12 March 2025

EY Tax Alert

HC holds IGST as part of customs duty cannot be levied on reimport of goods after repairs

EY Alerts cover significant tax news, developments and changes in legislation that affect Indian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor.

Executive summary

This Tax Alert summarizes recent ruling of the Delhi High Court (HC)[1] on whether integrated tax (IGST) is payable on cost of repairs, insurance and freight in case of re-import of goods which were earlier exported for repairs.

Notification No. 45/2017–Customs provided exemption from duties of customs on re-imported goods in excess of duty which would be leviable if the value of re-imported goods were made up of the fair cost of repairs, insurance and freight charges.

The same was amended by Notification No. 36/2021 – Customs, and Circular No. 16/2021 – Customs was issued to clarify that the integrated tax and cess under Customs Tariff Act, 1975 (CTA) would also be payable on the fair cost of repairs, *etc.*

The key observations of the HC are:

- Section 3(7) of the Customs Tariff Act, 1975 cannot be construed as being the source of an independent levy of IGST on import of goods. The same merely designates the place and the juncture when the tax liability would be liable to be discharged.
- The transaction, in the instant case, is liable to be treated as import of service in terms of Section 5(1) of the Integrated Goods and Services Tax Act, 2017 (IGST Act) read with Entry 3 of Schedule II to the Central Goods and Services Tax Act, 2017 (CGST Act). The same cannot be again characterized as import of goods and taxed under Section 3(7) of the Customs Tariff Act.
- The unamended Notification No. 45/2017 was in unambiguous terms restricted to the levy of BCD. Thus, the amendments made vide Notification No. 36/2021 - Customs together with Circular No. 16/2021 - Customs were clearly intended to expand the tax net and hence, cannot be termed to be merely clarificatory.

Basis above, HC declared Notification No. 36/2021 read with Circular No. 16/2021 as unconstitutional and *ultra vires* the IGST Act insofar as it purports to levy an additional duty over and above the IGST imposed under Section 5(1) of IGST Act.

[1] 2025-VIL-210-DEL-CU

Background

- The petitioner is a scheduled airline operator engaged in the business of transportation of goods and passengers.
- It had imported aircrafts to carry out the operations. In case the engines/ auxiliary power units/ other parts or aircraft itself began to develop defects, they were exported out of India for repairs.
- Notification No. 45/2017-Customs dated 30 June 2017 (exemption notification) exempts goods falling under any chapter of the first schedule of the Customs Tariff Act, 1975 (CTA) when re-imported into India, from so much of the duty of customs specified in the said first schedule, integrated tax (IGST) and compensation cess leviable, as is in excess of amount specified in the said notification.
- Serial No. 2 of the Notification provides exemption in excess of duty of customs leviable on cost of repairs, insurance and freight where the goods were exported outside India for repairs.
- At the time of re-import of aircrafts/ parts, petitioner filed bills of entry and claimed exemption from payment of basic custom duty under notification no. 50/2017-Customs dated 30 June 2017 and full exemption from IGST under Notification No. 45/2017-Customs.
- Petitioner also discharged IGST on import of services in terms of Section 5(1) of Integrated Goods and Services Tax Act, 2017 (IGST Act) read with Entry 3 of Schedule II of the Central Goods and Services Tax Act, 2017 (CGST Act).
- Revenue disallowed full exemption and levied IGST as part of customs duty on fair cost of repairs, insurance and freight charges.
- The matter reached CESTAT[2] wherein the Tribunal held that petitioner was entitled to full exemption from payment of IGST under the exemption notification on re-import of goods since "duty of customs" referred in the exemption notification would not include IGST.
- The exemption notification was then amended by Notification No. 36/2021 - Customs dated 19 July 2021 as follows:
  - In Sl. No. 2, the expression "duty of customs" was substituted by the words "said duty, tax or cess".
  - An Explanation was inserted which clarified that goods mentioned at Sl. No. 2 would also be exigible to IGST and Cess as leviable under the Customs Tariff Act.
- Circular No.16/2021 – Customs dated 19 July 2021 was also issued by Central Board of Indirect Taxes and Customs to clarify the same.
- In this factual backdrop, petitioner filed writ petition before the Delhi High Court (HC) challenging the levy of IGST on subject goods upon re-import into India as well as the validity of Notification No. 36/2021 read with Circular No. 16/2021.

Petitioners' Contention

- Article 246A came to be introduced in the Constitution by way of a non-obstante clause which thus accorded primacy to its provisions over and above those contained in Articles 246 and 254.
- Article 246A(2) reserves exclusive power in Parliament to make laws with respect to levy of GST where the supply of goods, services or both were to take place in the course of inter-state trade or commerce.
- IGST is levied by the Union on inter-state supply of goods and/or services by virtue of the power conferred under Article 246A(2) and therefore, IGST cannot partake the character of an impost envisaged under Entry 83 of List I (Duties of customs) read with Article 246.
- Further, if Section 3(7) of CTA were to be construed as a provision authorizing an independent levy of IGST on transaction classified as import of services, it would travel far beyond the scope of Entry 83 of List I and impinge upon the legislative field reserved by Article 246A.
- Discharging IGST on re-import of goods would amount to the imposition of "double levy" with a tax firstly being imposed on a supply of services and thereafter being taxed as an import of goods.
- Since the import of goods/services is deemed to be an inter-state supply by virtue of the Explanation to Article 269A of the Constitution read with Sections 7(2) and 7(4) of IGST Act, Section 3(7) of Customs Tariff Act can neither be construed as being the source of an independent levy of IGST on import of goods nor can such a dual levy be sustainable in law.
- The transaction, in the instant case, is liable to be treated as a supply of service or import of service in terms of Section 5(1) of the IGST Act read with Entry 3 of Schedule II to the CGST Act.

  The same could not be subjected to another levy on a perceived reading of Section 3(7) of Customs Tariff Act or by extension of the proviso to Section 5(1) of IGST Act.
- The proviso to Section 5(1) applies only to contingencies where goods are being imported into India. Insofar as the import of services are concerned, the same would be governed exclusively

[2] 2020 (43) G.S.T.L. 410 (Tri. - Del.)

by the principal part of Section 5(1) and to which the proviso would have no application.

- Section 3(7) of CTA was introduced in the statute book merely for the purposes of convenience and designation of the point at which IGST leviable on imported goods may be collected.

- The operation of a proviso to Section 5(1) of IGST Act cannot travel beyond the main section itself. Thus, proviso cannot levy tax on an import of goods where such import does not qualify as supply.

- Invocation of the "aspects theory" is also not tenable. Solitary transaction, in the instant case, was a re-import of aircraft engines and parts which had been sent overseas for repairs. The said activity already stood classified as a supply of services and hence, it would be wholly incorrect to bifurcate one composite taxable event into two.

  Two taxable events could only occur if it is possible to isolate and identify distinct aspects under different fields of tax legislation. The aspects theory does not sanction the levy of a tax twice over on the same transaction.

Respondents' Contention

- The import of goods is not the subject matter of IGST Act. The said Act is merely concerned with the inter-state supply of goods, services or both as distinct from the import of goods. Both are liable to be viewed as two separate and distinct taxable events.

- Section 3(7) of the Customs Tariff Act constitutes an independent provision envisaging the levy of an additional duty of customs on imported articles and goods.

  The expression "integrated tax" in the above provision is not to be confused with the expression as it appears in the IGST Act. The phrase "integrated tax at such rate as occurring" is merely a measure of tax.

- The transaction, in the instant case can be broken down into three principal taxable events: (a) supply of repaired goods, (b) supply of services on carrying out repairs in re-imported goods and (c) import of repaired goods.

  While aspects (a) and (b) would be governed by IGST Act, aspect (c) would be regulated by the Customs Act and the Customs Tariff Act. Hence, as per the aspect theory, all the aspects can be taxed.

- Section 5(1) is not a charging provision in respect of import of goods. The only significance of the Proviso to Section 5(1) is its objective to indicate that the levy of an additional duty under Section 3(7) would be over and above the tax attracted on supply component of the transaction.

- Under Section 3(7), the import of an article into India manifests the taxable event while the expression "be liable" underlines the corresponding liability which comes to be statutorily created, which leads to the imposition of an additional duty of customs.

- The mere treatment of the transaction as a supply of service under IGST Act would have no bearing on the liability that stands cast upon the petitioner to pay the additional duty of customs under Section 3(7) on import of such goods.

High Court Ruling

- The characterization of the nature of a supply under the CGST Act by virtue of Section 7(1A) and Schedule II is adopted and embraced by the IGST in terms of Section 20 of that statute.

  This exercise of a statutory classification and characterization of the genre of supply is clearly in accordance with the mandate of Articles 246A and 269A of the Constitution.

  Thus, once the transaction qualifies as an import of service, the same cannot be characterized as import of goods.

- The integrated tax which is spoken of in Section 3(7) of the Customs Tariff Act can only be recognized as being a reference to the integrated tax leviable under the IGST Act.

- A conjoint reading of the proviso to Section 5(1) of IGST Act and Section 3(7) of the Customs Tariff Act clearly establishes that they are a part of a composite and comprehensive machinery laid in place for collection of IGST. It merely designates the place and the juncture when the tax liability would be liable to be discharged.

- Both the provisions are indelibly connected to the levy and collection of the tax contemplated under the former. Section 3(7) cannot be construed or interpreted as envisaging an independent levy.

- The unamended Notification No. 45/2017 was in unambiguous terms restricted to the levy of a BCD. Thus, the amendments made in Notification No. 45/2017 vide Notification No. 36/2021 together with the clarification (Circular No. 16/2021) issued by the CBIC were clearly intended to expand the tax net and both, therefore, cannot be termed to be merely clarificatory.

- Thus, Notification No. 36/2021 insofar as it purports to levy an additional duty of customs over and above the IGST imposed under Section 5(1) of IGST Act is unconstitutional and *ultra vires* the IGST Act. Hence, the same is quashed to the aforesaid extent.

- Basis above, HC allowed writ petition filed by the Petitioner.

Comments

a. The ruling of the HC that IGST on import of goods is levied under IGST Act and not under Customs Tariff Act may raise questions on the validity of several notifications issued under the Custom Act exempting IGST on import of goods.

b. Businesses may also explore a position of non-payment of IGST on import of goods where such goods are imported free of cost and hence, not constituting a "supply" as per Section 7 of the CGST Act.

c. One may also need to analyze whether this ruling can be made applicable to goods imported under lease or for job-work.

d. In cases where the place of supply of services provided on goods falls outside India, no tax is paid on such transaction in absence of import of services. Businesses may have to evaluate whether IGST as part of customs duty is required to be paid at the time of reimport of goods in such cases.

Our offices

Ahmedabad

22nd Floor, B Wing, Privilon
Ambli BRT Road, Behind Iskcon Temple
Off SG Highway
Ahmedabad - 380 059
Tel: + 91 79 6608 3800

8th Floor, Building No. 14A
Block 14, Zone 1
Brigade International Financial Centre
GIFT City SEZ
Gandhinagar - 382355, Gujarat
Tel +91 79 6608 3800

Bengaluru

12th & 13th Floor
"UB City", Canberra Block
No.24 Vittal Mallya Road
Bengaluru - 560 001
Tel: + 91 80 6727 5000

Ground & 1st Floor
11, 'A' wing
Divyasree Chambers
Langford Town
Bengaluru - 560 025
Tel: + 91 80 6727 5000

3rd & 4th Floor
MARKSQUARE
#61, St. Mark's Road
Shantala Nagar
Bengaluru - 560 001
Tel: + 91 80 6727 5000

1st & 8th Floor, Tower A
Prestige Shantiniketan
Mahadevapura Post
Whitefield,
Bengaluru - 560 048
Tel: + 91 80 6727 5000

Bhubaneswar

8th Floor, O-Hub, Tower A
Chandaka SEZ, Bhubaneswar
Odisha – 751024
Tel: + 91 674 274 4490

Chandigarh

Elante offices, Unit No. B-613 & 614
6th Floor, Plot No- 178-178A
Industrial & Business Park, Phase-I
Chandigarh - 160 002
Tel: + 91 172 6717800

Chennai

6th & 7th Floor, A Block,
Tidel Park, No.4, Rajiv Gandhi Salai
Taramani, Chennai - 600 113
Tel: + 91 44 6654 8100

Delhi NCR

Aikyam
Ground Floor
67, Institutional Area
Sector 44, Gurugram - 122 003
Haryana
Tel: +91 124 443 4000

3rd & 6th Floor, Worldmark-1
IGI Airport Hospitality District
Aerocity, New Delhi - 110 037
Tel: + 91 11 4731 8000

4th & 5th Floor, Plot No 2B
Tower 2, Sector 126
Gautam Budh Nagar, U.P.
Noida - 201 304
Tel: + 91 120 671 7000

Hyderabad

THE SKYVIEW 10
18th Floor, "SOUTH LOBBY"
Survey No 83/1, Raidurgam
Hyderabad - 500 032
Tel: + 91 40 6736 2000

Jaipur

9th floor, Jewel of India
Horizon Tower, JLN Marg
Opp Jaipur Stock Exchange
Jaipur, Rajasthan – 302018

Kochi

9th Floor, ABAD Nucleus
NH-49, Maradu PO
Kochi - 682 304
Tel: + 91 484 433 4000

Kolkata

22 Camac Street
3rd Floor, Block 'C'
Kolkata - 700 016
Tel: + 91 33 6615 3400

Mumbai

14th Floor, The Ruby
29 Senapati Bapat Marg
Dadar (W), Mumbai - 400 028
Tel: + 91 22 6192 0000

5th Floor, Block B-2
Nirlon Knowledge Park
Off. Western Express Highway
Goregaon (E)
Mumbai - 400 063
Tel: + 91 22 6192 0000

3rd Floor, Unit No 301
Building No. 1
Mindspace Airoli West (Gigaplex)
Located at Plot No. IT-5
MIDC Knowledge Corridor
Airoli (West)
Navi Mumbai – 400708
Tel: + 91 22 6192 0003

Altimus, 18th Floor
Pandurang Budhkar Marg
Worli, Mumbai - 400 018
Tel: +91 22 6192 0503

Pune

C-401, 4th Floor
Panchshil Tech Park, Yerwada
(Near Don Bosco School)
Pune - 411 006
Tel: + 91 20 4912 6000

10th Floor, Smartworks
M-Agile, Pan Card Club Road
Baner, Taluka Haveli
Pune - 411 045
Tel: + 91 20 4912 6800

Download the EY India Tax Insights App

Ernst & Young LLP

EY | Building a better working world

EY is building a better working world by creating new value for clients, people, society and the planet, while building trust in capital markets.

Enabled by data, AI and advanced technology, EY teams help clients shape the future with confidence and develop answers for the most pressing issues of today and tomorrow.

EY teams work across a full spectrum of services in assurance, consulting, tax, strategy and transactions. Fueled by sector insights, a globally connected, multi-disciplinary network and diverse ecosystem partners, EY teams can provide services in more than 150 countries and territories.

All in to shape the future with confidence.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via ey.com/privacy. EYG member firms do not practice law where prohibited by local laws. For more information about our organization, please visit ey.com.

Ernst & Young LLP is one of the Indian client serving member firms of EYGM Limited. For more information about our organization, please visit www.ey.com/en_in.

Ernst & Young LLP is a Limited Liability Partnership, registered under the Limited Liability Partnership Act, 2008 in India, having its registered office at Ground Floor, Plot No. 67, Institutional Area, Sector - 44, Gurugram - 122 003, Haryana, India.

ED None.

ey.com/en_in