No IGST on Ocean Freight if the goods are imported in a CIF contract – SC

In the case of Union of India vs Mohit Minerals Pvt Ltd

The highlights of the judgement:

- Section 5(4) of the IGST Act enables the Central Government to specify a class of registered persons as the recipients, thereby conferring the power of creating a deeming fiction on the delegated legislation
- The impugned levy imposed on the 'service' aspect of the transaction is in violation of the principle of 'composite supply' enshrined under Section 2(30) read with Section 8 of the CGST Act. Since the Indian importer is liable to pay IGST on the 'composite supply', comprising of supply of goods and supply of services of transportation, insurance, etc. in a CIF contract, a separate levy on the Indian importer for the 'supply of services' by the shipping line would be in violation of Section 8 of the CGST Act.
- The deletion of Article 279B and the inclusion of Article 279(1) by the Constitution Amendment Act 2016 indicates that the Parliament intended for the recommendations of the GST Council to only have a persuasive value, particularly when interpreted along with the objective of the GST regime to foster cooperative federalism and harmony between the constituent units
- Neither does Article 279A begin with a non-obstante clause nor does Article 246A state that it is subject to the provisions of Article 279A. The Parliament and the State legislatures possess simultaneous power to legislate on GST. Article 246A does not envisage a repugnancy provision to resolve the inconsistencies between the Central and the State laws on GST. The 'recommendations' of the GST Council are the product of a collaborative dialogue involving the Union and States. They are recommendatory in nature. To regard them as binding edicts would disrupt fiscal federalism, where both the Union and the States are conferred equal power to

legislate on GST. It is not imperative that one of the federal units must always possess a higher share in the power for the federal units to make decisions. Indian federalism is a dialogue between cooperative and uncooperative federalism where the federal units are at liberty to use different means of persuasion ranging from collaboration to contestation

- The Government while exercising its rule-making power under the provisions of the CGST Act and IGST Act is bound by the recommendations of the GST Council. However, that does not mean that all the recommendations of the GST Council made by virtue of the power Article 279A (4) are binding on the legislature's power to enact primary legislations.

Analysis of the judgement in detail

- The bone of contention is whether an Indian importer can be subject to the levy of Integrated Goods and Services Tax on the component of ocean freight paid by the foreign seller to a foreign shipping line, on a reverse charge basis
- The importer imports non-coking coal from Indonesia, South Africa and the U.S. by ocean transport on a 'Cost-Insurance-Freight' basis which is supplied to domestic industries. The goods are transported from a place outside India, up-to the customs station in India. The importer pays customs duties on the import of coal, which includes the value of ocean freight. In the case of a CIF contract, the freight invoice is issued by the foreign shipping line to the foreign exporter, without the involvement of the importer. Ocean freight is paid by the importer only when goods are imported under a 'Free-on-Board' contract. In the case of a high seas sale transaction, the coal is purchased from the original buyer before it arrives at Indian ports.
- On 28 June 2017, the Central Government issued Notification 10/2017 categorizing the recipient of services of supply of goods by a person in a non-taxable territory by a vessel to include an importer as per Customs Act.
- Section 11 of the IGST Act stipulates that place of supply of goods in case of goods imported in India shall be the place of the importer. Section 13(9) of the IGST Act contemplates that the place of supply of services, in the case of transportation of goods shall be the destination of the goods. The importer alleges that the impugned notifications create an element of double taxation, as ocean

freight is included in the value of goods for the purpose of customs duty which the importer is liable to pay. The importer does not dispute the liability of integrated tax on supply of services of transportation when it imports goods on an FOB basis.

- The Gujarat High Court had passed the judgement in favour of the importer.
- The argument placed before the honourable Supreme Court by the importer is as below:

Under Section 5(4) of the IGST Act, the Government cannot specify the person liable to pay service tax on a reverse charge basis.
Section 5(3) of the IGST Act provides that the Government may specify the categories of supply of goods or services or both on which the tax shall be paid on reverse charge basis by the recipient of the goods or services. Thus, the power under Section 5(3) is only to specify the categories of supply, while the liability to pay tax is fixed on the recipient. The Government cannot specify the person liable to pay tax on reverse charge basis under Section 5(3)
Notification 10/2017 has been issued under Section 5(3) of the IGST Act. Since the power flows from Section 5(3), the Government can by a notification only specify the 'categories of supply', as the liability for tax has been determined by Parliament
Under the CGST Act and the IGST Act, the only place where a person other than a supplier or recipient is made liable to pay tax is under Section 5(5) of the IGST Act, where an electronic commerce operator through whom supply is made is taxed
In case the Parliament desired the tax to be collected from a person other than a supplier or recipient, it would have expressly provided so in the legislation. Since Parliament has specified the person liable for tax, it is not a matter to be governed by delegated legislation
Section 2(98) of the CGST Act defines 'reverse charge' as the liability to pay tax by the recipient of supply of goods or services or both instead of the supplier of such goods or services or both. In other words, only the recipient can be made liable to pay tax under reverse charge basis and the reverse charge cannot be disintegrated from the recipient of supply
The taxable event for levy of GST is 'supply' of goods or service. In the absence of supply, no tax can be levied under IGST, CGST or State Goods and Services Tax Act.

Article 366(12A) of the Constitution defines the 'goods and services tax' as the tax on 'supply' of goods or services or both. Section 5 of the IGST Act, which is the charging section for levy of tax, also states that the IGST will be levied on all inter-State 'supplies' of goods or services or both. Each transaction has to be evaluated independently to determine its taxability. The transaction of supply takes place between the contracting parties, that is, at whose instance the supply is made.
The CGST Act does not envisage a taxable supply without consideration, other than those specified in Schedule I.
Section 13(9) of the IGST Act is only relevant to determine the place of supply and not the recipient of supply. Whether the supply of service is an export of services under Section 2(6)(a) of the IGST Act or an import of services under Section 2(11), read with Section 7(4) of the IGST Act; or an inter-State supply of service, is not determined by Section 13(9).
Notification 10/2017 has been issued on the recommendation of the GST Council under Section 5(3) of the IGST Act and not under Article 279A of the Constitution. If the GST Council intended to make a recommendation deeming the importer as recipient of supply, then the proper course of implementation would be to make an amendment in the IGST Act and seek Parliamentary approval.
The objective of the tax or levy cannot validate an ultra vires levy The Government has contended that the levy of tax on services of transportation of goods into India provided by a person in a non-taxable territory to a person in a non-taxable territory, has been introduced to create parity for Indian shipping lines with foreign shippers The notification for the levy and reverse charge has been lifted from the erstwhile service tax regime into the GST regime without considering the changes in language in Section 5(3) of the IGST Act as opposed to Section 68(2) of the Finance Act 1994. Thus, the notification is ultra vires the Act.
In case of CIF contracts, the customer contracts for a supply of delivered goods at the port of destination. The contract for transportation of goods is entered into by the foreign exporter with

the foreign shipper. Thus, the person liable to pay consideration to the foreign shipper is the foreign exporter. The importer of goods in India is not the person liable to pay the consideration, and is thus, not the 'recipient' of the service.
The contract of the Indian importer with the foreign exporter is for supply of delivered goods. The service of transportation is a component of the supply of goods similar to raw material, manufacturing cost or employee cost of the supplier. To contend that the purchaser has received the supply of raw material or the services of an employee is illogical. Similarly, the argument that the Indian importer has received transportation services is irrational.
A CIF contract is an inclusive price covering cost of goods, insurance and freight payable for carriage of goods to the destination specified in the contract. The essence of the contract is that a seller having shipped the goods in accordance with the contract, can fulfil his part of the bargain by tendering to the buyer the proper shipping documents. If he does this, he is not in breach even if the goods are lost before such tender. In the event of a loss, the buyer must pay the price on tender of documents and his remedies lie against the carrier but not the seller.
A CIF contract has two components: (i) price is paid for the freight, and (ii) the buyer is never obligated to pay it. The owner of the vessel who enters into a contract of affreightment has a privity of contract with the supplier of goods and is rendering a service to the supplier. If the service is not received, then the question of reverse charge does not arise.
There must be a taxable event in the CIF contract of the kind contemplated under the IGST Act. In case there is no such event, it cannot be created through delegated legislation by the GST Council. There is an absence of a statutory fiction by which a CIF contract can be split into a contract for supply of goods and services and creating a second layer of fiction by which the shipper is rendering a service to the supplier of goods. Thus, the question of levy of tax by the GST Council does not arise.