Lakshmikumaran & Sridharan attorneys

L&S Update

an e-update to clients from
Lakshmikumaran & **Sridharan**

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Recent High Court decisions in respect of ocean freight

- **Notifications imposing GST/Service tax on ocean freight in specific case declared to be unconstitutional**

Mohit Minerals Pvt. Ltd. v. UOI
2020-VIL-36-GUJ (dated 23-01-2020)

Ratio of the decision:

- The Gujarat High Court in the aforesaid case has held that no IGST is leviable 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 up to the customs station of clearance in India.

- Entry 9(ii) of Notification No. 8/2017 (I.T.R.) and Entry 10 of Notification No. 10/2017 (I.T.R.) declared as *ultra vires* the IGST Act due to lack of legislative competency and accordingly held to be unconstitutional.

Major take-aways from the decision:

- Under Section 5(3) of the IGST Act, the person liable to pay tax can only be “the recipient” of supply. The term “recipient” has to be read in the sense in which it has been defined in the CGST Act. Importer cannot be said to be the recipient of the ocean freight service in the instant case since the importer has neither availed the service of transportation of goods nor he is liable to pay consideration for such service. The foreign shipping line is engaged by foreign exporter.

- The importer can not be made liable to pay tax on a mere premise that the importer is directly or indirectly recipient of service.

- It is neither an inter-state supply under Section 7 nor an intra-state supply under Section 8 of the IGST Act as follows:
  - For Section 8, both the location of the supplier and place of supply should be in India. The same is not applicable since location of foreign shipping line is outside India.
  - Sub-sections (1) and (2) of Section 7 are dealing with goods and not relevant.
  - For Section 7(3), both the location of the supplier and place of supply should be in India. The same is not applicable since location of foreign shipping line is outside India.
  - Section 7(4) i.e. import of service, is not applicable since the location of recipient of service, i.e., the foreign exporter being outside India.
  - Section 7(5)(a) is not applicable since location of foreign shipping line is outside India.
  - Section 7(5)(b) pertaining to SEZ is also not applicable.

- A supply where both provider and recipient are outside India can be made leviable to tax only under Section 7(5)(c) i.e. residuary clause, provided that "supply is in taxable territory". The same cannot be equated with "place of supply". Supply in the taxable territory shall mean a supply, all the aspects or majority of aspects, of which takes place in taxable territory. Thus, e.g., the provision may cover cases such as a foreign tour operator conducting a tour in India for a foreign tourist. Mere fact that transportation of goods terminates in India, will not make such supply of transportation of goods as taking place in India.
- Thus, no tax can be levied and collected from importer/petitioner.
- In the instant case, the freight has already suffered IGST as a part of value of goods imported. Dual levy of IGST cannot be imposed treating it as supply of service. Double taxation, through delegated legislation, where statute does not provide, is not permissible.

SAL Steel Ltd. Vs. UOI (Gujarat High Court)
Special Civil Application No. 20785/2018, dated 06-09-2019

Ratio of the decision:

- The Gujarat High Court held that no service tax is leviable 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 up to the customs station of clearance in India.

- Notification No. 15/2017-ST and Notification No. 16/2017-ST regarding Rule 2(1)(d)(EEC) and Rule 6(7CA) of the Service Tax Rules and inserting Explanation-V to reverse charge Notification No. 30/2012-ST was struck down as *ultra vires* Sections 64, 66B, 67 and 94 of the Finance Act, 1994.

Major take-aways from the decision:

- Service covering sea transportation from place outside India up to Indian Port, is in the nature of an extraterritorial event. Section 64, 66B and section 94 of Finance Act, 1994 do not permit nor empower Government to collect service tax on such events.
- The impugned Rules and Notifications seek to levy and collect service tax on services rendered and consumed outside India and therefore, *ultra-vires* the provisions of the Act.
- Section 68 read with Section 94 do not permit Government to make rules for recovering service tax from a third party who is neither service provider nor service receiver.
- Charging section has to be strictly interpreted. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all. It cannot be said that importers indirectly receives transportation services.
- No machinery provision for valuation of service, hence Rules and Notifications are unenforceable.

Open Issues:

- Whether refund is available in respect of Service Tax or GST already paid under RCM where credit was not eligible?

- Whether ongoing demands by department for service tax or GST for non-payment of tax on ocean freight under RCM are liable to be dropped?

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