liberty Oil Mills⁶ case, which addressed a similar issue. The Bombay High Court, in accordance with the decision of the Gujarat High Court in the Mohit Minerals case (subsequently upheld by the Supreme Court), allowed the petitioner's proceedings and set aside the Show Cause Notice.

Revenue's assertions before the HC

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

High Court Ruling

- The High Court held that the notifications have been declared as ultra vires and that the same has been upheld by the Gujarat High Court in the case of Mohit Minerals, which, in turn, was upheld by the Supreme Court.

- The HC observed that in the matter of Mohit Minerals before Gujarat HC, it was a case where the Assessee was importing coal from various countries on FOB (Free on Board) and CIF (sum of Cost, Insurance and Freight) basis, and such decision was upheld by the Apex Court. Therefore, the argument of the Revenue that the judgment of Mohit Minerals needs to be only applied in cases where the contract is for CIF and not for FOB was untenable.
- Delhi HC 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.⁷

- This Court in case of Liberty Oil Mills dealt with the similar issue and after relying on SC and HC rulings in case of Mohit Minerals, set aside the SCN.
- The HC thus held that once the notification itself has been declared as ultra vires and the same has been upheld by the Supreme Court, following the mandate of the settled principle of law as laid down in Kusum Ingots, 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. HC thus set aside the SCN holding it would be without jurisdiction. And as the SCN itself has been set aside, the HC permitted the assessee to seek refund of the tax paid under protest.

Key takeaways from the Ruling

- It is noteworthy that the Gujarat High Court struck down the Reverse Charge Mechanism (RCM) notification on the grounds that the Indian importer is not the recipient in the case of CIF imports. Consequently, the levy cannot be imposed on the Indian importer through the RCM mechanism.
- The Supreme Court concluded that the non-levy of IGST is justified on the basis that tax separately cannot be levied on a component of a composite supply. Additionally, the judgment noted that the taxpayer does not dispute the liability of integrated tax on FOB contracts. While

the Supreme Court decision in the case of Mohit Minerals only pertains to CIF contracts, this is the first instance where a court has explicitly stated that the Supreme Court decision also applies to FOB contracts. As a result, no IGST would be leviable on services of transportation of goods, even in FOB contracts.

- The Bombay High Court decision is succinct and does not delve into the details of the discussions or reasoning, if any, adopted by the court. The court has expressed the view that the Gujarat High Court, in the case of Mohit Minerals, held that the notifications are ultra vires the IGST Act, 2017.
- It would be prudent to closely monitor whether the government chooses to challenge this decision in the Supreme Court. Accordingly, businesses may need to assess the impact of this decision and take necessary actions.
- For the previous period, importers outside the GST credit chain may consider claiming a refund of tax paid under RCM. In doing so, it is relevant to analyze the applicability of the two-year limitation period, as it can be argued that the levy of tax per se was not proper.

¹ *Agarwal Coal Corporation Pvt Ltd vs. The Assistant Commissioner of State Tax [TS-199-HC(BOM)-2024-GST]*

² *Mohit Minerals Private Limited [2020 (33) GSTL 321 (Gujarat High Court)]*

³ *Union of India v. M/s Mohit Minerals Private Limited [Civil Appeal No. 1390 of 2022]*

⁴ *Writ Petition No. 19382 of 2017 order dated 30 January 2023*

⁵ *M/s Kusum Ingots & Alloys Limited v. Union of India and Anr. [AIR 2004 S.C. 2321]*

⁶ *Liberty Oil Mills v. Union of India [2023 (72) GSTL 305 (Bombay High Court)]*

⁷ *M/s. Agarwal Fuel Corporation Pvt. Ltd. Vs. Union of India & Anr.4 Writ Petition No.19382 of 2017 order dt. 30/01/2023*

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