Price ₹ 300/- per copy

No. MCS/149/2019-21 / R.N.I. No. MAHENG/2012/47041 - Total Pages: 136

Vol. VII | No. 6 March 2019

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A Monthly Journal of
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YOUR MONTHLY COMPANION ON TAX & ALLIED SUBJECTS

Concepts Relevant to Taxation Law & Practice

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Other Contents

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CONTENTS

Vol. VII No. 6 | March – 2019

CA Naresh Sheth & CA Jinesh Shah

INDIRECT TAXES

GST – Recent Judgments and Advance Rulings

A. Writ Petition

1. Torrent Power Limited vs. Union of India – High Court of Gujarat (2019-TIOL-15-HC-AHM-GST)

Facts, issue involved and contention of petitioner

Petitioner is a public limited company, which is engaged in the business of generation, transmission and distribution of electricity in the State of Gujarat and is duly registered under the Goods and Services Act, 2017. As per Section 43(2) of the Electricity Act, 2003, it is the duty of the distribution licensee to provide electric plant or electric line for giving electric supply to the premises of the customer. An electric meter is also required to compute the actual consumption of electricity. The petitioner collects monthly meter rent of such meter in the bill for electricity consumption itself, as determined by the State Electricity Regulatory Commission (SERC).

Prior to the introduction of the Negative List regime for Service tax, the petitioners were of the belief that since there is no specific clause in the charging provision of the Finance Act requiring payment of service tax, no service tax was required to be paid in respect of any amount collected from the consumers. The Government of India issued **Notification No. 11/2010- Service Tax,** exempting taxable service provided to any person by any person for transmission of electricity. Another **Notification No. 32/2010- Service Tax** was issued exempting taxable service provided to any person by a distribution licensee/franchisee for distribution of electricity.

Department issued notices to the distribution/ transmission companies imposing tax on various charges collected by such companies on the activities relating to transmission and distribution of electricity for the period prior to the issuance of the exemption Notifications 11/2010 and 32/2010. Many representations were made to Government to intervene and clarify the issue of related services of transmission and distribution of Electricity. Government, therefore, issued Circular dated 7-12-2010, wherein it clarified that supply of electricity meters for hire to the consumers was an essential activity having direct nexus with the transmission and distribution of electricity.

GST regime was introduced w.e.f. 1-7-2017. As per Notification No. 12/2017 – Central tax (rate), transmission or distribution of electricity is taxed at nil rate. The petitioners were of the view that the legal position under

the Finance Act, 1994 was continued even under the Goods and Services Tax Act, 2017. Thereafter, the government issued the impugned **circular 38/2018** dated 1-3-2018, clarifying that the transmission and distribution by an electricity transmission or distribution utility is exempt from GST under Notification No. 12/2017 – CT(R). However, other services such as application fee for releasing connection of electricity, rental charges against metering equipment, testing fees for meters/ transformers, etc., are taxable.

The petitioner contended that all the charges such as application fee, meter rent, testing fee, etc. are towards the service of transmission and distribution of electricity which are covered by the negative list and by virtue of exemption notifications issued under the CGST Act, and therefore, all such services are exempt from payment of GST.

Alternatively, it was contended that if the services relating to transmission and distribution of electricity are *per se* not covered by the exemption notifications, then such services would form part of composite supply of services of the petitioners involving more than one supply. Therefore by virtue of provisions of Section 8 (a) of the CGST/SGST Acts, it would be treated as a supply of the **principal supply**, namely, transmission and distribution of electricity and taxed accordingly.

Observations of HC

Service tax circular dated 7-12-2010 stated that supply of electricity meters for hire to consumers is covered by the exemption notification as it is an essential activity having direct and close nexus with transmission and distribution of electricity.

The meaning of "transmission and distribution of electricity" does not change under the Negative List regime or the GST regime. Accordingly, services which stood included within the ambit of transmission and distribution of electricity during the pre-Negative List regime cannot now be sought to be excluded by merely issuing a clarificatory circular, that too, with retrospective effect. By the clarificatory circular, the respondents seek to give a different interpretation of the very same services as against the clarification issued for the pre-negative list regime.

Section 43(2) of the Electricity Act casts a duty upon the licensee to provide, if required, electric plant or electric line for giving electric supply to the premises. Therefore, providing electric line and electric plant are elements of service which are naturally bundled in the ordinary course of business, with the single service of transmission and distribution of electricity which gives the bundle its essential character. The only related service, which does not fall within the ambit of the definitions of electric line and electric plant, is the meter used for ascertaining the quantity of electricity supplied to any premises.

However, in so far as installation of electricity meter and hire charges collected in respect of electricity meters are concerned, service tax circular clarifies that supply of electricity meters for hire to the consumers is an essential activity having direct and close nexus with transmission and distribution of electricity. Therefore, it is covered under the exemption entry for transmission and distribution of electricity extended under the relevant notifications. Therefore, all the services related to transmission and distribution of electricity are naturally bundled in the ordinary course of business of the petitioner. They are required to be treated as provision of a single service of transmission and distribution of electricity, which gives the bundle its essential character.

Services provided by the petitioner are in the nature of composite supply and therefore, in view of the provisions of clause (a) of section 8 of the CGST Act, the tax liability has to be determined by treating such composite supply as a supply of the principal supply of

transmission and distribution of electricity. Consequently, if the principal supply of transmission and distribution of electricity is exempt from levy of service tax, the tax liability of the related services shall be determined accordingly.

Held

Paragraph 4(1) of the impugned Circular No. 34/8/2018- GST dated 1-3-2018 is struck down as being ultra vires to the provisions of Section 8 of CGST Act as well as notification no. 12/2017 – Central tax (rate).

In other words, Hon'ble High Court held that application fees, meter rent, testing fees, etc. received by the electricity company is for transmission and distribution of electricity which is exempt from GST.

B. Rulings by Appellate Authority of Advance Ruling

2. M/s. Nutan Warehousing Company Private Limited – AAAR Maharashtra (2018-TIOL-25-AAAR-GST)

Facts, issue involved and contention of applicant

Applicant was engaged in the business of providing warehousing services and was registered under the GST Act. Applicant had constructed warehouses at various places, one of which situated at Fursungi, Pune and has rented it to M/s. Unilever India Exports Ltd. (hereinafter referred to as "Unilever"). Unilever procures tea of various qualities in bulk either from public tea auctions or directly from the manufacturers and stores in warehouse of applicant. The procured tea leaves undergo standard processes prior to procurement. However at no point of time, it crossed the limit and lost its essential characteristics. Unilever undertook blending and packing of the same at the warehouse after which they were exported overseas. The applicant is of the strong view that the tea procured is **an agricultural produce** as defined under **clause 2(d)** of the notification No. 12/2017-CT(R) dated 28-6-2017 and hence storage and warehousing of tea is exempt from GST.

Applicant seeks ruling on *"Whether the supply of warehouse services used for packing & storage of tea is exempted vide Serial No. 54(e) of notification no. 12/2017 CT (R)".*

Discussions by and observations of AAR

AAR studied the details of nature of goods being stored by Unilever. They also studied in detailed the process flow chart and steps. On its perusal, AAR was of the view that even if Unilever bought in raw tea leaves or semi-processed tea leaves, they are undertaking further processing and manufacturing. Such processed tea leaves are packed into Lipton Pure and Simple 100s tea bags. The activity of Unilever of processing raw tea leaves into tea results into emergence of new product having distinct name i.e., Tea, which has distinct name, character and use. As such the impugned activity is a 'manufacture' as defined u/s. 2(72) of CGST Act. Final product (Tea) cannot be considered as agricultural produce.

Ruling of AAR

AAR ruled that exemption stated in Notification No. 12/2017 – Central tax (Rate) will not apply in applicant's case.

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 further stated that blending and packing of tea leaves does not alter the essential characteristics of tea. None of the processes so carried out changes the originality of tea. Applicant was of the view that AAR has not provided any sufficient reasoning or

explanation on whether these processes are changing the essential characteristics of tea or not.

The moot issue is to decide upon whether the tea leaves procured are agricultural produce or otherwise.

Firstly, AAAR set out to determine the essential character and the nature of the green tea leaves. The leaves plucked are not fit for human consumption and hence are processed to make it consumable. The manufacturers carry out the said processes after procuring the leaves and as a result, the tea leaves acquire new flavour and colour. Thus, the tea leaves are not acrid as in case of the original tea leaves directly packed from the garden. The nomenclature of tea also undergoes a change from green tea leaves to black tea. Unilever has stated that their sole ingredient is black tea, which are blended in specific proportions as per the order received from customers. Thus, it can be inferred that the product stored in the warehouse has a different name, character and uses from the green tea leaves cultivated in the garden. Thus, tea procured by Unilever is a manufactured product.

Secondly, it needs to be determined whether the manufactured product i.e., black tea is an agricultural produce or not. Following parameters are relevant:

a) The produce must emerge from cultivation of plants or rearing of all life forms of animals

b) Either no further processing is done or such processing is done as is usually done by a cultivator or producer, which does not alter its essential characteristics but make it marketable in primary market.

AAAR observed that though the product is produce out of cultivation of plants, the same is obtained as a result of specific manufacturing processes, carried out by the manufacturers on the original agriculture produce i.e., Green Tea Leaves for making them suitable for consumption by imparting desired flavours and colours by aforesaid activities. All these processes, which change the characteristics of green tea leaves, are carried out by the **manufacturers** and **not cultivators or producers** and thus cannot be considered as an agricultural produce.

Ruling of AAAR

AAAR did not find any reason to interfere with ruling given by AAR and dismissed the appeal filed by the applicant.

C. Rulings by Authority of Advance Rulings

3. M/s. Bindu Ventures – AAR Karnataka (2018-TIOL-294-AAR-GST)

Facts, issue involved and contention of the applicant

Applicant is engaged in the business of construction of commercial complexes. One such construction project was implemented at Karnataka in name of "Bindu Galaxy" in February 2016 and was completed in all aspects by the end of November 2017. The applicant obtained all the necessary approvals from various Government departments as required. The applicant stated that in Karnataka, the law provides for issuance of Occupancy Certificate (OC) from the Bruhat Bengaluru Mahanagara Palike (BBMP) and there is no provision for issuing the Completion Certificate (CC) on the construction of immovable property. For some reasons, applicant was unable to obtain the OC from BBMP. However, they have obtained CC from a chartered engineer, declaring that the construction was completed by 1-12-2017.

Applicant has sought advance ruling in respect of following questions:

i. Which date should be considered as the date of completion of the property – the

date of receipt of necessary approvals from BBMP / Karnataka Pollution Control Board / Karnataka Electricity Board or the date of receipt of CC from a registered Chartered Engineer?

ii. *Whether the applicant is liable to pay GST on any amount received as consideration towards sale of completed offices, after the date of completion, where part of the consideration was received prior to date of completion as stated in (i) above?*

iii. *Whether the applicant is liable to pay GST on the consideration received towards the sale of completed offices, where the entire consideration is received after the date of completion as stated in question (i) above?*

Applicant's submissions based on Schedule II of CGST Act, 2017

Clause 5: Construction of complex, building, civil structure which is intended for sale to a buyer will be liable to GST **except when** the entire consideration, towards sale of immovable property, is received after issuance of CC, where required, by the Competent Authority or after its first occupation, whichever is earlier.

Explanation to clause 5: CC obtained from a registered Architect / Chartered Engineer/ Licensed Surveyor will be a **sufficient compliance** for the purpose of clause 5, only when there is no requirement under state law to obtain such certificate from a specific authority.

Therefore, applicant contends that date mentioned in CC received from Chartered Engineer should be taken as **Date of Completion** of construction for all purposes of GST law.

The applicant had filed an additional submission of an extract of Karnataka State local law for the reference which reads as follows:

"5.6 Occupancy Certificate

5.6.1 (a) Every person shall before the expiry of five years from the date of issuance of licence shall complete the construction or reconstruction of a building for which the licence was obtained and within one month after the completion of erection of a building shall send intimation to the Commissioner in writing of such completion accompanied by a certificate in schedule VIII certified by a ***Registered Architect / Engineer / Supervisor*** *and shall apply for permission to occupy the building…"*

Thus, according to the applicant, the BBMP provides a clear distinction between CC and OC and that it cannot be deemed to be a CC as contemplated under the GST Law.

Further, it submitted that phrase "First Occupation" may be understood (based on dictionary meaning) to mean the act of occupying or using the complex / building for first time by a person. Therefore, construction is deemed to have been completed, if any person has occupied a unit in the complex. Applicant claimed that occupation in "Bindu Galaxy" started in September 2017 and furnished copies of affidavits from respective owners and electricity bill for the period 4-8-2017 to 30-11-2017 in support of its claim of first occupation.

Discussions by and observations of AAR

AAR, w.r.t. about question (i) drew attention to Clause of 5 of Schedule II of CGST Act, 2017. The authority stresses on following words:

- **entire consideration;**
- **after the issuance of CC by the competent authority, where required;**
- **first occupation.**

The competent authority is defined in Sec 2(29) of the CGST Act, 2017 which means 'any such authority as may be notified by the Government' whereas Sec 2(80) of the CGST Act, provides for the meaning of the words "notified".

The crucial aspect, which decides the tax liability, is the date of ***completion certificate*** or ***first occupation***, whichever is earlier, issued by a competent authority.

The complete extract of bye-law 5.6 brings out that once the builder feels that the construction of the building is over, the builder shall first obtain a certificate from a registered architect / engineer to that effect and shall apply to the BBMP for occupancy permission. It further provides that the authority shall conduct physical inspection for various compliances, only after which, the OC shall be issued. This brings out that mere submission of a certificate from an engineer / architect does not certify the building to be complete. The law provides the submission of the certificate only as a **supportive document.**

The terms 'OC' and 'CC' become congruous to each other and only remain a matter of pedagogical difference. 'OC' issued means that the building has complied with all required bye-laws and is complete in all respects as its construction is concerned and can be occupied. **An OC is in the nature of CC** because unless the construction is complete, it cannot be occupied. Thus, AAR is of the opinion that the OC is akin to CC and is a must.

The building or part thereof can only be occupied after completion and necessary OC is obtained from BBMP. Thus, the fact that building is occupied does not mean it's complete. Therefore, the Chartered Engineer's certificate **cannot** be a substitute for **OC/CC** and the relevant date would be the **Date of OC**.

Ruling of AAR

In respect of question (i), the date of OC issued by the competent authority, i.e. BBMP should be treated as the date of completion of the construction.

In respect of question (ii), if any consideration is received before date of OC, then the transaction would be considered as the supply of services in terms of Clause 5 of Schedule II to the GST Acts, and liable for GST.

In respect of question (iii), if the whole consideration is received after the date of completion, then the transaction would not be liable to GST.

4. Asahi Kasei India Private Limited – AAR Maharashtra (2019-TIOL-14-AAR-GST)

Facts, issue involved and contention of the applicant

Applicant is a subsidiary of Asahi Kasei Corporation, Japan. The applicant provides sales promotion and marketing support to Asahi Kasei group. For this the applicant has entered into a Service Agreement with Asahi Japan and Marketing Services Agreement with various group companies of Asahi Kasei group. Broad scope of work as per the agreement is as under:

a. Collecting and analyzing information .i.e. market analysis and supporting Asahi Kasei group in getting new business;

b. Providing marketing & administration support and back- office support (including accounting Support);

c. Networking .i.e. co-ordinate with the government authorities and relevant universities to join relevant trade associations;

d. Supporting sales activity of Asahi Kasei group.

Applicant has sought advance ruling in respect of following questions:

i. Whether the service supplied by the applicant under the Service Agreement dated 1st March 2013 constitutes supply of "Support services" classifiable under HSN code 9985 or "Intermediary service' classifiable under HSN 9961/9962?

ii. Whether the service supplied by the applicant under the Marketing Services Agreement dated 1 December 2012 constitute supply of "Support Services" falling under HSN code 9985 or "Intermediary service" classifiable under HSN code 9961/9962?

iii. Whether the services provided by the applicant is an export of services as defined under Section 2(6) of Integrated Goods and Services Tax Act 2017?

Applicant's submissions

Term "intermediary" is defined as under Section 2(13) of the IGST Act, 2017 to mean *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 instant case the applicant and the Service recipient are acting as independent contractors. Moreover, the applicant and the Service recipient have no authority to create nor do they assume any obligation on behalf of the other. Also the agreement clearly specifies that parties do not intend to create any principal-agent relationship. Further, the consideration charged is not qua a particular transaction. Activities of sales promotion and marketing are not selling of goods and therefore, such activities would not be classifiable under the said heading of intermediary.

Applicant further relied on ruling of *M/s. GoDaddy India Web Services Pvt. Ltd. [2016 (46) STR 806 (AAR)]* wherein it was concluded that services (marketing, branding, offline marketing, overlooking third party customer care centre, etc.) provided by GoDaddy is a bundle of service (in normal course of business) and not intermediary services.

It is amply clear that the services provided by the applicant cannot be considered as an "Intermediary Services". However, in order to determine the correct classification of the services provided by the applicant, it would be imperative to refer to the scope of the term "Support Services".

Erstwhile Section 65B(49) of Finance Act, 1994 defines "support services" to mean *infrastructural, operational, administrative, logistic, marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever ……."*

From the stated definition, it can be construed that marketing services, advertisement and promotion services, customer relationship management, evaluation of prospective customers, etc. would qualify to be in the nature of support services. Thus, the supply of services that is to be provided by the applicant to the Asahi Kasei group would be classified under Tariff Entry 9985 as "Business Support Services".

In relation to "export of services", applicant was of the view that they are complying with all the conditions as prescribed under Section 2 (5) of IGST Act for treating supply of services as export of services.

Discussions by and observations of AAR

In order to determine whether a person is acting as an intermediary or not, following factors need to be considered:

a. Nature and value – An intermediary cannot alter nature or value of the service

b. Separation of value – Value of an intermediary's service is invariably identifiable from main supply of service

c. Identity and title – The service provided by intermediary on behalf of principal is clearly identifiable from main supply that he is arranging.

Normally, the intermediary has documentary evidence authorising him to act on behalf of the provider of the 'main service'. From the scrutiny of clause 15 of service Agreement, AAR confirmed that the relationship between the parties is that of independent contractors. Agreement does not intend to create relationship of principal and agent. Applying the test laid

down in the Educational Guide to the facts of the case, we can safely conclude that the proposed service would not fall to be classified as 'intermediary service'.

Moving on further, one needs to decide whether the services supplied by applicant constitute composite supply and categorises as "support services". As per the definition of composite supply, it is necessary to determine whether a particular supply is naturally bundled in ordinary course of business and what constitutes a principal supply. Applicant proposes to provide broadly two distinct categories of services namely:

a. Research related services; and

b. Information on markets in the territory

From the nature of services provided it is evident that these services are not independent but could be provided as standalone services. One can say that applicant intends to provide two distinct category of services And as such services provided by this agreement can not constitute 'composite supply' as defined under the GST Act. Services provided by applicant in nature of research on the matter related to functioning of holding company would fall under Tariff Code 998599 – *"Other support services nowhere else classified"* and that in nature of information on market in territory would fall under tariff code 998371 – *"Market research services"*.

AAR was of the same view with regards to marketing services agreement that applicant is not an intermediary and acts in capacity of an independent contractor. Services provided by applicant under said agreement would fall under group 99837 as "Market Research Services".

Supplier of service is located in India; service recipient is located outside India - Japan; payments is received in convertible foreign exchange; supplier and recipient are not merely establishment of distinct person and applicant not being intermediary, place of supply would be location of recipient of services i.e. Japan which is outside India. All the conditions as to export of services are being satisfied in the given case.

Ruling of AAR

In respect of the question (i), the services provided in the nature of Research would fall under the service Tariff Code 99859 as other support services. The services provided in nature of information on market would fall under the service Tariff Code 99837.

In relation to question (ii), the services provided under Marketing Services Agreement would fall under 99837.

In relation to question (iii), AAR ruled that services provided by applicant would qualify as export of services.

5. M/s. Nforce Infrastructure India Private Limited – AAR Karnataka (2018-TIOL-290-AAR-GST)

Facts, issue involved and contention of the applicant

The applicant, M/s. Nforce Infrastructure India Pvt. Ltd., entered into an agreement with land owners for construction project and in turn has agreed to hand over 8,828 square feet of residential apartment area, 1,630 square feet of commercial area and 8 car parkings to the land owner.

Applicant has sought advance ruling in respect of following questions:

i. Whether the applicant is liable to pay GST on the value of building constructed and handed over to the land owner in terms of the Joint Development Agreement?

ii. If yes, then, on what value GST is to be paid since there is no monetary consideration involved?

iii. Is the applicant liable to pay service tax up to 30-6-2017 and GST thereafter?

Discussions by and observation of AAR

Notification No. 4/2018- Central Tax (Rate) dated 25-1-2018, **notifies the registered persons** who supply construction service to supplier of development rights against consideration in the form of transfer of development rights, **as the registered persons** liable to pay central tax on supply of said services, on the consideration received in the form of development rights. The liability to pay tax shall arise at the time when the said developer **transfers possession or the right in the constructed complex, building or civil structure,** to the person supplying the development rights by entering into conveyance deed or similar instrument.

In the instant case the applicant, a registered person, needs to pay tax towards construction service provided to the land owner, on the value to be determined in terms of **Para 2 of the Notification No. 11/2017- Central Tax (Rate)** dated 28-6-2017, which is appended as under:

In case of supply of service specified in column (3) of the entry at item (i) against serial no. 3 of the table above, involving transfer of property in land or undivided share of land, as the case may be, the value of supply of service and goods portion in such supply shall be ***equivalent to the total amount charged for such supply less the value of land*** *or undivided share of land, as the case maybe, in such supply shall be* ***deemed to be one third of the total amount charged for such supply.***

For the purpose of paragraph 2, "total amount" means the sum total of:-

a) Consideration charged for aforesaid service; and

b) Amount charged for transfer of land or undivided share of land, as the case may be

Further, attention is to be drawn to Section 142 (11)(b) of CGST/ KGST Act 2017, which is appended below:

(b) notwithstanding anything contained in Section 13, no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994;

It is clearly evident from Section 142(11)(b) that the service tax is liable to be paid, which is leviable under the Finance Act, 1994, on the services up to 30-6-2017, on the services provided after 1-7-2017. Therefore, AAR was of the opinion that the applicant has to pay service tax/GST proportionate to the services provided before/after 30-6-2017 respectively.

Ruling of AAR

In respect of question (i), the applicant is liable to pay GST on the value of building constructed and handed over to the land owner in terms of the Joint Development Agreement.

In respect of question (ii), the value on which the applicant is liable to pay GST is to be determined in terms of para 2 of notification No. 11/2017- Central Tax (Rate) dated 28-6-2017.

In respect of question (iii), the applicant is liable to pay service tax/ GST proportionate to the services provided before/after 30-6-2017 respectively.

6. POSCO India Pune Processing Centre Private Limited – AAR Maharashtra (2018-TIOL-25-AAR-GST)

Facts, issue involved and contention of the applicant

Applicant is a South Korea based company and primarily engaged in distribution of steel coils. It also undertakes low value-added processing of traded goods based on the requirement of the customers. Applicant is paying GST on reverse charge basis under import of services, transport of goods by road, legal services, etc.

As per POSCO group policy, key personnel such as Managing Director (MD) and General Manager (GM) are deputed to the Indian

POSCO group companies. The key personnel are provided rent-free accommodation in hotel and the cost is borne by the applicant.

Applicant has imported certain goods from POSCO Daewoo Corporation, Korea. Upon receipt of said goods, the applicant availed Input Tax Credit of IGST. Applicant eventually sold the goods to the customer on payment of GST. Subsequent to the sale, it was observed that said goods were defective and did not meet customer requirements. Therefore the applicant raised a credit note on the customer. As per the agreement with POSCO Korea, applicant is supposed to charge back the loss to the parent company and for this applicant is required to raise tax invoice on POSCO Korea.

It is the practice of the applicant to provide Mediclaim cover to the employees as well as to their parents. In case of Parent Insurance facility, the applicant initially pays the entire premium along with taxes and then 50% is recovered from respective employees on a monthly basis.

Applicant has sought advance ruling in respect of following questions:

i. *Whether Input Tax Credit is admissible in respect of GST paid for hotel stay in case of rent free hotel accommodation provided to GM and MD of the Applicant?*

ii. *Whether invoice for quality claim raised by the applicant in POSCO Daewoo Corporation located in Korea will be treated as "export of services"?*

iii. *Whether recovery of Parent Health Insurance expenses from employee in respect of insurance provided by the applicant amounts to "supply of services" under Section 7 of Central Goods and Services Tax Act, 2017?*

iv. *If the said recovery amounts to "supply", what will be the time of supply and value of supply? Whether the applicant can claim input tax credit of GST charged by the insurance company?*

Applicant's submissions

As per Section 16(1) of the CGST Act, 2017, every registered person shall be entitled to take Input Tax Credit on any supply on any supply of goods or services or both to him which are used or intended to be used **in the course of business**. In the present case, as per the policy the MD and GM are deputed to India considering the business requirement and smooth functioning of business. Moreover, providing rent-free accommodation is generally accepted business practice across most of the business in India. Also Income Tax Department has allowed the said expenditure (as part of salary) as a business expenditure. If the MD and GM have been on business trips to India such expenditure should have been considered to be in the course of business. Therefore, GST paid such hotel expenses should be allowed as input tax credit under Section 16(1) of the Act.

As per the agreement, applicant is to recover the loss (i.e., loss incurred due to defective imported goods) by raising tax invoice on POSCO Korea. "Export of services" is defined u/s. 2(6) of IGST Act and requires fulfilment of certain conditions. Applicant is of the view that the above service classified under "agreeing to the obligation to tolerate an act or a situation will qualify as 'export of service' since all the conditions of Section 2(6) are satisfied.

As per Company policy, applicant recovers 50% of insurance premium amount from its employees. As per Schedule III of CGST Act, 2017, services by an employee to employer in the course of or in relation to his employment are not treated as a supply of service. However, if employer provides any services, the same will be considered as supply of services. As per Section 15(5)(a)(iii) of CGST Act, 2017, employer are treated as "related persons" and hence, valuation of the supply needs to be determined as per **Rule 28** of CGST Act.

As per the above stated rule, *the value of supply shall be the **open market value** of such supply OR*

value of supply of services of like kind and quality OR value determined by rule 30 or rule 31, ***in the order.***

Based on the above rule, the applicant is of the view that GST should be levied on the entire amount of premium paid by the applicant and not just premium amount recovered from its employees.

Discussions by and observations of AAR

In accordance with Section 16 of CGST Act, ITC is available on the tax charged on any supply of goods or services or both to the applicant, which are used or intended to be used in the course or furtherance of business. As per Section 17(5)(g) of CGST Act, ITC shall not be available **on goods or services or both used for personal consumption.** AAR observed that providing residential accommodation is not in furtherance of business. MD/GM could have been provided with any other residential accommodation and still could have performed their duties for the applicant. In case of residential accommodation, GST is not liable to be paid on rent received. If MD / GM were residing at any residential place or society, they would have only paid rent without GST. In view of the above discussions, AAR held that ITC cannot be claimed by the applicant.

With regards to the goods imported, defects were only noticed after the goods were sold to the customer. Till then credit had already been taken on such imported goods. It is not known as to what happens to the defective goods, whether the same is returned back to the applicant or not. At the time of receipt of goods no defect seems to have been noticed by the applicant and therefore there is no reason for them to tolerate any act. Further, defect has been noticed by customer and therefore it is the customer who is tolerating the act of having sent defective goods. In respect of the so-called defective goods, applicant has failed to state whether the goods are sold as such to their clients or whether the goods were sold to their customer after they have carried out low value-added processing function. AAR refrained from answering second question as complete details was not submitted by the applicant.

Applicant pays premium upfront and recovers 50% of the premium amount from employees. There is no way that 50% amount recovered can be treated as amounts received for services rendered. Such recovery of 50% premium amount cannot be termed as supply of services under GST laws. In fact, what is happening that since applicant is recovering 50% of premium paid and they want to treat same as output services and claim full ITC on insurance premium paid to insurance company in terms of Section 17(5)(b)(iii) of CGST Act. It appears that applicant is creating fiction of providing health insurance services to employees in order to avail 100% ITC of insurance premium expenses. Hence they are not rendering any services of health insurance to their employees and there is no supply in this case.

Ruling of AAR

In respect of the question (i), ITC is not admissible in respect of GST paid for hotel stay.

In respect of the question (ii), AAR refrained from answering because of incomplete details.

In respect of the question (iii), the recovery of parents health insurance expenses from employee does not amount to "supply of service" under the GST laws.

In respect of question (iv), since there is no supply of services there is no question of time and value of supply. Applicant cannot claim ITC of the GST charged by the insurance company.

7. Storm Communications Private Limited – AAR West Bengal (2019-TIOL-15-AAR-GST)

Facts, issue involved and contention of the applicant

Applicant is a supplier of Event Management Services who organises events on behalf of clients. For this purpose, they book conference halls, banquet halls, outdoor caterers etc.

The applicant is registered in West Bengal, Jharkhand, Odisha, Maharashtra and Delhi.

In relation to their event management services, applicant needs to move to other States (where he is not registered), to cater the clients. They incur various miscellaneous expenses in such States for booking hotels, banquet halls and on food. Applicant is charged local CGST & SGST of that particular state (where he is not registered) on such inward supplies. Local vendors issue B2B invoices with the applicant's GSTIN and such invoices appear in GSTR 2A of the applicant.

Applicant has sought advance ruling in respect of following questions:

i. Can a person, registered in West Bengal, claim ITC for CGST and SGST of other states?

ii. Can he adjust the ITC of one state's CGST for payment of another State's CGST?

iii. Can he adjust the ITC of Tamil Nadu GST for payment of IGST, whereas he is not registered in Tamil Nadu?

Discussions by and observations of AAR

GST is a destination based consumption tax. Tax is levied where goods and services are consumed and revenue accrues to that particular State. Under GST, there are three levels of tax, IGST, CGST & SGST and based on the "place of supply" so determined, the respective tax will be levied. "Place of Supply" is determined by location of the supplier and the recipient. Place of Supply has been defined in Chapter V of the IGST Act, 2017.

Applicant is registered in West Bengal and is charged local CGST and SGST (on hotel booking, banquet booking, food expenses, etc.) in the States where he is not registered.

In terms of Section 12(3) & (4) of the IGST Act, 2017, the place of supply will be the location of the hotel, banquet hall or restaurant, where the services are actually performed (in this case, Tamil Nadu). Hence, the suppliers of Tamil Nadu have rightly charged CGST & SGST on the invoices, since all the transactions are intra-state. The applicant on the contrary can avail ITC on the said invoices only if registered in Tamil Nadu.

Section 49(4) of the GST Act states that the amount available in the electronic credit ledger [Section 2(46)] may be used for settlement of outward tax liability. As per section 2(62) of the GST Act, 'Input Tax' means CGST, SGST and IGST charged on any supply of goods or services to the registered person. Input tax and its credit are linked with whether the person is registered or not, however, its availment is subject to registration in the state of consumption of supply. In this case, credit can be availed only if registration is taken in Tamil Nadu under section 25(1) of the GST Act after which it is regarded as "distinct person" as per section 25(4) of the GST Act. The architecture of the GST Act is such that if the applicant is not registered in a particular state, the tax paid on the inward supplies in that state is not 'input tax' in relation to the said person. As the applicant is not registered under section 25(1) in Tamil Nadu, the SGST and CGST paid on intra-state inward supply in Tamil Nadu are not 'input tax' to the said person. The GST Act does not contain any concept of 'input tax' to an unregistered person. No credit of it is, therefore, admissible under the GST Act.

Ruling of AAR

In respect of question (i), a person registered in West Bengal, cannot claim ITC for CGST & SGST of other States.

In respect of question (ii), the applicant cannot adjust the ITC of one State's CGST for payment of another State's CGST.

In respect of question (iii), the applicant cannot adjust the ITC of Tamil Nadu GST for payment of IGST, whereas he is not registered in Tamil Nadu.

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