Vol. **VII** No. **12** | **September** – 2019

Contents

CA Naresh Sheth & CA Jinesh Shah

INDIRECT TAXES

GST – Recent Judgments and Advance Rulings

A. Rulings by Appellate Authority for Advance Ruling

1. BAJAJ FINANCE LIMITED – AAAR MAHARASHTRA (2019-TIOL-54-AAAR-GST)

Facts, Issue involved and Query of Appellant
Appellant, being an NBFC, is engaged in providing various types of interest bearing loans to customers. EMI paid by the customer is a fixed amount, which includes both interest and principal amount. In case of delay in repayment of EMI, appellant collects penal interest for the number of days of delay in terms of the agreements executed by the customers. The % of penal interest ranges between 2% to 4% per month depending on the product.

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

"I. Definitions and Abbreviations

*r. **"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.

.....

(B) Penal charges for bounce up to ₹ 350/- per default/per month & late payment penalty not exceeding 3% on amount due."

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

However, considering the ambiguity in GST law, appellant had filed an application to authority of advance ruling ('AAR') on 09.05.2018 on following questions:

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 28.06.2017?*

2. *If the answer to the above is negative, whether the activity of collecting penal interest by*

appellant would amount to a taxable supply under the GST regime?

Appellant 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."*

Appellant submitted that service 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 event of default by the customers in making the payment of loan installments. It was 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 appellant 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

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

Further appellant stated that penal interest is part of interest and therefore, eligible for exemption. However, penal interest is received by appellant 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 appellant 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, appellant would tolerate such act of default or situation and the defaulting party was required to compensate appellant 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.

Appeal to the AAAR

Aggrieved by above-referred ruling, appellant preferred an appeal to AAAR against the same. Appellant reiterated the grounds stated in the application including following:

(i) Penal interest is to be included in value of main supply u/s 15(2)(d) of CGST Act, 2017. Main supply, being interest, is exempt from GST, therefore, penal interest will also be exempt.

(ii) Penal interest can't be covered under entry 5(e) of Schedule II as said entry is applied when there is **an agreement to obligation to tolerate an act or situation.** The word **'obligation'** implies a duty or liability on the person agreeing to such obligation, with a corresponding right to other person. However, in present case there is no obligation on appellant as it can take legal action against borrower and borrower can't sue it for such action taken.

(iii) Compensation received for termination/ breach of contract is not treated as supply, therefore, is not subjected to GST/VAT levy in most of other countries.

E.g. Relevant extract of **UK VAT Notice 701/49-Finance** issued under UK Vat law states that "where you agree to defer payment beyond time of supply and make additional charge for doing so, such a charge will be consideration for an exempt supply of credit."

Australian GST legislation includes within its ambit "an obligation to tolerate an act". However, it also states that damages, loss or injury is not a supply and liquidated damages are not liable to GST. Further following references are important to be noted:

a) **New zealand case S65 (1996) 17 NZTC 7408**

b) ***Societe Thermale vs. Ministere de I'Economie*** **[2007] S.T.I 1866, Celex No. 605J0277**

c) ***M/s. Vehicle Control Services Limited*** **(2013) EWCA Civ 186**

Thus, based on above rulings, it can be concluded that penal interest is not taxable, as the same does not amount to consideration for any supply.

AAR order was silent on the above submissions and failed to provide any reason for not accepting the aforementioned grounds. The absence of reasons has rendered the order not sustainable. In this regard, reliance is placed on following judgements of Apex court:

(i) ***State of Orissa vs. Dhaniram Luhar*** **(2004) 5 SCC 568**

(ii) ***Oryx Fisheries Pvt. Ltd. vs. Union of India,*** **2011 (266) E.L.T. 422 (SC)**

(iii) ***Commercial Tax Department vs. Shukla & Brothers*****, 2010-TIOl-131-SC-CT**

(iv) ***Commissioner of CGST & Central Excise vs. M/s Development Credit Bank Ltd.,*** **2018-TIOL-2313-HC-MUM-CX**

It was submitted that penal interest reflects time value of money. Penal interest is charged for use of money by borrower beyond the stipulated period, therefore, it is an interest only. Loan agreements can use various terms such as penal interest, late payment penalty, etc. It is a settled principle that nomenclature alone would not

determine the nature of transaction. Reliance can be placed on following judgements in this regard:

(i) ***Moped India Limited* 1986 (23) ELT 8 (SC)**

(ii) ***Hindustan Gas & Industries Ltd. vs. CCE* 1991 (54) ELT 383 (Tri.)**

It was further submitted that overdue installment on default would virtually be treated as new loan transaction and penal interest so charged would be the interest for such loan. Further, mere difference in rate of interest and penal interest does alter the nature of transaction as such rate is at discretion of lender and based on various other risk factors. Therefore, finding of AAR is erroneous.

Without prejudice to above, it was submitted that if penal interest is treated as penalty or liquidated damages for default committed by customers, then it is not leviable to GST. Since penalty or liquidated damages is not a Consideration u/s 2(31), therefore, there is no supply as defined u/s 7 of CGST Act, 2017.

Concept of **"Consideration"** is based on phrase "quid pro quo" which means "something in return of something". Damages for breach of contract is not a consideration. It is a **legal/statutory right provided u/s 73 and 74 of Indian Contract Act, 1872** and even without an clause in the contract for damages or compensation payable upon breach of contract, the party suffering breach has the statutory right to claim damages from the party who broken the contract terms.

Discussion and Observations of AAAR

AAAR closely examined the loan agreements and observed that the terms 'Default interest, 'Penal charges' and 'Bounce charges' are defined separately and exclusive to each other and whatever amount is recovered by appellant is only penalty for delay payment of EMI under the term ' Penal charges'.

Further as mentioned above, the term 'Interest' is defined under para (zk) of Notification No. 12/2017-Central tax (rate). The definition is not inclusive of specifically mentioned therein service fees or **other charge** which further proves the legislative intent to exempt only interest. Penal charges are also covered by the said term **"other charge"**.

Appellant while relying upon various judgements contended that any consideration, in lieu of use of money, is nothing but interest only. However, it is to be noted that 'interest' is defined in the notification and one cannot opt meaning in common parlance.

Further Section 15(2)(d) will not apply in present case, as it is applicable where interest is not defined separately anywhere else in specific context. In present case, the term 'interest' is defined separately, therefore, general meaning of Section 15 is not applicable.

International rulings, as contended by appellant, are not applicable to AAAR.

It is observed that while interpreting entry 5(e) of Schedule II, appellant has tried to play with the words by contending that **"agreeing to the obligation"** is a prefix to all the three expressions in 5(e). However, it is evident that all three expressions namely **"agreeing to the obligation to refrain from an act; or to tolerate an act or situation; or to do an act"** are separated with semicolon followed by 'or' showing that they are inextricably connected. In this regard, reference can be made to judgement of **Hon. Supreme Court in case of PIL of *Shri Jayant Verma vs. Union of India*** dated 16.02.2018 related to the expressions separated by semicolons. Hence, it is concluded that "agreeing to tolerate an act or situation" is a separate expressions and toleration of delay in payment of EMI is covered by entry 5(e).

Ruling of AAAR

The AAAR upheld the order passed by AAR and dismissed the appeal filed by appellant.

2. BAJAJ FINANCE LIMITED – AAAR MAHARASHTRA (2019-TIOL-53-AAAR-GST)

Maharashtra AAR through its order No. GST-ARA-21/2018-19/B-84 dated 06.08.2018 stated that bounce charges are liable to GST in terms of entry 5(e) of Schedule II.

Subsequently, applicant filed appeal with AAAR against aforesaid order and AAAR upheld the AAR order for taxing bouncing charges based on exactly same grounds which it used for passing its another order in case of ***Bajaj Finance Limited – AAAR Maharashtra (2019-TIOL-53-AAAR-GST)*** as discussed above. Therefore, same have not been discussed here further.

3. SABRE TRAVEL NETWORK INDIA PRIVATE LIMITED – AAAR MAHARASHTRA (2019-TIOL-58-AAAR-GST)

Facts, Issue involved and Query of Appellant

Appellant ('Sabre India') is subsidiary of Sabre Asia Pacific Pte. Ltd. ('Sabre APAC'), a leading provider of travel solutions and services across the globe. Sabre GLBL Inc., an affiliate of Sabre APAC and Sabre India, has developed a global distribution system which uses a computer reservation system software ('CRS Software') owned by it. The said CRS software performs various functions including airline seat reservations, scheduling, booking for a variety of air, car and hotel services, automated ticketing and fare displays, etc. Sabre GLBL Inc. had granted to Sabre APAC a non-exclusive right to market and promote CRS software and authorized to sub-license certain part of its marketing rights and obligations to local country distributors. Accordingly, under a marketing agreement, appellant has obtained such right from Sabre APAC to distribute CRS software in India and to promote access of CRS software to end subscribers viz. travel agent in India.

Marketing agreement and its operations

Appellant identifies potential subscribers, informs them about the features of CRS software and also scans credentials and business potential of subscribers. If any subscriber is interested then appellant requests to Sabre APAC through a website ('SCMS') to create Pseudo City Code which is used for tracking the subscriber. Pseudo City Code is allotted to subscriber only when criteria set by Sabre APAC is met by the him. Then, appellant's engineers install the user interfaces to access of CRS software.

Therefore, appellant's responsibility stands completed on identification of potential subscribers and analysis of their potential. Subsequently, their responsibility to provide marketing support services arises when Sabre APAC accepts the request of subscribers based on analysis of appellant. Appellant's responsibility also includes marketing support services such as PR, promotions, sponsorship, special events and trade shows as well as any other related support services.

Appellant raises a consolidated monthly invoice (cost plus a mark-up basis) for all such services and receives consideration in convertible foreign exchange.

As per Article 11 of agreement, the relationship of appellant and Sabre APAC is on principal to principal basis and there is no relationship by way of an agent, broker, etc.

In light of the aforesaid facts, appellant sought answers to following:

Whether the marketing, promotion and distribution services provided to Sabre APAC would be subject to GST or would remain excluded from GST payable as the said activities

qualify as export of services u/s. 2(6) of IGST Act, 2017?

Ruling of AAR

In respect of aforesaid question, AAR declared that the marketing, promotion and distribution services provided to Sabre APAC is subject to tax under GST legislation.

Appeal to the AAAR

Aggrieved by the above-referred ruling, appellant preferred an appeal to AAAR based on following grounds:

(i) Services provided by appellant would not qualify as an intermediary service;

(ii) Services rendered to Sabre APAC qualify as export of services;

(iii) The services rendered by appellant is classifiable as a composite supply.

Services provided by appellant would not qualify as an intermediary service in terms of section 2(13) of IGST Act

Appellant submitted that they undertake sales promotion and marketing support activities to advance the business of Sabre APAC in India and to strengthen the subscribers' trust in the brand 'Sabre'.

It was submitted that the use of technology and hardware connectivity are the crucial elements for any interaction with the principal and **the use of digital infrastructure cannot ipso facto mean that the activity is as a broker or agent and cannot be regarded as facilitating the service.** AAR has completely ignored the fact that the marketing agreement has clearly stated that the relationship is on principal-to-principal basis.

Appellant invited kind attention to the ruling issued by West Bengal AAR in ***Global Reach Education Services Pvt. Ltd.*** *vide* GST-ARA15/2017-18/8-30 dated 08.05.2018 wherein it was held that appellant was providing intermediary service. Appellant is paid consideration in the form of Commission, based on performance in recruiting students, as a percentage of the tuition fee. Appellant aggrieved by the said ruling appealed to the AAAR wherein decision of AAR was upheld.

Appellant also invited attention to decision of AAAR in **Five Star shipping (Maharashtra) at para 67 of its order No. MAH/AAAR/SS-RI/11/2018-19** dated 23.10.2018 reported in 2018 (10) TMI 1517.

Appellant submitted that the tests laid down in above rulings answers as to whether the consideration is received as a function of sale or independent of the sale. In present case, there is no obligation to generate any sale and this is the most distinguishing feature vis-a-vis the other two AARs mentioned above.

It is also a well settled law that the expression in the document that is construed cannot be ignored as held by the Hon'ble Andhra Pradesh He in ***G. S. Lamba & Sons vs. State of A.P*** **2012-T/C'L-49-HC-AP-CT.**

The ruling made on the ground that appellant is not providing services on their own, **because they do not own the software**, is legally untenable in as much as appellant has no role in negotiating the terms of subscription or conclude the same. **The role of appellant is to popularize the brand, which induces the customers to show interest.**

Further, it is relevant to note that Section 2(13) of CGST Act, which defines Intermediary, intends for participation of three parties, namely supplier, recipient and a facilitator, which is absent in present case.

The AAR observed that the customers come on their own to appellant, however, there is no evidence to state this. This is unsustainable in as much as appellant utilizes the advertising and promotion techniques. Sabre APAC only

undertakes the business analysis and decides as to whether allot the Pseudo City Code or not. The Agreement does not facilitate nor does it enable the facilitation of any supply of services between Sabre APAC and the Subscriber.

Appellant also gave reference to ruling in case of In Re Godaddy India Web Services Pvt Ltd [2016 (46) STR 806 (AAR)] and **Re: Universal Services Indio Pt Ltd [2016 (42) STR 5855 (AAR)]** in this regard.

The views expressed by the ruling of AAR have great persuasive value as held by Hon'ble Tribunal in ***The Bombay Flying Club vs. Commr. of Service Tax Mumbai-II*** **2012 TIOL 841 CESTAT Mum** at para 5.9 and the Hon'ble Supreme Court in ***Columbia Sportswear Co vs. Director of Income Tax, Bangalore*** **2012 (383) ELT 321 (SC)** at para 9.

In view of the above, the finding of the AAR that appellant is facilitating service between travel agents and Sabre Singapore cannot render them as intermediary.

In view of above, it was submitted that appellant would interact with the travel agents cannot take away the relationship with Sabre APAC from that of a principal-to-principal basis and bring them within the scope of intermediary.

Services provided by appellant would qualify as an Export of Service in terms of section 2(6) of IGST Act

It was submitted that in the impugned findings that the supply of appellant to Sabre APAC is intermediary in nature and hence concluding that the said services cannot be treated as export of services is completely erroneous and unsustainable.

Based on the facts stated above, the objective and the intent of the parties under the Marketing Agreement was that the services are to be rendered from India to Sabre APAC situated in Singapore. This is an inter-state supply as defined u/s 13 of the IGST Act, 2017 read with Sec 2(57) of the CGST Act, 2017.

Said services would be excluded from taxation if they are treated as "export of services" u/s 2(6) of the IGST Act which is defined 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;

In said case, AAR observed that **condition (iii) is not satisfied** as place of supply will be location of supplier of services (i.e. India) u/s 13(8)(b) of IGST Act, 2017.

However, appellant submitted that place of supply have to be determined u/s 13(2) and place of supply should be location of recipient of services i.e. Singapore. Therefore, such services will fall under the definition of "export of services" and appellant will be entitled to claim the benefit of zero-rated supplies. Application of Section 13(8)(b) of IGST Act, 2017 was erroneous.

The services rendered by appellant is classifiable as a composite supply u/s 2(30) of the CGST Act

As per facts stated above, appellant provides a bundle of services in relation to marketing and promotion of CRS Software within the territory of India which includes advertising, identification of

potential business opportunities and other related support services as per agreement.

Considering the nature of the services, these are a bundle of services and is a **"composite supply"** as defined u/s 2(30) of the CGST Act which reads as follows:

*"Composite supply means 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**".*

It was submitted that in present case, service of marketing access to the CRS Software is of principal nature with the other services being supplementary to it.

Discussion and Observations of AAAR

AAAR closely examined the marketing agreement and facts stated by appellant and observed that by carrying out all the activities as per the said agreement, appellant is arranging for the supply of services, which, in the instant case, is on line information and database access and retrieval services' (OIDAR Services) provided by Sabre APAC, by way of identifying the potential subscribers.

To understand the significance of the role of appellant, AAAR considered the activities carried out by appellant, from the chain representing the supply of OIDAR services provided by Sabre APAC to the Subscribers and it observed that there is no provision of this OIDAR Services at all. Thus, AAAR noted that it is abundantly clear that appellant is arranging as well as facilitating the supply of services between Sabre APAC and the potential subscribers.

Now question arises that whether the above discussed activities of appellant are in the nature of the intermediary or not. For anyone, seeking to be qualified as an intermediary u/s 2(13), the following conditions are required to be satisfied:

(i) He should be a broker, an agent or any other person, by whatever name called;

(ii) He arranges or facilitates the supply of goo ds or services or both, or securities, between two or more persons; and

(iii) He should not supply such goods or services or both or securities on his own account.

Now coming to the condition (i) above, it is relevant to note the meaning of broker, or agent. It is observed that 'broker' is not separately defined in the GST Act. However, the meaning of 'Agent' is provided in Section 2(5) of the CGST Act, 2017 according to which he is the person who carries on the business of supply or receipt of goods or services or both on behalf of another.

In the instant case, it is revealed that appellant is carrying on the business of supply of services, in this case OIDAR Services, which is actually provided by Sabre APAC, by performing the activities of 'identification of potential subscribers' and initiating the process of subscription with respect to CRS Software, by logging request on the Sabre APAC website and by providing the outcome of the organizational and work flow analysis as well as background check of their credentials on behalf of Sabre APAC. Thus, appellant is acting as an "agent".

Now coming to the condition no. (ii), it has been established that appellant is arranging as well as facilitating the supply of services viz.- OIDAR Services between Sabre APAC and OIDAR service recipient.

Further, coming to the condition no. (iii), AAAR observed that appellant is not providing the main service (OIDAR Services), on its own account as the said OIDAR service is provided by Sabre APAC.

As regards appellant contention that they do not facilitate or undertakes any such arrangements to supply goods or services referring to article 11 of the said agreement, AAAR observed that appellant has intentionally entered into such agreement to escape from the Principal - Agent relationship and thereby refraining from the liability to pay tax.

Further, as regards the High Court Judgement in case of ***G. S. Lamba & Sans vs. State of A. P.*** **(2012-TIOL-49-HC-AP-CT)** cited by appellant, it is seen that Hon'ble High Court has, *inter alia*, clearly distinguished that in the event of the intrinsic incongruities and inconsistencies flowing from the words and language used in the document, "the intention would prevail over the words used." Thus, above contention is devoid of any merit and substance and hence not tenable.

AAAR further stated that based upon **ejusdem generis** it has arrived on conclusion that the activities of appellant are primarily in the nature of those of intermediary.

As regards the above cited advance rulings, it was opined that the said rulings do not have any implication in the instant case as the facts of the case is different.

As regards appellant 's question as to whether services rendered to Sabre APAC qualify for exclusion as an export of service, it was stated that for deciding any supply of services as export of services, place of supply of service has to be determined. However, on perusal of the provisions related to the set of questions qualified to sought for the Advance Ruling as laid out in Sect ion 97(2) of the CGST Act it is seen that question regarding the determination of the supply of goods or services or both is not mentioned in the above said provision.

Thus, from the above, it is apparent that AAAR do not have jurisdiction to decide whether any particular supply of service is export or otherwise. However, AAR has commented on the place of supply of service, transcending their jurisdiction.

As regards appellant's contention regarding the entire gamut of activities carried out eligible to be classified as a composite supply, AAAR agreed with the exception that principal supply is intermediary services.

Ruling of AAAR

In respect of question of appellant, AAAR held that it does not have jurisdiction to decide the place of supply of service, which is one of the prerequisites to determine the export of services u/s 2(6) of the IGST Act, 2017.

B. Rulings by Authority for Advance Rulings

1. CHOWGULE INDUSTRIES PRIVATE LIMITED – AAR GOA (2019-TIOL-225-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is an authorised dealer for Maruti Suzuki India Limited for sale of motor vehicles and spares. It carries out servicing for Maruti as well as some other commercial vehicle manufacturers. Applicant purchases vehicles against tax invoices which are reflected in the books of accounts as Capital Assets. These vehicles are used as demo cars for providing trial run to customers to understand the features of the vehicle.

Applicant has sought an advance ruling as to "Whether GST charge on Motor Vehicle purchased for demonstration purpose be availed as credit on Capital Goods and set off against output tax payable under GST?"

Discussions by and observations of AAR

As per the dealership norms, every sales outlet is bound to maintain at least one demo vehicle of

each model per location. The vehicles are usually held for two years or 40,000 kms., whichever is earlier and then sold. When the demo vehicles are sold applicable GST is paid on the selling price.

As per section 16(1) of the GST Act, every person shall be entitled to take input tax credit on every supply of goods or services or both which are used or intended to be used in course or furtherance of business.

As per section 2(19) of the GST Act, Capital goods means the value of which is capitalize in the books of accounts of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business.

Applicant purchases vehicles from the supplier against tax invoices after paying taxes. The vehicles purchased from the supplier are capitalized. The capital goods which are used in the course or furtherance of business is entitled for input tax credit.

As per section 17(5) of the CGST Act, input tax credit shall not be available in respect of motor vehicle except when they are used for making taxable supply or for transportation of goods or passengers or imparting training on driving such vehicles. The taxable supply includes further supply of such vehicles. The demo vehicles are being used only for a specified period. Later on when the demo vehicles are sold at the written down value GST is charged at applicable rate at that point of time. GST Act does not prescribe the time within which time further supply is to be effected. Hence the provision of section 17(5) will not be applicable. The applicant is entitle for input tax credit on demo vehicles.

Availability of input tax credit shall be subject to the provisions of section 18(6) of the CGST Act. In case of supply of capital goods on which input tax credit has been taken, the register person shall pay an amount equal to the input tax credit on the said capital goods reduce by such percentage of points as may be prescribed or the tax on transaction value of such capital goods determined as value of taxable supply, whichever is higher.

Ruling of AAR

Input Tax Credit on the Motor Vehicle purchased for demonstration purpose can be availed and set off against output tax payable under GST.

2. E-DP MARKETING PRIVATE LIMITED – AAR MADHYA PRADESH (2019-TIOL-196-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is engaged in the trading of various edible oils. Applicant intends to import crude soyabean oil on CIF basis (Cost + Insurance + Freight) which includes the component of ocean freight in the price of imported goods. Applicant is required to authorize the seller who is a person located in non-taxable territory for transporting the goods by a vessel from supplier's place up to the place in Indian Custom Territory. Ocean freight will not be paid by the applicant because the seller is supposed to collect the ocean freight while deciding the price of the goods payable by the applicant. The payment of ocean freight would be made by the seller located outside India.

Applicant has sought advance ruling as to whether the applicant is liable to pay IGST under Reverse Charge Mechanism on Ocean Freight component when IGST is paid by him on full value of goods Imported on CIF Basis?

Applicant's submissions

At the time of import of goods into India, applicant is required to pay aggregate customs duties on CIF value of the imported goods, which is considered as assessable value for the purpose of levying the import duties on such goods. Since the CIF value of the imported goods includes

the component of ocean freight, therefore, the applicant is required to pay IGST on this ocean freight component also along with other duties of customs. This is a first incidence of payment of IGST on the component of ocean freight by the applicant.

Further, Notification No. 10/2017-lntegrated Tax (Rate) dated 28th June, 2017, applicant is again required to pay IGST under reverse charge mechanism on ocean freight component in respect of imported cargo. If this is paid by applicant/ importer, it will amount to double taxation of IGST on the same component of ocean freight of the imported goods which apparently is illegal and against the basic principles GST of law.

Discussions by and observations of AAR

Applicant intends to import crude soya bean oil on CIF basis, which includes the component of ocean freight in the price of imported goods. Obviously, in case of such imports the seller being located in non-taxable territory, the ocean freight is collected by the seller from the importer located in the taxable territory. However, as per Notification No. 10/2017-lntegrated Tax (Rate) dtd. 28.06.2017, [Sr. No. 10], the 'Services supplied by a person located in non-taxable territory by way of transportation of goods through a vessel from a place outside India up to the customs station of clearance in India' have been put under Reverse Charge Mechanism and the recipient of service viz. 'Importer, as defined in clause (26) of Section 2 of the Customs Act 1962 (52 of 1962), located in the taxable territory' is made liable to pay GST.

Further, in terms of Notification No. 08/2017-Integrated Tax (Rate) dtd. 28.06.2017, read with Corrigendum dtd. 30.06.2017, the taxable value is deemed to be 10% of the CIF value of imported goods.

In view of the above two notifications, AAR did not find any ambiguity regarding payment of IGST on ocean freight. As per existing law, IGST on ocean freight has to be paid by the importer under reverse charge mechanism, irrespective of the fact that such freight charges are included in the intrinsic CIF value.

Ruling of AAR

Applicant shall be liable to pay IGST on ocean freight paid on imported goods [CIF value] under Reverse Charge Mechanism in terms of Notification No. 10/2017-IT(R) and Notification No. 8/2017-IT(R).

3. SPACELANE OFFICE SOLUTIONS PRIVATE LIMITED – AAR KERALA (2019-TIOL-255-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is engaged in business of sub-leasing of office spaces as 'co-working spaces' to its clients. Lease agreement between applicant and landlord permits sub-leasing and accordingly applicant obtained NOC from landlord for registering its customers under GST. In 'co-working space model', the applicant offers dedicated distinct and identifiable space, tables and chairs to each client working there. The clients maintain their financial records in electronic form.

Applicant has sought advance ruling that can GST registrations be allowed for multiple companies from same address, provided they follow all GST rules related to principle place of business?

Discussions by and observations of AAR

Many start-ups prefer co-working solution. Start-up companies working in shared business places are facing difficulties in GST registration. The registration application was rejected by the authority for the reason that 'already another company is registered in the address'. These companies have same address and electricity bill except suit/desk number.

There is no prohibition under GST law for obtaining GST registration to a shared office

space or virtual office, if the landlord permits sub-leasing as per agreement. Each 'co-working space' is demarcated with different suit/desk number. As GST registration is PAN based, identification of tax payers is not difficult.

While applying for GST registration for the co-working space, rental agreement with landlord and lessee along with agreement between lessee and sub-lessee must be uploaded as proof of address of principal place of business of respective desk/suit number. In addition to this, upload monthly utility bill – electricity charges/water charges, etc. If so, there is no hindrance in taking GST registration for co-working space. GST number and certificate of each co-working space must be displayed at prominent place and books of accounts are to be maintained at principal place of business.

Ruling of AAR

Separate registration can be allowed to multiple companies functioning in a co-working space and which provide services alone. Such companies shall upload rental agreement of landlord and lessee alongwith sub-lease agreement as proof of principal place of business. In addition to this, applicants can upload copy of monthly utility bill.

4. SPECSMAKERS OPTICIANS PRIVATE LIMITED – AAR TAMIL NADU (2019-TIOL-245-AAR-GST)

Facts, Issue involved and Query of the Applicant

Applicant is importing as well as locally procuring lenses, frames, sun glasses, contact lenses, etc. and are engaged in re-selling them. They have their office in Tamil Nadu at Chennai and have branches outside the state of Tamil Nadu. Goods imported and re-sold by the applicant are also transferred to their branches located outside the State for subsequent supply to ultimate customers.

Applicant has sought advance ruling as to what value to be adopted in respect of goods transferred to branches located outside the State?

Applicant's submissions

As the branches are distinct persons, applicant are required to discharge the GST while supplying the goods to their branches outside the State. Rule 28 of GST rules, 2017, provides three options for determining the value in respect of supplies to distinct/related persons. These options governed by two provisos. Applicant is of the view that the second proviso is applicable to their case, i.e., where the recipient is eligible for full input tax credit, the value declared in the invoice shall deemed to be the open market value of the goods or services. Hence, in their view if the second proviso is applied it is sufficient that they pay tax at the time of supply of goods from the state of Tamil Nadu on the value declared by taking into account the cost price in the tax invoice while dispatching the supplies to other states. The goods received by the recipient are further sold or supplied to the consumers/customers based on the market price. Applicant submitted orders of West Bengal AAR and AAAR in a similar issue in case of M/s. GKB Lens Private Limited.

Discussions by and observations of AAR

Applicant claims that by applying the second proviso to Rule 28 of CST Rules, it is sufficient to pay tax on supply of goods from Tamil Nadu on the value arrived by taking into account the cost price while dispatching the supplies to other States. The claim is that the value need not be as per first proviso to Rule 28, even though such price be available.

As per section 25 of CGST Act, applicant and its branches are distinct persons and should have separate registrations. Supply between applicant and its branches is considered as supply between distinct persons. Branches and applicant are related person as defined u/s 15 of CGST Act and hence valuation needs to be adopted as per Valuation Rules.

As per Rule 28(a), open market value needs to be adopted for transaction between related parties. In the instant case, applicant supplies the same goods i.e. Lenses, Frames, Sun Glasses, Contact Lenses, etc. to recipients in Tamil Nadu as well as its branches outside Tamil Nadu. As per applicant, there are supplies being made to such unrelated recipients within Tamil Nadu for which price is the sole consideration. Thus, there exists an 'open market value' for such supplies being made to distinct recipients who are branches of the applicant in different states/ Union territories. Thus, there is no necessity to go further down to Rule 28(b) or (c) as they are to be read sequentially and are also applicable only when 'open market value' is not available. Once Rule 28(a) is applicable, Rule 28(b) or (c) cannot be used by the applicant for determining the value of the supply of goods between distinct persons.

Applicant states that their recipients in other states (branches) further supply such goods to their customers without any further value addition, re-packaging, labelling etc. i.e. they are supplied as such. In such a scenario, Rule 28 gives an option to the supplier, i.e. the applicant, to adopt an amount equivalent to 90% of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person as the value at which the supplier i.e. the applicant supplies to his distinct/related branch in another state. If the applicant does not use this option for supplies to the recipient who further supplies to their customers as such, he has to supply at 'open market value' which is available as per Rule 28(a).

There is a further proviso to Rule 28 which states that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services. This further proviso has to be read along with the first proviso above. In the event the applicant chooses the option in the first proviso, the value of his supplies to distinct recipients outside state will not be at open market value. In such a case, if the recipient is eligible for full input tax credit, the value in the invoice, i.e. the value after exercising the option in the first proviso, will now be deemed to be the open market value.

Applicant states that he may include any value while invoicing to the recipient as the recipient is eligible for full input tax credit as per second proviso to Rule 28. If that were the case, the applicant may use a value much higher than the open market value to pass on input tax credit to his branch office outside the state or he may use a much lower value than even his cost price, which will lead to accumulation of input tax credit for the applicant, which is not the intention of a taxation based on value addition.

Further, if a taxpayer can skip all the provisions under Rule 28(a) to (c), in spite of them being specifically mentioned as the value which "shall" be adopted, then in no scenario will any taxpayer ever use Rule 28(a) to (c). Both provisos are to be read together and not independently, i.e. the applicant cannot choose whichever proviso is favorable to them.

Ruling of AAR

The value in respect of supply of goods i.e. lenses, frames, sun glasses, etc. by the applicant to distinct persons being branches outside the state of Tamil Nadu shall be the open market value of such supplies that is available as per of Rule 28(a). Where the goods are intended for further supply as such by the recipient, the applicant has the option to adopt an amount equivalent to 90% of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person as the value of such supplies to the distinct recipient.

❍□❍