HIGH COURT OF ORISSA : CUTTACK.

W.P.(C) No. 1684 of 2019

(In the matter of an application under
Articles 226 & 227 of the Constitution of India, 1950)

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M/S. PARADEEP PHOSPHATES LTD. … ***Petitioner***

Mr. Jnanesh Mohanty,
Advocate for the petitioner

-versus-

UNION OF INDIA & OTHERS … ***Opposite Parties***

Mr. Prasanna Kumar Panda,
Senior Standing Counsel
(GST, Central Excise & Customs)
for opposite party Nos.2, 3 & 4

Date of Hearing and Order : 01.08.2022

CORAM:

MR. JUSTICE JASWANT SINGH
AND
MR. JUSTICE MURAHARI SRI RAMAN

ORDER

1. This matter is taken up by virtual/physical mode.

2. The Petitioner has filed this writ petition craving for following reliefs:

> ***"(a)*** *To issue a Writ of Certiorari/Mandamus or any other appropriate Writ/Order/Director against the Opposite Parties by quashing the impugned Notification No.8 of*

P.T.O.

2017-Integrated Tax (Rate), dtd.28.06.2017 and Entry 10 of the Notification No.10 of 2017-Integrated Tax (Rate), dtd.28.06.2017 by declaring that the same lack legislative competency, ultra vires to the Integrated Goods and Services Tax Act, 2017 and hence unconstitutional;

(b) *To issue a Writ of Certiorari/Mandamus or any other appropriate Writ/Order/Director against the Opposite Parties by declaring that no tax shall be 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 and levy and collection of tax on such ocean freight under the impugned Notifications is not permissible under the law;*

(c) *To issue a writ of mandamus/order/direction to the Opposite Party No.2 to place before this Hon'ble Court the records of the recommendation given and all decision taken in respect of impugned Notification No.8 of 2017-Integrated Tax (Rate), dtd.28.06.2017 and the Notification No.10/2017-Integrated Tax Rate, dated 28.06.2017;*

(d) *To direct the Opposite Parties to refund a sum of Rs.19,75,16,275/- to the Petitioner which was collected by the Revenue without authority of law. The Opposite Parties may be directed not to insist for deposit of IGST on ocean freight henceforth.*

(e) *To issue such other writ/order/direction and further orders as the Hon'ble Court may deem just and proper in the facts and circumstances of the case."*

3. Facts as outlined by the Petitioner, incorporated under the provisions of the Indian Companies Act, 1956, reveals that having its factory located at Paradeep within the territory of State of Odisha, it imports raw materials namely, Anhydrous Ammonia, Phosphoric Acid, Sulphur, Sulphuric Acid, Rock Phosphates, Murriate of Potash *etc*. from suppliers situated in foreign terriroty for the purpose of manufacture of fertilizers which description falls within the scope of the Chapter 31 of the Customs Tariff Act, 1975.

3.1. It is the case of the petitioner that when the contract with overseas suppliers is for supply of goods on CFR (cost & freight), by which arrangement it is the responsibility of the foreign supplier to arrange for transportation, the price of the goods so imported compulsorily includes the ocean freight which goes into the determination of assessable/transaction value of goods so imported as provided for in Section 14 of the Customs Act, 1962.

3.2. Further fact, as revealed from the writ petition, clearly outlines that on the transaction of import, the petitioner-company discharged its liability in terms of Section 5 of the Integrated Goods and Services Tax Act, 2017 (for brevity, "IGST Act") at the time of clearance of the goods which is in consonance with the provisions as introduced by virtue of the Central Goods and Service Tax Act, 2017 (for short, "CGST Act") with effect from 1st July, 2017.

3.3. For ready reference, it may be fruitful to have a glance at the following provisions of Section 14 of the Customs Act, 1962, as they stood prior to amendment by virtue of the Finance Act, 2022:

"14. Valuation of goods.—

(1) For the purposes of the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods, that is to say, the price actually paid or payable for the goods when sold for export

to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to such other conditions as may be specified in the rules made in this behalf:

Provided that such transaction value in the case of imported goods shall include, in addition to the price as aforesaid, any amount paid or payable for costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the rules made in this behalf:

Provided further that the rules made in this behalf may provide for,—

(i) the circumstances in which the buyer and the seller shall be deemed to be related;

(ii) the manner of determination of value in respect of goods when there is no sale, or the buyer and the seller are related, or price is not the sole consideration for the sale or in any other case;

(iii) the manner of acceptance or rejection of value declared by the importer or exporter, as the case may be, where the proper officer has reason to doubt the truth or accuracy of such value, and determination of value for the purposes of this section:

Provided also that such price shall be calculated with reference to the rate of exchange as in force on the date on which a bill of entry is presented under Section 46, or a shipping bill of export, as the case may be, is presented under Section 50.

(2) Notwithstanding anything contained in sub-section (1), if the Board is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods,

having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value.

Explanation. —

For the purposes of this section—

(a) "rate of exchange" means the rate of exchange—

(i) determined by the Board, or

(ii) ascertained in such manner as the Board may direct,

for the conversion of Indian currency into foreign currency or foreign currency into Indian currency;

(b) "foreign currency" and "Indian currency" have the meanings respectively assigned to them in clause (m) and clause (q) of Section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999)."

Section 5 of the IGST Act stands thus:

"Levy and Collection.—

(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the integrated goods and services tax on all inter-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under Section 15 of the Central Goods and Services Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point when duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962.

(2) The integrated tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) [1] The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.

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1. Substituted sub-section (4) by the Integrated Goods and Services Tax (Amendment) Act, 2018, which stood prior to amendment as follows:

"The integrated tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both."

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services, the tax on inter-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax."

4. It is contended by the counsel for the petitioner-company that the entire import being made through vessels and goods are loaded at port of despatch (outside India) to the port of discharge (Indian Port), there is no occasion for levying Integrated Goods and Service Tax (IGST) on such ocean freight which is paid by the foreign supplier to the shipping company towards transportation of goods to the port of destination in India. The taxable event taking place in a non-taxable territory between htwo separate and distinct non-taxable persons, the petitioner-importer being not the recipient of freight services cannot be saddled with the liability to discharge IGST on reverse charge mechanism. Essentially, therefore, it is urged that the freight originated from the foreign territory (non-taxable territory) terminated at Indian port, and the petitioner having discharged its liability on the assessable value which included component of ocean freight, it could not again be asked to discharge tax on the ocean freight.

4.1. The petitioner has submitted that the IGST on ocean freight is sought to be levied by issue of Notifications being Nos.8/2017, dated 28th June, 2017 with Corrigendum and 10/2017, dated 28th June, 2017 which stand as follows:

"Government of India
Ministry of Finance
(Department of Revenue)
Notification No. 8/2017— Integrated Tax (Rate)
New Delhi, the 28th June, 2017

G.S.R......(E).— In exercise of the powers conferred by sub-section (1) of Section 5, sub-section (1) of Section 6 and clause (iii) and clause (iv) of Section 20 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017) read with sub-section (5) of Section 15 and sub-section (1) of Section 16 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, and on being satisfied that it is necessary in the public interest so to do, hereby notifies that the integrated tax, on the inter-State supply of services of description as specified in column (3) of the Table below, falling under Chapter, Section or Heading of scheme of classification of services as specified in column (2), shall be levied at the rate as specified in the corresponding entry in column (4), subject to the conditions as specified in the corresponding entry in column (5) of the said Table:

Table

Sl No.	Chapter, Section or Heading	Description of Service	Rate (per cent.)	Condition
1	2	3	4	5
9	Heading 9965 (Goods transport services)	(i) Transport of goods by rail (other than services specified at item no. (iv)).	5	Provided that credit of input tax charged in respect of goods in supplying the service is not utilised for paying integrated

				tax, central tax, state tax or union territory tax on the supply of the service
		(ii) Transport of goods in a vessel including services provided or agreed to be provided by a person located in non-taxable territory to 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	5	Provided that credit of input tax charged on goods (other than on ships, vessels including bulk carriers and tankers) used in supplying the service has not been taken Explanation: This condition will not apply where the supplier of service is located in non-taxable territory. [Please refer to Explanation no. (iv)]
		(iii) Services of goods transport agency (GTA) in relation to transportation of goods (including used household goods for personal use). Explanation.— "goods transport agency" means any person who	5	Provided that credit of input tax charged on goods and services used in supplying the service has not been taken [Please

		provides service in relation to transport of goods by road and issues consignment note, by whatever name called.		refer to Explanation no. (iv)]
		(iv) Transport of goods in containers by rail by any person other than Indian Railways.	12	—
		(v) Goods transport services other than (i), (ii), (iii) and (iv) above.	18	—

4. Explanation.—

For the purposes of this notification,—

(i) Goods includes capital goods.

(ii) Reference to "Chapter", "Section" or "Heading", wherever they occur, unless the context otherwise requires, shall mean respectively as "Chapter, "Section" and "Heading" in the scheme of classification of services.

(iii) The rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of heading 9988.

(iv) Wherever a rate has been prescribed in this notification subject to the condition that credit of input tax charged on goods or services used in supplying the service has not been taken, it shall mean that,—

(a) credit of input tax charged on goods or services used exclusively in supplying such service has not been taken; and

(b) credit of input tax charged on goods or services used partly for supplying such service and partly for effecting other supplies eligible for input tax credits, is reversed as if supply of such service is an exempt supply and attracts provisions of clause (iv) of Section 20 of the Integrated Goods and Services Tax Act, 2017 read with sub-section (2) of Section 17 of the Central Goods and Services Tax Act, 2017 and the rules made thereunder.

(v) "information technology software" means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment.

(vi) "agricultural extension" means application of scientific research and knowledge to agricultural practices through farmer education or training;

(vii) "agricultural produce" means any produce out of cultivation of plants and rearing of all life forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products, on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market;

(viii) "Agricultural Produce Marketing Committee or Board" means any committee or board constituted under a State law for the time being in force for the purpose of regulating the marketing of agricultural produce;"

Corrigendum to said notification reads as under:

"Government of India
Ministry of Finance
(Department of Revenue)
Corrigendum
New Delhi, The 30th June, 2017

G.S.R. (E).— In the English version of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 8/2017-Integrated Tax (Rate), dated the 28th June, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i) vide number G.S.R. 683 (E), dated the 28th June, 2017, at page 22, —

(i) after line 6, insert

"4. Where the value of taxable service provided by a person located in non-taxable territory to 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 is not available with the person liable for paying integrated tax, the same shall be deemed to be 10 % of the CIF value (sum of cost, insurance and freight) of imported goods.";

(ii) in line 7, for "4" read "5";

(iii) in line 10, for "scheme of classification of services", read "scheme of classification of services annexed to notification No. 11/2017-Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i) dated 28th June, 2017 vide GSR number 690(E) dated 28th June, 2017.";

(iv) in line 34, for "5" read "6".

[F. No. 334/1/2017 –TRU]
(Ruchi Bisht)
Under Secretary to
the Government of India"

Notification No. 10/2017— Integrated Tax (Rate), 28th June, 2017 stood thus:

"Government of India
Ministry of Finance
(Department of Revenue)
Notification No. 10/2017— Integrated Tax (Rate)
New Delhi, the 28th June, 2017

GSR......(E).— In exercise of the powers conferred by sub-section (3) of Section 5 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), the Central Government on the recommendations of the Council hereby notifies that on categories of supply of services mentioned in column (2) of the Table below, supplied by a person as specified in column (3) of the said Table, the whole of integrated tax leviable under Section 5 of the said Integrated Goods and Services Tax Act, shall be paid on reverse charge basis by the recipient of the such services as specified in column (4) of the said Table:

Sl. No.	Category of Supply of Services	Supplier of service	Recipient of Service
1	2	3	4
10	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.	A person located in non-taxable territory	Importer, as defined in clause (26) of Section 2 of the Customs Act, 1962(52 of 1962), located in the taxable territory.

4.2. On the facts and in the circumstances as noted above, the Petitioner by invoking writ jurisdiction challenged the validity of Notification bearing No. 8 of 2017— Integrated Tax (Rate), dated 26th June, 2017 and Entry 10 of the Notification No.10 of 2017—

Integrated Tax (Rate), dated 28th June, 2017 issued under the IGST Act and posed the following for adjudication by this Court:

"When the contract with the overseas suppliers, is for supply of goods on CFR basis, and the price of imported goods compulsorily includes the ocean freight component, for determining the assessable/transaction value of imported goods, in terms of Section 14 of the Customs Act, 1962, on which IGST is paid by the petitioner, in terms of Section 5 of the IGST Act, 2017, at the time of clearance of the goods, whether the same ocean freight component, on which IGST is paid towards value of imported goods, can be once again subjected/assessed to IGST in the hands of the petitioner, treating the said freight component as supply of service, by the overseas suppliers to the petitioner."

5. This Court admitted the writ petition on 20th February, 2019 and passed the following order:

"Heard learned counsel for the petitioner, Mr. M.K. Badu, learned CGC for opposite party No.1-Union of India and Mr. T.K. Satapathy, learned Standing Counsel for the Department.

Admit.

The matter to come up on 26.06.2019.

Names of Mr. M.K. Badu, learned CGC for opposite party No.1-Union of India and Mr. T.K. Satapathy, learned Standing Counsel for the Department be reflected in the cause list.

As an interim measure, it is directed that any payment made by the Petitioner, pursuant to the impugned notification shall be subject to result of the writ petition".

5.1. This Court, on 6th April, 2021, has passed further Order which is to the following effect:

"This writ petition is adjourned sine die vide common order passed today in W.P.(C) No. 14456 of 2020."

5.2. It is noticed that in the said referred case being *W.P.(C) No. 14456 of 2020 [Indian Farmers Fertilizers Cooperative Ltd. Vrs. Union of India], on 11th January, 2021*, this Court has been pleased to pass the following order:

*"****

It appears that against the judgment of the Gujarat High Court dated 23rd January, 2020 in Mohit Minerals Private Limited v. Union of India and against the judgment dated 12th March, 2020 of the Calcutta High Court in M/s. Adani Wilmar Limited v. Union of India, Special Leave Petitions have been filed and are pending before the Supreme Court of India.

Learned counsel for the Petitioner points out that there is no interim order passed by the Supreme Court of India staying the operation of the aforementioned judgments of the High Court of Gujarat and Calcutta.

Mr. Goutam Mishra, learned Senior Counsel appearing for the Petitioner in Writ Petition (Civil) No. 28302 of 2020 (M/s. Visa Minmetal Limited v. Union of India) further points out that to the best of their knowledge, refund applications have been processed by the Opposite Parties in case of some of the aforementioned Petitioners and prays that they should be asked why a similar treatment should not be accorded to the present Petitioner. W.P.(C) No. 14456 of 2020."

5.3. It may be worthwhile to take note of further order as has been passed in the said case on 6th April, 2021:

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> *4. Learned counsel for the Petitioner in W.P.(C) No. 1684 of 2019 has filed a memo drawing the attention to the Court to the fact that the Special Leave Petitions pending the Supreme Court are now listed for hearing on 20th April, 2021. It is also clear that there is no interim order passed by the Supreme Court staying operation of the judgment of the Gujarat High Court in the case of M/s. Mohit Minerals Pvt. Ltd. v. Union of India or the subsequent judgment in the case of Bharat Oman Refineries Ltd. Pvt. Ltd. v. Union of India reported in 2020 (41) GSTL 292 (Guj.).*
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> *5. In that view of the matter, it is clarified that while the question of the Petitioner being entitled to refund will await the final decision of the Supreme Court in the aforementioned SLPs, the Opposite Parties will not require the Petitioners before this Court hereafter to pay IGST on ocean freight until further orders.*
>
> *6. These writ petitions are adjourned sine die with liberty to the parties to mention them for listing after disposal of the SLPs pending before the Supreme Court."*

6. Mr. Jnanesh Mohanty, learned counsel for the Petitioner has placed on record the Judgment dated 19th May, 2022 rendered by the Hon'ble Supreme Court in the appeal preferred by Union of India in the case of *Mohit Minerals Pvt. Ltd. & Ors.* being *Civil Appeal No. 1390 of 2022 etc., etc.* reported at *2022 SCC OnLine SC 657* which was directed against the Judgment dated 23rd January, 2020 delivered by the Hon'ble Gujarat High Court in *Mohit Minerals Pvt. Ltd. Vrs. Union of India, R/Special Civil Application No. 726 of 2018* reported in *(2020) 74 GSTR 134 (Guj) = (2020) 33 GSTL 321 (Guj) = 2020 SCC OnLine Guj 49* and submitted that the grounds of challenge with a prayer to declare Notification being Nos.8/2017, dated 28th June, 2017 and 10/2017, dated 28th June, 2017 *ultra vires* the Constitution of India insofar as IGST is sought to be levied on "ocean freight" in respect of transactions of import on CFR/CIF (cost and freight/cost, insurance and freight) basis have been addressed to by the Hon'ble Supreme Court of India by affirming the decision of the Hon'ble Gujarat High Court. Accordingly, he claims that the petitioner-company is entitled for refund of Rs.19,75,16,275/- which was collected by the Revenue *vide* prayer (d) of the writ petition.

6.1. In *Mohit Minerals Pvt. Ltd. Vrs. Union of India, (2020) 74 GSTR 134 (Guj) = 2020 SCC OnLine Guj 49 = (2020) 33 GSTL 321 (Guj)* the Hon'ble Gujarat High Court *inter alia* has made following observation:

> *"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.*
>
> *149. If the definition of the term 'recipient' is overlooked or ignored, then the writ-applicant would become the recipient of all the goods which goes into the manufacture/production of goods and all the services which have been availed by the foreign exporter for such purposes. Such reasoning which leads to harsh and arbitrary result has to be avoided, particularly when the term has been expressly defined by the legislature. Thus, the writ-applicant cannot be said to be the recipient of the supply of the ocean freight service and no tax can be collected from the writ-applicant.*
>
> *150. The Notification No.8/2017– Integrated Tax (Rate) and Notification No.10/2017– Integrated Tax (Rate) both dated 28.6.2017, makes the importer of the goods as the person liable to pay the integrated tax on the supply of service by a*

person located in the non-taxable territory to a person located in a non-taxable territory by way of transportation of goods by vessel from a place outside India to a place in India. The impugned notifications have been issued in exercise of the powers conferred by Section 5(3) of the IGST Act. The said section provides power to the Government to specify the categories of supply on which the tax shall be paid by the recipient of the supply. The section does not further provide that the Government may also specify the other person (other than the recipient of supply) liable to pay tax. Under Section 5(3), the person liable to pay can only be the recipient of supply.

151. It is a settled principle of law that if a delegated legislation goes beyond the power conferred by the statute, such delegated legislation has to be declared ultra vires. The delegated legislation derives power from the parent statute and not without it. The delegated legislation is to supplant the statute and not to supplement it.

152. In the aforesaid view of the matter, the impugned notifications levying tax on supply of service of transportation of goods by a person in a non-taxable territory to a person in a non-taxable territory from a place outside India up to the customs station of clearance in India and making the petitioner, i.e. the importer, liable for paying such tax, are ultra vires the provisions of the IGST Act.

153. The supply of service of transportation of goods by a person in a non-taxable territory to another person in a non-taxable territory from a place outside India up to the customs station of clearance in India, is neither an inter-state supply nor an intra-state supply. Thus, no tax can be levied and collected from the writ-applicant.

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203. The next submission we need to deal is that the impugned notifications are contrary to the provisions of Article 265 of the Constitution of India.

204. Article 265 of the Constitution provides that: "No tax shall be levied or collected except by authority of law." Thus, both the levy and collection of tax shall be provided by a statute enacted by a competent legislature. A delegated legislation, i.e. a rule, regulation or notification, cannot provide for levy or collection of tax which is not authorized by the parent statute.

205. In a fiscal matter it is not proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. Such power of imposition of tax and/or fee by a delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. The delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power.

206. Thus, the impugned notification levying the tax on supply of ocean freight service and making the import of goods as the person liable for paying the tax are also unconstitutional as there is no statutory sanction for levy and collection of such tax.

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"251. In Phulchand Exports Limited v. O.O.O. Patriot, (2011)10 SCC 300, the Supreme Court in para 21 has referred to and relied upon the decision in the case of Johnson v. Taylor Brothers and Company Limited, 1920 AC 144 (HL) in the context of determination of rights of the sellers and buyers under the Indian Contract Act, 1872. Johnson (supra) referred to by the Supreme Court explains the nature of a CIF contract. Johnson (supra) lays down the following :

(i) To make out an invoice of the goods sold.

(ii) To ship at the port of shipment goods of the description contained in the contract.

(iii) To procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract.

(iv) To arrange for an insurance upon the terms current in the trade.

(v) To send forward and tender to the buyer the shipping documents namely the invoice, bill of lading and policy of assurance.

252. The view taken in Johnson (supra) is that in a CIF contract, the seller is obliged to procure a contract of affreightment under which the goods would be delivered at their destination.

253. In our opinion, such observations, on the contrary, supports the case of the writ-applicants that in a case of CIF contract, the contract for transportation is entered into by the seller, i.e. the foreign exporter, and not the buyer, i.e. the importer, and the importer is not the recipient of the service of transportation of the goods.

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.

255. In the result, this writ-application along with all other connected writ-applications is allowed. The impugned Notification No.8/2017 – Integrated Tax (Rate) dated 28th June 2017 and the Entry 10 of the Notification No.10/2017– Integrated Tax (Rate) dated 28th June 2017 are declared as ultra vires the Integrated Goods and Services Tax Act, 2017, as they lack legislative competency. Both the Notifications are hereby declared to be unconstitutional."

6.2. Three-Judges Bench of the Hon'ble Supreme Court of India *vide* Judgment dated 19th May, 2022 in *Union of India Vrs. Mohit Minerals Pvt. Ltd., Civil Appeal No. 1390 of 2022 etc., etc.* reported at *2022 SCC OnLine SC 657* has been pleased to dismiss the appeal preferred at the behest of the Union of India against the Judgment in *Mohit Minerals Pvt. Ltd. Vrs. Union of India, (2020) 74 GSTR 134 (Guj) = 2020 SCC OnLine Guj 49 = (2020) 33 GSTL 321 (Guj).*

6.3. The relevant portions of the Judgment of the Hon'ble Supreme Court of India are quoted hereunder:

"D.4 Taxable event:

Is an ocean freight transaction for import of goods a valid category of supply of services under Section 5(3) of IGST Act?

95. The other limb for contesting the validity of the impugned notification is with respect to its identification of a "taxable event". The question that falls for the determination is whether the impugned notifications issued in 2017, under Section 5(3) of the IGST Act, validly prescribe a taxable event that constitutes an inter-State supply of goods and services with the importer being a recipient of shipping services in CIF transactions.

96. The analysis of whether import of goods under CIF contracts constitutes a valid import of service has to be answered on two prongs:

(i) whether classification of imports as a specific category of supply of shipping service is valid under Section 5(3) read with Section 5(1) of the IGST Act; and

(ii) whether the recipient of the imported goods is also a recipient of shipping services in CIF transactions under Section 5(3).

D.4.(a)

Do imported goods procured on a CIF basis constitute an inter-state supply or is it an extra-territorial tax?

97. Notification 8/2017 specifically delineates the service that is accompanied with the transportation of goods from a non-taxable territory as a specified category of service under Section 5(3) of the IGST Act. This categorization taxes the recipient of such transportation service on a reverse charge basis. The respondents have argued that the supply of service of shipping in a CIF contract is from the foreign shipping line to the foreign exporter. It is alleged that this transaction has no territorial nexus to India and does not constitute "supply" that can be taxed within the meaning of the CGST Act and IGST Act.

98. We shall now advert to certain key provisions relevant to determine whether the taxable event in the present case that is, "services supplied by a person located in a 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" constitutes an 'inter-State supply' for the purposes of the charging Section 5(1) of the IGST Act, read with Sections 5(3) and the unamended Section 5(4).

99. Section 5(1) levies IGST on all "inter-state supplies" of goods or services or both. Section 5(3) of the IGST Act confers power on the Central Government, on the recommendation of the GST Council, to specify categories of supply of goods or services or both where the tax shall be paid on a reverse charge basis by the recipient. While analysing the respondents' contention, it is important to contextualize the purpose of GST and the constitutional amendment to *effect it. In modern commerce, the distinction between goods and services is increasingly becoming a matter of degree than substance. GST seeks to focus on the taxation of "supply" of goods or services. The provisions of the IGST and CGST Act focus on implementing a workable machinery to adequately capture the complexities of supply in a global and digital age.*

100. The term 'supply' has been defined in the IGST Act with reference to the CGST Act.

Section 2(21) of the IGST Act provides that:

"(21) "supply" shall have the same meaning as assigned to it in Section 7 of the Central Goods and Services Tax Act"

Section 7(1) of the CGST Act provides thus:

"7. Scope of supply.—

(1) For the purposes of this Act, the expression "supply" includes—

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

[(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation.—

For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for *the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;]*

(b) [import of services for a consideration whether or not in the course or furtherance of business; [and]

(c) the activities specified in Schedule I, made or agreed to be made without a consideration;

[....]

(3) Subject to the provisions of sub-sections (1), (1-A) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods."

[emphasis supplied]

Further, Section 7 of the IGST Act defines the scope of inter-State supply. Section 7(4) of the IGST Act states that "supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce":

"7. Inter-State supply.—

(1) Subject to the provisions of Section 10, supply of goods, where the location of the supplier and the place of supply are in—

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory, shall be treated as a supply of goods in the course of inter-State trade or commerce.

(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.

(3) Subject to the provisions of Section 12, supply of services, where the location of the supplier and the place of supply are in—

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory, shall be treated as a supply of services in the course of inter-State trade or commerce.

(4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.

[...]"

(emphasis supplied)

101. Section 7 of the CGST Act defines the term "supply" with a broad brush and provides for an inclusive definition. Section 7(1)(b) of the CGST Act considers import of services for a consideration to constitute "supply". Section 7(1)(c) of the CGST Act captures any and all activities in Schedule 1 of the CGST Act, *irrespective of whether they are made for a consideration. Additionally, Section 7(3) confers the power on the Central Government to specify which transactions are to be treated as a supply of goods and not a supply of services, and vice-versa. Section 7(4) of the IGST Act states that supply of services imported into India would be considered as a supply of services in the course of "inter-State trade or commerce". Thus, an Indian importer could also be considered as an importer of the service of shipping which is liable to IGST on inter-state supply, if the activity falls within the definition of "import of service" for the IGST Act and CGST Act.*

102. *The term 'importer' is not defined in the IGST Act or the CGST Act. Section 2(26) of the Customs Act defines an 'importer' as:*

"(26) "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes [any owner, beneficial owner] or any person holding himself out to be the importer"

The term 'import of goods' is defined in Section 2(10) of the CGST Act as:

"(10) "import of goods" with its grammatical variations and cognate expressions, means bringing goods into India from a place outside India"

"Import of services" is defined in Section 2(11) of the CGST Act as:

"(11) ''import of services" means the supply of any service, where—

(i) the supplier of service is located outside India;

(ii) the recipient of service is located in India; and

(iii) the place of supply of service is in India;"

The conditions for an "import of service" would entail three aspects:

(i) the supplier of service must be located outside India;

(ii) the recipient of the service must be located in India; and

(iii) the place of supply of service ought to be in India.

The respondents have argued that conditions (ii) and (iii) are not satisfied in the case of CIF contracts since the recipient of shipping services would be the foreign exporter and the place of supply would be the place of business of such foreign exporter. However, in interpreting the expressions "recipient" and "place of supply", this Court would have to analyse these terms vis-à-vis the IGST Act and the CGST Act and not exclusively from the provisions of the contract between the foreign exporter and the foreign shipping line.

103. *Chapter V of the IGST Act provides for methodologies to determine the place of supply of goods or services or both. Section 13 of the IGST Act provides the place of supply of services where the location of the supplier or location of recipient is outside India:*

"13. Place of supply of services where location of supplier or location of recipient is outside India—

(1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.

(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:

Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

[...]

(9) ***The place of supply of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of such goods.*** *"*

(emphasis supplied)

Section 13(9) of the IGST Act appears to create a deeming fiction, where in case of supply of services of transportation of goods by a supplier located outside India, the place of supply would be the place of destination of such goods. The supplier, the foreign shipping line, in this case would be a non-taxable person. However, its services in a CIF contract for transport of goods would enter Indian taxable territory as the destination of such goods. The place of supply of shipping service by a foreign shipping line, would thus be India.

104. The respondents argued that since Section 7(1)(b) of the CGST Act does not define "supply" of import of service without consideration, other than the ones specified in Schedule 1, this would be inapplicable to importers with CIF contracts as the consideration is paid by the exporter. Thus, the importer of goods cannot be said to be an importer of shipping service since the latter is not an import of service for a consideration under Section 7(1)(b) of the CGST Act. However, this argument- misses out on some crucial definitions. The term 'supply' has been defined in the IGST Act with reference to the CGST Act. Thus, the three conditions for "import of services" under Section 2(11)(iii) must be understood with reference to the provisions of the CGST and IGST Acts, including the provisions for determination of place of supply under Section 13(9) of the IGST Act. As mentioned previously, *Section 13(9) of the IGST Act creates a deeming fiction of place of supply of transportation services to be in India when the destination of goods is in India. In this case, it is clear the supplier of service— the foreign shipping line— is located outside India; and the place of supply is India. Accordingly, Section 13 of the CGST Act would be applicable to determine the time of such supply.*

105. The respondents have argued that the ocean freight transaction cannot be considered as "supply" since Section 7(1)(b) of the IGST act requires the import of service to be for a "consideration". The definition of "consideration" in Section 2(31) of the CGST Act is instructive:

"(31) "consideration" in relation to the supply of goods or services or both includes—

*(a) **any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person** but shall not include any subsidy given by the Central Government or a State Government;*

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;"

(emphasis supplied)

Thus, Section 2(31) of the CGST Act defines 'consideration' to include payment made or to be made, in money or any *other form, for the inducement of supply of goods or services to be made by the recipient or by any other person. Thus, in the case of goods imported on a CIF basis, the fact that consideration is paid by the foreign exporter to the foreign shipping line would not stand in the way of it being considered as a "supply of service" under Section 7(4) of the IGST Act which is made for a consideration, thereby constituting "supply of service" in the course of inter-state trade or commerce that can be subject to IGST under Section 5(1) of the IGST Act.*

106. At this stage, we note that the respondents have also challenged the impugned levy on the ground that the transaction takes place beyond the territory of India and is thus, extra territorial in nature. Mr Arvind Datar and Mr Harish Salve, learned senior counsel have urged that the service of transportation occurs outside India, that is outside the taxable territory and bears a nexus with India only as the destination of goods is India. However, the submission is that since the import of goods is taxed under Section 5(1) as 'supply of goods', there remains no territorial nexus of the transportation service with the Indian territory. An extension of this argument is that in case Parliament seeks to levy a tax outside its territory, it makes a deeming fiction in the statute and not by way of delegated legislation.

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108. The impugned levy on the supply of transportation service by the shipping line to the foreign exporter to import goods into India has a two-fold connection:

first, the destination of the goods is India and thus, a clear territorial nexus is established with the event occurring outside the territory; and

second, the services are rendered for the benefit of the Indian importer.

Thus, the transaction does have a nexus with the territory of India.

109. As an alternative, the respondents submitted that though the levy may have a nexus with the Indian territory, the levy of tax extra-territorially must be provided by Parliament through statute and not by the Union Government through delegated legislation. We do not find any applicability of this submission to the facts at hand. As stated above, the IGST Act under Section 13(9) recognises the place of supply of services as the destination of goods when the supplier is located outside India. Since the destination of goods is India, the statute itself is broad enough to cover a taxable event that has extra-territorial aspects, which bears a nexus to India.

110. In determining the vires of the impugned notifications, the only question that falls for determination is whether the impor`ter of goods can be considered as the recipient of the service of shipping in CIF contracts.

D.4.(b)

Are importers service recipients under CIF contracts?

111. The impugned notification 8/2017, inter alia, identifies several categories of supply of services such as hotels, restaurants, transportation by rail/road/air and legal and accounting services. The respondents, as importers of goods under CIF transactions, are aggrieved by the following categorization:

"Transport of goods in a vessel including services provided or agreed to be provided by a person located in non-taxable territory to 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 up to the customs station of clearance in India."

The respondents are aggrieved by the fact that this categorization, coupled with impugned notification 10/2017, deems the importer of goods as the recipient of the service of shipping, irrespective of whether the import of goods was on the basis of a CIF or FOB contract.

112. Section 5(3) of the IGST Act enables taxation of the recipients of certain specified categories of supply of services on a reverse charge basis. It is pertinent to note that the tax is payable "by the recipient" of such services, in contradistinction to broad language such as "any person as may be prescribed" which was otherwise used in Section 98(2) of the Finance Act 1994 which taxed services. Section 5(3) states:

"(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both…"

(emphasis supplied)

The term "recipient" of a supply of service has been exhaustively defined by Section 2(93) of the CGST Act:

"(93) "recipient" of supply of goods or services or both, means—

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and

(c) ***where no consideration is payable for the supply of a service, 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 the supply *and shall include an agent* *acting as such on behalf of the recipient in relation to the goods or services or both supplied;"*

(emphasis supplied)

Thus, the language employed in Section 2(93)(a) of the CGST Act clearly stipulates that when a consideration is payable for the supply of services, the recipient would mean the person who is liable to pay that consideration. However, when no consideration is payable for the supply of a service, Section 2(93)(c) states that the recipient shall be the person to whom the service is rendered. Further, Section 2(93) provides that "any reference to a person to whom supply is made shall be construed as a reference to the recipient". Hence, where the statute refers to a person to whom a supply is made, it has to be construed as a reference to the recipient of service.

In a CIF transaction, the foreign exporter contracts with a foreign shipping line. The service of shipping is rendered by the foreign shipping line to the foreign exporter and the consideration is accordingly payable by the latter to the former. The cost of such shipping may form a component of the price that is eventually charged to the importer, based on the negotiated terms. If an FOB contract were to be negotiated, the importer would independently avail of the service of shipping and pay for the consideration. The Union Government has argued that import of goods on a CIF basis would be construed as import of services where sub-clause (c) of Section 2(93) applies to determine the recipient. The respondents have argued that the importer in a CIF contract can be considered as a recipient of the service only in a colloquial sense. The mere destination of the service of shipping would not convert it into a service vis-à-vis the importer without any elements of a contract. Hence, they urge that in the absence of specific deeming provisions in the statute, overarching principles of privity of contract are relevant for interpreting the term "recipient" deployed in Section 5(3) of the IGST.

114. The Union Government has argued that Section 2 of the CGST Act is prefaced with the term "unless the context *otherwise requires", and hence would enable taxation of the importer on a reverse charge basis as the "recipient" of service under Section 2(93). However, this argument overlooks the context of Section 5(3) of the IGST Act which reiterates the taxable person to be the recipient of the service and only enables the Union Government to notify categories of interstate supply of goods and services.*

115. *The Union Government has attempted to make a far-fetched argument that Section 24(iii) of the CGST Act mandating compulsory registration of persons liable to pay tax on a reverse charge basis extends to designating any person to pay the tax on a reverse charge basis, irrespective of their status as either a recipient or a supplier of service. This argument inverts the identification of a category of goods and services under Section 5(3) and the recipient therein, who is then liable to compulsorily register themselves under Section 24(iii) of the CGST Act. The power of the Central Government to designate persons and categories of supply for reverse charge derives from Sections 5(3) and 5(4) of the IGST Act and not Section 24(iii) of the CGST Act which mandates the compulsorily registration as a logical corollary to ensure tax collection. Section 2(98) of the CGST Act, which defines "reverse charge" reiterates that it means the "liability to pay tax by the recipient of supply of goods or services or both instead of the supplier…". It cannot be construed to imply that any taxable person identified for payment of reverse charge would automatically become the recipient of such goods or service. The deeming fiction of treating the importer as a recipient must be found in the IGST Act. As it currently stands, Section 5(3) of the IGST Act enables the delegated legislation to create a deeming fiction on categories of supply of goods/services alone.*

116. *Interpreting the term "by the recipient" vis-à-vis the categories of goods and services identified in Section 5(3) of the IGST Act should necessarily be governed by the principles governing the definition of "recipient" under Section 2(93) of the CGST Act. Contrary to the arguments of the Union Government, such an interpretation would not*

annihilate the mandate of compulsory registration under Section 24(iii) of the CGST Act. It would be applicable to suitably worded provisions in the CGST or IGST Act which permit the Central Government to identify a taxable person for a reverse charge. In any event, it would be applicable to all the recipients liable for reverse charge under Sections 5(3) and 5(4) of the IGST Act. The ineffectiveness of a tax collection mechanism under Section 24(iii) of the CGST Act cannot be argued to obfuscate the concept of a "recipient" of a good or service that is uniformly understood across the IGST Act, CGST Act and tax jurisprudence.

117. The Union Government has argued that the expression "by the recipient" in Section 5(3) of the IGST Act does not impede the authority of the GST Council in making recommendations for issuance of notifications for identifying such persons who shall be governed by reverse charge and once the identification is complete, such taxable person would automatically be interpreted as "the recipient". This argument requires the Court to completely discard the principles of determining the recipient of a service and replace it with whichever taxable person is identified. The appellant may argue for such an interpretation to achieve a favourable outcome in this case. However, in matters of inter-state supply when the supplier and recipient are within the territory of India, this Court would have to follow this artificially bifurcated interpretation which identifies recipients vis-à-vis the nature of service and supply in some cases, and by a simple equation of the identified taxable person in others without considering the literal and contextual definition of recipient. This is against settled rules of interpretation and would be an act of judicial legislation. If Parliament's intention were to designate certain persons for reverse charge, irrespective of them being the recipient of such goods and services, it must make a suitable amendment to confer such power for exercise of delegated legislation.

118. The only argument that supports the case of the appellant is that of Section 13(9) of the IGST Act read together with Section 2(93)(c) of the CGST Act which defines a *"recipient". As noted in Section D.4.(a) above, Section 13(9) of the IGST Act creates the deeming fiction of place of supply of service to be the destination of goods when they are transported by means other than mail or courier. No specific exemptions for importers have been carved out. This Court is inclined to accept this reasoning and read it into the definition of recipient in Section 2(93) of the CGST Act which is as follows:*

"(93) "recipient" of supply of goods or services or both, means—

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and

(c) where no consideration is payable for the supply of a service, 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 the supply** and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;"*

(emphasis supplied)

Since a reference to a person to whom a supply is made, is a reference to the recipient, the place of supply is critical. By virtue of Section 13(9) of the IGST Act, the place of supply is the destination of goods. The time of supply is then PART D 131 determined through the provisions of Section 13 of the CGST Act. Sections 2(14) and 2(15) of the IGST Act also define the location of the recipient and supplier of services with respect to the physical location where the supply of services is made or received.

"(14) —location of the recipient of services means,—

*(a) where a **supply is received** at a place of business for which the registration has been obtained, the location of such place of business;*

*(b) where a **supply is received** at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;*

*(c) where a **supply is received** at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and*

(d) in absence of such places, the location of the usual place of residence of the recipient;

(15) location of the supplier of services means,—

*(a) where a **supply is made** from a place of business for which the registration has been obtained, the location of such place of business;*

*(b) where a **supply is made** from a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;*

*(c) where a **supply is made** from more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the provision of the supply; and*

(d) in absence of such places, the location of the usual place of residence of the supplier;"

(emphasis supplied)

In such a scenario, when the place of supply of services is deemed to be the destination of goods under Section 13(9) of the IGST Act, the supply of services would necessarily be *"made" to the Indian importer, who would then be considered as a "recipient" under the definition of Section 2(93)(c) of the CGST Act. The supply can thus be construed as being "made" to the Indian importer who becomes the recipient under Section 2(93)(c) of the CGST Act.*

119. This conclusion comports with the philosophy of the GST to be a consumption and destinated based tax. The services of shipping are imported into India for the purpose of consumption that is routed through the import of goods. Although the consideration for shipping is payable by the foreign supplier to the foreign shipping line in CIF contracts, the price is consequently factored into the price of the shipment. The ultimate benefactor of the shipping service is also the importer in India who will finally receive the goods at a destination which is within the taxable territory of India. Thus, the meaning of the term "recipient" in the IGST Act will have to be understood within the context laid down in the taxing statute (IGST and CGST Act) and not by a strict application of commercial principles.

120. Some of the respondents have argued that the possibility of two different recipients of services would create absurdities since whether a supply of service is an inter-state supply under Section 7(3) or intra-state supply under Section 8(2) of IGST Act depends on the location of the supplier and the place of supply, which in most cases is the location of the recipient of service. Since there can effectively be two recipients on a reading of Section 2(93)(a) and (c) of the CGST Act, the respondents argue that the transaction may simultaneously become an inter-state or intra-state supply. This could also mean that two recipients can claim ITC. However, this argument is inapplicable to the case at hand since Sections 7(3) and 8(2) of the IGST Act do not conflate the concept of imports. Section 8(2) deals with a scenario where the location of the supplier and place of supply are within the same State/Union Territory in India. This is inapplicable to determining imports where the supplier is located outside India. Similarly, Section 7(3) deals with inter-state supply within the territory of India. Further, both *these sections are subject to the provisions of Section 12 of the IGST Act where both- the supplier and recipient are located in India. Section 12 of the IGST Act does not create the deeming fiction under Section 13(9) of the IGST Act which is applicable only when the supplier is located outside India. The applicable section in this case would be Section 7(4) of the IGST Act which clearly stipulates that "Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce". Thus, no absurdity is created by the deeming fiction argued by the Union Government. In no scenario would the foreign exporter be claiming ITC in India.*

121. The respondents' arguments of identification of two recipients do not have any bearing on the determination of the present dispute as the foreign exporter is not sought to be taxed in this case. In the digital age, the concepts of supplier and recipient of service have also been altered and are not necessarily understood as two parties with a direct chain of supply. The IGST Act tends to create several such deeming fictions to adequately capture such complexities. For instance, Section 5(5) of the IGST Act taxes the electronic commerce operator as the supplier of service in spite of it only being a conduit, in the commercial sense. These deeming fictions need to be respected for the purpose of the statute, as long as they have constitutional and parliamentary sanction. Similarly, Section 2(14)(c) of the IGST Act recognizes the possibility of the supply being received in more than one establishment:

"(14) "location of the recipient of services" means,—

(a) where a supply is received at a place of business for which the registration has been obtained, the location of such place of business;

(b) where a supply is received at a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), the location of such fixed establishment;

(c) where a supply is received at more than one establishment, whether the place of business or fixed establishment, the location of the establishment most directly concerned with the receipt of the supply; and

(d) in absence of such places, the location of the usual place of residence of the recipient;"

122. Section 13 of the IGST Act is critical to effectively meet the aim of the GST statute to tax the destination of supplies, as opposed to their origins. The deeming fiction therein is critical to interpret the charging provision under the IGST Act (Section 5). The respondents' argument for the irrelevance of determining the beneficiary of the supply or who has received the supply in view of the definition of 'recipient' of Section 2(93) of the CGST Act mis-reads Section 2(93) which identifies the recipient, inter alia, on the basis of the person to whom "supply is made" i.e. the place of supply.

123. GST laws mark a departure from the previous policy of taxing sale/consignments and focuses on the taxing of supplies. The concept of a supply-centric and destination-based tax runs through the scheme of the statutory provisions and the proposals issued by the GST Council. Thus, an amendment to the Constitution was introduced in the form of Article 366(12-A) to create a tax on the supply of goods, or services, or both. In the commercial reality of the times, the conceptual lines between goods and services wear thin. Hence, the focus is on the taxation of supply, as opposed to the creation of neat compartments between goods and services. Section 7(1)(c) of the CGST Act specifically characterizes import of services for a consideration to constitute "supply". The only question that falls for determination is whether the imports of goods on a CIF basis would also constitute import of shipping services, by way of deeming fiction. We have held that Section 5(3) of the IGST does not confer the powers on the Central Government to create a deeming fiction vis-à-vis who constitutes the recipient. Section 5(3) merely enables the Central Government to identify certain categories of goods and services, where the recipient of such services is subject *to a reverse charge, as opposed to the usual mode of taxation where the supplier of the service is charged on a forward charge basis. However, Section 13(9) of the IGST Act read with Section 2(93)(c) of the CGST Act inherently create a deeming fiction of the importer of goods to be the recipient of shipping service.*

D.5

Applicability of Section 5(4) of IGST Act 124

By way of an arguendo, the Union Government has argued that if the importers do not qualify as service recipients, the impugned notifications would derive their validity from Section 5(4) of the IGST Act. The unamended Section 5(4) of the IGST Act stated as follows:

*"(4) **The integrated tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient** and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both."*

(emphasis supplied)

On 29 August 2018, Section 5(4) was amended by Amending Act 32 of 2018, to state the following:

*"(4) **The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both,** and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both."*

(emphasis supplied)

The amended Section 5(4) came into effect on 1 February 2019 [Notification No. GSR 67(E), dated 29th February, 2019]. Amending Act 32 of 2018 enables the Central Government to create a deeming fiction of declaring a class of registered persons "as the recipient" of the supply of taxable goods or service. In deploying the language "as the", and not "by the" recipient, the applicability of the definition of recipient vis-à-vis Section 2(93) of the CGST Act is no longer necessary for determining the validity of such a notification. The effect of the Amending Act 32 of 2018 has been as follows—

(i) the powers of the Central Government to specify through a notification has been clarified; and

(ii) the power to specify a class of registered persons as the recipient has been recognised.

125. *The Union Government has argued that Notifications 8/2017 and 10/2017 dated 28 June 2017 issued under Section 5(3) may also be read as issued under Section 5(4) of the IGST, in which case, the importers would be liable to tax with effect from 1 February 2019 though exempted for the period 13 October 2017 – 31 January 2019.*

126. *The respondents have argued that the amended and unamended Section 5(4) do not save the impugned notifications since they still make the reference to the term "recipient". However, the respondents crucially miss out that Section 5(4) employs the language "as the recipient", in contradistinction to Section 5(3) of the IGST Act which uses "by the recipient". We have held that recipient includes the importer in Part D above. Further, Section 5(4) clarifies that it may designate a class of registered persons as the recipient, thereby broadening the scope of Section 2(93) of the CGST Act, which is anyway an inclusive definition since Section 2 is prefaced with "unless the context otherwise requires".*

***

129. *The impugned notifications were issued with the intention of creating a level playing field between the Indian and foreign shipping lines. In the Eighteenth GST Council meeting held on 31 June 2017, the agenda of taxing importers on a reverse charge basis was discussed:*

“ “Para 6.7.1: Agenda Item 3(v)—

Value for the purpose of levy of GST on transportation of goods by a vessel from a place outside India up to the customs station in India

6.7.1. In the existing Service Tax Law, with a view to provide level playing field to the Indian shipping companies, it has been provided that in cases where the goods are imported by an importer in India on CIF (Cost, Insurance and Freight) basis and the service of transportation of goods by a vessel from a place outside India up to the customs station in India is provided by a person located in non-taxable territory (a foreign shipping line) to a person located in non-taxable territory (overseas supplier/ exporter of goods), the importer in India shall be liable to pay Service Tax on freight. In view of the representations that where the importer purchases goods on CIF basis, he may not have the invoice issued by the shipping line for freight and may not know the amount of freight charged by the foreign shipping line from the foreign supplier; it was stipulated in the Service Tax Rules that in such cases the importer shall have the option to pay an amount calculated at the rate of 1.4% of the CIF value of imported goods. This provision was stipulated on the basis that freight roughly constitutes 10% of the CJF value of goods on an average. Under GST too, it was decided that the liability to pay GST on such transportation service provided by a foreign shipping line to a foreign supplier shall be of the importer in India and the notifications are being issued accordingly. It is proposed that the similar provision deeming value of such service at 10% of the CIF value may be incorporated in the IGST notification. Considering the nature of the service, this provision is not required in the CGST, SGST or UTGST notifications. The Council approved the proposal.

[….]

8(v) .....in respect of agenda item 3 the Council approved to incorporate a provision in the IGST notification that in cases where the goods are imported by an importer in India on CIF basis and the service of transportation of goods by a vessel from a place outside India up to the customs station in India is provided by a person located in non-taxable territory (a foreign shipping line) to a person located in non-taxable territory (overseas supplier/exporter of goods) and in case the importer did not know the amount of freight charged by the foreign shipping line from the foreign supplier the deemed value of such service shall be 10% of the CIF value."

130. The impugned notifications were issued after the GST Council took note of the fact that since transport of imported goods by Indian shipping lines to India is not treated as export of service, the Indian shipping lines pay IGST on the same on a forward charge basis. On the other hand, on the same transportation service, the foreign shipping lines are not required to pay tax as they are not taxable persons in India. Therefore, to provide a level playing field to Indian shipping lines, the importer in India has been made liable to pay IGST on transportation of goods by foreign shipping lines on a reverse charge basis. If Indian shipping lines continue to be taxed and not their competitors, namely, the foreign shipping lines, the margins arising out of taxation from GST would not create a level playing field and drive the Indian shipping lines out of business.

131. It was contended by the respondents that instead of course correcting the input tax mechanism, the Union Government has chosen to tax the Indian importer on reverse charge. However, this Court is not in a position to adjudicate the desirability of a taxation scheme, as long as it is legally issued. Commenting on the efficacy of the tax intervention with the desired goals would be delving into the arena of policy.

D.6

Composite Supply and Issues of Double Taxation

132. *Having examined whether the impugned levy is permissible under Section 5 of the IGST Act, we shall now advert to the arguments raised by the respondents regarding the impugned notifications amounting to double taxation. The respondents have submitted before this Court that the transaction between the foreign exporter and the respondents is already subject to IGST under Sections 5 of the IGST Act read with Sections 3(7) and 3(8) of the Customs Tariff Act as "supply of goods". An additional levy of IGST on imported goods, that is on the supply of transportation service, by designating the importer as the recipient would amount to double taxation.*

133. *The transaction at hand involves three parties- the foreign exporter, the Indian importer and the shipping line. The first leg of the transaction involves a CIF contract, wherein the foreign exporter sells the goods to the Indian importer and the cost of insurance and freight are the responsibility of the foreign exporter. In other words, the foreign exporter is liable to ensure that the goods reach their place of destination and the Indian importer pays the transaction value to the exporter. The second leg of the transaction involves an agreement between the foreign exporter and the shipping line (whether foreign or Indian) for providing services for transport of goods to the destination, i.e., in the territory of India.*

134. *On the first leg of the transaction, between the foreign exporter and the Indian importer, the latter is liable to pay IGST on the transaction value of goods under Section 5(1) of the IGST Act read with Section 3(7) and 3(8) of the Customs Tariff Act. Although this transaction involves the provision of services such as insurance and freight it falls under the ambit of 'composite supply'. We note from the written submissions of the Union that the ASG has fairly submitted that this transaction would include value elements of freight and insurance, and yet the IGST is levied as a tax on supply of goods only. Such transactions are termed as "composite supply" under the CGST Act.*

135. Section 2(30) of the CGST Act defines "composite supply" as

> *"(30) "composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;*
>
> *Illustration.—*
>
> *Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;"*

136. Section 2(30) of the CGST Act clearly provides that a transaction may have two or more taxable supplies, where one of them is a principal supply. The illustration to Section 2(30) further clarifies that a transaction such as the CIF contract for supply of goods reflects a composite supply under the CGST Act, where the principal supply is the supply of goods.

137. The tax liability on composite supply is provided under Section 8 of the CGST Act.

> *"8. Tax liability on composite and mixed supplies.—*
>
> *The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:—*
>
> *(a)* ***a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply****; and*
>
> *(b) a mixed supply comprising two or more supplies shall be treated as a supply of that*

particular supply which attracts the highest rate of tax."

(emphasis supplied)

Section 8 of the CGST Act provides that the tax liability on a composite supply which comprises of two or more supplies, will only be levied on the 'principal supply'. In a CIF transaction, the principal supply, according to Section 2(30), is supply of goods. Thus, the tax would be levied as if the transaction was one of supply of goods.

138. Section 20 of the IGST Act provides that the provisions relating to 'composite supply' under the CGST Act would apply mutatis mutandis under the IGST Act. By extension, the IGST in a transaction of composite supply would be levied on the principal supply of goods.

*****

142. In the present case, the question is whether the imposition of IGST on supply of services can be sustained when there is a concomitant imposition of IGST on supply of goods. However, we must first analyse the context in which the IGST is levied on the import of goods in this case.

143. The provisions of composite supply in the CGST Act (and the IGST Act) play a specific role in the levy of GST. The idea of introducing 'composite supply' was to ensure that various elements of a transaction are not dissected and the levy is imposed on the bundle of supplies altogether. This finds specific mention in the illustration provided under Section 2(30) of CGST Act, where the principal supply is that of goods. Thus, the intent of the Parliament was that a transaction which includes different aspects of supply of goods or services and which are naturally bundled together, must be taxed as a composite supply.

144. It is true that in this case, the first leg of the transaction between the foreign exporter and the Indian importer is a composite supply, while the second leg, between the foreign exporter and the shipping line may, from a perspective, be regarded as a standalone transaction. Both of them are *independent transactions and ordinarily, the IGST could be levied on both sets of transactions— one as supply of goods (under the ambit of composite supply) and the other as supply of services. However, the impugned notifications seek to tax the importer as the deemed recipient of the supply of service. The ASG has advanced an interpretation of Sections 5(3) and 5(4) of the IGST Act, read with Section 2(93) of the CGST Act to contend that the importer can be classified as the 'recipient' of the services. On this interpretation, we have upheld the validity of the impugned notifications under Sections 5(3) and 5(4) of the IGST Act in Section D.2-D.5 of this judgment. The respondents as a matter of fact urged that*

(i) the Indian importer is not privy to the contract between the foreign exporter and the foreign shipping line;

(ii) the Indian importer does not pay consideration to the foreign shipping line; and

(iii) the Indian importer does not receive any services from the foreign shipping line since the transportation services are provided by the foreign shipping line to the foreign exporter.

The ASG, while advancing arguments on behalf of the Union Government, has opposed these submissions. The Union Government has urged that this Court must look beyond the text of the contract between the foreign shipping line and the foreign exporter to identify the Indian importer as the recipient of the services. This Court has upheld the validity of the impugned notifications on this ground. The Union Government is contradicting the main plank of its submission now by contending that the two legs of the transaction are separate standalone agreements. That would imply, that while on the one hand the Union Government seeks to levy tax on the Indian importer by going beyond the text of the contract between the foreign shipping line and foreign exporter (for the purpose of identifying the Indian importer as the recipient of services), on the other hand, as far as the submissions on composite *supply are concerned, the Union Government urges that the contracts must be viewed as separate transactions, operating in silos. We are unable to subscribe to this view. The Union of India cannot be heard to urge arguments of convenience— treating the two legs of the transaction as connected when it seeks to identify the Indian importer as a recipient of services while on the other hand, treating the two legs of the transaction as independent when it seeks to tide over the statutory provisions governing composite supply.*

145. This Court is bound by the confines of the IGST and CGST Act to determine if this is a composite supply. It would not be permissible to ignore the text of Section 8 of the CGST Act and treat the two transactions as standalone agreements. In a CIF contract, the supply of goods is accompanied by the supply of services of transportation and insurance, the responsibility for which lies on the seller (the foreign exporter in this case). The supply of service of transportation by the foreign shipper forms a part of the bundle of supplies between the foreign exporter and the Indian importer, on which the IGST is payable under Section 5(1) of the IGST Act read with Section 20 of the IGST Act, Section 8 and Section 2(30) of the CGST Act. To levy the IGST on the supply of the service component of the transaction would contradict the principle enshrined in Section 8 and be in violation of the scheme of the GST legislation. Based on this reason, we are of the opinion that while the impugned notifications are validly issued under Sections 5(3) and 5(4) of the IGST Act, it would be in violation of Section 8 of the CGST Act and the overall scheme of the GST legislation. As noted earlier, under Section 7(3) of the CGST Act, the Central Government has the power to notify an import of goods as an import of services and vice-versa:

"7. Scope of supply—

[…]

(3) Subject to the provisions of [sub-sections (1), (1A) and (2)] 16, the Government may, on the

recommendations of the Council, specify, by notification, the transactions that are to be treated as—

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods."

No such power can be noticed with respect to interpreting a composite supply of goods and services as two segregable supply of goods and supply of services.

146. The High Court in the impugned judgment has observed that:

"What has led to the present day problems in the implementation of the GST:

132. The GST is implemented by subsuming various indirect taxes. ***The difficulty which is being experienced today in proper implementation of the GST is because of the erroneous misconception of law, or rather, erroneous assumption on the part of the delegated legislation that service tax is an independent levy as it was prior to the GST and it go vivisect the transaction of supply to levy more taxes on certain components completely overlooking or forgetting the basic concept of composite supply introduced in the GST legislation and the very idea of levying the GST.*** *Prima facie, it appears that while issuing the impugned notification, the delegated legislature had in mind the provision of the Finance Act, 1994, rather than keeping in mind the object of bringing the GST by making the Constitutional (101st) Amendment Act, 2016 to merge all taxes levied on the goods and services to one tax known as the GST.*

133. It appears that despite having levied and collected the integrated tax under the IGST Act, 2017, on import of goods on the entire value which includes the Ocean Freight through the impugned *notifications, once again the integrated tax is being levied under an erroneous misconception of law that separate tax can be levied on the services components (freight), which is otherwise impermissible under the scheme of the GST legislation made under the CA Act, 2016.*

134. All the learned senior counsel are right in their submission that if such an erroneous impression is not corrected and if such a trend continues, then in future even the other components of supply of goods, such as, insurance, packaging, loading/unloading, labour, etc. may also be artificially vivisected by the delegated legislation to once again levy the GST on the supply on which the tax is already collected.

[...]

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."

(emphasis supplied)

147. We are in agreement with the High Court to the extent that a tax on the supply of a service, which has already been included by the legislation as a tax on the composite supply of goods, cannot be allowed.

E. Conclusion

148. Based on the above discussion, we have reached the following conclusion:

(i) The recommendations of the GST Council are not binding on the Union and States for the following reasons:

(a) 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;

(b) *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; and*

(c) *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;*

(ii) *On a conjoint reading of Sections 2(11) and 13(9) of the IGST Act, read with Section 2(93) of the CGST*

Act, the import of goods by a CIF contract constitutes an "inter-state" supply which can be subject to IGST where the importer of such goods would be the recipient of shipping service;

(iii) The IGST Act and the CGST Act define reverse charge and prescribe the entity that is to be taxed for these purposes. The specification of the recipient— in this case the importer— by Notification 10/2017 is only clarificatory. The Government by notification did not specify a taxable person different from the recipient prescribed in Section 5(3) of the IGST Act for the purposes of reverse charge;

(iv) 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;

(v) 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."

7. Mr. Prasanna Kumar Panda, learned Senior Standing Counsel, CGST & Central Excise, has conceded to the aforesaid legal position enunciated by the Hon'ble Supreme Court and submitted that the same is applicable to the present case.

8. In view of authoritative pronouncement of the Hon'ble Supreme Court confirming the decision of the Hon'ble Gujarat High Courrt rendered in the case of *Mohit Minerals Pvt. Ltd. Vrs. Union of India, (2020) 74 GSTR 134 (Guj) = (2020) 33 GSTL 321 (Guj) =*

2020 SCC OnLine Guj 49 as culled out above, there remains nothing for adjudication in the instant writ petition and, therefore, the writ petition is bound to be allowed in terms of *Union of India Vrs. Mohit Minerals Pvt. Ltd., 2022 SCC OnLine 657.*

9. In consequence, the petitioner is at liberty to make appropriate application before the competent Proper Officer in order to raise claim for refund in terms of Order dated 20.02.2019 to the effect that *"any payment made by the petitioner, pursuant to the impugned notification, will be subject to result of the writ petition"* as directed by this Court in the instant writ petition. The Proper Officer shall quantify the amount in accordance with law particularly taking into account the legal proposition as propounded in *Union of India Vrs. Mohit Minerals Pvt. Ltd., 2022 SCC OnLine 657.* The Proper Officer may examine the records of the petitioner and take appropriate decision within a period of three months from the date of production of the certified copy of this order.

9.1. With the aforesaid observation and direction, the writ petition stands disposed of.

(JASWANT SINGH)
JUDGE

(M.S. RAMAN)
JUDGE

AKS High Court of Orissa, Cuttack
August 01, 2022