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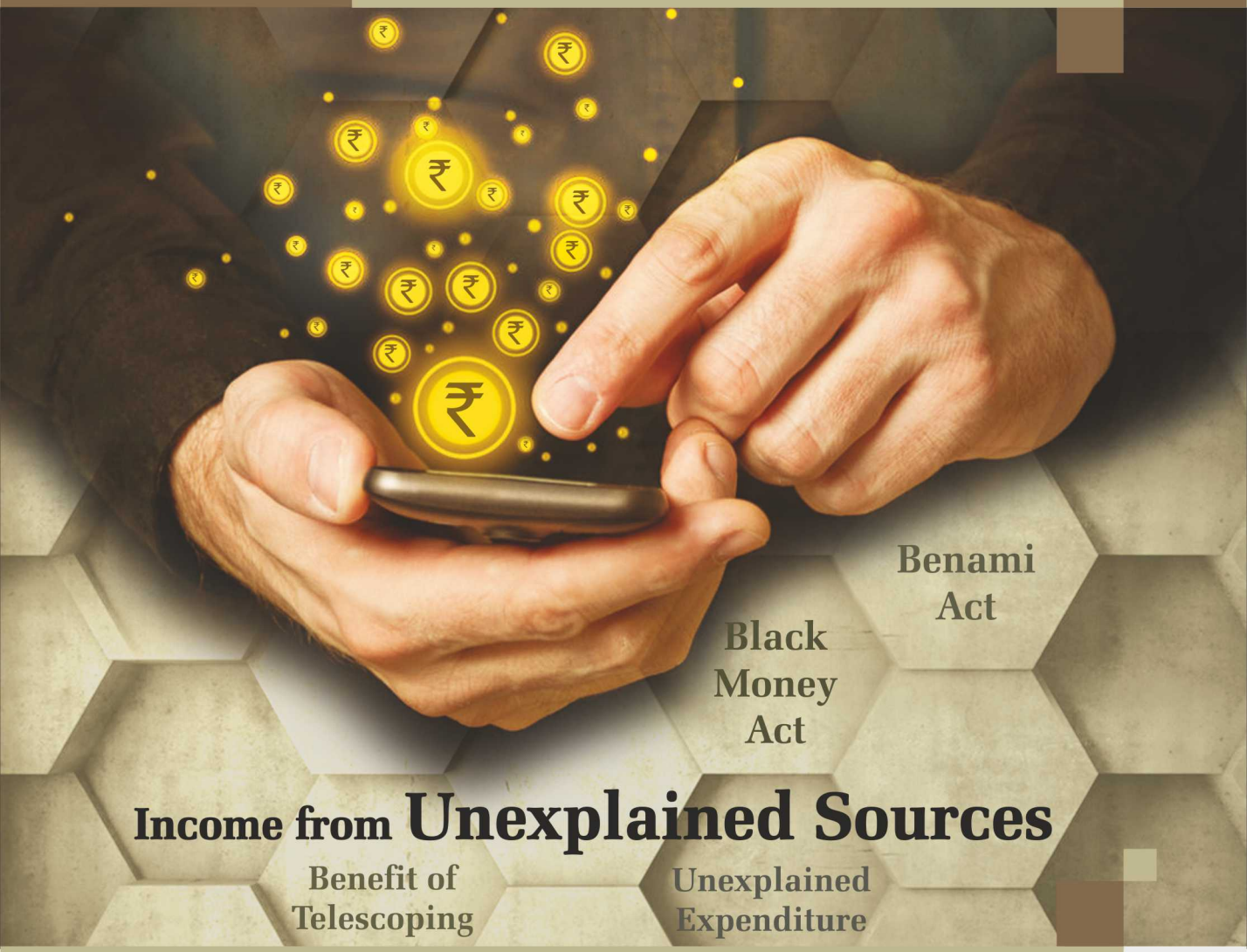
YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS



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INDIRECT TAXES

GST – Recent Judgments and Advance Rulings

A. Writs and Special Leave Petitions

1. Saji S., Ranjith R. vs. Commissioner – State GST Department, Asst. State Tax Officer – Kerala High Court (2018-TIOL-162-Hc-Kerala-GST)

Facts, Issues involved and Contentions of the Petitioner

The petitioner is a registered dealer. He purchased certain goods from Chennai and then transported it to Kerala. While the goods were in transit, the Assistant State Tax Officer (ASTO) detained the goods and issued Ext. P3 notice of detention under Section 129 of CGST Act.

Based on the demand raised in Ext. P3 notice, the consignor paid the tax and penalty under the ASTO's directions. However, he erroneously paid the tax and penalty under the wrong head of SGST/CGST instead of IGST. Therefore, the authorities refused to release the goods.

Aggrieved by the above, the petitioner had filed this writ petition.

The petitioner's counsel drew attention to Section 77 of the GST Act and also to Rule 92(1) of the CGST Rules, 2017, especially the proviso appended to the Rule. To hammer home his contentions that even if the remittance were to treated as a mistake on the consignor's part, the statute empowers the authorities to transfer the deposit from one head to another: from SGST to IGST.

The Government Pleader, on the other hand, submitted that the petitioner could as well pay the amount under 'IGST' and then claim a refund from the head 'SGST'. According to her, if the authorities have to go for an adjustment, it will take more than a couple of months' time.

Held

Section 77 - Tax wrongfully collected and paid to Central Government or State Government

(1) A registered person who has paid the Central tax and State tax or, as the case may be, the Central tax and the Union territory tax on a transaction considered by him to be an intra-State supply, but which is subsequently held to be an inter-State supply, shall be refunded the amount of taxes so paid in such manner and subject to such conditions as maybe prescribed.

(2) A registered person who has paid integrated tax on a transaction considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall not be required to pay any interest on the

amount of Central tax and State tax or, as the case may be, the Central tax and the Union territory tax payable.

Rule 92(1) of the CGST Rules, 2017 reads as:

(1) Where, upon examination of the application, the proper officer is satisfied that a refund under sub-section (5) of section 54 is due and payable to the applicant, he shall make an order in FORM GST RFD-06, sanctioning the amount of refund to which the applicant is entitled, mentioning therein the amount, if any, refunded to him on a provisional basis under sub-section (6) of section 54, amount adjusted against any outstanding demand under the Act or under any existing law and the balance amount refundable:

PROVIDED that in cases where the amount of refund is completely adjusted against any outstanding demand under the Act or under any existing law, an order giving details of the adjustment shall be issued in Part A of FORM GST RFD-07.

Section 77 provides for the refund of the tax paid mistakenly under one head instead of another. However, Rule 92 speaks of adjustment. If the amount of refund is adjusted against any outstanding demand under the Act, an order giving details of the adjustment is to be issued in Part A of FORM GST RFD-07.

The petitioner's counsel lays stress on this process of adjustment and asserts that the amount remitted under one head can be adjusted under another head, for the demand of any amount under the Act.

Under these circumstances, the Court found no difficulty for the respondent officials to allow the petitioner's request and get the amount transferred from the head 'SGST' to 'IGST'. It may take some time, as the Government Pleader has contended, but it is inequitable for the authorities to let the petitioner suffer on that count.

The court held that the 2nd respondent will release the goods forthwith along with the vehicle and, then, ensure that the tax and penalty already stood remitted under the 'SGST' is transferred to the head 'IGST'.

The writ petition was disposed of accordingly.

B. Rulings by Authority of Advance Ruling

2. M/s. Spaceage Syntex Pvt. Ltd. – AAR Maharashtra (2018-TIOL-269-AAR-GST)

Facts, Issues involved and Query of Applicant

Applicant is engaged in trading of export entitlement licences such as Duty Free Import Authorisation (DFIA), Duty Free Replenishment Certificate (DFRC), etc. Applicant has purchased said licences from exporters and sold them to manufacturers to avail benefit of entitlement of duty free imported goods.

Duty credit scripts are used for payment of basic customs duty, anti-dumping duty, etc. W.e.f. 13-10-2017, Government *vide* notification no. 35/2017 – Central tax (rate) dated 13-10-2017 has prescribed NIL rate of tax on duty credit scripts classified under HSN code 4907.

Applicant seeks an advance ruling as to whether *GST is applicable on Sale and / or Purchase of DFIA licenses.*

Therefore the basic issue to be decided in the application is whether DFIA will be covered under 'Duty Credit Scrips' and attract NIL rate of tax.

Department was of the view that DFIA is different from Duty credit scrips on the following grounds:

- Duty Credit Scrips are issued under MEIS and SEIS schemes and are freely transferable.

- Duty credit scrips are used for payment of specified duties of customs on imported goods.
- DFIA is an exemption scheme and not a duty credit scheme.
- DFIA entitles the holder to import goods duty free.
- Duty credit scrips can be used to import any Open General License (OGL) items whereas under DFIA only items specified in particular authorisation can be imported.

Applicant's submissions were as under:

- Though MEIS and DFIA are under different chapters, it makes no difference as rationale behind both the scrips need to be taken into consideration.
- Essence of the benefits under MEIS and DFIA is reward in duty payment.
- Rationale behind both the scrips need to be taken into consideration. Press release issued by GST council explains this. FTP policy enumerates both MEIS and DFIA as export incentives.
- Main objective of exempting duty credit scrip was to take all possible measures to support the exporter earning valuable foreign exchange and providing significant employment.
- Discriminating exporter having MEIS and DFIA licence is against natural justice.
- Letter issued by GST council clarifies that DFIA licence is like MEIS / SEIS and exempt from GST. This clarification is given by GST council and not superintendent.
- It is incorrect to ignore the intention of the legislature.
- Duty credit scrips referred in entry no. 4907 is inclusive concept which includes all duty credit scrips where duty saving / non-payment is involved.

Applicant thereby requested the AAR not to interpret the words Duty credit scrips in narrow sense but to interpret in the broader sense keeping in view the legislative intent.

Discussions by and observations of AAR

The basic issue is whether DFIA licence is a 'Duty Credit Scrip' as defined under GST laws.

DFIA:

DFIA are paper authorisation that allow holder to import inputs that go into manufacture of products to be exported. Under DFIA, only items specified in annexure can be imported. DFIA is issued only after the goods are exported and all the export obligations are completed. DFIA, under GST laws, is covered under HSN 4907. DFIA are quantity based.

Duty Credit Scrips:

Duty Credit Scrips are issued under MEIS and SEIS scheme and can be used to pay specified duties of customs to central government. Duty credit scrips are value based. Duty credit scrips are freely transferable.

Difference between DFIA and duty scrips includes the following:

- Duty credit scrips can be used for payment of specified duties of customs whereas DFIA does not give any credit of duty.
- Duty Credit scrips are covered under MEIS and SEIS whereas DFIA is not covered.
- DFIA enables duty free import of inputs whereas duty credit scrips are issued to reward the exporters to offset infrastructural inefficiencies and
- Validity of DFIA is 12 months whereas the validity of Duty credit scrips is 24 months.

Applicant has submitted that GST council had observed that duty credit scrips such as MEIS

were losing its value due to reduced usability as it could no longer be used to pay IGST / GST. Hence, it clearly appears that only duty credit scrips was losing its value and not DFIA as DFIA does not envisage payment of duty at all. DFIA is connected with duty free imports.

DFIA and Duty credit scrips are not one and same or similar at all. They are different incentives given to exporters with different conditions. Even though both are incentive to promote export, both schemes are used in different circumstances and in different manner. When FTP itself has segregated the two different chapters, it will not be proper to consider the two schemes as one and the same.

Hence, DFIA is distinguishable from Duty credit scrips and cannot be considered as duty credit scrips even though it falls under HSN 4907. GST exemption is only in respect of duty credit scrips.

Applicant has submitted the letter received from GST council, which clarified that advance authorisation, are to be included in duty credit scrips. However, it appears that Government has not issued any circular, notification, etc. in this regard.

Ruling of AAR

Sale and / or purchase of DFIA licence is liable to GST.

3. M/s. Kundan Misthan Bhandar – AAR Uttarakhand (2018-TIOL-276-AAR-GST)

Facts, Issue involved and Query of Applicant

Applicant has a sweetshop on ground floor from where they supply food items such as sweetmeats, namkeen, 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:

1. *Whether supply of pure food items such as sweetmeats, namkeens, cold drinks and other edible items from sweetshop that also runs a restaurant is a transaction of supply of goods or services?*
2. *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, namkeen, 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

In the present case, the applicant has a sweetshop on the ground floor and a restaurant on the first floor of the same building. It was noticed that very often than not, two or more goods or a combination of goods and services was supplied together.

The question before the AAR was whether the transactions undertaken by applicant will constitute supply of goods or supply of services.

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, the first requisite is to rule out that supply is 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 shall be treated as supply of service and the sweetshop 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 which is as under:

The following composite supplies shall be treated as a 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 goods and services used for supplying such services.

4. M/s. Nash Industries (I) Pvt. Ltd. – AAR Karnataka (2018-TIOL-260-AAR-GST)

Facts, Issue involved and Query of Applicant

Applicant is in the business of manufacturing sheet metal pressed components and caters to various industries, ATM, printers etc., and is having multi-locational facilities in and around Bangalore. Such components are manufactured by the applicant based on the drawings provided by the customer.

To manufacture such components, applicant had designed and manufactured certain tools. Such manufactured tools were billed to the customer and were retained by the applicant for manufacturing the sheet metal pressed components.

Applicant stated that the erstwhile Central Excise Valuation Rules provided that the amortised cost of tool is to be added to the value of the goods removed for the purpose of payment of Excise duty.

Applicant was of the view CGST Act and Rules have similar valuation provisions and hence cost of amortisation is to be added to the value of goods supplied for the purpose of payment of GST.

Applicant drew analogy that had he procured such tool from outside then the cost of tool

would have formed part of the value of supply of component. As per section 15(2)(b) if the tool is provided free of cost to the supplier, the amortised cost of tool would have formed part of the taxable supply.

However, applicant's customers were of the view that cost of amortisation is not to be included in valuation of goods for the purpose of payment of GST.

In absence of clarity on the matter, the applicant has sought an advance ruling on the following question:

1. *Whether amortised cost of the tool is to be added to arrive at the value of goods supplied for the purpose of GST under Section 15 of the CGST Act read with Rule 27 of CGST Rules?*

Discussions by and Observations of AAR

AAR observed that there were two supplies involved in the entire activity.

Applicant, once he gets the order for the specialised components, manufactures the tools specifically required for the job and invoices it to the recipients. The applicant needs to collect the applicable tax on the tools and the recipient becomes the owner of such tools.

Later the recipient gives the tool free of cost to the applicant and the applicant uses the same for the manufacture of the components. Section 7(1) of the CGST Act 2017 stipulates that 'Supply' shall be made for a consideration. Therefore, consideration is an essential element in supply. However, Section 7(1)(c) specifies that the activities described in Schedule I shall be considered as 'Supply' even if there is no consideration involved. One such activity covered in Schedule I is permanent disposal of business assets. As the tools are supplied by the recipient to the applicant for the limited purpose of manufacture / supply of components, the activity does not amount to permanent transfer of business asset of the recipient. Therefore, the activity of free supply of tools by the recipient to the applicant does not amount to supply as defined in Section 7 of the CSGT Act 2017.

AAR examined the provisions of Section 15 of the CGST Act 2017 in order to address the question raised by the applicant.

Section 15(1) of the CGST Act provides as under:

"The value of a supply of goods or services or both shall be transaction value, which is the price actually paid or payable for the said supply of goods or services or both when the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply"

Therefore, the transaction value carried out at arm's length, constitutes the value of supply.

AAR considered Section 15(2)(b) of CGST Act 2017 relevant to the facts of this case and analysed the same.

Section 15(2) (b) of the CGST Act 2017 reads as follows:

"Any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both."

Either the tools could be manufactured by the applicant himself **or** they could get it manufactured by someone else **or** the recipient could supply them free of cost.

In case the applicant procures the tools from the third party, then they would incur the cost and such cost would be included in the value of taxable supply to the recipient.

However, when the first or third situation prevails, then the applicant has not spent any amount in respect of the tools. Here the cost of the tool is borne by the recipient of the supply whereas the same should have been borne by the applicant, as evident from the situation discussed above.

Therefore the facts and circumstances of the transaction as put forth by the applicant attract Section 15(2)(b) of the CGST Act 2017.

Ruling of AAR
The amortised cost of tools re-supplied back to the applicant free of cost shall be added to the value of the components while calculating the value of the components under Section 15 of the CGST Act 2017.

5. M/s. Synthite Industries Limited – AAR Andhra Pradesh (2018-TIOL-255-AAR-GST)

Facts, Issue involved and Query of Applicant
The applicant (Job worker) is engaged in job work of removing "Caffeine" from tea powder imported from foreign company viz., HTH Hamburger Teehandel Gmbh Im. & Export, Hamburg, Germany (Principal) and then subsequently exporting the decaffeinated tea to his Principal.

Applicant undertakes "super critical fluid extraction" process. The raw material is being supplied by applicant's principal foreign customer free of cost and the processed output is exported back to the principal. The tea powder contain caffeine which is removed by the applicant-job worker through extraction process.

In backdrop of above facts, applicant has sought advance ruling on the following questions:

1. *Whether the process of providing job work service to foreign customer as explained above is taxable under GST. Does such transaction attract GST?*
2. *If GST is applicable, whether they have to pay IGST or SGST+CGST?*
3. *Is the job work service provided by them is exempted from service tax under Mega exemption list as per notification No. 25/2012 dated 20-6-2012 and not chargeable to GST?*

Discussions by and observations of AAR
Job work is defined u/s. 2(68) of CGST Act to mean *any treatment or process undertaken by a person on goods belonging to another registered person.* The one who does the said job work is termed as job worker. The ownership of goods does not transfer to the job worker. He is only required to carry out processes as specified by the principal.

There is no doubt that the applicant is squarely covered under definition of job work as defined u/s. 2(68) of CGST Act.

Process of providing job work service by the applicant to the foreign principal shall be classified under the **HSN Code services heading 9988,** which reads as under:

"9988 – Manufacturing services on physical inputs owned by others. The services included under Heading 9988 are performed on physical inputs owned by units other than the units providing the service. As such, they are characterised as outsourced portions of a manufacturing process or a complete outsourced manufacturing process. Since this heading covers manufacturing services, the output is not owned by the unit providing this service. Therefore, the value of the services in this Heading is based on the service fee paid, not the value of the goods manufactured."

Therefore, in light of the above, the aforesaid services are covered by Entry No. 26 (HSN Code 9988) and **liable to tax @18%**.

As regards to IGST liability, Section 13(3) of IGST Act reads as under:

(3) The place of supply of the following services shall be the location where the services are actually performed, namely:—

(a) ***Services supplied in respect of goods which are required to be made physically available by the recipient of services to the supplier of services, or to a person acting on behalf of the supplier of services in order to provide the services:***

Provided that when such services are provided from a remote location by way of electronic means, the place of supply shall be the location where goods are situated at the time of supply of services:

Provided further that nothing contained in this clause shall apply in the case of services supplied in respect of goods which are temporarily imported into India for repairs and are exported after repairs without being put to any other use in India, than that which is required for such repairs.

Transaction undertaken by applicant squarely falls under clause (a) of Section 13(3) of IGST Act, 2017. Hence, the place of supply for the aforesaid transaction is the location where services are actually performed i.e., State of Andhra Pradesh. Hence, the tax liability under SGST Act/ CGST Act will apply.

Ruling of AAR

In respect of question (1), the process of providing job work service to foreign principal, in the premises of the applicant, is taxable under APGST Act, 2017 / CGST Act, 2017 as per Entry 26 (HSN Code 9988) Proviso (iv), and liable to tax @ 18%.

In respect to question (2), the place of supply for this transaction is the location of supplier of service as per Section 13(3)(a) of IGST Act, 2017. Hence, the tax liability under APGST Act, 2017 / CGST Act, 2017 will apply.

In respect of question (3), as the Service tax Act itself is subsumed under Goods and Services Act, the Notification No. 25/2012 – ST dated 20-6-2012 is no more applicable.

6. Vservglobal Private Limited – AAR Maharashtra (2018-TIOL-263-AAR-GST)

Facts, Issue involved and Query of Applicant:

Applicant is incorporated in India and is engaged in providing back office support services to overseas companies (hereinafter referred to as 'Clients') engaged in trading of chemicals and other products. Applicant comes into picture only after finalisation of purchase/ sale order by the client.

Applicant intends to undertake following activities:

1. *Get SDF (Sales Detail Form) & PDF (Purchase Detail Form) from concerned party*
2. *Generate order No. in VOSS*
3. *Create PO (Purchase Order) & SC (Sales Contract) in VOSS*
4. *Liase with supplier for cargo readiness*
5. *Process payment request in VOSS*
6. *Various other back-office functions.*

Apart from above, the applicant will also maintain record of employees of clients, their payroll processing etc. All the payments to third parties like supplier, employees, etc., will be done directly by clients and the applicant will maintain accounting for the same. Applicant will be compensated on fixed monthly basis or as per the volume of transactions, on mutually agreed terms, in convertible foreign exchange.

In light of above, applicant has sought advance ruling on the following question:

1. *Whether the aforesaid services proposed to be rendered by the applicant will qualify as "zero rated supply" in terms of s.16 of the IGST Act, 2017 or not.*

Applicant's submissions

As per legal understanding of the applicant, the aforesaid services qualify as "zero rated supply" in terms of Section 16 of IGST Act, 2017.

As per Section 16(1)(a) of the Act, export of goods or services or both is a zero rated supply.

The phrase 'Export of Service' is defined in Section 2(6) of the Act which reads as under:

"export of services" means the supply of any service when, -

i. *The supplier of service is located in India;*

ii. *The recipient of service is located outside India;*

iii. The place of supply of service is outside India'

iv. The payment for such service has been received by the supplier of service in convertible foreign exchange; and

v. The supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8.

Applicant is providing services to overseas offices of recipients. Aforesaid services are not specified under any sub-section from (3) to (13) of Section 13 of IGST Act and hence place of supply will be the location of service recipient as per Section 13(2) of the IGST Act. Payment for services will be received in convertible foreign exchange. Further, the applicant and its clients are separate incorporated companies and therefore, they are not merely establishment of distinct person in terms of statutory provisions. Thus, it is clear that the services proposed to be rendered by the applicant satisfy all the condition of "Export of Services" and therefore, covered under the definition of "Zero Rated Supply".

Personal Hearing

During the course of personal hearing, a question was posed as to how the services rendered by applicant is not covered under the definition of 'Intermediary Services' as defined under Section 2(13) of the IGST Act which is reproduced below:

"(13) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account."

Applicant's additional submissions

CBEC in the Educational Guide released by it had explained the concept of 'Intermediary' and its exclusion clause in para 5.9.6 which reads as under:

*"Similarly, persons such as call centres, who provide services to their clients by dealing with customers of the client on client's behalf, but actually provided these services on their own account", **will not be categorised as intermediaries."***

An identical issue to the case in hand came before the Hon'ble Authority for Advance Ruling In Re: GoDaddy India Web Service Private Ltd., reported as 2016 (46) S.T.R. 806 (AAR).

The above definition contains an exclusion as per which the person who supplies goods or services on his own account is not included. In the instant case, the applicant proposes to supply "Business Support Service" comprising of "Back office support" and "Accounting" which is its principal supply. The said "Business Support Service" would be provided by applicant to its client would be on Principal to Principal basis. Therefore, the instant case is covered by exclusion clause in definition of 'Intermediary'.

Department's contention

Proper officer argued that application submitted by the applicant is not maintainable. Since the question pertains to "Zero Rated Supply", it means it relates to place of supply and question pertains to place of supply cannot sought before Hon. Advance Ruling Authority.

Further, if Hon. Advance Ruling Authority has accepted the application, alternative argument is made that in the instant case main issue is the place of supply is outside India or inside India. The proper officer analysed the Section 12 and Section 2(14) of IGST Act and applied it to the instant case.

On the website of Vikudha Overseas Corporation Limited (Hong Kong based client) it is learnt that company has operated throughout the world and operated his business in India. The Vikudha Overseas Corporation Limited has operated in India through its branch whatever name called Group Company, sister concern, etc. M/s Vikudha India Trading Limited, having registered office Dhantak Plaza, 201, Opp.

Waman Centre, Makwana Road, Marol, Andheri East, Mumbai, MH 400059 IN (As per website of ministry of commerce) and the director of company are Mr. Deapkumar Balkishan Adukia and Seema Sanjau Enand.

The applicant will provide services specified in agreement to M/s. Vikudha India Trading Limited, which operates in India and represents M/s. Vikudha Overseas Corporation Limited.

This means that the applicant will provides services to M/s. Vikudha India Trading Limited and therefore the location of recipient of service is in India at 201, Dhantak Plaza, Opp. Waman Centre, Makwana Road, Andheri (E), Mumbai. Therefore, place of supply of service is not outside India. Only mere agreement by foreign company with Indian company is not sufficient to determine Exports of services.

It is also seen from bank account of M/s Vservglobal Pvt. Ltd., that payment for such services has not been received by the supplier in convertible foreign exchange.

From the aforesaid fact and related provision under the statute, the above transaction does not qualify export of services, hence, not qualified under "Zero Rated Supply".

Discussions by and Observations of AAR

Applicant is registered person under GST who is supplier of services incorporated in India.

On basis of service agreement, applicant submits that services proposed to be rendered by them such as back office administrative and accounting support services, payroll processing services and maintenance of records of employees satisfy all the conditions of export of services and should qualify as zero rated supply of services.

In the course of final hearing, a reasonable doubt was raised by the members whether the applicant is an 'intermediary' as defined under the Act.

Section 2(13) of IGST Act defines intermediary as under:

"intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account;

In the context of definition of 'Intermediary' as mentioned above, the service agreement was examined as a whole to ascertain whether the applicant is an Intermediary or not. It is necessary to decide whether place of supply is outside India.

Important clauses of service agreement are reproduced as under:

1. Applicant commits to provide back office administrative and accounting services.
2. Clients will provide software VOSS to the applicant for accounting purpose.
3. Applicant will obtain SDF and PDF from concerned party.
4. Generate order no. in VOSS.
5. Create PO and Sales order.
6. Liaise with suppliers, inspection authorities and customers.
7. Various other functions on behalf of clients.

A sum of all the above activities indicate that applicant as a person arranges or facilitates supply of goods or services between the overseas client and customer of the overseas client and is therefore clearly covered in the definition of an ***intermediary***.

As the applicant is held as an intermediary, the provisions pertaining to place of supply in case of intermediary services provided in Section 13(8) are relevant. Therefore, place of supply would be the location of supplier of

services which is located in State of Maharashtra, India.

It is seen that the condition (iii) of Section 2(6) of the IGST Act is not satisfied and hence without examining condition (v) of the said section as to distinct person, it is held that the services proposed to be rendered by the applicant do not qualify as 'export of services' as defined under Section 2(6) of IGST Act and thus not a 'Zero Rated Supply' as per Section 16(1) of IGST Act.

Ruling of AAR

The Hon. Advance Ruling Authority decided that aforesaid services proposed to be rendered by the applicant do not qualify as 'Zero Rated Supply' in terms of Section 16 of IGST Act.

7. Bajaj Finance Limited – AAR Maharashtra (2018-TIOL-264-AAR-GST)

Facts, Issues involved and Query of Applicant

Applicant is engaged in providing various types of interest bearing loans to customers. EMI payable by the customer is used to pay-off both interest and principal amount. In case of delay in repayment of EMI, the applicant collects penal interest for the number of days of delay in terms of the agreements executed by the customers. The per cent of penal interest ranges between 2% to 4% per month depending on the product.

The relevant extract of clauses of sample auto loan agreement in respect of penal interest is reproduced below:

"1. DEFINITIONS AND ABBREVIATIONS

I. "Penal charges" shall mean and include overdue charges on non-payment of installment on the due date. ……

II. TERMS OF THE LOAN:

3. The borrower agrees and confirms that:

(iv) BFL is entitled to levy penalty as follows on default

(a) for continuing non-payment of amount due, a penalty not exceeding 3% per month on the amount due calculated on pro rata basis from due date till actually paid as per clause B of the schedule.

Applicant is of the view that penal interest collected is in the nature of additional interest, therefore, it is not subject to GST levy.

In light of above, the applicant has sought advance ruling on the following:

1. *Whether the penal interest is to be treated as interest for the purpose of exemption under Sr. No. 27 of Notification No. 12/2017-Central Tax (Rate) dated 28-6-2017?*

2. *If the answer to the above is negative, whether the activity of collecting penal interest by the applicant would amount to a taxable supply under the GST regime?*

Applicant submitted that penal interest represents the time value of money for the period of delay in making payment of installment. It is nothing but additional interest on loan. Therefore, the penal interest shall be given similar treatment as that of the principal interest which is factored in EMI / Installment amount, and, hence, shall also be covered under definition of interest as defined under Notification no. 12/2017 – Central tax (rate):

*"(zk) **"interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred** (including a deposit, claim or other similar right or obligation) but does not include any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised."*

Applicant submitted that services of providing loans is exempt under the GST regime, in so far consideration is represented by way of interest. Therefore, penal interest would be exempt from GST levy.

It is further submitted that the expression agreeing to tolerate an act used in Entry 5(e) of Schedule II, should be understood to cover instances where the consideration is being charged by the person in order to allow another person to undertake any particular activity.

Contrary to the above, the penal interest is collected on happening of any event of default by the customers in making the payment of loan installments. It is submitted that Intention of the parties entering into loan agreement is to grant / avail the loan and not to tolerate non-payment of loan dues. Therefore, merely because of existence of the clause of penal interest in the contract for breach of the performance of the contract, it does not mean that the parties have entered into the contract for the penal interest. Therefore, the collection of penal interest does not even fall under the ambit of deemed supply under clause 5(e) of Schedule II of CGST Act.

However, contention of the proper officer was based on the ground of clause 5(e) of Schedule II of CGST Act and according to him, bounce / penal charges on non-performance of a contract is an activity or transaction which is treated as a supply of service and the applicant is receiving consideration in form of charges, liquidated damages and is accordingly required to pay tax on such amount.

Discussions by and observations of AAR

The applicant has agreed to do an act (the act of tolerating of delayed payment of EMIs by their customers) and such act, by the applicant, squarely falls under clause 5(e) of Schedule II of CGST Act and therefore, amount received by the applicant for having agreed to do such an act, would attract tax liability under GST laws.

Further applicant stated that penal interest is part of interest and therefore, eligible for exemption. However, penal interest is received by the applicant only because their customer/s have defaulted in repaying the due EMIs. This amount is over and above the interest amount received on account of extending deposits, loans, etc.

Further, assumption by applicant that EMI is nothing but a new loan amount is not only fallacious but also devoid of merit because from the agreements it is seen that rate of interest on loan advanced and rate of penal charges are collected on so called new loan amount (i.e. defaulted EMI) are also different. Further, as per facts of the case, the rate of penal interest ranges between 2% to 4% i.e. not fixed as in case of interest on loan.

Thus, it is very clear that in case of default of EMI by the customer, the applicant would tolerate such act of default or situation and the defaulting party was required to compensate the applicant by way of payment of extra amounts in addition to the principal and interest.

Ruling of AAR

In respect of question (1), penal interest is not to be treated as interest for the purpose of exemption.

In respect of question (2), the aforesaid activity squarely falls under clause 5(e) of Schedule II of the CGST Act and, therefore, construes as "supply" and would attract tax liability under GST.

❍□❍

Truth is infinitely more weighty than untruth; so is goodness.

— *Swami Vivekananda*