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INDIRECT TAXES
GST – Recent Judgments and Advance Rulings

A. Rulings by National Anti-Profiteering Authority

1. Kerala Screening Committee, Director General Anti-Profiteering Board vs. M/s. Saint Gobain India Pvt. Ltd. – NAPA Kerala (2019-TIOL-23-NAA-GST)

Facts, Issue involved and Contention of the Applicant

Kerala State Screening Committee on Anti-Profiteering *vide* its minutes of meeting held on 8-5-2018 had referred the case to the Standing Committee on Anti-Profiteering, alleging profiteering by the Respondent on Supply of 'Gypsum Board' (hereinafter referred as product). Applicant has alleged that the respondent has failed to pass on the benefit of tax rate reduction in GST regime w.e.f. 1-7-2017. The Standing Committee on Anti-Profiteering further referred the case to the Director General of Anti-Profiteering.

DGAP in his report dated 26-9-2018 observed that in the Pre-GST regime the tax rates were CST @2% and Central Excise Duty @12.5% and Post GST the tax rate of the product was 28%. The DGAP further furnished the pre-GST and post-GST sale invoice wise details of the applicable tax rates. The details of the invoice is as follows:

	Particulars		Pre-GST	Post-GST
1	Product Description	A	Gypsum Board HSN Code 69091100	
2	Invoice No.	B	1300002553	GY9114061424
3	Invoice Date	C	29.05.2017	20-9-2017
4	Gross Price per unit	D	139.44	139.50
5	Discount per UOM	E	22.60	22.70
6	Discounted base price	F = D-E	116.84	116.80
7	Central Excise Duty (%)	G	12.5%	-
8	Central Excise Duty (in ₹)	H = F*G	14.61	-

	Particulars		Pre-GST	Post-GST
9	Central Sales Tax (CST) (%)	I	2%	-
10	Central Sales Tax (CST) (in ₹)	J = (F+H)*I	2.63	-
11	GST (%)	K	-	28%
12	GST on base price (In ₹)	L = F*K	-	32.70
13	Total Tax (in ₹)	M = H+J or L	17.24	32.70
14	Total tax as % of base price	N = M/F*100	14.75%	28%

Discussions and observations

DGAP submitted that the rate of tax on the product was 2% (CST) and 12.5% (Central Excise Duty) in the pre-GST era and 28% (GST) in the post-GST era. DGAP observed that the rate of tax has increased from 14.75% to 28%. Therefore, the rate of tax applicable to the product was increased from 14.75% as can be seen from the table above, in the pre-GST era to 28% in the post-GST era.

Section 171 of the CGST Act, 2017 reads as under:

(1). *"Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."*

Provisions of Section 171 of the CGST Act comes into play when there is a reduction in the rate of tax or if there is net benefit of input tax credit. Consequently, the DGAP stated that there was no reduction in the rate of tax on the said product and the respondent had reduced the price from ₹ 116.84 (pre-GST) to ₹ 116.80 (post-GST). Provisions of Section 171 of the CGST Act, 2017 were not contravened.

Ruling of NAPA

It is apparent from the perusal of the facts of the case and the invoices placed on record that there was no reduction in the rate of tax on the above product w.e.f. 1-7-2017. Instead, rate of tax in the pre-GST era, which was 14.75%, has increased to GST @ 28% in the post-GST era. Therefore, the allegation of profiteering is not sustainable in terms of Section 171 of the CGST Act, 2017.

B. Rulings by Appellate Authority of Advance Ruling

2. M/s. Nash Industries – AAAR Karnataka (2019-TIOL-07-AAAR-GST)

Facts, Issue involved and Query of the Appellant

Appellant 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 Bengaluru. Such components are manufactured by the appellant based on drawings provided by customers.

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

Appellant had filed an application for Advance Ruling on the following questions –

- *Whether the amortised cost of the tools is to be added to arrive at the value of the 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.

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

Later the recipient gives the tools free of cost to the appellant and he 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 appellant 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 appellant does not amount to supply as defined in Section 7 of the CSGT Act 2017.

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 appellant himself could manufacture the tools or get it manufactured by someone else or the recipient could supply them free of cost. In case the appellant 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 appellant 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 appellant, as evident from the situation discussed above.

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

Ruling of AAR

The Karnataka Authority for Advance Ruling gave the following order:

"The amortized cost of tools which are re-supplied back to appellant free of cost shall be added to the value of the components while calculation the value of the components supplied as per Section 15 of the CGST /KGST Act, 2017".

Appeal to AAAR and observations of AAAR

Aggrieved by the said ruling of the Authority, the appellant filed an appeal to the Advance Appellate Authority seeking answer to the same query.

Appellant submitted the purchase order for the manufacture of components out of tools supplied by the recipient at free of cost provided by the customers. Appellate Authority observed that the appellant and their customers are not related party and the price paid by the customer is the sole consideration for the supply made by the appellant. To understand the scope of the transaction, the contractual agreement between the appellant and their customers was to be verified.

Appellate Authority took note of CBIC Circular No. 47/21/2018-GST dated 8-6-2018 which clarified that goods owned by the OEM (Original Equipment Manufacturer) and provided to the component manufacturer on FOC (Free of Cost) basis do not constitute a supply as there is no consideration involved.

In such cases, the value of goods provided on FOC basis shall not be added to the value of supply of components.

In this case, the terms and conditions of the contract between the OEM and the appellant clearly indicate that no such obligation is cast on them. The OEM has taken the responsibility to provide the tools. The tools are developed and manufactured by the appellant as per the requirements of customer. The tools (along with the title thereon) is then sold to customer. Appellant is allowed to retain the tools in his premises for undertaking the manufacture and supply of components to the customer.

In this instance, the value of the tools, which has already suffered tax and supplied FOC to the appellant, is not required to be added to the value of the components supplied by the appellant.

Order of AAAR

Appellate Authority set aside the ruling of the AAR and observed that the cost of the tools supplied by the OEM customer on FOC basis to the appellant is not required to be added to the value of the components supplied by the appellant.

C. Rulings by advance ruling Authority

3. M/s. Biostadt India Limited – AAR Maharashtra (2019-TIOL-59-AAR-GST)

Facts, Issue involved and Contention of Applicant

Applicant is engaged in the business of developing, manufacturing and distributing crop protection chemicals and hybrid seeds. Applicant has extensive network which includes three mother depots, 22 stock points & a network of more than 2000 distributors & above 25,000 retailers across the country.

Applicant launched one **Kharif Gold Scheme 2018** (target based – sales incentive scheme) for their distributors and retailers in order to maximise their sales and minimise their outstanding collections.

The terms and conditions of the scheme are as under:

a. The said scheme was in force for the period June 2018 to August 2018.

b. The scheme was divided into two parts:

<u>Lifting of products</u>

Customers who purchase certain specific products on or above their specific quantity shall be entitled to one 10 grams gold coin

<u>Collections:</u>

If the customers after lifting the products from the applicant and make payment in the prescribed staggered manner, then the customers shall be entitled to one 8 grams gold coin.

c. A meeting will be called at the end of the scheme period and customers who have satisfied either of the lifting or collection criteria shall be entitled to attend such meeting. They shall be rewarded with the 8 gms or 10 gms gold coin depending upon the criteria fulfilled by him.

Applicant has procured gold coins from jewellers which are to be distributed at the end of the scheme. As per Notification 1/2018 – CGST (Rate) dtd. 28-6-2017, gold is leviable to GST at the rate of 3 per cent.

Applicant has sought advance ruling in respect of the following questions.

1. *Whether Input Tax credit ("ITC") can be claimed by the applicant on procurement of gold coins which are to be distributed to the customers at the end of scheme period for achieving the stipulated lifting or payment criteria.*

2. *The Applicant notifies schemes with similar conditions periodically, so whether the ITC can be claimed in all such similar schemes?*

Applicant's submissions

Applicant submitted that it has satisfied all the criteria's w.r.t. registered person, input tax, in course of business as laid down u/s. 16(1) of CGST Act. It has also complied with the conditions laid down u/s. 16(2) of the Act. The only criteria that needs to be evaluated is the restriction laid down u/s. 17(5) of the Act.

Section 17(5)(h) of CGST Act disallows ITC in respect of goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples. Term gift is not defined under CGST Act.

Gift-tax Act (18 of 1858) had defined the word gift to mean transfer by one person to another of any existing movable or immovable property voluntarily and without consideration in money or money's worth.

Gift is a gratuity and does not require any consideration. If a consideration is attached to a transaction, then it cannot be termed as a gift. Gift cannot arise out of a contractual obligation.

Applicant has launched a sales promotion scheme. It is a known principle that "nothing comes free in business". Each and every act done for business comes with a consideration. Applying same analogy, gold coins are not given away freely to the customers. Applicant has a contractual arrangement with the customer wherein if he purchases certain amount of company's product or makes payment in a prescribed manner then he shall be entitled to a gold coin of specific weight.

Applicant strongly contends that the gold coins distributed to customers at the end of scheme period cannot be qualified as "gift". Since they cannot be qualified as gift, disallowance under Section 17(5) will not be attracted.

Contentions of the Concerned Officer

Departmental officer has opined that the "Gold Coins" to be distributed are not inputs and hence, GST paid on such a purchase does not qualify to be an input tax for the purpose of section 16(1) read with section 2(62) of the CGST Act 2017. What is important in definition of input is the use of phrase "in course or furtherance of business". An activity is undertaken in course or furtherance of business on the basis of few principles:

- Was the activity undertaken in line with basic business model?
- Is the activity needed for continuity in supply?
- Is the activity mainly concerned for making taxable supply?

From above it is clear that applicant wants to avail ITC on gold coins which is not exclusively used in assessee's business related to manufacture and distribution of crop protection chemicals. They are not in line with basic business model and are not needed for continuity in supply. They are not used for making and further taxable supplies and hence cannot be termed as inputs.

Basic intention behind section 17(5)(h) is to restrict people from giving benefit in garb of gifts to avoid valuation and thus avoid levy of tax. If consideration for these goods (gold coins) is not charged directly, they shall qualify as gifts and ITC shall not be eligible.

Discussions by and Observations of AAR

Applicant has floated the subject scheme for the period June, 2018 to August, 2018 only, by way of which gold coins of different denominations would be given to those customers who lifted a certain quality of product or made a certain amount of payment. It is only those specific customers who fulfil the conditions would be able to avail the benefit to subject scheme.

The provisions of ITC are governed by sections 16 and 17 of the CGST Act 2017. In order to avail ITC, two basic provision need to be complied with i.e., Section 16 and Section 17.

As per section 16, a taxpayer is entitled to take credit of input tax charged on any supply of goods or services to him which are used in the course or furtherance of his business. Section 17(5) of the CGST Act deals with blocked credit and being with a *non obstante* clause, which means even if section 16(1) allows ITC, Section 17(5) shall block the same in respect of certain cases.

As per section 17(5)(h), "Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of goods lost, stolen, destroyed, written off or disposed of by way of gist or free samples.

As per the definition of gift under Gift-tax Act, transfer should be made voluntary. Applicant states that they have a contractual arrangement with customer for lifting products and for making payments. A contractual arrangement implies that it should be agreed upon by the customer in writing that such scheme has been floated by applicant. Applicant has submitted only brochure / write-up and has not submitted any concrete contract / agreement. Hence gold coins are not given under a contractual obligation but are given voluntary.

There are several schemes advertised in the market by business house which promise to give 'assured gifts' to their customers. Similarly malls offer various gifts to customers. Gift has an enlarged scope and has its own colour. In the present case, the statement that gold coins will be given to customers who satisfy certain conditions is nothing but assurance of giving away gifts on conditions being achieved by customers.

Under GST, non-granting / denial of ITC is envisaged in situations where there is no tax on output liability. In case where goods are procured with levy of input tax and are supplied without output tax levy, scheme of GST Act does not provide for ITC except for exports.

As a corollary if it is assumed that gifts have some commercial consideration, then GST should be paid at time of giving away of disposal of same and in such cases only ITC shall be available. Also applicant has assigned fixed price of Rs. 3,200/- per gram to gold coin. They have not explained as to how they have arrived at it because value of good changes everyday.

To sum up, ITC shall not be available when no GST is being paid on their disposal.

Ruling of AAR

Distribution of gold coins by the applicant is nothing but gifts hence applicant cannot avail ITC on procurement of gold coins for distribution to customers.

4. E-Square Leisure Pvt. Ltd. – AAR Maharashtra (2019-TIOL-121-AAR-GST)

Facts, Issue involved and Query of Applicant

Applicant is engaged in various services including renting of immovable property to business entities for commercial purpose. The applicant discharges GST on the rent received from the lessees. They also receive **interest free security deposit** (hereinafter to be referred as "security deposit") from the lessees.

The security deposit received is taken on account of security against the damages, if any, caused to the interiors or the property as a whole. Further, the security deposit shall be returned on the completion of tenure of lease.

Applicant has sought advance ruling in respect of following questions:

1. *Whether GST would be applicable on interest free security deposit and notional interest if any?*

2. *In case GST is applicable, what would be the value of notional interest for levy of GST?*

Applicant's submissions

Applicant, referring to Section 7(1)(a) read with 2(31) of the CGST Act, 2017, contends that the deposits received shall not be considered as a payment made for such supply unless the supplier applies such deposit towards consideration for the said supply.

Further, it is submitted that the security deposit has not been given as any additional consideration and it needs to be refunded to the tenant on completion of lease term. Therefore, it cannot form part of the consideration received towards rendition of renting services.

The applicant further contends that the concept of notional interest has nowhere been prescribed in the GST Rules. It existed only under the Excise Valuation rules where notional interest on advance received was includible in assessable value of the goods.

Discussions by and Observations of AAR

Definition of consideration u/s. 2(31) of CGST Act is inclusive and the consideration may be in cash or kind. The payment received will not be treated as consideration, if there is no direct link between the payment and supply. From the close scrutiny of definition, it is clear that there should be a close nexus between the payment and supply.

By referring to Section 2(31), a conclusion is hereby drawn stating that a deposit given in respect of supply shall not be considered as payment made for such supply unless the supplier appropriates such deposit as consideration for the said supply.

In the absence of definition of 'Deposit' in the GST Act, the payment to be considered as security deposit should have following attributes namely:

For performance of an obligation

a) Security against return of the hired goods.

b) Security against damage to properties rented.

c) Must be reasonable

Applying the above test to the facts of the case we find that, the security deposit taken by the applicant is to secure or to act as a guarantee as per the terms of agreement against damages to the properties. Further, admittedly applicant has taken security deposit against the damages caused to the furniture, equipments, fittings supplied along with the premises or damage done to the properties. Applicant will not apply the deposit received, as consideration for the said supply and therefore will not be liable to pay GST on the deposit received.

However at the time of completion of the lease tenure, if the entire deposit or a part of it is withheld and not paid back, as a charge against damages, etc., then at that stage such amounts not returned back will be liable to GST as per the present GST laws.

Ruling of AAR

It was held that GST shall not be applicable on interest free security deposit and notional interest thereon.

5. M/s. Arihant Enterprises – AAR Maharashtra (2019-TIOL-120-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is a partnership Firm engaged in the business of reselling ice cream in wholesale as well as retail sale packages. Applicant

purchases ice-cream from its sole manufacturer, M/s. Kamaths Ourtimes Ice-creams Pvt. Ltd. (the franchisor). The applicant sells the ice cream **"as it is"** without any further processing/alteration/structural or chemical change. Applicant supplies ice cream from its retail stores and selling of ice-cream in below mentioned manner is its only source of revenue:

i. **Sale of ice-cream in retail packs –**

Ice creams are sold in retail packs / plastic containers (popularly called tubs).

ii. **Sale of ice-cream by way of scoops –**

Ice-cream scoops are sold in cones, cups or waffle cones to customers who wish to consume ice-cream on a take away basis. The customer walks to the counter, goes through the menu, selects the flavours, places the order and makes payment to the cashier. Once the ice-cream is handed to the customer, he either waits within or outside the store or takes it away. There are a few tables/chairs/benches for customers to sit while having their ice cream.

Applicant purchases ice-cream in retail and whole sale pack from the franchisor under a tax invoice who collects GST @ 18%. Due to the inherent nature of the product, the packages received from the manufacturer/franchisor are stored in a refrigerator located inside the retail store.

Applicant has sought advance ruling on the following questions -

1. *Whether supply of ice-cream by the applicant from its retail outlets would be treated as supply of 'goods' or supply of 'services' or a 'composite supply' and subject to GST accordingly?*

2. *Whether the supply not being a composite supply, would be treated as supply of service in terms of Entry 6(b) of Schedule II of the CGST Act, 2017 and leviable to CGST @2.5% in terms of Notification No. 11/2017 as amended by Notification No. 46/2017 – Central Tax (Rate) (Serial No. (i) Entry No.7).*

3. *In case the supply is held to be 'composite supply', whether the taxability of the same should be treated as supply of service in terms of Entry 6(b) of Schedule II of the CGST Act, 2017 or should be taxable on the basis of nature of principal supply in accordance with Section 8 of the Act?*

4. *In case the supply is held to be a supply of service in terms of entry 6(b) of Schedule II of the CGST Act, 2017, would it be mandatory for the applicant to collect and pay CGST @ 2.5% in terms of Notification No. 11/2017.*

Applicant's submission

Section 2(52) of the CGST Act, 2017 defines goods as "every kind of movable property other than money and securities .... "

Definition of service u/s. 2(101) of the Act is residuary in nature. In other words what are not goods are services.

Section 2(30) of Act defines Composite Supply to *mean a supply made by a taxable person consisting of two or more taxable supplies of goods or services or both, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.*

Most prominent question to be answered in this regard is whether the supply of ice cream in retail package and in scoops by the applicant at the outlets would be termed as supply of goods or supply of service or a composite supply.

There is no objection to the fact that the transaction under consideration involves transfer of property in movable goods. The

intention of the parties and the understanding of the parties is that the same is a sale. The customer intends and accordingly, agrees to purchase the abovementioned final products from the applicant. There is no contract for provision of any service. The customers of the applicant are free to consume the ice-cream inside and outside the outlet. There are no restrictions as regards to the place of consumption. This contention is supported by the fact that none of the outlet provides the facility of serving/dining to the customer. Every customer, irrespective of age or sex is required to collect the same from the delivery counter. Applicant relied on various case laws in support of its contention that the transaction is that of sale of goods and not provision of services.

It is clear that there is only one activity which has taken place predominantly i.e., buying and selling of ice-cream. Applicant does not intend to provide any sort of service to their consumers. Selling the scoop of ice-cream into the cups and cones, as desired by the consumer, is merely an ancillary or incidental supply. The same could not be treated as a predominant nature of the transaction. Thus, apparently, the predominant nature of the transaction is that of supply of goods.

Applicant further submits that prior to the introduction of GST the company was registered under the Maharashtra Value Added Tax Act, 2002 (MVAT Act) as resellers and were discharging VAT @ 13.5%. It is mandatory for resellers of food and food service providers to obtain a licence under the Food Safety and Standards Act, 2006. Applicant is registered under the said Act as a "Retailer". Further, each of the stores are registered under the Maharashtra Shops and Establishment Act, 1948 and holds a registration certificate issued by the Municipal Corporation. The registration certificate describes the nature of business of the store as "Sale of ice-cream".

Discussions by and observations of AAR

The main issue before us is whether the supply of ice-cream by the applicant from its retail outlets would be treated as supply of "goods" or supply of "service" or a "composite supply".

Applicant has submitted that they purchase ice creams from their franchisor and resell the same in wholesale as well as retail sale packages as it is without any further processing/alteration/structural or chemical change.

Applicant has further submitted that their business transaction involves transfer of property in movable goods wherein the customer places the order and the same is delivered to him. It does not provide any separate facility of serving/ dining.

The Space (chair-tables) for consuming the ice-cream is made for the convenience of the customers and the dominant object involved is sale of ice-cream. The decision of Rajasthan High Court in case of *Govind Ram and Ors. vs. State of Rajasthan* is squarely applicable to this case. Applicant's outlet differ from the conventional restaurants. Generally, in restaurants the customers go with the intention of ordering articles of food for consuming the same at the restaurant.

Even if we consider the said transaction as a composite supply as per Section 2(30) of the CGST Act, we find that the principal supply in the subject case is a sale of goods i.e., ice-cream, being the predominant element of the transaction.

AAR observed that there is a transfer of title in ice-creams from the applicant to their customers and therefore as per Entry No. 1(a) of the Schedule II of the CGST Act, the subject transaction is nothing but a supply of goods.

Ruling of AAR

In respect of question (1), it held that supply of ice-cream by applicant from its retail outlets would be `treated as *'Supply of Goods'*.