Office of Assistant Commissioner

Central Goods and Service Tax,

Respected Sir/Madam,

1. Introduction, business place details etc of the RTP

2. We have received SCN in form DRC 01 / Audit Observation from your office with allegation for non-deposit of RCM by us U/s 9(3) read with Notification 08/2017 & 10/2017 on the freight paid by the foreign seller to the foreign shipping company on our import on CIF basis.

3. There are some details or basic element of the CIF contract, this element is below.

   A. A CIF contract is an inclusive price covering cost of goods, insurance and freight payable for carriage of goods to the destination specified in the contract. The essence of the contract is that a seller having shipped the goods in accordance with the contract, can fulfil his part of the bargain by tendering to the buyer the proper shipping documents. If he does this, he is not in breach even if the goods are lost before such tender. In the event of a loss, the buyer must pay the price on tender of documents and his remedies lie against the carrier but not the seller;

   B. A CIF contract has two components: (i) price is paid for the freight, and (ii) the buyer is never obligated to pay it. The owner of the vessel who enters into a contract of affreightment has a privity of contract with the supplier of goods and is rendering a service to the supplier. If the service is not received, then the question of reverse charge does not arise;

4. On 28 June 2017, the Central Government issued Notification 8/2017, in exercise of its powers under Section 5(1), Section 6(1) and Section 20 of the IGST Act, read with Section 15(5) and Section 16(1) of the CGST Act. Entry 9(ii) of Notification 8/2017 reads as follows:

SI No.	**Chapter, Section or Heading**	**Description of Service**	**Rate (per cent)**	**Condition**
9	Heading 9965 (Goods transport services)	[…]	[…]	[…]
		(ii) Transport of goods in a vessel including services provided or agreed to be 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 up to	5	Provided that credit of input tax charged on goods (other than on ships, vessels including bulk carriers, tankers) used in supplying the service has not been taken Explanation: This condition will not apply where the supplier of service is located in

		the customs stations of clearance in India.		non-taxable territory. [Please refer to Explanation no. (iv)]

By Entry 9(ii) of Notification 8/2017, an integrated tax of 5 per cent was levied on supply of specified services, including transportation of goods in a vessel from a place outside India up to the customs station of clearance in India.

5. On 28 June 2017, Notification 10/2017 was issued by the Central Government in exercise of powers conferred by Section 5(3) of the IGST Act. Notification 10/2017 specified the importer as the recipient of transportation of service when the supplier is location in a non-taxable territory and the service of transportation is supplied by a person in a non-taxable territory. Entry 10 of Notification 10/2017 states the following:

SI No.	**Category of Supply of Services**	**Supplier of**	**Recipient of Service**
0)	(2)	(3)	(4)
10	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	A person located in non-taxable territory	Importer, as defined in clause (26) of section 2 of the Customs Act 1962 (52 of 1962), located in the taxable territory

Thus, Entry 10 of Notification 10/2017 deems an importer of goods as the 'recipient of service' of transportation of goods by a foreign shipping line.

6. Both Notification 08/2017 & 10/2017 was challenged before the Hon'ble Gujarat High Court in the case of MOHIT MINERALS PVT LTD Vs UNION OF INDIA R/SPECIAL CIVIL APPLICATION No. 726 of 2018 Date: 23.01.2020, Hon'ble Gujarat High court in the bunch of petitions declare said notification ultra-virus of Act, relevant extract of the order is reproduce below for your reference.

201. In view of the above, it is submitted that the scheme of the Goods and Services Tax is that it is a transaction/contract based on value added tax. The tax is levied on each transaction and the tax paid at early stage is available as credit. Hence, it is a tax on consumption and not on business. It is a contract-based levy which depends on the contract between the supplier and the recipient. Thus, where the tax is sought to be levied and collected by a person other than the supplier or the supplier of service, distortions and contingency which the Act does not covers, are bound to occur.

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.

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.

7. Union of India has challenged the Hon'ble Gujarat High Court order at Supreme Court in case of **Civil Appeal No. 1390 of 2022 Union of India Vs M/s Mohit Minerals Pvt Ltd**, Hon'ble court given judgment on Dated 19th May, 2022 on this petition alongiwth other petition filled on same issue, the Hon'ble Supreme Court upheld that order of Hon'ble Gujarat High Court and held that IGST on Ocean Freight cannot be levied in case of Import on CIF basis. The relevant extract of the order is reproduced below for reference.

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 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.

8. It is requested you to drop the SCN issued against us as per the Hon'ble Supreme Court order, in case of any clarification, pls let us know.

Yours's
A/R