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IGST exemption on Imports – Does it require GST Council recommendation?

"Nobody has a more sacred obligation to obey the law than those who make the law."
[Sophocles]

Introduction

The question posed in the title of the article may startle readers and some may even consider it outlandish, if not absurd! After all, who, in his right mind, can think of anything happening in the GST arena without **'the recommendations of the GST Council'**? The phrase **'on the recommendation of the Council'** has been so liberally sprinkled across the GST laws that it has become an all pervading, all-dominating phrase! Like an omnipresent God, the GST Council's presence is felt by all stakeholders behind every decision on any matter concerning GST on account of this phrase!

Nevertheless, the author has raised (or dared to raise!) the above question in view of two recent developments viz.

- One, the stormy and controversial issue of the need to grant exemption from IGST to the import of the oxygen concentrators, by way of gift for personal use; and
- Two, **the officially unannounced (but otherwise all over the print media, news channels and of course, the social media)** agenda of the forthcoming 43 rd Meeting of the GST Council to be held on May 28, 2021 where the above issue of the import of oxygen concentrators, by way of gift, for personal use, is proposed to be discussed.

For the uninitiated, it is in order to lay down a few bare facts as are relevant for the present discussion:

a) By notification no. **28/2021-Cus** dated 24.04.2021, total exemption from the payment of customs duty and health cess leviable on the 'Oxygen Concentrator', amongst other goods specified in the notification, when imported into India, has been unconditionally granted by the Central Government. **This notification shall remain in force up to July 31, 2021.**

b) Close upon the heels of the above notification, the Central Government issued another notification no. **30/2021-Cus** dated 01.05.2021, **possibly to pacify agitated minds**, providing for a

concessional rate of IGST at 12% adv. on 'oxygen concentrator' imported for personal use. **This notification shall remain in force up to June 30, 2021.**

c) However, taking note of the 'hue and cry' over the levy of IGST on the imports of oxygen concentrator, the Central Government issued an Ad hoc Exemption Order No. **04/2021-Cus** dated 03.05.2021, in terms of S. 25(2) of the Customs Act, 1962 ('the CA') granting total exemption from the payment of IGST leviable on the oxygen concentrator, amongst other specified goods, when imported into India, by the specified canalising agencies, albeit, subject to the conditions prescribed therein. **This exemption order shall remain in force up to June 30, 2021.**

d) By a scintillating judgement delivered on May 21, 2021 in the case of **Gurcharan Singh vs. Ministry of Finance - 2021-TIOL-1168-HC-DEL-CUS**, the Hon'ble Delhi High Court has quashed Notification no. 30/2021-Cus ibid as being unconstitutional.

The question posed in the beginning of this article and which is the central point of this piece needs to be considered against the backdrop of the above developments and factual position.

Levy of IGST on imports - A legal framework

Before we advert to the above issue, it will be necessary and advantageous to understand the legal framework relating to the levy of IGST on the imports.

The power to levy GST on the supply of goods and services is rooted in Art. 246A of the Constitution. Art. 246A (2) has vested Parliament with the exclusive **power to make laws** with respect to goods and services tax, where the **supply** of goods, or services, or both **takes place in the course of inter-state trade or commerce**. Art. 269A (1) empowers **the Union to levy and collect the GST on the supplies in the course of inter-state trade or commerce**. Explanation appended to Art. 269A (2) reads as under:

"Explanation.- For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce".

Thus, the Explanation creates a deeming fiction by declaring the 'supply of goods or of services, or both in the course of imports into India' as 'supply in the course of inter-state trade or commerce'. Art. 279A deals with the constitution of the GST Council and its powers to make recommendations to the Union and the States on the matters enumerated in sub-clauses (a) to (h) of clause (4) thereof. In pursuance of Art. 246A, several GST legislations have been enacted, one of them being 'Integrated Goods and Services Tax **Act, 2017**' ('IGST Act'). S. 5(1) of the IGST Act provides for the levy of integrated tax on all inter-state supplies of goods or services or both, except alcoholic liquor for human consumption. In terms of S. 7(2) of the IGST Act, the **supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated** to be a supply of goods **in the course of inter-state trade or commerce**. However, proviso to S. 5(1) of the IGST Act states that the integrated tax on the goods imported into India shall be levied and collected in accordance with S.3 of the Customs Tariff Act, 1975 ('the CTA') on the value as determined under S.12 of the said Act at the point when the customs duties are levied on the said goods under S.12 of the CA. There is, thus, an interplay between the provisions of the CA, CTA and IGST Act, in so far as the imposition of levy of IGST on goods imported into India is concerned.

S.3 of the CTA was amended by the Taxation Laws (Amendment) Act, 2017 so as to substitute, inter alia, sub-section (7) and to provide for the levy of integrated tax at the rate not exceeding 40 per cent on the imported goods as is leviable under S.5 of the IGST Act on the like article on its supply in India, on the value of the imported article as determined under sub-section (8) or sub-section (8A). [Sub-section (8A) was inserted in S.3 by S. 102 of Finance Act, 2018 w.e.f. 28.03.2018].

Thus, S.3 of the CTA read with the proviso to S. 5(1) of the IGST Act provides for the levy of IGST on the goods imported into India at the rate not exceeding 40% on the values determined under S. 3(8)

and (8A) of the CTA and at the point when duties of customs are levied on the said goods under S.12 of the CA.

Exemption from IGST - Statutory framework

The power to grant exemption from IGST, **on the recommendation of the Council**, any goods or services or both, are vested in the Central Government under S. 6(1) of the IGST Act. The poor drafting of this provision apart, it does not provide for, nor can it be read as providing for the Central Government's power to grant exemption from IGST to any goods imported in India.

On the other hand, sub-section (12) of S. 3 of the CTA makes the provisions of the CA and the rules and regulations made thereunder, **including those relating to the exemption from duties**, so far as may be, applicable, inter alia, to the tax chargeable under the said Section as they apply in relation to the duties under that Act. In other words, in terms of S. 3(12), the Central Government is empowered to grant exemption from IGST in respect of any goods imported in India, by exercising the powers vested in it under S. 25 of the CA.

IGST on exemption on imports - Where is the role for the GST Council?

It is against the above Constitutional and legal framework concerning the levy and collection of IGST on the goods imported into India and exemption from payment of IGST in respect thereof that one needs to consider the role, if any, of the GST Council insofar as the grant of exemption is concerned.

Even if one were to ignore the complete dichotomy and disconnect between the proviso to S.5(1) of the IGST Act and the provisions of S. 3(7) of the CTA and assume the validity of levy of IGST on imported goods, the levy and collection of the IGST on the goods imported into India is in terms of S. 3 of the CTA read with the proviso to S.5 of the IGST Act. IGST has in effect, replaced countervailing duty ('CVD') which was hitherto leviable under S. 3 of the CTA and was being traditionally levied on the imported goods to ensure a level playing field to the domestic manufacturers. Thus, CVD levied on imported goods was equivalent to the basic excise duty on a like product produced or manufactured in India. With the introduction of GST regime in the country w.e.f. July 01, 2017, the role hitherto played by CVD has been taken over by IGST which is levied on the goods imported into India under S. 3(7) of the CTA read with the proviso to S. 5(1) of the IGST Act. A careful perusal of S. 3(7) of the CTA would indicate that the provision only refers to the rate that is leviable under S.5 of the IGST Act. The power to levy IGST on the imported goods has to be searched and found essentially in S.3(7) of the CTA.

This being the legal position, the power to grant exemption from IGST also has to be searched in the provisions of CTA and/or CA only. Needless to say, S. 3 (12) of the CTA makes the provisions of the CA relating to exemption from customs duties i.e. the provisions of S. 25 of the CA applicable, so far as may be, to tax i.e. integrated tax or IGST chargeable under the said S.3 of the CTA. Consequently, the Central Government is empowered to grant exemption from IGST in respect of any goods imported into India by exercising its powers vested in it under S. 25 of the CA. As will be observed from a careful perusal of S. 25 of the CA, the power vested in the Central Government to grant exemption thereunder to any imported goods **is not dependent on the recommendation of the GST Council**. This, indeed, reflects the legislative wisdom inasmuch as the power to levy and collection of duties of customs and IGST on the goods imported into India is vested in the Parliament, and so also, the power to grant exemption from duties of customs and/or IGST is vested in the Central Government under delegated legislation. Any role of the GST Council that comprises members representing the Union and the States/Union Territories was never envisaged in so far as the levy and collection of IGST and the grant of exemption from IGST in respect of the imported goods is concerned. **It is significant to note here that the matter relating to the 'grant of exemption from integrated tax to any goods imported into India' is conspicuous in its absence in clause (4) of Art. 279A of the Constitution.**

It is further to be noted that under Art. 246A (2) of the Constitution, Parliament has **exclusive power** to make laws with respect to GST where the supply takes place in the course of inter-state trade or commerce. Art. 269A provides for the levy and collection of GST i.e. integrated tax on supplies in the course of inter-state trade or commerce. Explanation to Art. 269A(1) **deems** the supply of goods

or services or both in the course of import into India as a supply in the course of inter-state trade or commerce. It therefore follows that the law governing the levy and collection of the integrated tax or IGST on the supply of goods or services or both imported into India lies within the exclusive domain of the Union and no role of the GST Council consisting of the members of Union and the States/UTs is envisaged here by the Legislature. It is therefore evident that S. 6 (1) of the IGST Act, inter alia, empowering the Central Government to grant, **on the recommendation of the Council**, exemption from the integrated tax to any goods or services, or both, has to be considered as being confined to domestic inter-state supplies and not extending to the supplies imported into India. To conclude, the power to grant exemption from IGST in respect of any goods imported into India remains vested in the Central Government under S. 25 of the CA and exercise of such power does not depend on the recommendation of the GST Council. This view is fortified by the fact that the Ad hoc Exemption Order No. 04/2021-Cus dated 03.05.2012 providing for the partial exemption from IGST, inter alia, in respect of the oxygen concentrator imported for personal use has been issued by **the Central Government under S. 25 (2) of the CA and there is neither, nor can there be any mention of the 'recommendation of the GST Council'**. Readers may also refer to Notification no. **33/2017-Cus** dated 30.06.2017 (effective from 01.07.2017) inter alia, granting exemption from the payment of IGST leviable under S. 3(7) of the CA in respect of the imported goods specified therein. This notification has been issued by the Central Government under S. 25 (1) of the CA.

Finally, Para 16.1 to 16.3 of the above referred Delhi High Court judgement dated May 21, 2021 (supra) fully supports the view that in the matter of the grant of exemption from IGST in respect of any supply of goods or services or both, imported into India, **the GST Council has neither any say nor any role to play.**

IGST exemption on imports -Propriety of the GST Council's deliberations

In view of the above discussion and clear and explicit Constitutional framework and the statutory provisions, one wonders as to the propriety of the GST Council undertaking any deliberations over the grant of IGST exemption to imports (oxygen concentrator is the 'goods' in question) at all, when it has not even been vested with the powers to make any recommendations on this count under the Art. 279A(4) of the Constitution? The power to grant IGST exemption to imported goods is vested with the Central Government (read 'Union') under S.25 of the CA and it may exercise this power or refrain from doing so. Why should the Council arrogate to itself this role and by implication, bring State Governments into the picture which is clearly not envisaged by the Legislature and is against the Constitutional scheme of things? Or is it that considering the sensitive nature of the issue of grant of IGST exemption to 'oxygen concentrator imported for personal use', the Central Government is reluctant to 'bite the bullet' and has considered it prudent to take the States/UT's along in the decision-making process?

Be that as it may, the very fact that 'grant of IGST exemption' (and for that matter, even customs duty exemption) to any imported goods is being discussed by the GST Council shows that something is terribly amiss here!

"....even the fixing of a tariff rate must be moral."
[Ida Tarbell, American Writer "The Tariff in Our Times, 1906]

[Concluded]

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