GOODS AND SERVICES TAX ON OCEAN FREIGHT: DELINEATING THE DICHOTOMY OF DUAL LEVY

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ABSTRACT

The service tax regime has had its fair share of the trickledown effect in Goods and Services Tax (GST) laws. One of them, which has considerably been in question since its inception is, the levy of service tax on ocean freight in case goods are imported on a Cost Insurance Freight (CIF) basis. In a CIF contract, the freight component is included in the value of imported goods. However, where a foreign shipping line is engaged by the foreign supplier, the said amount is paid by the foreign supplier outside the country. Through notifications and amendments, the revenue department brought such transactions under the purview of service tax by shifting the liability to pay tax on such ocean freight to the importer. This paper is an attempt to decipher the existing dichotomy in the levy of tax on ocean freight as addressed by the Gujarat High Court in the year 2020. Part I of this paper examines the change in the taxability of ocean freight in the service tax regime and its spill-over effects on the GST regime. Part II discusses the recent landmark judgments of the Gujarat High Court in 2019-2020, holding the levy on ocean freight as unconstitutional and ultra-vires the IGST Act, 2017 as well as Finance Act, 1994. Part III suggests a way forward by analysing the effect and implications of these judgments on the importers, among other stakeholders. Part IV throws light upon other such levies that have created an incidence of unnecessary tax burden through a legal fiction. Finally, Part V concludes by summarizing the views of the authors on the obvious dichotomy of dual levies.

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In 2017, to improve the ease of doing business in India, the Government of India subsumed numerous State and Central taxes into the Goods and Services Tax (GST). This "One-Nation-One Tax" policy was the largest tax reform since independence, and therefore, was bound to be disruptive. At the same time, the promise of a simpler and more tax payer-friendly reform instilled hope. The Government has, since then, walked a tight rope in terms of implementation of the GST in a manner that meets the expectations of the consumer, the industry, and the Government itself.

I. EVOLUTION OF LEVY FROM SERVICE TAX TO GST

Service Tax was implemented in India for the first time through Chapter V of the Finance Act, 1994 (hereinafter 'Finance Act'). Since July 2012, service tax was levied on all services provided by a taxable person in the taxable territory of India at the rate of 14%. However, certain services, listed in Section 66D of the Finance Act, were outside the ambit of Service Tax. Section 66D(p)(ii) exempted services provided for transportation of goods by an aircraft or vessel from a place outside India up to the customs station of clearance in India. Therefore, this provision exempted ocean freight from the levy of Service Tax.

At this juncture, it is imperative to note the common shipping terms associated with ocean freight. In international trade, the transport of goods takes place as per the INCOTERMS. INCOTERMS are standardized shipping terms, defined by International Chamber of Commerce that apportions the costs and liabilities of international shipping between buyers and sellers.[1] Two of the most commonly used

[1] *Incoterm*, BLACK'S LAW DICTIONARY (8th ed. 2015).

INCOTERMS are CIF and FOB. While in a CIF contract, the seller is obligated to contract and arrange for transportation of goods, in a FOB contract, the buyer is obligated to arrange for his own transportation of goods.

With effect from 1st June 2016, Section 66D(p)(ii) of the Finance Act was omitted *vide* Finance Act, 2016. As a result, service of ocean freight was no longer exempt from service tax. However, the Mega Exemption Notification in Entry 34 exempted services provided by a person in a non-taxable territory to a person in the non-taxable territory.[2]

This entry created a peculiar situation. The table below explores the taxability in various cases:

Service Provider	**Service Recipient**	**Taxability**
Indian Shipper	Indian Importer (i.e. FOB Contract)	Service Provider in Forward Charge
Indian Shipper	Exporter in non-taxable territory (i.e. CIF Contract)	Service Provider in Forward Charge
Foreign Shipper	Indian Importer (i.e. FOB Contract)	Indian Importer under Reverse Charge Mechanism
Foreign Shipper	Exporter in non-taxable territory (i.e. CIF Contract)	Exempt as per Mega Exemption Notification

[2] Notification No. 25/2012-ST (June 20, 2012).

Due to this entry, ocean freight in cases on import of goods on CIF basis, where the shipper is located in the non-taxable territory was exempt. However, FOB contracts were leviable with service tax. To overcome this inequality, the Government *vide* notification[3] amended Entry 34 of the Mega Exemption Notification and deleted the exemption. However, as the provider and the recipient of service are both located outside India, the liability to pay service tax was upon the master of the vessel or its agent in India as per Rule 2(1)(d)(EEC) Service Tax Rules, 1994.

On 13th April, 2017, the Government issued two notifications.[4] First notification amended the Reverse Charge Notification[5] by substituting Explanation-V, which states that it is the importer, as defined under Section 2(26) of the Customs Act, 1962, who is liable to pay service tax for service of transportation of goods from outside India to India provided by person in a non-taxable territory to a person in a non-taxable territory. Second notification amended Rule 2(1)(d)(EEC) and imposed liability on the importer as defined under the Customs Act, 1962 to pay tax. Furthermore, Rule 6(7CA) of the Service Tax Rules was amended to provide the option to pay service tax on ocean freight at 1.4% of the CIF value of imported goods. Thus, the added effect of these notifications was that in case of CIF contracts for import, the importer was liable to pay Service Tax on ocean freight.

On 1st July, 2017, India saw a regime shift to GST. Under the new Central Goods and Services Tax Act, 2017 (hereinafter 'CGST Act') and

[3] Notification No. 1/2017-ST (Jan. 12, 2017).
[4] Notification No. 15/2017-ST (Apr. 13, 2017); Notification No. 16/2017-ST (Apr. 13, 2017).
[5] Notification No. 30/2012-ST (June 20, 2012)

the Integrated Goods and Services Tax Act, 2017 (hereinafter 'IGST Act') ocean freight remained taxable. On 28th June, 2017, the Government notified that ocean freight service is taxable at the rate of 5%, including services provided or agreed to be provided by a person located in a non-taxable territory to a person located in a non-taxable territory.[6] Further, the importer under Section 2(26) of the Customs Act, 1962 was made liable to pay IGST on ocean freight.[7]

A table delineating the evolution of the levy is mentioned below:

UPTO 21.01.2017					
Type	Person Paying Freight	Location of Shipper	Location of person paying freight	Tx./Non Tx.	Person liable to pay Service Tax
FOB	Importer	India	India	Taxable	Shipper
FOB	Importer	Outside India	India	Taxable	Importer
CNF/CIF	Exporter	India	Outside India	Taxable	Shipper
CNF/CIF	Exporter	Outside India	Outside India	Non Taxable	N/a
From 22.02.2017 to 22.04.2017					

[6] Notification No. 8/2017-Integrated Tax (Rate) (June 28, 2017), entry 9.
[7] Notification No. 10/2017-Integrated Tax (Rate) (June 28, 2017).

Type	Person Paying Freight	Location of Shipper	Location of person paying freight	Tx./Non Tx.	Person liable to pay Service Tax
FOB	Importer	India	India	Taxable	Shipper
FOB	Importer	Outside India	India	Taxable	Importer
CNF/CIF	Exporter	India	Outside India	Taxable	Shipper
CNF/CIF	Exporter	Outside India	Outside India	Taxable	Agent of Shipper
From 23.04.2017					
FOB	Importer	India	India	Taxable	Shipper
FOB	Importer	Outside India	India	Taxable	Importer
CNF/CIF	Exporter	India	Outside India	Taxable	Shipper
CNF/CIF	Exporter	Outside India	Outside India	Taxable	Importer

Such a mechanism of levy of service tax and GST on ocean freight caused various problems within the industry. As a result, two petitions

were filed in the Gujarat High Court. This paper shall deliberate upon the judgements in the cases of *Sal Steel*[8] and *Mohit Minerals*[9] in Part II.

II. ANALYSIS OF THE HIGH COURT JUDGEMENTS

The Gujarat High Court first faced the issue of tax on ocean freight in the case of *Sal Steel* in which the levy was challenged on the ground that the transaction between the exporter and carrier in a non-taxable territory cannot be taxed by the Central Government and further, no machinery or mechanism had been provided in the Finance Act and the rules made thereunder for the valuation of service.

The court in its decision held that the levy is *ultra vires* on three major grounds:

A. No Power to Tax Extra-Territorial Events

The court observed the scheme of Chapter V of the Finance Act and stated that the Finance Act does not empower the Central Government to levy Service Tax on extra-territorial events.

Service is defined to be any activity carried out by a person for another for a consideration.[10] This indicates that there are only two parties that are involved in a transaction, viz., the service provider and the service recipient. No third party levy is envisaged in the meaning of 'service'.

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[8] SAL Steel v. Union of India, Spl. Civ. App. No. 20785/2018 (Guj. H.C.).
[9] Mohit Minerals v. Union of India, 2020 [33] G.S.T.L. 321 (Guj. H.C.).
[10] Finance Act, 1944, Acts of Parliament, No. 32, 1944, § 65B(44) [hereinafter **Finance Act, 1994**].

Further, service tax is levied on the value of services provided or agreed to be provided in the taxable territory.[11] 'Taxable Territory' means the whole of India, except the state of Jammu and Kashmir.[12]

Thus, it seems to be the legislative intention that the application of provisions of service tax shall be limited to the taxable territory of India. In addition, a Constitution Bench of the Supreme Court in *GVK Industries Ltd. v. Income Tax Officer*[13] held that the executive having delegated powers under any Act of the Parliament does not possess any jurisdiction to make rules beyond the scope of the powers envisaged within the Act. Furthermore, section 65B(44) only contemplates service between two parties, i.e., to be flowing from a provider to a recipient for a consideration.

B. Strict Interpretation of the Charging Section

As the charging provision, Section 66, states that service tax shall be levied on the value of taxable services, the Indian importer cannot be charged with service tax because he is importing goods and not services. The court observed that the Indian importer who is importing goods on CIF basis pays a lump-sum amount for the goods. Further, as the exporter is obliged to arrange and contract for transport of goods, the importer is simply a recipient of goods and not services.

The charging provision, section 66, needs to be interpreted strictly. The court observed that, unless a person is brought within the

[11] *Id.*, § 66B.
[12] Finance Act, 1994, §§ 65B(52) and 64(1).
[13] GVK Industries ltd. v. Income Tax Officer, 2017 (48) STR 177 (SC).

ambit of the charging section in clear terms, no tax liability can be affixed on him.[14]

C. No Machinery for Valuation

Lastly, the court stated that there is no valid mechanism for the valuation of the service. To overcome this infirmity, the Central Government inserted Rule 6(7CA) which provided an option of valuation of the service of transportation of goods at 1.4% CIF value. It was observed that Section 94 of the Finance Act does not grant the Government the power to make rules for valuation of services, and hence, Rule 6(7CA) is *ultra vires* due to excessive delegation of legislation.

As a result the High Court held Notification No. 15/2017-ST and Notification No. 16/2017-ST as *ultra vires* Sections 64, 66B, 67 and 94 of the Finance Act.

In January 2020, the Gujarat High Court gave the decision in *Mohit Minerals v. Union of India*,[15] concerning levy of IGST on ocean freight. Government notified that IGST at the rate of 5% is leviable on ocean freight[16] and is payable by the importer in reverse charge mechanism.[17] The court after a detailed deliberation held that under the IGST Act, no tax is leviable on ocean freight for imports on CIF basis and the impugned notifications are *ultra vires* the IGST Act.

The court made the following observations while holding the levy to be *ultra vires*:

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[14] Surat-I v. Patel Vishnubhai Kantilal & Co., 2012 (28) STR 113 (Guj. H.C.).
[15] Mohit Minerals v. Union of India 2020, [33] G.S.T.L. 321.
[16] Notification No. 8/2017-Integrated Tax (Rate) (June 28, 2017).
[17] Notification No. 10/2017-Integrated Tax (Rate) (June 28, 2017).

(a) *Not Recipients of Supply:* The court observed that Section 5(3) of the IGST Act permits collection of tax in reverse charge mechanism for certain specified categories of goods. The liability to pay tax on the supply of services shall be upon the supplier and in certain circumstances, the recipient. Thus, it was interpreted that a person who is neither a suppler nor a recipient cannot be required to pay tax under IGST Act.

In a CIF contract, the exporter is obligated to arrange and contract for the transport of goods to the importer. Thus, the importer is neither a supplier nor a recipient of service of ocean freight, and cannot be made liable for payment of tax under the IGST Act.

(b) *No mechanism for determination of time of supply:* The court perused Section 13 of the IGST Act which contemplates the time when the liability to pay tax arises. In cases where tax is liable to be paid in reverse charge, the time of supply of services is the date of payment in the books of accounts of the recipient or the date on which the payment is debited in his bank account, whichever is earlier, or 60 days after the issue of invoice.[18]

The earliest time of supply of service, in case of reverse charge mechanism, is the date of payment in the books of account of the recipient. In a CIF contract the recipient of the ocean freight service is the exporter. The Indian importer cannot determine the date of payment in the books of the exporter. Furthermore, the

[18] Integrated Goods and Services Tax Act, 2017, No. 13, Acts of Parliament, 2017, § 13(3) [hereinafter **IGST Act**].

proviso to section 13(3)(b) provides a residuary manner of determination of time of supply, viz., the date of entry in the books of account of the recipient of supply. Again, it would be impossible for the Indian Importer to determine such a date in case import of goods is in CIF basis.

(c) *Value of Ocean Freight cannot be Determined:* As per section 15 of the CGST Act, the value of supply of service for levy of tax is the transaction value actually paid. When import is done on the CIF basis, the Indian Importer pays a lump-sum amount to the Exporter. The Exporter is liable to arrange and contract for the transport of goods. It is impossible for the Indian Importer to determine the value actually paid by the Exporter.

(d) *Dual Levy:* Section 5(1) of the IGST Act read with Section 3(7) of the Customs Tariff Act, 1975 provides for levy and collection of IGST on import of goods. When importing on the CIF basis, the importer discharges relevant customs duty and IGST on the freight component of the CIF value. However, the impugned notifications levy IGST on ocean freight again, after the importer has already paid IGST on the freight component of the CIF value. Such double taxation is not permissible. The Supreme Court affirmed the order of the tribunal in the case of *United Shippers v. CCE*,[19] wherein dual levy on barge charges was held to be unconstitutional.

Thus, the High Court held the impugned notifications to be *ultra vires* of the IGST Act. Both the judgements of the Gujarat High Court

[19] United Shippers v. CCE, 2015 (37) STR 2043(T).

settled a key issue in the GST regime. The implications of the judgement are discussed in Part III of the paper.

III. A WAY FORWARD

The orders passed in *Sal Steel* and *Mohit Minerals* have led to various confusions. The three major points of concern according to the authors are addressed as below:

a) Extra territorial application of the Gujarat High Court judgment.
b) The *modus operandi* of the Revenue Department in addressing the concerns of tax-payers with reference to the availability of Input Tax Credit (hereinafter 'ITC') on such supply and/or the refund of such tax paid.
c) What is the nature of refund of such service tax paid as an *ultra vires* levy? Whether such a refund has to fulfil the requirements of Section 11B of Central Excise Act, 1944. Will the treatment be identical for GST?

A. Extra-territorial Applicability of High Court Orders

It is a settled position that the decisions of a High Court cannot be used as binding precedents on other High Courts, by virtue of Article 226 of the Constitution of India, 1950. The holy regalia of writs in the country, i.e., Article 226 empowers the High Courts to issue orders/writs/directions to any person or authority under its territorial jurisdiction and that such powers can only be exercised within such territory.

However, these judgements of the Gujarat High Court provide room to analyse whether due to the large scale impact of the levy, the

decision of the High Court can be applied in the jurisdictions of other High Courts?

In this regard, reliance may be placed upon the Supreme Court decision of *Kusum Ingots*[20], whose *obiter dictum* has been relied upon by various High Courts:

> An order passed on writ petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act.

The question for consideration here is whether such an *obiter*, which deviates from Article 226 of the Constitution of India, is good law? And if so, does it preclude High Courts from deciding upon the constitutionality of such a Parliamentary Act?

Article 141 provides that law declared by Supreme Court shall be binding on all the courts in India.[21] An *obiter dictum* is also entitled to considerable weight[22] and it is expected to be followed and obeyed.[23] Therefore, one may speculate that such an *obiter dictum* may bind the High Courts, if there is absence of any direct pronouncement by the Supreme Court on the legal issue addressed in the *obiter*.[24] Since there are no direct pronouncements on this legal issue the principle laid down by the *obiter dictum* of *Kusum Ingots* will be good in law.

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[20] Kusum Ingots & Alloys Ltd. v. Union of India, (2004) 6 SCC 254.
[21] INDIA CONST. art. 141.
[22] CIT Hyderabad, Deccan v. Vazir Sultan, AIR 1959 SC 814.
[23] Sarwan Singh Lamba v. Union of India, (1995) 4 SCC 546.
[24] Oriental Insurance Co. Ltd. v. Meena Variyal, (2007) 5 SCC 428.

The High Courts have followed this principle in various cases[25] wherein a High Court decided on the constitutionality of a central legislation and the other High Courts relied on such orders to decide the cases harmoniously. The High Courts have adopted the *obiter* of *Kusum Ingots* and it has been recognised by the Supreme Court.[26]

Therefore, orders under *Mohit Minerals* & *Sal Steel* shall stand applicable to the whole of India. It is to be kept in mind that the obiter of *Kusum Ignots* has been academically criticized. In the event of a specific pronouncement in the future, the legal position might change. However, as this obiter has been followed in a plethora of cases, discussed above, this position constitutes the law of the land at present. The department may always dispute this view by stating that such orders are not applicable in their jurisdictions. But the abovementioned cases tell a different story and provide an alternative to avoid a non-uniform treatment of taxpayers belonging to different jurisdictions.

B. Refund of Levy of Tax on Ocean Freight under Service Tax and GST

Since the levy of tax on ocean freight is held to be *ultra vires*, the analysis of its aftermath ought to include a plan of action for those importers who have already paid the tax on ocean freight. Thus, the

[25] Partha Protim Datta v. Union of India, 2016 SCC OnLine Cal 8511; Durgapur Steel Town Cable TV Operators' Association v. Union of India, 2016 SCC OnLine Cal 3025; Saumya Ann Thomas v. Union of India, 2010 (1) KLJ 449; Shiv Kumar v. Union of India, AIR 2014 (Kant) 73.

[26] All India Jamiatul Quresh Action Committee v. Union of India, W.P. (C) No. 422/2017 (SC).

deliberation that follows shall address the remaining concerns as previously raised in this part.

Earlier, ITC was available to the importers as they were the recipient of supply of service. Therefore, suppliers who were engaged in:

a) exclusive supply of taxable goods or services or both, were in receipt of full ITC
b) supply of both taxable and non-taxable or exempted goods or services or both, were in receipt of ITC attributable to such taxable supplies; and
c) exempted supply of goods or services or both, were in receipt of no ITC.

Hence, the importers who did not receive full ITC for non-taxable or exempt supply of goods or services or both shall be refunded the amount of tax paid for ocean freight as the state should not retain any amount which should not have been collected in the first place.

But, how is such a refund to be claimed? In this regard, Section 83 of the Finance Act[27] read with Section 11B of the Central Excise Act, 1944,[28] provide a mechanism for refund of service tax. The pre-requisites of a refund to an applicant under Section 11B are:

a) Such an application shall be made within the special limitation period as prescribed in the statute (i.e. one year); [29] and
b) The incidence of tax must not have been passed to any other person by the tax payer.[30]

[27] Finance Act, 1994, § 83.
[28] Central Excise Act, 1944, No. 1, Acts of Imperial Legislature, 1944, § 11B.
[29] *Id.*, § 11B(1).
[30] *Id.*, § 11B(2).

However, whether a levy declared as *ultra vires* by a court order or decree is covered by the mechanism of refund as per Section 11B? This question was answered by the Supreme Court in 1996, in the case of *Mafatlal Industries v. Union of India.*[31] The majority decision of the nine-judge bench held that an unconstitutional levy is outside the scope of the impugned statute and therefore, the remedy shall also fall outside the purview of the statute. Therefore, in cases as above, an assessee may file a writ petition under Article 226 or a civil suit under Section 72 of the Contracts Act, 1872 as per the appropriate limitation (Section 17 of Limitation Act, 1963). This case does not only interpret the limitation strictly but also solidifies the role of doctrine of unjust enrichment in the refund mechanism.

In his majority opinion, J. Reddy states that the test of unjust enrichment is an equitable principle that must be followed with or without any legal recognition. The reason behind such an approach by the court is purely economic, and thus, if any incidence of tax is passed on to another person by the tax-payer, he is in no position to claim a refund as he has not borne the loss or burden of such levy. Therefore, even though the levy is declared *ultra vires*, the court while granting refund ought to test the transaction on the touchstone of principles of unjust enrichment.

The above principles have been followed by the courts, tribunals and adjudicating authorities with complete dedication in *SRF Ltd. v. Assistant Collector of Central Excise, Trichy,*[32] and *Casa Grande Co-*

[31] Mafatlal Industries v. Union of India, (1997) 5 SCC 536.
[32] SRF Ltd. v. Assistant Collector of Central Excise, Trichy, AIR 2002 SC 98.

Operative Housing v. Commissioner of CGST.[33] Similarly, in another case, the limitation under Section 11B did not apply when the levy is invalid.[34]

Furthermore, the power of a High Court to adjudicate over a writ petition filed for refund of an unconstitutional levy of tax was reinforced by the Punjab & Haryana High Court in *Idea Cellular v. Union of India.*[35] The court held that when a levy is rendered *void ab initio*, and when there is no mechanism for remedy in the impugned statute, then the court can exercise its power under Article 226 subject to the test of unjust enrichment.

Therefore, upon perusal of the above decisions, it seems that the only remedy available with the importer is to either file a writ petition or a civil suit. However, the burden of proof to show that the incidence of tax was not passed and that he qualifies the test of unjust enrichment is on the petitioner. For this purpose, the limitation period under Section 11B shall not be applicable on refund of an unconstitutional levy.

Finally, it is observed that the refund mechanism under GST is *pari materia* to Central Excise and thus, the principles stated under *Mafatlal Industries* will be squarely applicable in the case of IGST as well.

IV. OTHER LEVIES

Parts I, II, and III of this paper have addressed the complete life cycle of the levy on ocean freight, including its origin, controversial journey, and its 'burial' on account of its unconstitutionality. However, the

[33] Casa Grande Co-Operative Housing v. Commissioner of CGST, 2019 [29] G.S.T.L. 349.

[34] Geojit Bnp Paribas Financial Services Ltd. v. C.C.E., Customs. & S.T., Kochi 2015 (39) S.T.R. 706 (Ker).

[35] Idea Cellular v. Union of India, 2016 [42] S.T.R. 823 (P&H).

fiscal regime in India is driven by various principles such as progression, buoyancy, unjust enrichment, welfare etc. These principles are socio-economic in their stature. There are other levies in the new GST regime that are complex and problematic.

The only justification given by the Ministries given in respect of such levies is that there was a need to level the playing field of the markets, or in some cases, that such levies are a result of the legal fiction created by the statute in order to clarify complex economic transactions of the market. In any case, collection of tax by a state should not come at the cost of exploitation of its tax payers.

A. Cross Border B2C OIDAR Services

The Online Information & Database Access Retrieval (OIDAR) services supplied by a supplier located outside the taxable territory of India to a recipient in India were initially made taxable in in the year 2016 by virtue of a collection of Notifications,[36] that resulted in amending of the Place of Provision of Service Rules, 2012 to incorporate that in the aforementioned cases the place of supply of services shall be the location of the recipient.

However, the taxable treatment for the above set of services depends upon the category of recipient of services as follows:

a) Non- taxable Online recipient: Tax payable on forward charge by the supplier;[37]

[36] Notification Nos. 46/2016-ST to 50/2016-ST (Nov. 09, 2016).
[37] Notification No. 48/2016- ST (Nov. 09, 2016).

b) Registered persons: Tax payable on reverse charge by the recipient of services.[38]

Therefore, a supplier in a non-taxable territory liable to pay tax had to register under Service Tax and pay the tax in forward charge. It is submitted that GST laws continued to tax[39] these services under the IGST Act by providing that the place of supply of such services is the location of the recipient.[40] Further, this payment mandates the supplier to take a simplified registration under GST.[41]

As discussed in *Mohit Minerals* and *Sal Steel*, the levy of tax on ocean freight component of a CIF contract is an extra-territorial application of GST laws and the Finance Act. Although, the place of supply for cross-border B2C OIDAR services has been fixed by deeming fiction as inside India, but the statute cannot go beyond its scope and make a person outside the taxable territory of India liable to pay tax in forward charge for services provided to Non-Taxable Online Recipients which is different from the taxability of services provided to registered persons based on reverse charge mechanism.[42]

Such a levy not only creates a compulsion on an otherwise non-taxable person but it does so by an extra- territorial application of legislative power.

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[38] *Id.*
[39] IGST Act, §§ 5 and 14(1).
[40] *Id.*, § 13(12).
[41] *Id.*, § 14(2).
[42] Notification No. 10/2017-ITR (June 28, 2017), entry 1.

B. Services Directly in Relation to Immovable Properties

Services directly in relation to immovable property provided by a supplier in non-taxable territory to a recipient in taxable territory have also been litigious under GST. These services are taxable as per Notification No. 10/2017-ITR on a reverse charge basis. However, the provisions of GST for place of supply provide:

> Place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators, shall be the place where the immovable property is located or intended to be located.[43]

Therefore, the above corollary creates a contradiction between the statute and the relevant notification. In order to ascertain the taxability of these services, they shall have to be classified either as inter-state[44] or intra-state[45] supply to be covered under the scope of supply as per GST.

As per Section 7(4), services imported in territory of India shall be treated as in the course of inter-state trade or commerce.[46] However, there are three pre-requisites for import of services: "(i) the supplier is located outside India; (ii) the recipient is located in India; and (iii) the place of supply of service is in India".[47]

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[43] IGST Act, 2017, § 13(4).
[44] *Id.*, § 7(4).
[45] *Id.*, § 8.
[46] *Id.*, § 7(4).
[47] *Id.*, § 2(11).

For instance, consider, a supplier located outside India is providing services in relation to accommodation to a recipient in India and the location of immovable property is outside India, i.e., the place of supply is the location of an immovable property, i.e., outside India. This case shall not qualify as an import of service and subsequently, shall not be covered under inter-state supply. Therefore, Section 5(1)[48] shall not be applicable to such services, rendering the service outside the scope of IGST.

As per section 8, the pre-requisite of an intra-state supply is that the location of the supplier and the recipient must be in the same state or territory. However, in the above example, the location of the supplier is outside India and recipient is in India. Therefore, it shall not qualify as an intra-state supply and shall be outside the scope of GST.

However, at this juncture, Notification No. 10/2017-ITR may be referred to. This notification renders the above services liable to taxation under reverse charge without giving any attention to the place of supply of such transactions. Therefore, the respective entry of this notification is against the provisions of IGST Act.

The purpose of the deliberation above is to highlight various other tax levies that are subject to excessive delegation of power or extra-territorial application of laws by the Government. Therefore, the reasoning used by the Gujarat High Court in deciding *Mohit Minerals* and *Sal Steel* can be relied upon for testing the constitutionality of other levies in India's taxation regime.

[48] *Id.*, § 5(1).

V. CONCLUSION

The study of taxation laws usually begins with theories and canons of taxation. These principles paint an idealistic view of a fiscal paradigm. However, it is worthwhile to mention that every country has faced their respective fiscal challenges and seamless implementation of GST was one such challenge for India. During the initial time period, the major point of concern for a tax-payer was the applicable tax rates. However, with the passage of more than 2.5 years, this country has learned from its own mistakes.

After pursuing the aforementioned levy in a great detail, it is safe to say that, there is no straitjacket legislative drafting mechanism to produce an ideal law. However, it is crucial to realise and amend the errors as and when they become apparent.

The judgements of the Gujarat High Court were widely celebrated by the industry, since many representations were made to the GST Council in this regard. However, this celebration was short lived as concerns still loom over this issue.

Firstly, it is unclear whether other High Courts will interpret the matter similarly and agree with the Gujarat High Court. In case where deviating opinions are pronounced, the existing in the industry will pave way to hysteria. It is also unclear whether the Government will prefer an appeal in the Supreme Court and pray for a stay on the Gujarat High Court judgements.

Secondly, the Government needs to notify a mechanism for refund of the IGST and Service Tax already paid by the importers for ocean freight. As discussed above, it is a settled principle that there cannot be

any levy without the authority of law and any tax so collected must be refunded. If the Government is not prompt in notifying a mechanism for refund, the importers would be forced to approach the High Court for directing the Government to initiate refund; further increasing litigation on this matter.

Thirdly, there is an apprehension that the Government may amend the provisions of the CGST Act, 2017 and the IGST Act, 2017 retrospectively, so as to nullify the effect of these judgements. In that case, they will lose their significance.

Finally, the tax-payer's future is at the mercy of various uncertainties revolving around ocean freight. Therefore, one can only hope for cooperation and prompt action on part of the Government in order to realise the gains of these judgments.