

ERGO

Analysing developments impacting business

SUPREME COURT STRIKES DOWN REVERSE CHARGE ON OCEAN FREIGHT

20 May 2022

Background

The Hon'ble Supreme Court decided on the constitutional challenge to the levy of Goods and Services Tax (GST) on ocean freight for Cost, Insurance and Freight (CIF) imports. The Gujarat High Court had struck down the levy pursuant to its finding that the reverse charge was ultra vires the parent enactment, that is the Integrated Goods and Services Tax Act, 2017 (IGST Act). The High Court observed that the charge of IGST could be reversed and fastened only to a "recipient". However, peculiarly, the onus of discharging IGST on ocean freight was shifted to the Indian CIF importer, who did not statutorily qualify as a "recipient" of the services in question. The department assailed the High Court's order in a batch of connected matters.

Update

On 19 May 2022, the Apex Court affirmed the judgement of the Gujarat High Court whilst dismissing the Revenue's Special Leave Petition (SLP). The Supreme Court primarily hinges on the finding that a typical CIF contract is a composite supply which cannot be vivisected and subjected to a levy of IGST qua the freight component. Notably, the Supreme Court has also observed that the recommendations of the GST Council are not binding on the Government and have only persuasive value. The Court has expounded upon aspects of co-operative federalism, which forms the cornerstone of GST enactments.

Implications and immediate action points

- It stands confirmed that the reverse charge levy on ocean freight, which can be traced to Notification No. 10/2017-IGST (Rate) dated 28 June 2017, did not have the force of law.
- Any amounts collected from CIF importers towards ocean freight services lacks / lacked legal sanction and thus were collected in violation of Article 265 of the Constitution. Such importers ought to evaluate the possibility of recouping such amounts via refund claims to the extent not utilized as input credit – such a refund claim may also necessitate reversing the corresponding input tax credit availed but hitherto unutilized.

- The above refund option will be pertinent especially for those CIF importers who are outside the GST credit chain such as oil and gas players, power generation companies and alcohol companies. The Gujarat High Court has already passed several orders directing processing of refunds.
- Objections concerning non-payment of IGST on ocean freight services have been raised in various audit inquiries across the country. With the binding pronouncement of the Hon'ble Supreme Court, this point of controversy should now extinguish.

This decision has elaborated on the important aspects such as the "service recipient", taxability in case of composite supplies, extra-territorial jurisdiction, aspect theory and excessive delegation. Further, the findings of the Supreme Court with respect to the recommendations of the GST Council to be only persuasive will be useful in those cases where the validity of provisions are under judicial review and such provisions were implemented based on the recommendations of the GST Council. It will be interesting to observe the functioning and the recommendations of the GST Council while guiding towards a harmonized structure of GST and for the development of a harmonized national market for goods and services.

- *Abhishek A Rastogi (Partner), Sudipta Bhattacharjee (Partner) and Mahir Chablani (Senior Associate)*

Khaitan and Co. has represented several litigants in the challenge before the Hon'ble Supreme Court as well as in the earlier round of proceedings before the Gujarat High Court. Khaitan & Co. is also representing several parties in similar Writ Petitions preferred before various High Courts across the country.

For any queries please contact: editors@khaitanco.com

We have updated our [Privacy Policy](#), which provides details of how we process your personal data and apply security measures. We will continue to communicate with you based on the information available with us. You may choose to unsubscribe from our communications at any time by clicking [here](#).