CA Naresh Sheth & CA Jinesh Shah

INDIRECT TAXES

GST – Recent Judgments and Advance Rulings

A. Writ Petition

1. Vasu Clothing Private Limited vs. The Union of India – High Court of Madhya Pradesh (2018-TIOL-2931-HC-MP-GST)

Facts, Issue involved and Contention of Petitioner

Petitioner is engaged in the business of manufacturing and exporting of garments. It has filed petition for grant of relief by way of exemption under GST on supply of goods to the Duty Free Shops (DFSs) at the international Airports in India.

The petitioner's contention is that after enactment of Central Goods and Services Tax Act, 2017 ('CGST Act') and the Rules framed thereunder, it is entitled to supply goods and services to Duty Free Shops without payment of taxes and similar supplies from all over the world **except India** are permitted without payment of taxes. The petitioner intends to supply goods to Duty Free Operator (DFO), who in turn is selling the goods from Duty Free Shops (DFSs). Duty Free Operator operating in India imports goods like liquor, tobacco products, souvenirs, eyewear, watches, fashion, chocolates, perfumes, etc. by filing import general manifest and Bill of Entry for warehousing with the customs department without payment of import duty on the first importation subject to certain conditions. The bill of entry clearly indicates the Duty Free Operator as an "importer". The imported goods are warehoused at a bonded warehouse (customs warehouse) and the bill of entry also discloses that the goods imported are for "sale only for Duty Free Shop / Export". Duty Free Operator also takes on rent a private bonded warehouse located near the airport as well as certain shops called "Duty Free Shops" at the arrival and departure terminals of international airports in India. The goods are sold to international passengers without payment of duties and taxes. Prior to GST, duty free operations were exempted from payment of Customs Duty, Countervailing Duty (CVD), Special Additional Customs Duty (SACD), Excise Duty, VAT / Sales Tax, OCTROI, etc. The petitioner's contention is that principle for exemption from payment of VAT / Sales Tax by an Indian Duty Free Shop was evolved pursuant to the judgment delivered by the Hon'ble Supreme Court in the case of *M/s. Hotel Ashoka (Indian Tourism Development Corporation Limited) vs. Assistant Commissioner of Commercial Taxes and Another* (Civil Appeal No.2560/2010, decided on 3-2-2012). In respect

of indigenous products manufactured in India which were subjected to payment of Excise Duty and VAT, Government of India, in the year 2013, issued notifications so as to allow excise duty free sale of goods manufactured in India to international passengers or members of crew arriving from abroad at the Duty Free Shops located in the arrival halls of international airports and to passengers going out of India at Duty Free Shops located in the departure hall of international airports in the country. The petitioner has made a prayer for directing the respondent to treat the goods supplied to DFS as an export without payment of CGST and IGST, only on the ground that Duty Free Shop at international airport are located beyond the customs frontier of India and any transaction that takes place in a Duty Free Shop is said to have taken place outside India.

Discussions by and Observations of HC

As per Section 2(5) of IGST Act, 2017, **export of goods** takes place only when goods are taken out to a place outside India. Petitioner is supplying goods to Duty Free Shops.

India is defined under Section 2(27) of Customs Act, 1962 as "India includes territorial waters of India". Similarly under the CGST Act, 2017 under Section 2(56) "India" means the territory of India including its territorial waters and the air-space above its territory and territorial waters and therefore, the goods can be said to be exported only when they cross territorial waters of India and **the goods cannot be called to be exported merely on crossing customs frontier of India.**

As per Section 2(4) of IGST Act, "customs frontiers of India" means the limits of a customs area as defined in section 2 of the Customs Act, 1962 (52 of 1962);

As per Section 2 (ab) of Central Sales Tax Act, 1956, "Crossing the customs frontiers of India" means crossing in the limits of the area of a customs station in which imported goods or export goods are ordinarily kept before clearance by customs authorities. Explanation — For the purposes of this clause, "customs station" and "customs authorities" shall have the same meanings as in the Customs Act, 1962 (52 of 1962).

For the purpose of CGST Act, India extends the Exclusive Economic Zone upto 200 nautical miles from baseline. The location of DFS, whether within custom frontier or outside, shall be within India. Therefore, supply to DFS by an Indian supplier cannot qualify as 'Export of Goods'. Therefore, he is liable to pay GST on supply of indigenous goods to DFS.

The petitioner is aggrieved by the fact that the benefit available to him under the erstwhile central excise regime of removing goods from his factory to DFS located in International airports without payment of duty is not available to him under the GST regime.

In case of *Kothari Industrial Corporation Limited vs. Tamil Nadu Electricity Board and another 2016 4 SCC 134,* Apex court held that there is no estoppel against law and recipient of a concession has no legally enforceable right against the Government to grant or to continue to grant a concession.

The petitioner cannot escape GST liability as he is not exporting the goods or taking goods outside India. He is selling to a person, who is having a DFS located in India [defined u/s. 2(56) of CGST Act].

A statute is an edict of the legislature, courts do not have power to enact a statute and court can only do interpretation of statute. Once the court does not have power to legislate, the question of granting exemption in absence of any statutory provision to the petitioner under the GST Act does not arise.

Decision of HC

The petitioner is liable to pay GST. In light of the aforesaid judgment, as no such exemption

is available to the petitioner in light of the GST Act, the judgment relied upon by the petitioner is of no help. In view of above, writ petition was dismissed.

B. Rulings by Appellate Authority of Advance Ruling

2. M/s. Kundan Mishthan Bhandar – AAAR Uttarakhand (2019-TIOL-29-AAAR-GST)

Facts, Issue involved and Query of Applicant

Applicant has a sweetshop on ground floor from where they supply food items such as sweetmeats, namkeens, cold drinks and other edible items. They also run a restaurant on the first floor in the same building.

Applicant has sought advance ruling for the following questions:

i. *Whether **supply of pure food items** like sweetmeats, namkeens, and other edible items from sweetshop that also runs a restaurant is supply of goods or services.*

ii. *What is the nature and rate of tax applicable to the following items supplied from the ground floor of a sweetshop and wherein restaurant is also located on the first floor and whether applicant is entitled to claim benefit of input tax credit with respect to the same:*

   a. *Sweetmeats, namkeens, dhokla, etc. commonly known as snacks, cold drinks, ice cream and other edible items.*

   b. *Ready to eat (partially or fully pre-cooked / packed) items supplied from live counters such as jalebi, chole bhature and other edible items*

   c. *Takeaway order of sweetmeats or namkeen by a person sitting in the restaurant of a sweetshop when such products are not consumed within the premise of applicant but are takeaway.*

Discussions by and Observations of AAR

It was noticed by authority that two or more goods or a combination of goods and services were supplied together. Under GST law, supplies that are bundled, with two or more supplies of goods or services or a combination thereof can be classified either as composite supply or as mixed supply.

Composite supply is defined u/s. 2(30) of CGST Act to mean *a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.*

Mixed supply is defined u/s. 2(74) of CGST Act to mean *two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person **for a single price** where such supply does not constitute a composite supply.*

For a supply to be considered as a mixed supply, firstly it should be out of coverage of Composite supply. In order to constitute a composite supply, the goods or services or both are to be supplied together, in a natural bundle and in normal course of business, **provided** one of them has to be a principal supply.

In the instant case, the nature of restaurant services is such that it may be treated as the main supply and the other supplies combined with such main supply are in the nature of incidental or ancillary services. Thus, restaurant services get the character of predominant supply over other supplies.

Therefore, in the present case, supply will be treated as supply of service and the sweet shop shall be treated as extension of the restaurant in as much as the said activity covered under clause 6(b) of Schedule II of the Act that is as under:

Following composite supplies will be treated as supply of services, namely:—

(b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration.

Since the supply of restaurant service is treated as principal supply therefore the rate applicable on such composite supply shall be rate attributable to the restaurant service i.e. 5% [HSN- 9963] subject to condition that input tax credit will not be availed on the provision of such service.

Ruling of AAR

In respect of question (1), supply shall be treated as supply of service and sweet shop shall be treated as extension of restaurant services.

In respect of question (2), rate of GST on aforesaid activity and takeaway items shall be 5% with the condition that no ITC can be claimed in respect of inward supply.

Appeal to the AAAR and Observations of AAAR

Aggrieved by the above-referred ruling, the applicant preferred an appeal to AAAR against the same. Applicant reiterated grounds stated in the application and submitted the following contentions relying upon various judgments:

S. N.	Contention	Judgement supporting contention
1	Impugned ruling passed by the UAAR was a non-speaking order and thus liable to set aside.	Delhi High Court in the case of *T.T. Ltd. vs. Union of India [2017 (349) E.L.T. 130 (Del)*
2	Mere Supply of food items is a transaction of supply of goods only and concept of composite supply is not applicable.	*Cochin State Power & Light Corporation Ltd. vs. State of Kerala [AIR 1965 SC 1688]*
3	The Guidance for Classification can be taken from statutes in parimateria and assistance from earlier statutes.	*Bengal Immunity Co. Ltd. vs. State of Bihar [AIR 1955 SC 661]*
4	The Sphere of Restaurant services should be understood in its 'Commercial Sense'	*Collector of Central Excise Pune vs. Dai Chi Karkaria Ltd [AIR 1999 SC 3234]*
5	The deeming provision shall be understood in a restricted manner.	*CIT Bombay City II vs. Shakuntala [AIR 1966 SC 719]*
6	The taxing Statutes must be construed strictly.	*A.V. Fernandes vs. State of Kerela [AIR 1957 SC 657]*

Further, the applicant submitted that **supply of pure food items** from a sweetshop, which also runs a restaurant is a transaction of **supply of such individual goods.** Therefore, rate of tax for supply of pure food items from a sweetshop shall be individual rate of GST as may be applicable to such items with benefit of Input Tax Credit.

Further, any item or take away **ordered or consumed within/from restaurant** shall be considered as **supply of restaurant service** on which rate of GST of Restaurant service shall apply and benefit of Input tax shall not be applicable.

The Applicant in the personal hearing also referred to the GST council press release dated 22-12-2018, wherein they have clarified that it is not the nature of establishment but the nature of supply that is the decisive factor.

Firstly, AAAR observed that the applicant is running a sweetshop and a restaurant in two distinctly marked separate parts of the same premise and is also maintaining separate accounts as well as separate billings for the two types of business. The goods sold from the sweetshop are being billed exclusively as sweetshop sales whereas the goods supplied from the restaurant are billed under Restaurant head.

AAAR cited the definition of Composite Supply and stated that when sweets, namkeens, cold drinks and other edible items are supplied to customers in the restaurant or as takeaways from the restaurant counter and which are being billed under restaurant sales head should fall under 'Composite Supply' with restaurant service being the Principal supply. The taxability of all such goods supplied to or through the restaurant will be governed by the principal service i.e. restaurant service and GST rate applicable thereon with applicable conditions. ITC will not be allowed for the above case.

Since, there is no direct nexus to the goods supplied by the sweetshop i.e. anyone can come and purchase any item of quantity from the shop counter without visiting the restaurant. The billing of such sales are done separately and such sales cannot be clubbed with restaurant service. These sales are completely independent of restaurant activity and continue even if restaurant is closed.

Therefore, such sales will be treated as supply of goods with applicable GST rates on the items sold and Input credit will be allowed on such supply.

Order of AAAR

AAAR has set aside the ruling of the Authority of the Advance Ruling and have passed the following order:

- Sale of sweets, namkeens, cold drinks and other edible items through restaurant will be treated as 'composite supply' with restaurant supply being the principal service. Existing GST rates on restaurant service will also be applicable on all such sales and no ITC will be allowed.
- Sale of sweets, namkeens, cold drinks and other edible items from sweetshop counter will be treated as supply of goods with applicable GST rates of the items being sold and ITC will be allowed on such supply.
- The applicant should maintain separate records for restaurant and sweatshop with respect to input and output and billings as well as other accounting records should also be separately maintained.

3. M/s. Geojit Financial Services Limited – AAAR Kerala (2019-TIOL-13-AAAR-GST)

Facts, Issue involved and Query of Applicant

The applicant is engaged in activity of providing various retail financial services like stock broking, share broking, etc. which were not taxable under VAT Law.

As on 30th June 2017, they had in their possession physical stock of goods such as computers, laptops etc., which were utilised by them in providing the output services. Placing reliance on the transitional provisions, they have availed input tax credit on closing stock of computers, laptops and other goods lying in the physical possession of the applicant as on 30th June 2017. The applicant has sought for Advance Ruling for following questions:

i. Whether computers, laptops etc. used by the applicant for providing output service would qualify as inputs for the purpose of availing transitional ITC under section 140 (3) of KSGST Act?

ii. If the goods are physically available as closing stock as on 30th June 2017, can the applicant avail ITC for the VAT paid?

Applicant submitted that as per Section 140 (3) of the GST Act, 2017 a registered person, who was not liable to be registered under the existing law or who was engaged in the sale of exempted goods or tax free goods, by whatever name called, or goods which have suffered tax at the first point of their sale in the state and the subsequent sales of which are not subject to tax in the state under the existing law but which are liable to tax under this act or where the person was entitled to the credit of input tax at the time of sale of goods, if any, shall be entitled to take the credit of the value added tax in respect of inputs held in stock and inputs contained in semi – finished or finished goods held in stock on appointed day subject to the condition that:

i. Such inputs or goods are used or intended to be used for making taxable supplies under this Act;

ii. The said registered person is eligible for input tax credit on such inputs under this act;

iii. The said registered person is in possession of invoice or other prescribed documents evidencing payment of tax under the existing law in respect of such inputs; and

iv. Such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

Discussions by and Observations of AAR

The applicant being a service provider had no tax liability under VAT regime. Section 140 (2) of the Act covers transitional credit claim on capital goods by a dealer registered in the earlier law. The proviso to sub-section (2) of section 140 of the GST Act is specific to the point that ITC ineligible under the existing law is also ineligible for ITC under GST Act. The computers, laptops etc. used by the applicant for providing output services are capital assets. These capital goods are ineligible to claim input tax credit under VAT Laws. Section 2 (x) of Kerala Value Added Tax, define capital goods as follows:

"Capital Goods" means plant, machinery, equipment including pollution quality control, lab and cold storage equipments used in manufacture, processing, **excluding for job works or rendering of services**, packing or storage of goods in the course of business and delivery vehicles but shall not include such goods and civil structure as may be notified by government.

Section 140(2) of the Act covers transitional credit claim on capital goods by a dealer registered in earlier law. Section 140 (3) of the GST Act covers credit of eligible duties in respect of inputs held on stock and inputs contained in semi-finished goods or finished goods held in stock in appointed day.

Hence, the transitional credit claim of the taxpayer in respect of capital goods is not acceptable.

Ruling of AAR

In respect of question (i), laptops, computers etc. used by the applicant in providing its output service would not qualify as capital goods for the purpose of the transitional provisions under the Act. By virtue of the same, the said laptops, computers, etc. would qualify as inputs under Section 140 (3) of the Act.

In respect of question (ii), the goods even though physically available as closing stock as on 30th June 2017, ITC is not eligible for the VAT paid.

Appeal to the AAAR and Observations of AAAR

Applicant submitted that items in question are inputs eligible for ITC relying solely on Section 140(3) of the Act. Therefore, denial of ITC U/s. 140(2) by AAR is irrelevant.

Goods in question do not fall within the definition of capital goods defined under Section 2 (x) of the Kerala Value Added Tax Act, 2003 thereby the goods in question would automatically qualify as inputs as defined in section 2 (59) of the Act. Once the goods in question fall within the ambit of inputs, the eligibility of transitional credit benefit has to be examined under section 140 (3) of the Act and not Section 140 (2) of the Act.

Applicant further submitted that it satisfies all the four conditions prescribed under Section 140 (3) of the Act for availment of transitional credit. In the light of the above, applicant is of the view that stock held as on 30th June 2017, qualifies as inputs on which the applicant can avail ITC under Section 140(3) of Chapter XX of the Act.

The contentions raised by the applicant were examined by the AAAR in detail.

Section 2(19) of the KSGST Act, 2017 defines "Capital Goods" as goods the value of which is capitalized in the books of accounts of person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business.

Further, Section 2(59) of the KSGST Act, 2017 defines "inputs" as any goods other than capital goods used by a supplier in the course or furtherance of business.

Hence, from the above definitions it is clear that, in the GST period, the input tax credit of Tax paid on computers etc. can only be claimed as "Capital Goods" but not as "Inputs".

The computers, laptops etc. fail to qualify as "inputs" under KSGST Act, 2017 and thereby fail to satisfy the condition set under clause (ii) of Section 140 (3) of the KSGST Act, 2017, hence they are not eligible to claim ITC under transitional provisions of the VAT paid during the pre-GST period on the computers and laptops etc. physically available on 30th June, 2017.

Further, the computers etc. which were lying in stock as on 30.06.2017 were declared as capital assets prior to GST and used by the applicant for providing output services. Thereby they had no tax liability under the erstwhile KVAT law. Therefore they squarely fall under the definition of "Capital Goods" under section 2(19) of the KSGST Act, 2017 and not under the Section (59) of the KSGST Act, 2017. Hence the relevant transitional provision applicable in the instant case is section 140 (2) of the KSGST Act, 2017 and Section 140 (3) of the KSGST Act cannot be invoked.

In view of the above discussions, this appellate authority for advance ruling does not find any reason to modify the decision of the Authority for Advance Ruling.

Order of AAAR

The computers, laptops etc. used by the applicant for providing output services would not qualify as inputs, though they are physically available as on 30th June 2017, for the purpose of availing transitional input tax credit of the VAT paid during the pre-GST period under section 140 of the KSGST Act 2017.

4. M/s. MRF Ltd. – AAR Tamil Nadu (2019-TIOL-87-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant intends to enter into an agreement with M/s C2F0 India LLP, for setting up an interactive automated data exchange. The C2F0 platform provides interaction relating to sale and purchase of goods and services between a buyer and a seller. Both the Supplier and the Recipient of goods or services should register on the platform provided by C2F0.

By accepting the C2F0 terms and conditions, the supplier will be agreeable to offer certain discount in return for an early payment of an Invoice from the recipient of goods or services (i.e. the applicant).

The Applicant has stated that since the transaction is a post-invoice discount offer on optional basis, same discount is not captured in the purchase contract between the applicant and the supplier. Once the goods or services are delivered and the invoice is booked in the ERP and marked as approved to pay, the supplier via C2F0 can take voluntary decision and give discounts to the buyer to receive early payment. The supply is made in terms of the purchase contract and the recipient on receipt of the goods or services takes ITC as mentioned in the invoice.

The discount arrangement is not part of the Purchase Contracts or the invoices. It is the case of offering discount post supply falling under "Cash Discount" not agreed before or at the time of supply.

Applicant has sought Advance Ruling to clarify whether the company can avail the ITC of the full GST charged in the supply of invoice or a proportionate reversal of the same is required in case of post purchase discount given by the supplier of the goods or services.

The Applicant stated that as per Section 15(3) of the CGST Act, discount is not allowable for deduction from the price at the time of supply since the same is not known either before or at the time of supply. The taxable value for the purpose of payment of GST will be the value as per Purchase Contract without considering such discount so offered and the supplier is liable to pay tax on the value before discount.

The buyer pays **price** minus **the discount** plus GST **on the value without considering amount.** The Applicant submitted that the payment made by the recipient has to be considered as proper payment in compliance with Section 16(2). There is no requirement to reverse ITC by the recipient attributable to the amount of discount so allowed for the reason that such discount is not considered by the supply for payment of GST and the applicant is not entitled to issue any credit note for the discount amount including GST in terms of Section 34(1) and (2).

Discussions by and observations of AAR

The Authority has observed that the applicant intends to enter into an agreement with C2F0 for setting up an interactive software, which can integrate data relating to sale and purchase of goods or services between the applicant and the suppliers. The supplier on raising the invoice (undiscounted price) pays the applicable GST. The applicant avails ITC on receipt of goods or services provided by the supplier and thereafter, such invoice is staged for discount against early payment in the C2F0 platform and the price is discounted.

The Applicant states that there is no need on their part to reverse the ITC availed by them in proportion to the discount in the invoice price.

In this case, the value of supply is the **full-undiscounted value** indicated in the tax invoice and the recipient only makes payment to the extent invoice less the discount thrown up by the C2F0 software. As per section 16, the recipient is entitled to avail the ITC on the payment made by him alone and if any amount is not paid as per the Value of Supply and the recipient has availed full ITC, the same would be added to his output tax liability.

Therefore, in the instant case, the applicant can avail ITC only to the extent of the invoice value less the discounts. If he has availed ITC on the full amount, he should reverse the difference amount equal to the discount, to avoid adding to his output liability.

Ruling of AAR

In respect of question raised by the Applicant, ITC can be availed by the applicant only to the