IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 15227 OF 2023

M/s. Agarwal Coal Corporation Pvt. Ltd. … Petitioner

Versus

The Assist. Commissioner of State Tax. …Respondent

Mr. J. K. Mittal with Aman Mishra i/b. UBR Legal, for the Petitioner.

Ms. S. D. Vyas, Addl. Govt. Pleader with Ms. P. N. Diwan, AGP for the State- Respondent.

CORAM: G. S. KULKARNI &
FIRDOSH P. POONIWALLA, JJ.
DATED: 5 March 2024

Oral Order (Per G. S. Kulkarni, J.)

1. Rule, returnable forthwith. Respondent waives service. By consent of the parties, heard finally.

2. This petition under Article 226 of the Constitution of India challenges a show cause notice dated 26 September 2023 issued by the Assistant Commissioner of Sales Tax, "C" Division, Mumbai, primarily on the ground that the same has been issued without jurisdiction. The contention of the petitioner is to the effect that, what has been sought to be invoked by the Designated Officer is the Notification No.8/2017-Integrated Tax (Rate) dated 28/6/2017 in issuing the show cause notice which itself has been struck down

by the Division Bench of Gujarat High Court in the case **Mohit Minerals Pvt. Ltd. Vs. Union of India**[1] (Ex.D to the petition). The operative portion of the decision is relevant which reads thus:

> "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.
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> 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. Civil Application, if any, stands disposed of."

3. The said decision of the High Court of Gujarat was carried in appeal before the Supreme Court in the case "**Union of India Vs. Mohit Minerals Pvt. Ltd.**"[2] wherein a three Judges Bench of the Supreme Court by a decision dated 19 May 2022 has upheld the decision in terms of the conclusions as recorded in paragraph 147 of the said decision, which read thus:

> "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**
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> 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

1 2020(33)G.S.T.L. 321 (Guj.)

2 2022(61)G.S.T.L. 257 (SC)

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.

149 For the reasons stated above, the appeals are accordingly dismissed.

150 Pending application(s) if any, stand disposed of."

4. We may observe that in *Mohit Minerals* (supra) the petitioner's case before the High Court of Gujarat was a case where the petitioner was importing coal from various countries on FOB (Free on Board) and CIF (sum of Cost, Insurance and Freight) basis, as clearly set out in paragraph 15 of the said decision. Such decision of the High Court of Gujarat has been upheld by the Supreme Court. This apart in the petitioner's own case in the proceedings in **Agarwal Coal Corporation Pvt. Ltd. Vs. Union of Indian & Anr.**[3] which were filed before the Delhi High Court assailing the same notification, the Division Bench of the Delhi High Court disposed of the said writ petition in favour of the petitioner in terms of the following order:-

> "ORDER
> 24.08.2022
>
> Learned counsel for the petitioners states that the matter in issue has been decided in petitioner's favour by the Supreme Court in **Union of India vs. Mohit Minerals Pvt. Ltd. 2022 SCC Online SC 657**.
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> The said fact is not disputed by the learned counsel for the respondents.
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> Accordingly, the impugned Notification No. 8/2017-Integrated Tax (Rate) dated 28th June, 2017 and entry 10 of the Notification No. 10/2017-Integrated Tax (Rate) dated 28th June, 2017 are quashed as being ultra vires the Integrated Goods and Services Tax Act, 2017 and it is held that no tax is 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.
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> With the aforesaid directions, the present writ petitions stand disposed of."

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3 Writ Petition (C) No.8720/2017, order dt.24.8.2022

5. Also in a petition which was filed by one of the group companies of the petitioner which had approached the High Court of Madhya Pradesh in the proceedings in **M/s. Agarwal Fuel Corporation Pvt. Ltd. Vs. Union of India & Anr.**[4] Writ Petition No.19382 of 2017 (the case which involved both categories of contract namely CIF and FOB basis) came to be disposed of in terms of what was held in the case of *Mohit Minerals* (supra), which order reads thus:-

> "ORDER
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> Learned counsel for the parties jointly submits that the issue raised in this petition has been put to rest in case **Union of India Vs. Mohit Minerals Pvt. Ltd. 2022 SCC Online SC 657** by the Apex Court.
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> Keeping in view of the aforesaid judgment, the petitioner is not liable to pay IGST 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.
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> In view of above, the impugned notification No.8/2017-Integrated Tax (rate) dated 28th June and entry 10 of the Notification 10/2017 Integrated Tax (Rate) dated 28 June,2017 are quashed as being ultra vires.
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> With the aforesaid, petition is disposed of."

6. This Court had an occasion to consider a similar case in **Liberty Oil Mills Vs. Union of India**[5], where a challenge akin to the challenge in the present proceedings, was made to the show cause notice dated 31 March 2019 calling upon the petitioner to show cause as to why Integrated Goods and Service Tax may not be recovered under Section 74(1) of the Central Goods and Services Act,2017 (for short '**CGST Act'**) alongwith interest and penalty on the ocean trade service. This Court following the decision of the High Court of Gujarat in *Mohit Minerals* (supra) as also the decision of the Supreme Court in "*Union*

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4 Writ Petition No.19382 of 2017 order dt.30/1/2023

5 2023(72) G.S.T.L. 305(Bom.)

of India Vs. Mohit Minerals Pvt. Ltd."(supra) allowed the petitioner's proceedings, setting aside the show cause notice. The relevant extract of the said decision reads thus:-

> "3. The Petitioner is a company who is engaged in manufacture of vegetable edible oil, is registered under the goods and services tax holding a duty registration. A show cause notice issued by the Respondent No.2 dated 31March 2019 to the Petitioner called upon the Petitioner as to why Integrated Goods and Service Tax (IGST) amounting Rs.4,13,47,167/- be not recovered from the Petitioner under Section 74(1) of Central Goods and Services Act, 2017 alongwith interest and penalty as specified. The gist of the allegation against the petitioner is found in paragraph No.2 of the show cause notice which reads thus:
>
> > "2. During the course of GST audit conducted on the records of the assessee for the period from April 2018 to March 2019, it was observed from their financials that during the audit period, they have imported their major input (vegetable oils) from overseas involving payment of ocean freight. In terms of Notf. No.8/2017-Integrated Tax (Rate), dated 28th June, 2017 & Notf. No. 10/2017-Integrated Tax (Rate), as amended, 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, the person liable to pay the IGST under reverse charge has been specified to be the Imported recipient of the goods, as defined in clause (26) of Section 2 of the Customs Act, 1962, located in the taxable territory. However, it was observed during the audit that the assessee have not discharged the said IGST liability under reverse charge as required."
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> 4. When this petition was filed on 30 June 2021, the Petitioner had relied upon the decision of the division bench of the Gujarat High Court in the case of Mohit Minerals (P) Ltd. v. Union of India [2020] 113 taxmann.com 436/78 GST 519/33 GSTL 321 (Guj.) to which response was given by the Respondents by filing reply affidavit on 27 October 2021 contending as follows:
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> > "6. With reference to paragraph 10 of the petition, I say that the Petitioner has submitted its reply to the aforesaid observations vide letter dated 14.07.2020 and have stated that the issue is no longer res integra and has already been settled by the Gujrat High Court in favour of the Petitioner in the case of Mohit Minerals (P) Ltd v. Union of India [2020] 33 GSTL 321 (Gujrat). I say that the said judgment of Gujrat High Court in the Special Civil Application No.726 of 2018 filed by M/s

> Mohit Minerals Pvt Limited is assailed before Hon'ble Supreme Court in Special Leave Petition (Civil) No.13958 of 2020 and other connected SLPs. The same are likely to be listed for hearing and final disposal on 26.10.2021.
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> Thus the legal competency or otherwise, as contended by the Petitioner, for levy of tax on the said subject matter in terms of IGST Notification No 8/2017 dated 28.06.2017 and Notification No.10/2017 as amended has not attained finality. Since the matter is still sub-judiced, the Petitioners contention that the demand is unsustainable is pre-emptive and not legally correct."
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> 5. Learned counsel for the Petitioner informs that the Hon'ble Supreme Court has now rendered the decision in case of Union of India v. Mohit Minerals (P.) Ltd. [2022] 138 taxmann.com 331/92 GST 101/(61) GSTL 257 (S.C.) and upheld the judgment of the Gujarat High Court in Mohit Minerals (P.) Ltd. (supra). Learned counsel for the Respondents states that though this position is correct, the Petitioner can point it out to the Commissioner fact in response to the show cause notice.
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> 6. We do not find any purpose in the case, either for the Petitioner or the Commissioner to invest their time and energy on the issue, if the position on which the show cause notice is founded, already stands concluded in the light of the decision of the Hon'ble Supreme Court.
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> 7. Accordingly, writ petition is allowed and the impugned show cause notice dated 31 March 2019 is quashed and set aside."

7. Thus, in our opinion, the present petition also needs to be allowed considering the decision in the case of *Mohit Minerals* (supra).

8. Before parting, we may also note a submission being made on behalf of the respondent namely that the decision in *Mohit Minerals* (supra) needs to be applied only in respect of the cases which involve the contracts on CIF basis and not FOB contracts. It is submitted that in the present case the show cause notice has been issued referring to Notification No.8/2017-Integrated Tax (Rate) dated 28-6-2017 as the contract was a FOB contract. We find that such

argument is totally untenable inasmuch as the case in *Mohit Minerals* (supra) before the High Court of Gujarat, as observed by us hereinabove, was a case which involved both categories of contract namely CIF and FOB, which was noted in paragraph 57 of the judgment of the High Court of Gujarat. The Court on such facts, declared the revenue's decision *ultra vires* of the IGST Act. Once the notification itself has been declared as *ultra vires* and the same has been upheld by the Supreme Court, in our opinion, following the mandate of the settled principle of law as laid down in "**M/s. Kusum Ingots & Alloys Ltd vs Union Of India And Anr.**"[6] the notification is no manner was available to the State Authorities to be applied as it would amount to applying an illegal notification. For this reason also, the show cause notice is rendered without jurisdiction.

9. For all these reasons, the petition needs to succeed. It is allowed in terms of the following order:

ORDER

(i) The petition is allowed in terms of prayer clauses (A) and (B).

(ii) No costs.

10. At this stage it is informed to us that the petitioner has made payment of tax under protest. As the show cause notice itself has been set aside, the

6 AIR 2004 S.C. 2321

petitioner is permitted to seek refund of the same, and if such an application is made, the petitioner would be entitled to the refund of the same, let such amount with interest at 7% per annum, be refunded to the petitioner within a period of four weeks from the date on which a copy of this order is placed before the proper officer.

11. Rule is made absolute in the above terms. No costs.

(FIRDOSH P. POONIWALLA, J.) (G. S. KULKARNI , J.)