

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 19481 of 2023****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE BHARGAV D. KARIA****and****HONOURABLE MR. JUSTICE NIRAL R. MEHTA**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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BLA COKE PVT. LTD.
Versus
UNION OF INDIA & ORS.

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Appearance:

UCHIT N SHETH(7336) for the Petitioner(s) No. 1

MS HETVI H SANCHETI(5618) for the Respondent(s) No. 1,2,3,4

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CORAM: HONOURABLE MR. JUSTICE BHARGAV D. KARIA**and****HONOURABLE MR. JUSTICE NIRAL R. MEHTA****Date : 19/09/2024****ORAL JUDGMENT**



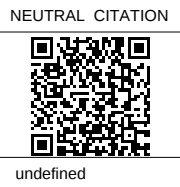
(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned advocate Mr. Uchit N. Sheth for the petitioner and learned advocate Ms. Hetvi H. Sancheti for the respondents.

2. Having regard to the controversy involved which is in a narrow compass with the consent of learned advocate for the respective parties, the matter is taken up for final hearing.

3. Rule returnable forthwith. Learned advocate Ms. Hetvi Sancheti waives service of notice of rule on behalf of the respondents.

4. By this petition under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs:

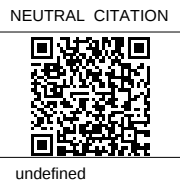


"A. This Hon'ble Court may be pleased to declare Entry No. 10 of Notification No. 10/2017-Integrated Tax (Rate) dated 28.6.2017 to be ultra-vires the provisions of the IGST Act and Article 14 and 265 of the Constitution of India even qua imports made on FOB basis;

B. This Hon'ble Court may be pleased to declare that levy of tax under the IGST Act on payment of ocean freight on reverse charge basis even qua FOB contracts once such freight element is part of the import value of goods which has been subjected to tax under the IGST Act is contrary to the judgement of Hon. Supreme Court in the case of Mohit Minerals Pvt. Ltd. (supra) and therefore unconstitutional;

C. This Hon'ble Court may be pleased to issue a writ of certiorari or writ in the nature of certiorari or any other appropriate writ or order quashing and setting aside order dated 30.8.2023 (annexed at Annexure B) withdrawing refund already sanctioned to the Petitioner;

D. Without prejudice to the above and in the alternative, this Hon'ble Court may be pleased to declare that at least the refund



of IGST paid on ocean freight qua CIF imports ought not to have been withdrawn by the impugned order dated 30.8.2023 (annexed at Annexure B);

E. This Hon'ble Court may be pleased to declare Entry No. 1 of Notification No. 10/2017-Integrated Tax (Rate) dated 28.6.2017 in so far as it would permit imposition of tax on freight paid qua FOB contracts post 1.10.2023 i.e. after deletion of Entry No. 10 of the same notification to be ultra-vires the provisions of the IGST Act and Article 14 and 265 of the Constitution of India;

F. Pending notice, admission and final hearing of this petition, this Hon'ble Court may be pleased to stay coercive steps of recovery against the Petitioner pursuant to the impugned appeal order dated 30.8.2023 (annexed at Annexure B) and further the Petitioner may be permitted to deposit the tax refund qua FOB contracts under protest which may be considered as subject to the final outcome of the petition

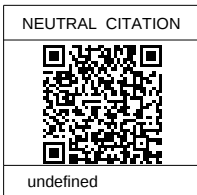
G. Ex parte ad interim relief in terms of prayer F may kindly be



granted;

H. Such further relief(s) as deemed fit in the facts and circumstances of the case may kindly be granted in the interest of justice for which act of kindness your petitioner shall forever pray."

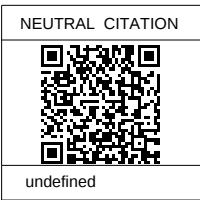
5. Brief facts of the case are that the petitioner is a Private Limited Company and is engaged in the business of manufacturing and sale of hard Coke of Coal falling under chapter 27 of the Customs Tariff Act, 1975. The petitioner is duly registered under the Central/State Goods and Service tax act, 2017 (for short 'the GST Act'). The Petitioner imports coking coal from outside the country for use in the course of business. Many of such imports are made on Cost Insurance and Freight ("CIF") basis while many imports are made on Free on Board ("FOB")



basis.

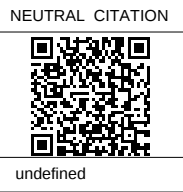
6. It is the case of the petitioner that in case of CIF contracts the transportation of goods up to the port in India is arranged for by the exporter of goods and the freight is also paid by such exporter. The foreign exporter raises consolidated invoice for such purchase by the petitioner on CIF basis. In so far as FOB contracts are concerned, the freight is paid by the petitioner directly to the foreign shipping line.

7. It is the case of the petitioner that when the goods are imported by the petitioner into the country, bill of entry for home consumption is duly filed by the petitioner. At the time of clearance of



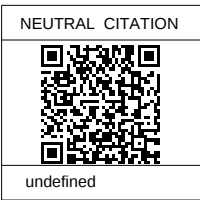
goods for home consumption, the petitioner pays customs duty and tax under the Integrated Goods and Service Tax Act, 2017 (for short 'the IGST Act') on total value of the goods including freight. Such payment of IGST is required to be made by the petitioner irrespective of whether the imports are on CIF or FOB basis.

8. It is the case of the petitioner that the petitioner is an importer as defined under the Customs Act and as per the Entry No.10 of Notification No. 10/2017-IGST (Rate) dated 28.06.2017, the petitioner became liable to pay tax on freight for transportation of goods by a vessel from a place outside India to the Indian Customs station even though IGST on total value of imports including freight amount had



already been paid by the petitioner at the time of clearance of the goods for home consumption.

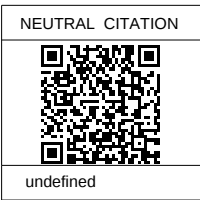
9. It is the case of the petitioner that the petitioner had filed an intervention application before Hon'ble Supreme Court pursuant to matter in case of **Union of India v. Mohit Minerals Pvt. Ltd** (judgment dated 19.05.2022 rendered in Civil Appeal No. 1390 of 2022 and allied matters, which the Union Government had filed before the Hon'ble Apex Court as Entry No.10 of the Notification No.10/2017 -IGST Rate dated 28.06.2017 was struck down by this Court as being ultra vires the provisions of the IGST Act as well as being unconstitutional.



10. It is the case of the petitioner that after pronouncement of judgement of Apex Court, the petitioner claimed refund of IGST already paid on ocean freight on the basis of the aforementioned judgement which was accompanied by certificate of Chartered Accountant in the prescribed form as required by Rule 89(2)(m) of the Central/Gujarat Goods and Services Tax Rules, 2017 (for short 'the Rules') .

11. In order to claim refund, the petitioner also reversed such amount of input tax credit so as to ensure there is no double benefit.

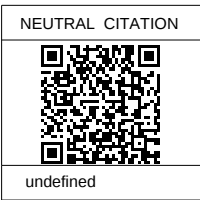
12. A show cause notice was issued to the petitioner proposing to reject the refund claim on multiple grounds including inter-



alia that the petitioner had not submitted proof of the fact that the contracts in question were CIF contracts.

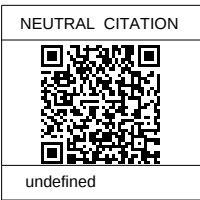
13. The petitioner replied by pointing out that while some of the import contracts were on FOB basis and not on CIF basis, the ratio of the judgment of Hon'ble Supreme Court in the case of **Mohit Minerals Pvt. Ltd.** (supra) was applicable even in respect of FOB contracts, as IGST was already paid at the time of importation on full value of imports which included freight amount.

14. Thereafter, refund was sanctioned to the petitioner by the concerned authority by passing a reasoned order. However, the GST department decided to prefer an appeal



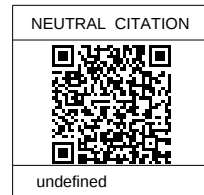
against such refund sanction orders under Section 107 of the GST Act on the principal ground that the contracts in question were FOB import contracts and therefore judgment of Hon'ble Supreme Court in the case of **Mohit Minerals Pvt. Ltd.** (supra) was not applicable.

15. It is the case of the petitioner that the first intimation regarding filing of appeal by the department was received by the petitioner on 22.7.2023 by way of email wherein personal hearing notice was also attached. The Petitioner immediately responded by email requesting for copies of the appeals and further requesting for some time for appearance. A physical letter was also submitted in this regard on 24.7.2023. Thereafter since copies of



appeal were served to the petitioner, the petitioner sought for some time to respond. The petitioner thereafter submitted written responses to the appeal memo which were received from the appellate authority on 12.9.2023.

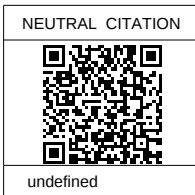
16. It is the case of the petitioner that in the meantime, without issuance of any further hearing notice, the appellate authority proceeded to pass the impugned order dated 30.8.2023 ex-parte withdrawing refund on the ground that no representative of the petitioner appeared. It is the case of the petitioner that the impugned order was issued on 18.9.2023 and received by the Petitioner on 7.10.2023 and the impugned order has been passed on the premise that the benefit of judgment



in the case of **Mohit Minerals Pvt. Ltd**
(supra) is not available to FOB imports.

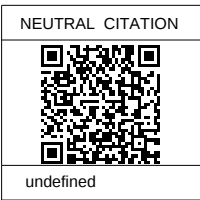
17. Being aggrieved by the impugned order,
the petitioner has preferred the present
petition.

18. Learned advocate Mr. Uchit Sheth for
the petitioner submitted that this Court
in case of **Mohit Minerals Pvt. Ltd v.**
Union of India and others reported in 2020
SCC OnLine Guj 736 has struck down the
Notification No.10/2017-Integrated Tax
(Rate) dated 28th June, 2017 so far as
levy of IGST on the value of Ocean Freight
is concerned. It was pointed out by
learned advocate Mr. Sheth that this Court
was considering the issue of importation
of coal from various countries on FOB



(Free on Board) and CIF (Sum of Cost, Insurance and Freight) basis. It was submitted that in case of both type of transactions, this Court concluded that Ocean Freight levied by Notification No.10/2017 is not legal.

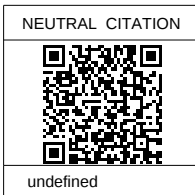
19. It was further pointed out that decision of this Court in case of **Mohit Minerals Pvt. Ltd** (supra), is upheld by the Hon'ble Apex Court in case of **Union of India and another v. Mohit Minerals Private Limited through Director** reported in (2022) 10 Supreme Court Cases 700. It was therefore, submitted that whether transaction is on basis of FOB value or CIF value would not make any difference so far as the payment of IGST is concerned as the IGST under the provisions of section



5(1) of the IGST Act, 2017 is levied on the basis of the provisions of Customs Tariff Act, 1975 read with sections 12 and 14 of the Customs Act, 1962.

20. Referring to the above provisions, it was pointed out that levy of the IGST is on the value of goods imported which includes the value of cost, insurance and freight even if the same is imported on FOB value as per the proviso to section 14 of the Customs Act, 1962.

21. It was therefore, submitted that the respondent authorities were not justified in again levy of IGST on FOB value of the transaction of import carried out by the petitioner.



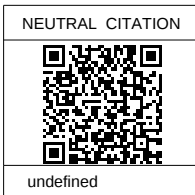
22. Learned advocate Mr. Sheth in support of his submission also placed reliance on the decision of Bombay High Court in case of **M/s. Agarwal Coal Corporation Pvt. Ltd. v. The Assist. Commissioner of State Tax** (judgment dated 05.03.2024 rendered in Writ Petition No.15227 of 2023) wherein Hon'ble Bombay High Court also relying upon the decision of this Court in case of **Mohit Minerals Pvt. Ltd** (supra) of this Court held as under :

"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



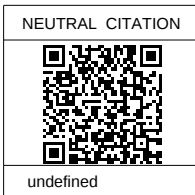
contract. We find that such argument is totally untenable inasmuch as the case in Mohit Minerals (supra) before the High Court of Gujarat, as observed by us hereinabove, was a case which involved both categories of contract namely CIF and FOB, which was noted in paragraph 57 of the judgment of the High 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 "Ms. Kusum Ingots & Alloys Ltd vs Union Of India And Anr." (AIR 2004 SC 2321), the notification in 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."

23. It was therefore, submitted by learned advocate Mr. Sheth that from any point of view, the levy of IGST on Ocean Freight on the FOB transaction is not valid since



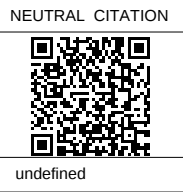
Notification No.10/2017 has been struck down by this Court which is upheld by Hon'ble Apex Court.

24. On the other hand, learned advocate Ms. Hetvi Sancheti for the respondent submitted that the Hon'ble Apex Court in **Union of India and another v. Mohit Minerals Private Limited through Director** (supra) while considering the validity of the Notification No.10/2017 in para no. 168 to 170 has referred to only CIF contract and not FOB contract for importation of the goods and accordingly, the decision of this Court so far as striking down of levy of IGST on transaction on FOB basis is not approved by the Hon'ble Apex Court.



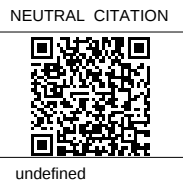
25. It was further submitted that this Court while considering the levy of IGST has made comparison of both the transactions of CIF and FOB in para no.78 while analysing the taxability of the Ocean Freight under different situations. Referring to the table produced in para no.78 of the judgment of the **Mohit Minerals** (supra) of this Court, it was pointed out that payment of cost, freight and insurance involves a service and this Court though has come to the conclusion that the importer has not availed any services in the CIF transaction, the same was not approved by Hon'ble Apex Court.

26. It was further submitted that all transactions of import and export whether



it is on CIF basis or FOB basis, the same would be liable to IGST as held by this Court. However, on the ground of double taxation considering the composite nature of transaction, this Court as well as Hon'ble Apex Court has come to the conclusion that by way of notification therefore cannot be any levy of IGST on transaction of CIF value. It was therefore, submitted that so far as transactions which involves import of goods on FOB value, the petitioner is liable to pay IGST on the amount of Ocean Freight as admittedly, the petitioner has availed the services on payment of freight for importation of the goods.

27. Having heard the learned advocates for the respective parties and considering

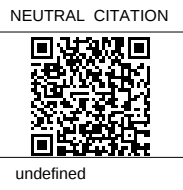


issue of levy of IGST on ocean freight on imports made on FOB basis it would be germane to refer to the various provisions of the IGST Act and the Customs Act which are already considered by this Court as well as Hon'ble Apex Court in case of **Mohit Minerals**(supra) and reiterated by Hon'ble Bombay High Court in case of **M/s. Agarwal Coal Corporation Pvt. Ltd.**(supra) as under:

: The Customs Act, 1962 :

"12. Dutiable goods.

(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)] [Substituted by Act 51 of 1975, Section 13, for " Indian Tariff Act, 1934 (32 of 1934)" (w.e.f. 2-8-1976).], or any other law for the time being in force, on goods imported into, or exported from, India.

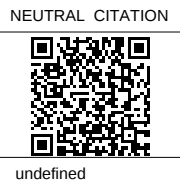


(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.] [Substituted by Act 30 of 1963, Section 2, for sub-Section (2) (w.e.f. 1-10-1963).]"

"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:

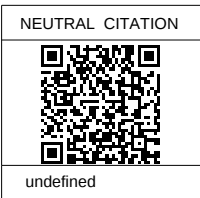
Provided further that the rules made in this behalf may provide for,-

(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.

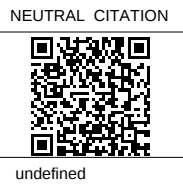
Explanation.-For the purposes of this section-

(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).

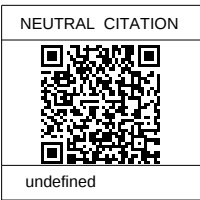


:Integrated Goods & Services Tax Act,
2017 :

"5. Levy and collection.- (1) Subject to the provisions of subsection (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:

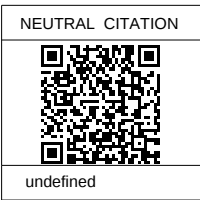
Provided that the integrated tax on goods [other than the goods as may be notified by the Government on the recommendations of the Council] imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) on the value as determined 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 (52 of 1962)."

28. Considering the above provisions, it is not in dispute that IGST as per proviso to section 5(1) is leviable on the on the



value as determined in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975) at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962) and value of goods includes the cost, freight and insurance at the place of importation and therefore, once the IGST is paid on value of goods including the freight, cost and insurance, it would not make any difference between the transactions is on CIF basis or FOB basis, as in both the cases IGST would be payable as per provision of section 5(1) of the IGST Act, 2017 on the value of goods as per the provisions of the Customs Act.

29. In such circumstances, as held by the



Hon'ble Apex Court in case of Union of India and another v. Mohit Minerals Private Limited through Director (supra) as well as by Bombay High Court in case of M/s. Agarwal Coal Corporation Pvt. Ltd. (supra), when the notification itself is struck down, the respondent authorities cannot insist for levy of IGST on the amount of ocean freight in case of transaction FOB basis also.

30. The petition, therefore, succeeds and is accordingly allowed. Impugned order is hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No order as to costs.

(BHARGAV D. KARIA, J)

(NIRAL R. MEHTA, J)

RAGHUNATH R NAIR