

N.A.SHAH ASSOCIATES LLP
Chartered Accountants

JUDGEMENTS AND ADVANCE RULINGS ON GST

We are pleased to draw your attention to following important advance ruling on GST which might be useful for you to take call on tax position.

Executive Summary:

Case & Citation	Issue involved	Decision
Bharat Oman Refineries Ltd. [2021-TIOL-286-AAR-GST-MP]	<ul style="list-style-type: none"> Whether GST is applicable on notice pay paid by an employee to the employer in lieu of non-serving of notice period? Whether GST is applicable on the recovery of Group Medical Insurance premium from employees in respect of non-dependent parents and from retired employees? Whether GST is applicable on provision of canteen services to employees either for a nominal amount or without consideration at the Refinery? Whether GST is applicable on recovery of telephone charges from the employees over and above the fixed 	<ul style="list-style-type: none"> GST is applicable on notice pay paid by an employee to employer in lieu of non-serving of notice period under clause 5 (e) of schedule II of CGST Act. Group Medical Insurance premium recovered by applicant falls within the ambit of supply and is liable to GST. The supply of canteen facility to its employees is taxable and its value is to be determined under Rule 28 of GST Rules i.e. Cost plus 10%. Company is liable to pay GST on the amount recovered from its employees towards telephone charges to the

	<p>rental charges payable to BSNL?</p> <ul style="list-style-type: none">• Whether ITC is available to the applicant in respect of above activities?	<p>extend it exceeds the fixed monthly charges at actuals.</p> <ul style="list-style-type: none">• Applicant shall be eligible to claim ITC in respect of premium paid to insurance company to the extent of its further supply.• Applicant shall not be eligible for ITC in respect of canteen services.• In respect of telephone charges paid to BSNL, the applicant shall be eligible to claim ITC
--	--	---

The brief analysis of above referred decisions and rulings are given below.

BHARAT OMAN REFINERIES LTD. [2021-TIOL-286-AAR-GST-MP]

Issue involved in Q:1	Whether GST is applicable on notice pay recovered by employer on non-serving of notice period under clause 5(e) of Schedule II of GST Act?
Contentions of Applicant	<ul style="list-style-type: none"> • Notice pay recovery is covered under clause 1 of Schedule. III which provides that 'services by an employee to the employer in the course of or in relation to his employment' will not be considered supply of services. Schedule III supersedes Schedules I and II. • Applicant relied upon decision of Madras High court in the case of GE T&D India Ltd vs Dy. Comm of CE wherein it was held that employer has not provided any service but merely facilitated the sudden exit upon imposition of a cost and has permitted but not tolerated the employee's act.
Observations & Decision of AAR	<ul style="list-style-type: none"> • Employer tolerates the act of an employee by relieving him without notice period. Such activity is covered under para 5(e) of Sch. II i.e., 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' and not under clause 1 of Sch. III therefore liable to tax. • Case law of GE T&D India Ltd is not applicable as it pertains to Service tax regime.
NASA Comments	<ul style="list-style-type: none"> • GST legislation is basically an amalgamation of service tax, excise, VAT and other indirect taxes and hence, ratio laid down by judiciary in earlier regimes cannot simply be brushed aside. • Ruling by AAR is binding only on applicant and its jurisdictional officer. It does not have general binding precedence value. • Schedule-II is not a charging schedule. It only classifies the supply in to "Goods" or "service". In order to trigger levy, the transaction should be a supply as defined under section 7 of CGST Act. One can definitely articulate that notice pay recovery is not a consideration for any supply.

Issue involved in Q:2	<ul style="list-style-type: none"> • Applicant has taken a "Group Medi-claim Insurance Policy" for all its employees which also covers their spouse, children and dependent parents under the policy. Applicant is not recovering any amount from employees for such scheme and it forms part of the cost to the company. • The employees are also given an option to enrol their non-dependent parents for availing the benefit of this scheme. In addition to this, retired employees are also given an option to avail this benefit. Additional insurance premium paid by the applicant in respect of: <ul style="list-style-type: none"> ➤ non-dependent parents is recovered from the employee's salary and ➤ retired employee is recovered at actuals. • Whether GST is applicable on the amount of premium of Group Medical Insurance Policy recovered at actuals?
Contentions of Applicant	<ul style="list-style-type: none"> • Applicant is not in the business of providing insurance services. Also, the applicant does not possess any licence to provide insurance services. • Such activity is not incidental or ancillary to the business of the applicant. • Applicant also relied on following favourable Advance Rulings: <ul style="list-style-type: none"> ➤ Tata Motors Ltd. (AAR-Maharashtra) ➤ Jotun India (P) Ltd. (AAR-Maharashtra) ➤ Posco India Pune Processing Center (P) Limited (AAR-Maharashtra)
Observations & Decision of AAR	<ul style="list-style-type: none"> • Held that such activities carried out by the Applicant are ancillary or incidental to activities falling under definition of "business" as volume, frequency, continuity or regularity of transaction is irrelevant. • Recovery would not have been taxable had the services been provided as a pure agent. • Since, applicant is not an agent of the insurance company, such activity falls under ambit of supply liable to GST.
NASA Comments	<ul style="list-style-type: none"> • Ruling by AAR is binding only on applicant and its jurisdictional officer. It does not have general binding precedence value.

	<ul style="list-style-type: none"> One may argue that paying premium on behalf of non-dependent parents or retired employees and subsequent recovery thereof from employees is a financial transaction not liable to GST.
Issue involved in Q:3	<ul style="list-style-type: none"> Applicant, as mandated under Factories Act, provides canteen facilities to its employees. Applicant has engaged a contractor for managing the canteen. Applicant recovers 700/- per month from the employees as a fixed amount irrespective of whether the employee is availing the canteen facility or not. Whether GST is applicable on recovery of nominal amount for availing the facility of Canteen? Whether GST is applicable if canteen services are provided free of cost?
Contentions of Applicant	<ul style="list-style-type: none"> As per Section 46 of Factories Act, 1948, it is mandatory for the applicant to provide canteen facility to its employees. The activity of supply of canteen services is part and parcel of employment contract falling under clause 1 of Schedule III. Schedule III supersedes Schedule I and Schedule II. Therefore, such provision of services is not liable to GST.
Observations & Decision of AAR	<ul style="list-style-type: none"> AAR held that such activities carried out by the Applicant are in the course or furtherance of business and not falling under Sch. III as the services are provided by the employer to the employee. Applicant is liable to pay GST on the value determined as per Rule 28 for transactions between related parties and not on the nominal amount charged by the Applicant to its employees. Also, applicant is liable to pay GST even when canteen services are provided free of cost to the employees.
NASA Comments	<ul style="list-style-type: none"> Ruling by AAR is binding only on applicant and its jurisdictional officer. It does not have general binding precedence value. The Board, vide Press release dt.10.7.2017, clarified that supply by the employer to the employee in terms of contractual agreement entered into between the employer and the employee, will not be subjected to GST. <p>The legislative intent appears not to tax such supply.</p>

Issue involved in Q:4	<ul style="list-style-type: none"> • Applicant has provided telephone connections in all the flats of its Township. The employees use these telephones for official as well as personal purposes. The applicant pays total telephone charges to BSNL and bears fixed monthly rental. Any amount over and above the fixed monthly rental is recovered from employees at actuals. • Whether GST is applicable on recovery of telephone charges recovered from the employees?
Contentions of Applicant	<ul style="list-style-type: none"> • It is not the business of the applicant to provide telecommunication services to its employees. The recovery of telephone charges from the employees is not in the course or furtherance of business of the applicant. Therefore, it is not a supply within the meaning of Section 7(1) of GST Act • Applicant also relied on following favourable Advance Rulings on similar matter: <ul style="list-style-type: none"> ➤ Tata Motors Ltd. (AAR-Maharashtra) ➤ Jotun India (P) Ltd. (AAR-Maharashtra) ➤ Posco India Pune Processing Center (P) Limited (AAR-Maharashtra)
Observations & Decision of AAR	<ul style="list-style-type: none"> • It is covered in the definition of 'business' given in Section 2(17), as it is an activity or transaction in connection with or incidental or ancillary to the business of the applicant. Moreover, it is a supply as per inclusive definition of 'supply' given under Section 7. • Applicant is liable to pay GST on amount recovered from employees.
NASA Comments	<ul style="list-style-type: none"> • Ruling by AAR is binding only on applicant and its jurisdictional officer. It does not have general binding precedence value. • One may argue that paying telephone charges and subsequent recovery thereof from employees is a financial transaction not liable to GST.

Issues involved in Q:5	<ul style="list-style-type: none"> Whether full ITC is available to the applicant in respect of Medi-claim Insurance Policy premium, canteen service and telephone service referred in question no. 2, 3 and 4 or ITC will be restricted to the extent of GST borne by the applicant?
Contentions of Applicant	<ul style="list-style-type: none"> As per definition of recipient, the applicant is recipient of services of health insurance and telecommunication services and the consideration for the said services is payable by the applicant to the insurance company or telecommunication company and not by the employees. Full ITC is available to the applicant on supply of above services, even if the recoveries are made from the employees or any other person.
Observations & Decision of AAR	<ul style="list-style-type: none"> ITC in respect of premium of Group Medical Insurance Policy is governed by provisions of clause (b)(i) of Section 17(5), and accordingly Input Tax Credit for the same shall be available. Applicant shall be eligible to claim Input Tax Credit in respect of premium paid to insurance company. As per clause (ii) of SI. No. 7 of Notification No. 11/2017-Central Tax (Rate), dt. 28.6.17, as substituted by Notification No. 20/2019-Central Tax (Rate), dt. 30.9.19, w.e.f. 10.10.19, Canteen services are taxable at the reduced rate of 5% (2.5+2.5) and no Input Tax Credit is available thereon. In respect of telephone charges paid to BSNL, the applicant shall be eligible to claim Input Tax Credit, because it is a further taxable supply by the applicant. Moreover, telephone charges are not covered by the provisions of Section 17 relating to blocked credit.
NASA Comments	<ul style="list-style-type: none"> In case taxpayer treats the transaction in respect of recovery of insurance premium, canteen services and telephone services as not a supply, it will be difficult to contest corresponding eligibility of ITC. The ITC pertaining to recovery amount may have to reversed. The disallowance of ITC in respect of factory canteen is legally untenable as blocked credit u/s 17(5)(b) of CGST Act as proviso to said section clearly provides such blockage of the credit is not applicable where it is obligatory for employer to provide benefit its

- | | |
|--|--|
| | <p>employees under any law time being force. In given case, factories Act mandates a compulsory provision of canteen service. Moreover, proviso to section 17(5)(b) provides that blocking of ITC in respect of inward supplies for providing outward supplies of same category.</p> <ul style="list-style-type: none">• AAR has disallowed ITC in respect of inward supplies used to provide canteen services on the ground that rate notification prohibits such credit. It may be noted that writ is filed before Hon. Gujarat High court challenging denial or restriction of ITC through rate notification. |
|--|--|

We will be glad to provide any elaboration or elucidation you may need in this regard.

From:

N. A. Shah Associates LLP

Chartered Accountants

Address: B 21-25 / 41-45, Paragon Centre,

Pandurang Budhkar Marg, Mumbai – 400013.

Tel: 91-022-4073 3000, Fax: 91-022-4073 3090

E-mail Id: info@nashah.com

This alert is prepared for educational purpose and general guidance of the clients. N.A. Shah Associates LLP is not responsible for any action taken by anyone on the basis of this alert. Views / Comments expressed herein should not be treated as professional advice or legal opinion in the matter. It is advisable to seek professional advice in the matter before acting on the basis of this alert.