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GST PROFESSIONALS TODAY

Editor : B P Bhargava • Executive Editor : CA Rajeev Talwar

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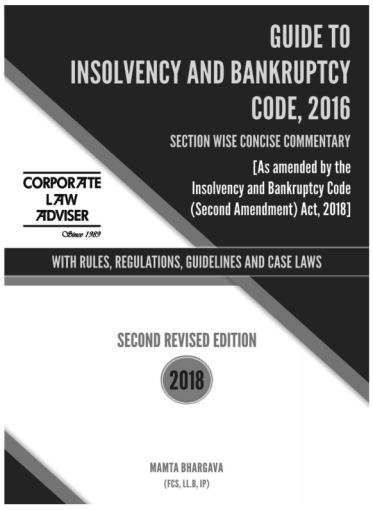
ABOUT THE BOOK

The Insolvency and Bankruptcy Code, 2016 (Code) which came into force in May 2016 has undergone various changes in the recent past including the passing of Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. Various changes have been made in Rules and Regulations from time to time. The Board has also issued Circulars and Clarifications from to time to time give clarity on matters of concern. An attempt has been made to present the section wise commentary on the Code in a simple language as amended by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.



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HIGHLIGHTS OF THE BOOK

DIVISION I

(1) The presentation of the section wise commentary is in BULLET FORM, unlike conventional form of commentary which runs in paragraphs.

(2) The commentary starts after every section under the head 'Guide Notes' which is further divided in various sub heads such as 'Overview' of the section supported by Land Mark judgments by Supreme Court / National Company Law Tribunal (NCLT) / National Company Law Appellate Tribunal (NCLAT), Relevant Rules and Regulations, Circulars and Clarifications, Punishment, etc., in order to give a complete picture of the section at one go.

(3) Supreme Court judgments and National Company Law Tribunal / Appellate Tribunal orders have been placed separately to provide a quick glance on the rulings given for a particular section.

DIVISION II

(4) To enhance the utility of the book, a separate division II has been added which contains updated Rules, Regulations, Guidelines relating to the Code

The book will serve as a single point reference Guide for the Insolvency Professionals and the Professionals who intend to give Insolvency Examination, Advocates, Company Secretaries, Chartered Accountants and academicians for academic and professional purposes.

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Central Goods and Services Tax (Eighth Amendment) Rules, 2018

GSR 831(E) dated 4th September 2018

In exercise of the powers conferred by section 164 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government hereby makes the following rules further to amend the Central Goods and Services Tax Rules, 2017, namely:-

(1) These rules may be called the Central Goods and Services Tax (Eighth Amendment) Rules, 2018.

(2) Save as otherwise provided in these rules, they shall come into force on the date of their publication in the Official Gazette.

2. In the Central Goods and Services Tax Rules, 2017, ('the said Rules'), in rule 22, in sub-rule (4), the following proviso shall be inserted, namely :

"Provided that where the person instead of replying to the notice served under sub-rule (1) for contravention of the provisions contained in clause (b) or clause (c) of sub-section (2) of section 29, furnishes all the pending returns and makes full payment of the tax dues along with applicable interest and late fee, the proper officer shall drop the proceedings and pass an order in Form GST-REG 20.".

3. In the said rules, in rule 36, in sub-rule (2), the following proviso shall be inserted, namely:-

"Provided that if the said document does not contain all the specified particulars but contains the details of the amount of tax charged, description of goods or services, total value of supply of goods or services or both, GSTIN of the supplier and recipient and place of supply in case of inter-State supply, input tax credit may be availed by such registered person.".

4. In the said rules, in rule 55, in sub-rule (5), after the words "completely knocked down condition", the words "or in batches or lots" shall be inserted.

5. In the said rules, in rule 89, in sub-rule (4), for clause (E), the following clause shall be substituted, namely :

'(*E*) "Adjusted Total Turnover" means the sum total of the value of –

(*a*) the turnover in a State or a Union territory, as defined under clause (112) of section 2, excluding the turnover of services; and

(*b*) the turnover of zero-rated supply of services determined in terms of clause

(*D*) above and non-zero-rated supply of services, excluding –

(*i*) the value of exempt supplies other than zero-rated supplies; and

(*ii*) the turnover of supplies in respect of which refund is claimed under sub-rule (4A) or sub-rule (4B) or both, if any, during the relevant period.'.

6. In the said rules, with effect from the 23rd October, 2017, in rule 96, for sub-rule (10), the following sub-rule shall be substituted, namely :

"(10) The persons claiming refund of integrated tax paid on exports of goods or services should not have –

(*a*) received supplies on which the benefit of the Government of India, Ministry of Finance notification No. 48/2017-Central Tax, dated the 18th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (*i*), *vide* number GSR1305(E), dated the 18th October, 2017 or Notification No. 40/2017-Central Tax (Rate), dated the 23rd October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number GSR 1320(E), dated the 23rd October, 2017 or Notification No. 41/2017-Integrated Tax (Rate), dated the 23rd October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (*i*), *vide* number GSR 1321(E), dated the 23rd October, 2017 has been availed; or

(*b*) availed the benefit under notification No. 78/2017-Customs, dated the 13th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), *vide* number GSR 1272(E), dated the 13th October, 2017 or Notification No. 79/2017-Customs, dated the 13th October, 2017 published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (*i*), *vide* number GSR 1299(E), dated the 13th October, 2017.".

7. In the said rules, in rule 138A, in sub-rule (1), after the proviso the following proviso shall be inserted, namely :

"Provided further that in case of imported goods, the person in charge of a conveyance shall also carry a copy of the bill of entry filed by the importer of such goods and shall indicate the number and date of the bill of entry in Part A of Form GST EWB-01.".

8. In the said rules, for FORM GST REG-20, the following FORM shall be substituted, namely :

"**FORM GST REG-20***

[*See* rule 22(4)]

Order for dropping the proceedings for cancellation of registration

9. In the said rules, for FORM GST ITC-04, the following FORM shall be substituted, namely:-

"FORM GST ITC-04*

[See rule 45(3)]

Details of goods/capital goods sent to job worker and received back

10. In the said rules, after FORM GSTR-8, the following FORMS shall be inserted, namely:-

"FORM GSTR-9*

(*See* rule 80)

Annual Return

"FORM GSTR-9A*

(*See* rule 80)

Annual Return (For Composition Taxpayer)

11. In the said rules, in FORM GST EWB-01, in the Notes, in serial number 7, in the Table, against Code 4 in the first column, for the letters and word "SKD or CKD" in the second column, the letters and words "SKD or CKD or supply in batches or lots" shall be substituted.

**For Forms refers www.cbec.gov.in* ❖❖❖

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CIRCULARS

Clarification regarding applicability of GST on various goods and services – *Circular No.52/26/2018-GST dated 9th August 2018*

Representations have been received seeking clarification in respect of applicable GST rates on the following items :

(*i*) Fortified Toned Milk

(*ii*) Refined beet and cane sugar

(*iii*) Tamarind Kernel Powder (Modified & Un-Modified form)

(*iv*) Drinking water

(*v*) Plasma products

(*vi*) Wipes using spun lace non-woven fabric

(*vii*) Real Zari Kasab (Thread)

(*viii*) Marine Engine

(*ix*) Quilt and comforter

(*x*) Bus body building as supply of motor vehicle or job work

(*xi*) Disc Brake Pad

2. The matter has been examined. The issue-wise clarifications are discussed below :

3.1 *Applicability of GST on Fortified Toned Milk* : Representations have been received seeking clarification regarding applicability of GST on Fortified Toned Milk.

3.2 Milk is classified under heading 0401 and as per Sl. No. 25 of notification No. 2/2017-Central Tax (Rate) dated 28th June 2017, fresh milk and pasteurised milk, including separated milk, milk and cream, not concentrated nor containing added sugar or other sweetening matter, excluding Ultra High Temperature (UHT) milk falling under tariff head 0401 attracts NIL rate of GST. Further, as per HSN Explanatory Notes, milk enriched with vitamins and minerals is classifiable under HSN code 0401. Thus, it is clarified that toned milk fortified (with vitamins 'A' and 'D') attracts NIL rate of GST under HSN Code 0401.

4.1 *Applicable GST rate on refined beet and cane sugar* : Doubts have been raised regarding GST rate applicable on refined beet and cane sugar. Vide S. No. 91 of

Schedule I of notification No. 1/2017-Central Tax (Rate) dated 28.06.2017, 5% GST rate has been prescribed on all kinds of beet and cane sugar falling under heading 1701.

4.2 Doubts seem to have arisen in view of Sl. No. 32 A of the Schedule II of notification No. 1/2017-Central Tax (Rate) dated 28.06.2017, which prescribes 12% GST rate on "All goods, falling under tariff items 1701 91 and 1701 99 including refined sugar containing added flavouring or colouring matter, sugar cubes (other than those which attract 5% or Nil GST)".

4.3 It is clarified that by virtue of specific exclusion in Sl. No. 32 A, any sugar that falls under 5% category [at the said Sl. No. 91 of schedule I of notification No.1/2017-Central Tax (Rate) dated 28th June, 2017] gets excluded from the S. No. 32 A of Schedule II. As all kinds of beet and cane sugar falling under heading 1701 are covered by the said entry at Sl. No. 91 of Schedule I, these would get excluded from S. No. 32 A of Schedule II, and thus would attract GST @ 5%.

4.4 Accordingly, it is clarified that beet and cane sugar, including refined beet and cane sugar, will fall under heading 1701 and attract 5% GST rate.

5.1 Applicable GST rate on treated (modified) tamarind kernel powder and plain (unmodified) tamarind kernel powder : Representation have been received seeking clarification regarding GST rate applicable on treated (modified) tamarind kernel powder and plain (unmodified) tamarind kernel powder.

5.2 *There are two grades of Tamarind Kernel Powder (TKP)* : Plain (unmodified) form (hot, water soluble) and Chemically treated (modified) form (cold, water soluble).

5.3 As per Sl. No. 76 A of schedule I of notification No. 1/2017-Central Tax (Rate) dated 28th June, 2017, 5% GST rate was prescribed on Tamarind Kernel powder falling under chapter 13. However, certain doubts have been expressed regarding GST rate on Tamarind kernel powder, as the said notification does not specifically mention the word "modified".

5.4 As both plain (unmodified) tamarind kernel powder and treated (modified) tamarind kernel powder fall under chapter 13, it is hereby clarified that both attract 5% GST in terms of the said notification.

6.1 *Applicability of GST on supply of safe drinking water for public purpose* : Representations have been received seeking clarification regarding applicability of GST on supply of safe drinking water for public purpose.

6.2 Attention is drawn to the entry at Sl. No. 99 of notification No. 2/2017-Central Tax (Rate) dated 28th June, 2017, by virtue of which water [other than aerated,

mineral, purified, distilled, medicinal, ionic, battery, de-mineralized and water sold in sealed container] falling under HS code 2201 attracts NIL rate of GST.

6.3 Accordingly, supply of water, other than those excluded from Sl. No. 99 of notification No. 2/2017-Central Tax (Rate) dated 28th June, 2017, would attract GST at "NIL" rate. Therefore, it is clarified that supply of drinking water for public purposes, if it is not supplied in a sealed container, is exempt from GST.

7.1 GST rate on Human Blood Plasma: References have been received about the varying practices being followed in different parts of the country regarding the GST rates on "human blood plasma".

7.2 Plasma is the clear, straw coloured liquid portion of blood that remains after red blood cells, white blood cells, platelets and other cellular components have been removed. As per the explanatory notes to the Harmonized System of Nomenclature (HSN), plasma would fall under the description antisera and other blood fractions, whether or not modified or obtained by means of biotechnological processes and would fall under HS code 3002.

7.3 Normal human plasma is specifically mentioned at Sl. No. 186 of List I under Sl. No. 180 of Schedule I of the notification No. 1/2017-Central Tax (Rate) dated 28th June, 2017, and attracts 5% GST. Other items falling under HS Code 3002 (including plasma products) would attract 12% GST under S. No. 61 of Schedule II of the said notification, not specifically covered in the said List I.

7.4 Thus, a harmonious reading of the two entries would mean that normal human plasma would attract 5% GST rate under List I (S. No. 186), whereas plasma products would attract 12% GST rate, if otherwise not specifically covered under the said List.

8.1 *Appropriate classification of baby wipes, facial tissues and other similar products* : Varied practices are being followed regarding the classification of baby wipes, facial tissues and other similar products, and references have been received requesting for correct classification of these products. As per the references, these products are currently being classified under different HS codes namely 3307, 3401 and 5603 by the industry.

8.2 Commercially, wipes are categorized into various types such as baby wipes, facial wipes, disinfectant wipes, make-up remover wipes, etc. These products are generally made by using non-woven fabrics of viscose and polyviscous blend and are sprinkled with demineralized water and various chemicals and fragrances, which impart the essential character to the product. The base raw materials are moisturising and cleansing agents, preservatives, aqua base, cooling agents,

perfumes, etc. The textile material is present as a carrying medium of these cleaning/wiping components.

8.3 According to the General Rules for Interpretation [GRI-3(*b*)] of the First Schedule to the Customs Tariff Act (CTA), 1975, "Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(*a*), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable." Since primary function of the article should be taken into consideration while deciding the classification, it is clear that the essential character of the wipes in the instant case is imparted by the components which are to be mixed with the textile material.

8.4 As per the explanatory notes to the HSN, the HS code 5603 clearly excludes nonwoven, impregnated, coated or covered with substances or preparations such as perfumes or cosmetics, soaps or detergents, polishes, creams or similar preparations. The HSN is reproduced as follows : "The heading also excludes : Nonwoven, impregnated, coated or covered with substances or preparations [*i.e.,* perfumes or cosmetics (Chapter 33), soaps or detergents (heading 3401), polishes, creams, or similar preparations (heading 3405), fabric, softeners (heading 3809)] where the textile material is present merely as a carrying medium. Further, HS code 3307 covers wadding, felt and non-woven, impregnated, coated or covered with perfumes or cosmetics. The HS code 3401, would cover paper, wadding, felt and non-woven impregnated, coated or covered with soap or detergent whether or not perfumed".

8.5 Further, as per the explanatory notes to the HSN, the heading 3307 includes wadding, felt and non-wovens impregnated, coated or covered with perfume or cosmetics. Similarly, as per explanatory notes to the HSN, the heading 3401 includes wipes made of paper, wadding, felt and non-wovens, impregnated, coated or covered with soap or detergent, whether or not perfumed or put up for retail sale.

8.6 Thus, the wipes of various kinds (as stated above) are classifiable under heading 3307 or 3401 depending upon their constituents as discussed above. Therefore, if the baby wipes are impregnated with perfumes or cosmetics, then the same would fall under HS code 3307 and would attract 18% GST rate. Similarly, if they are coated with soap or detergent, then it would fall under HS code 3401 and would attract 18% GST.

9.1 Classification and applicable GST rate on real Zari Kasab (thread): Certain doubts have been raised regarding the classification and applicable GST rate on Kasab thread (a metallised yarn) as yarn falling under heading 5605 attracts 12% GST, as per entry 137 of the Schedule-II-12% of the notification No.01/2017-

Central Tax (rate) dated 28th June, 2017, while specified embroidery product falling under 5809 and 5810 attracts GST @ 5%, as per entry No. 220 of the Schedule-I-5% of the above-mentioned notification.

9.2 The heading 5809 and 5810 cover embroidery and zari articles. These heading do not cover yarn of any kinds. Hence, while these headings apply to embroidery articles, embroidery in piece, in strips, or in motifs, they do not apply to yarn, including Kasab yarn.

9.3 Further all types of metallised yarns or threads are classifiable under tariff heading 5605. Kasab (yarn) falls under this heading. Under heading 5605, real zari manufactured with silver wire gimped (vitai) on core yarn namely pure silk and cotton and finally gilted with gold would attract 5% GST under tariff item 5605 00 10, as specified at entry no. 218A of Schedule-I-5% of the GST rate schedule. Other goods falling under this heading attract 12% GST.

Accordingly, kasab (yarn) would attract 12% GST along with other metallised yarn, whether or not gimped, being textile yarn, combined with metal in the form of thread, strip or powder or covered with metal including imitation zari thread (S. No. 137 of the Schedule-II-12%).

Therefore, it is clarified that imitation zari thread or yarn known as "Kasab" or by any other name in trade parlance, would attract a uniform GST rate of 12% under tariff heading 5605.

10.1 *Applicability of GST on marine engine* : Reference has been received seeking clarification regarding GST rates on Marine Engine. The fishing vessels are classifiable under heading 8902, and attract GST @ 5%, as per S. No. 247 of Schedule I of the notification No. 01/2017-Central Tax (rate) dated 28th June, 2017. Further, parts of goods of heading 8902, falling under any chapter also attracts GST rate of 5%, vide S. No. 252 of Schedule I of the said notification. The Marine engine for fishing vessel falling under Tariff item 8408 1093 of the Customs Tariff Act, 1975 would attract a GST rate of 5% by virtue of S. No. 252 of Schedule I of the notification No. 01/2017-Central Tax (rate) dated 28th June, 2017.

10.2 Therefore, it is clarified that the supplies of marine engine for fishing vessel (being a part of the fishing vessel), falling under tariff item 8408 10 93 attracts 5% GST.

11.1 Applicable GST rate on cotton quilts under tariff heading 9404-Scope of the term "Cotton Quilt".

11.2 Cotton quilts falling under tariff heading 9404 attract a GST rate of 5% if the sale value of such cotton quilts does not exceed Rs. 1000 per piece [as per S.

No. 257 A of Schedule I of the notification No. 01/2017-Central Tax (rate) dated 28th June, 2017]. However, such cotton quilts, with sale value exceeding Rs.1,000 per piece attract a GST rate of 12% (as per S. No. 224A of Schedule II of the said notification). Doubts have been raised as to what constitutes cotton quilt, *i.e.*, whether a quilt filled with cotton with cover of cotton, or filled with cotton but cover made of some other material, or filled with material other than cotton.

11.3 The matter has been examined. The essential character of the cotton quilt is imparted by the filling material. Therefore, a quilt filled with cotton constitutes a cotton quilt, irrespective of the material of the cover of the quilt. The GST rate would accordingly apply.

12.1 *Applicable GST rate for bus body building activity* : Representations have been received seeking clarifications on GST rates on the activity of bus body building. The doubts have arisen on account of the fact that while GST applicable on job work services is 18%, the supply of motor vehicles attracts GST @ 28%.

12.2 Buses [motor vehicles for the transport of ten or more persons, including the driver] fall under headings 8702 and attract 28% GST. Further, chassis fitted with engines [8705] and whole bodies (including cabs) for buses [8707] also attract 28% GST. In this context, it is mentioned that the services of bus body fabrication on job work basis attracts 18% GST on such service. Thus, fabrication of buses may involve the following two situations :

(*a*) Bus body builder builds a bus, working on the chassis owned by him and supplies the built-up bus to the customer, and charges the customer for the value of the bus.

(*b*) Bus body builder builds body on chassis provided by the principal for body building, and charges fabrication charges (including certain material that was consumed during the process of job-work).

12.3 In the above context, it is hereby clarified that in case as mentioned at para 12.2(*a*) above, the supply made is that of bus, and accordingly supply would attract GST @ 28%. In the case as mentioned at para 12.2(*b*) above, fabrication of body on chassis provided by the principal (not on account of body builder), the supply would merit classification as service, and 18% GST as applicable will be charged accordingly.

13.1 Applicable GST rate on Disc Brake Pad: Representations have been received seeking clarification on disc brake pad for automobiles. It is stated that divergent practices of classifying these products, in Chapter 68 or heading 8708 are being followed. Chapter 68 attracts a GST rate of 18%, while heading 8708 attracts a GST rate of 28%.

13.2 Parts and accessories of motor vehicles of headings 8701 to 8705 are classified under heading 8708 and attract 28% GST. Further, friction material and articles thereof (for example, sheets, rolls, strips, segments, discs, washers, pads), not mounted, for brakes, for clutches or the like, with a basis of asbestos, of other mineral substances or of cellulose, whether or not combined with textiles or other mineral substances or of cellulose, whether or not combined with textiles or other materials are classifiable under heading 6813 and attract 18% GST.

13.3 In the above context, it is mentioned that as per HSN Explanatory Notes, heading 8708 covers "Brakes (shoe, segment, disc, etc.) and parts thereof (plates, drums, cylinders, mounted linings, oil reservoirs for hydraulic brakes, etc.); servo-brakes and parts thereof, while Chapter 68 covers articles of Stone, Plaster, Cement, Asbestos, Mica or similar materials. Further, HSN Explanatory Notes to the heading 6813 specifically excludes :

(*i*) Friction materials not containing mineral materials or cellulose fibre (*e.g.*, those of cork);

(*ii*) Mounted brake linings (including friction material fixed to a metal plate provided with circular cavities, perforated tongues or similar fittings, for disc brakes) which are classified as parts of the machines or vehicles for which they are designed (*e.g.*, heading 8708).

13.4 Thus, it is clear, in view of the HSN Explanatory Notes that the said goods, namely –

"Disc Brake pad" for automobiles, are appropriately classifiable under heading 8708 of the Customs Tariff Act, 1975 and would attract 28% GST.

14. Difficulty, if any, may be brought to the notice of the Board immediately. Hindi version shall follow. ❖❖❖

Clarification regarding applicability of GST on the petroleum gases retained for the manufacture of petrochemical and chemical products – *Circular No.53/27/2018-GST dated 9th August 2018*

References have been received regarding the applicability of GST on the petroleum gases retained for the manufacture of petrochemical and chemical products during the course of continuous supply, such as Methyl Ethyl Ketone (MEK) feedstock, petroleum, gases etc.

2. In this context, it may be recalled that clarifications on similar issues for specific products have already been issued vide circular Nos. 12/12/2017-GST dated 26th October, 2017 and 29/3/2018-GST dated 25th January, 2018. These circulars apply

mutatis mutandis to other cases involving same manner of supply as mentioned in these circulars. However, references have again been received from some of the manufacturers of other petrochemical and chemical products for issue of clarification on applicability of GST on petroleum gases, which are supplied by oil refineries to them on a continuous basis through dedicated pipelines, while a portion of the raw material is retained by these manufacturers (recipient of supply), and the remaining quantity is returned to the oil refineries. In this regard, an issue has arisen as to whether in this transaction GST would be leviable on the whole quantity of the principal raw materials supplied by the oil refinery or on the net quantity retained by the manufacturers of petrochemical and chemical products.

3. The GST Council in its 28th meeting held on 21.7.2018 discussed this issue and recommended for issuance of a general clarification for petroleum sector that in such transactions, GST will be payable by the refinery on the value of net quantity of petroleum gases retained for the manufacture of petrochemical and chemical products.

4. Accordingly, it is hereby clarified that, in the aforesaid cases, GST will be payable by the refinery only on the net quantity of petroleum gases retained by the recipient manufacturer for the manufacture of petrochemical and chemical products. Though, the refinery would be liable to pay GST on such returned quantity of petroleum gases, when the same is supplied by it to any other person. It is reiterated that this clarification would be applicable mutatis mutandis on other cases involving supply of goods, where feed stock is retained by the recipient and remaining residual material is returned back to the supplier. The net billing is done on the amount retained by the recipient.

5. This clarification is issued in the context of the Goods and Service Tax (GST) law only and past issues, if any, will be dealt in accordance with the law prevailing at the material time. ❖❖❖

Classification of fertilisers supplied for use in the manufacture of other fertilisers at 5% GST rate – *Circular No. 54/28/2018-GST dated 9th August 2018*

References have been received regarding a clarification as to whether simple fertilisers, such as MOP (Murate of Potash) classified under Chapter 31,and supplied for use in manufacturing of a complex fertiliser, are entitled to the concessional GST rate of 5%, as applicable in general to fertilisers (*i.e.*, fertilisers which are cleared to be used as fertilisers).

2.1 The matter has been examined. Chapter 31 of the Customs Tariff Act, 1975

covers Fertilisers. The fertilisers are mostly used for increasing soil and land fertility, either directly, or by use in manufacturing of complex fertilisers. However, certain fertilisers and similar goods falling under this Chapter may be used for individual purposes like use of molten urea for manufacture of melamine and urea used in manufacturing of urea-formaldehyde resins or organic synthesis.

2.2 In the pre-GST regime, the concessional duty rate was prescribed for fertilisers falling under Chapter 31 of the Tariff (notification No. 12/2012-Central Excise). This concessional rate was applied to goods falling under Chapter 31 which are clearly to be used directly as fertilisers or in the manufacture of other fertilisers, whether directly or through the stage of an intermediate product.

3. In the GST regime, tax structure on fertilisers has been prescribed on the lines of pre-GST tax incidence. The wording of the GST notification is similar to the central excise notification except certain changes to meet the requirements of GST. These changes were necessitated as GST is applicable on the supply of goods while central excise duty was applicable on manufacture of goods. Accordingly, fertilisers falling under heading 3102, 3103, 3104 and 3105, other than those which are clearly not to be used as fertilisers, attract 5% GST [S. No. 182A to 182D of the First schedule to the notification No.1/2017-Central Tax (Rate) dated 28th June, 2017]. However, the fertilisers items falling under the above mentioned headings, which are clearly not to be used as fertiliser attract 18% GST [S. No. 42 to 45 of the III schedule to the notification No. 1/2017 Central Tax (Rate)]. The intention has been to provide concessional rate of GST to the fertilisers which are used directly as fertilisers or which are used in the manufacturing of complex fertilisers which are further used as soil or crop fertilisers. The phrase "other than clearly to be used as fertilisers" would not cover such fertilisers that are used for making complex fertilisers for use as soil or crop fertilisers.

4. Thus, it is clarified that the fertilisers supplied for direct use as fertilisers, or supplied for use in the manufacturing of other complex fertilisers for agricultural use (soil or crop fertilisers), will attract 5% IGST. ❖❖❖

Taxability of services provided by Industrial Training Institutes (ITI) – *Circular No. 55/29/2018- GST dated 10th August, 2018*

Representations have been received requesting to clarify the following :

(*a*) Whether GST is payable on vocational training provided by private ITIs in designated trades and in other than designated trades.

(*b*) Whether GST is payable on the service, provided by a private Industrial

Training Institute for conduct of examination against consideration in the form of entrance fee and also on the services relating to admission to or conduct of examination.

2. With regard to the first issue, [para 1(a) above], it is clarified that private ITIs qualify as an educational institution as defined under para 2(*y*) of notification No. 12/2017-CT(Rate) if the education provided by these ITIs is approved as vocational educational course. The approved vocational educational course has been defined in para 2(h) of notification ibid to mean a course run by an ITI or an Industrial Training Centre affiliated to NCVT (National Council for Vocational Training) or SCVT (State Council for Vocational Training) offering courses in designated trade notified under the Apprenticeship Act, 1961; or a Modular employable skill course, approved by NCVT, run by a person registered with DG Training in Ministry of Skill Development. Therefore, services provided by a private ITI in respect of designated trades notified under Apprenticeship Act, 1961 are exempt from GST under Sr. No. 66 of notification No. 12/2017-CT(Rate). As corollary, services provided by a private ITI in respect of other than designated trades would be liable to pay GST and are not exempt.

3. With regard to the second issue, [para 1(*b*) above], it is clarified that in case of designated trades, services provided by a private ITI by way of conduct of entrance examination against consideration in the form of entrance fee will also be exempt from GST [Entry (*aa*) under Sr. No. 66 of notification No. 12/2017-CT(Rate) refers]. Further, in respect of such designated trades, services provided to an educational institution, by way of, services relating to admission to or conduct of examination by a private ITI will also be exempt [Entry (*b*)(*iv*)] under Sr. No. 66 of notification No. 12/2017-CT(Rate) refers]. It is further clarified that in case of other than designated trades in private ITIs, GST shall be payable on the service of conduct of examination against consideration in the form of entrance fee and also on the services relating to admission to or conduct of examination by such institutions, as these services are not covered by the exemption *ibid*.

4. As far as Government ITIs are concerned, services provided by a Government ITI to individual trainees/students, is exempt under Sl. No. 6 of 12/2017-CT(R) dated 28th June, 2017 as these are in the nature of services provided by the Central or State Government to individuals. Such exemption in relation to services provided by Government ITI would cover both - vocational training and examinations conducted by these Government ITIs.

5. Difficulty if any, in the implementation of this circular may be brought to the notice of the Board. ❖❖❖

Clarification regarding removal of restriction of refund of accumulated ITC on fabrics – *Circular No. 56/30/2018-GST dated 24th August, 2018*

Certain doubts have been raised regarding the applicability and intent of notification No. 20/2018-Central Tax (Rate) dated 26th July, 2018 (which seeks to amend notification No. 5/2017-Central Tax (Rate) dated 28th June, 2017) relating to the provision for lapsing of input tax credit accumulated on account of inverted duty structure on fabrics for the period upto the 31st July, 2018.

2. The said notification No. 5/2017-Central Tax (Rate) was issued in exercise of powers vested under section 54 of the Central Goods and Services Tax Act, 2017(CGST Act, 2017). It notifies the items on which refund of accumulated input tax credit on account of inverted duty structure is not allowed. Some of the items notified under this notification are fabrics. A total 10 categories of fabrics covered in the notification are as follows :

S. No.	*Tariff item, heading, sub-heading or Chapter*	*Description of Goods*
(1)	*(2)*	*(3)*
1.	5007	Woven fabrics of silk or of silk waste
2.	5111 to 5113	Woven fabrics of wool or of animal hair
3.	5208 to 5212	Woven fabrics of cotton
4.	5309 to 5311	Woven fabrics of other vegetable textile fibres, paper yam
5.	5407, 5408	Woven fabrics of manmade textile materials
6.	5512 to 5516	Woven fabrics of manmade staple fibres
6A#	5608	Knotted netting of twine, cordage or rope; made up fishing nets and other made up nets, of textile materials
6B*	5801	Corduroy fabrics
6C#	5806	Narrow woven fabrics, other than goods of heading 5807; narrow fabrics consisting of warp without weft assembled by means of an adhesive
7.	60	Knitted or crocheted fabrics [All goods]

**Inserted in the month of September 17, # Inserted in the month of November 17*

3. In the 28th GST Council meeting, it was decided to remove the restriction of not allowing refund of ITC accumulated on account of inverted duty structure on fabrics with prospective effect on the input supplies received after the date of issue of notification. It was also decided to simultaneously lapse the accumulated ITC, lying unutilised, for the past period, after the payment of GST for the month of July 2018. Accordingly, to give effect to this decision, the notification No. 20/2018-Central Tax (Rate) has been issued amending notification No. 5/2017-Central Tax(Rate). To keep the accounting simple, it was decided to make these changes effective from the 1st day of August, 2018.

4. *Vide* the said notification No. 20/2018-Central Tax (Rate), the following proviso has been inserted in notification No. 5/2017-Central Tax (Rate).

"Provided that,-

(*i*) nothing contained in this notification shall apply to the input tax credit accumulated on supplies received on or after the 1st day of August, 2018, in respect of goods mentioned at serial numbers 1, 2, 3, 4, 5, 6, 6A, 6B, 6C and 7 of the Table below ; and

(*ii*) in respect of said goods, the accumulated input tax credit lying unutilised in balance, after payment of tax for and upto the month of July, 2018, on the inward supplies received up to the 31st day of July 2018, shall lapse.

5. The doubts raised, with reference to changes made vide notification No. 20/2018- Central Tax (Rate) are as follows :

(*1*) Whether this notification seeks to lapse all the input tax credit lying unutilised after payment of tax upto the month of July 2018?

(*2*) Whether unutilised ITC in respect of services and capital goods shall also be disallowed?

(*3*) Implication to fabrics like cotton and silk where there was no inverted duty structure?

(*4*) Whether accumulated ITC in respect of exports shall also be made to lapse?

6. The matter has been examined. Section 54 of the CGST Act, 2017 provides for refund of accumulated credit on inputs on account of inverted duty structure, *i.e.*, GST rate on inputs being higher than the GST rates on finished goods. However, proviso (*ii*) to section 54 (3) provides that in respect of notified goods, the refund of such accumulated input tax credit shall not be allowed. Notification No. 5/2017-Central Tax (Rate) has been issued in terms of this provision and it, inter alia, prescribes that refund of accumulated ITC on account of inverted duty structure shall not be allowed in respect of fabrics as mentioned in para 2.

Therefore, the restriction of refund of accumulated ITC under notification No. 5/2017-Central Tax (rate) dated 28.06.2017 is applicable only in respect of refund of accumulated ITC on inputs. This notification does not put any restriction in relation to the ITC on input services and capital goods.

7. The proviso has to be read with the principal part of the notification. A comprehensive reading of amended notification makes it clear that the proviso seeks to lapse only such input tax credit which is the subject matter of principal notification, *i.e.*, accumulated credit on account of inverted duty structure in respect of stated fabrics. The net effect of clause (*ii*) in the said proviso is that it provides for lapsing of input tax credit that would have been refundable in terms of section 54 of the Act, for the period prior to the 31 st July, 2018, but for the restriction imposed vide said notification No. 5/2017-Central Tax (Rate) and that too to the extent of accumulated ITC lying unutilised after making payment of GST upto the month of July, 2018. In other words, in terms of amended notification, the input tax credit on account of inverted duty structure lying in balance after payment of GST for the month of July (on purchases made on or before the 31st July, 2018) shall lapse.

8. As the notification No. 5/2017-Central Tax (Rate) does not put any restriction in respect of ITC on input services and capital goods, therefore the proviso now inserted in the said notification No. 5/2017-Central Tax (Rate) vide notification No. 20/2018 does not affect the ITC availed on input services and capital goods.

9. As regards, the legislative power of providing for lapsing of input tax credit, the same flows inherently from the power to deny refund of accumulated ITC on account of inverted structure.

10. Doubts have also been raised as regards the manner of calculating the ITC amount accumulated on account of inverted duty structure on the inputs of said fabrics that would lapse on account of above stated change. It is clarified that for determination of such amount, the formula as prescribed in rule 89(5) of the CGST rules shall mutatis mutandis apply as it applies for determination of refundable amount for inverted duty structure. Such amount shall be determined for the months from July, 2017 to July 2018 [or for the relevant period for such fabrics on which refund was blocked subsequently by inserting entries in notification No. 5/2017-Central Tax (Rate)]. The accumulated input tax credit determined by each supplier using the prescribed formula lying unutilised in balance after making the payment of GST for the month of July, 2018 shall lapse.

Illustrations :

(*1*) A manufacture who produces only manmade fibre fabrics, had a turnover of

Rs 5 crore for the period from July 2017 to July 2018 [or for the relevant period for fabrics on which refund was blocked subsequently by inserting entries in notification No. 5/2017-Central Tax (Rate)]. Tax payable thereon is Rs 25 lakh (@ 5%). Assuming the net ITC availed on inputs, during this period, was Rs 30 lakh. Applying the formula prescribed in rule 89(5), the accumulated ITC on account of inverted duly structure comes to Rs. 5 lakh. In other words, this manufacturer has accumulated Rs. 5 lakh on inputs on account of inverted duty structure during the said period. If ITC balance lying unutilized with him is more than this amount, say Rs. 10 lakh, the ITC equal to Rs 5 lakh will only lapse. However, if for any reason, the ITC balance lying unutilized is less than Rs 5 lakh, say Rs 3 lakh, the ITC equal to Rs 3 lakh will lapse.

(2) A manufacture who produces, say, grey manmade fibre fabrics and cotton fabrics, had a turnover of Rs 5 crore and 2 crore respectively for manmade fabrics and cotton fabrics for the months from July, 2017 to July 2018 [or for the relevant period for fabrics on which refund was blocked subsequently by inserting entries in notification No. 5/2017-Central Tax (Rate)]. Tax payable thereon is Rs 25 lakh on MMF fabrics and Rs 10 lakh on cotton fabrics. MMF fabric has inverted duty structure while cotton fabric does not have inverted duty structure. Assuming the net ITC availed on inputs, during this period, was Rs 35 lakh, *i.e.,*

= {(Turnover of inverted rated supply of goods ÷ Adjusted Total Turnover) x Net ITC) - tax payable on such inverted rated supply of goods

The accumulated ITC on account of inverted duty structure shall be equal to nil (5/7*35-25). Thus no amount shall lapse. However, assuming that in this case the ITC availed on input is Rs 42 lakh, the accumulated ITC on accounted on inverted duty structure is Rs 5 lakh (5/7*42-25)

The manner of calculation as provided in rule 89(5) would *mutatis mutandis* apply.

10.1 As illustrated, the application of formula prescribed in rule 89(5) ensures that ITC relating to capital goods and input services does not lapse.

11. However, a manufacturer may have closing stock of finished goods and inputs as on 31st July, 2018. A doubt has been raised as to whether input tax relating thereto shall also lapse and concern has been expressed that this would amount to double taxation. It is clarified that the proposed amendment seeks to lapse only such credit that has been accumulated on inputs on account of inverted duty structure. Therefore, in case a manufacturer, whose accumulated ITC is liable to lapse in terms of said notification, has certain stock lying in balance as on 31st July, 2018, the input tax credit involved in inputs contained in such stock

(including inputs lying as such) may be excluded for determination of Net ITC for the purposes of applying the said formula. For this purpose, the ITC relating to inputs contained in stock may be determined in the manner as provided in S. No. 7 of Form GST ITC-01.

12. As regards the applicability of said proviso to cotton, silk and other natural fibre fabrics, which do not suffer inverted duty structure, this is clarified that the said condition of lapsing of ITC would apply only if input tax credit on inputs has been accumulated on account of inverted duty structure. The aforesaid formula takes care of this aspect.

13. As regards accumulated ITC in relation to exports, the refund of such ITC on exports is separately determined under rule 89 (4). Application of formula, as prescribed in rule 89(5), ensures that accumulated ITC on exports does not lapse as this formula excludes zero rated supplies. Further notification No. 5/2017-Central Tax(Rate) does not impose any restriction of refunds on zero rated supplies as was also clarified *vide* CGST Circular No. 18/2017-Central Tax dated 16th November, 2017. Hence the proviso has no applicability to the input tax credit relating to zero rated supplies. Accordingly, accumulated ITC on zero rated supplies shall not lapse. This is ensured by application of formula.

14. *The procedure to be followed for lapsing of accumulated input tax credit* : A taxable person, whose input tax credit is liable to be lapsed in terms of said notification, shall calculate the amount of such accumulated ITC, in the manner as clarified above. This amount shall, upon self-assessment, be furnished by such person in his GSTR 3B return for the month of August, 2018. The amount shall be furnished in column 4B(2) of the return [ITC amount to be reversed for any reason (others)]. Verification of accumulated ITC amount so lapsed may be done at the time of filing of first refund (on account of inverted duty structure on fabrics) by such person. Therefore, a detailed calculation sheet in respect of accumulated ITC lapsed shall be prepared by the taxable person and furnished at the time of filing of first refund claim on account of inverted duty structure.

15. Difficulty, if any, in the implementation of this circular should be brought to the notice of the Board. ❖❖❖

Scope of Principal-agent relationship in the context of Schedule I of the CGST Act – *Circular No. 57/31/2018-GST dated 4th September 2018*

In terms of Schedule I of the Central Goods and Services Tax Act, 2017 ('the CGST Act'), the supply of goods by an agent on behalf of the principal without

consideration has been deemed to be a supply. In this connection, various representations have been received regarding the scope and ambit of the principal-agent relationship under GST. In order to clarify some of the issues and to ensure uniformity in the implementation of the provisions of the law across the field formations, the Board, in exercise of its powers conferred under section 168 (1) of the CGST Act hereby clarifies the issues in the succeeding paras.

2. As per section 182 of the Indian Contract Act, 1872, an "agent" is a person employed to do any act for another, or to represent another in dealings with third person. The person for whom such act is done, or who is so represented, is called the "principal". As delineated in the definition, an agent can be appointed for performing any act on behalf of the principal which may or may not have the potential for representation on behalf of the principal. So, the crucial element here is the representative character of the agent which enables him to carry out activities on behalf of the principal.

3. The term "agent" has been defined under sub-section (5) of section 2 of the CGST Act as follows :

"agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another.

4. The following two key elements emerge from the above definition of agent: Circular No. 57/31/2018-GST

(*a*) the term 'agent' is defined in terms of the various activities being carried out by the person concerned in the principal-agent relationship ; and

(*b*) the supply or receipt of goods or services has to be undertaken by the agent on behalf of the principal.

From this, it can be deduced that the crucial component for covering a person within the ambit of the term "agent" under the CGST Act is corresponding to the representative character identified in the definition of "agent" under the Indian Contract Act, 1872.

5. Further, the two limbs of any supply under GST are "consideration" and "in the course or furtherance of business". Where the consideration is not extant in a transaction, such a transaction does not fall within the ambit of supply. But, in certain scenarios, as elucidated in Schedule I of the CGST Act, the key element of consideration is not required to be present for treating certain activities as supply. One such activity which has been detailed in para 3 of Schedule I ('the said entry') is reproduced hereunder :

3. *Supply of goods* –

(*a*) by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal; or

(*b*) by an agent to his principal where the agent undertakes to receive such goods on behalf of the principal.

6. Here also, it is worth noticing that all the activities between the principal and the agent and vice versa do not fall within the scope of the said entry. Firstly, the supply of services between the principal and the agent and vice versa is outside the ambit of the said entry, and would therefore require "consideration" to consider it as supply and thus, be liable to GST. Secondly, the element identified in the definition of "agent", *i.e.*, "supply or receipt of goods on behalf of the principal" has been retained in this entry.

7. It may be noted that the crucial factor is how to determine whether the agent is wearing the representative hat and is supplying or receiving goods on behalf of the principal. Since in the commercial world, there are various factors that might influence this relationship, it would be more prudent that an objective criteria is used to determine whether a particular principal-agent relationship falls within the ambit of the said entry or not. Thus, the key ingredient for determining relationship under GST would be whether the invoice for the further supply of goods on behalf of the principal is being issued by the agent or not. Where the invoice for further supply is being issued by the agent in his name then, any provision of goods from the principal to the agent would fall within the fold of the said entry. However, it may be noted that in cases where the invoice is issued by the agent to the customer in the name of the principal, such agent shall not fall within the ambit of Schedule I of the CGST Act. Similarly, where the goods being procured by the agent on behalf of the principal are invoiced in the name of the agent then further provision of the said goods by the agent to the principal would be covered Circular No. 57/31/2018-GST by the said entry. In other words, the crucial point is whether or not the agent has the authority to pass or receive the title of the goods on behalf of the principal.

8. Looking at the convergence point between the character of the agent under both the CGST Act and the Indian Contract Act, 1872, the following scenarios are discussed :

Scenario 1

Mr. *A* appoints Mr. *B* to procure certain goods from the market. Mr. *B* identifies various suppliers who can provide the goods as desired by Mr. *A*, and asks the supplier (Mr. *C*) to send the goods and issue the invoice directly to Mr. *A*. In

this scenario, Mr. *B* is only acting as the procurement agent, and has in no way involved himself in the supply or receipt of the goods. Hence, in accordance with the provisions of this Act, Mr. *B* is not an agent of Mr. *A* for supply of goods in terms of Schedule I.

Scenario 2

M/s. XYZ, a banking company, appoints Mr. B (auctioneer) to auction certain goods. The auctioneer arranges for the auction and identifies the potential bidders. The highest bid is accepted and the goods are sold to the highest bidder by M/s. XYZ. The invoice for the supply of the goods is issued by M/s. XYZ to the successful bidder. In this scenario, the auctioneer is merely providing the auctioneering services with no role played in the supply of the goods. Even in this scenario, Mr. *B* is not an agent of M/s. XYZ for the supply of goods in terms of Schedule I.

Scenario 3

Mr. A, an artist, appoints M/s. B (auctioneer) to auction his painting. M/s. B arranges for the auction and identifies the potential bidders. The highest bid is accepted and the painting is sold to the highest bidder. The invoice for the supply of the painting is issued by M/s. B on the behalf of Mr. A but in his own name and the painting is delivered to the successful bidder. In this scenario, M/s. B is not merely providing auctioneering services, but is also supplying the painting on behalf of Mr. A to the bidder, and has the authority to transfer the title of the painting on behalf of Mr. A. This scenario is covered under Schedule I.

A similar situation can exist in case of supply of goods as well where the C&F agent or commission agent takes possession of the goods from the principal and issues the invoice in his own name. In such cases, the C&F/commission agent is an agent of the principal for the supply of goods in terms of Schedule I. The disclosure or non-disclosure of the name of the principal is immaterial in such situations.

Scenario 4

Mr. *A* sells agricultural produce by utilising the services of Mr. *B* who is a commission agent as per the Agricultural Produce Marketing Committee Act ('APMC Act') of the State. Mr B identifies the buyers and sells the agricultural produce on behalf of Mr. A for which he charges a commission from Mr. *A*. As Circular No. 57/31/2018-GST per the APMC Act, the commission agent is a person who buys or sells the agricultural produce on behalf of his principal, or facilitates buying and selling of agricultural produce on behalf of his principal and

receives, by way of remuneration, a commission or percentage upon the amount involved in such transaction.

In cases where the invoice is issued by Mr. *B* to the buyer, the former is an agent covered under Schedule I. However, in cases where the invoice is issued directly by Mr. *A* to the buyer, the commission agent (Mr. B) does not fall under the category of agent covered under Schedule I.

9. In scenario 1 and scenario 2, Mr. *B* shall not be liable to obtain registration in terms of clause (*vii*) of section 24 of the CGST Act. He, however, would be liable for registration if his aggregate turnover of supply of taxable services exceeds the threshold specified in sub-section (1) of section 22 of the CGST Act. In scenario 3, M/s *B* shall be liable for compulsory registration in terms of the clause (vii) of section 24 of the CGST Act. In respect of commission agents in Scenario 4, notification No. 12/2017 Central Tax (Rate) dated 24th June, 2017 has exempted "services by any APMC or board or services provided by the commission agents for sale or purchase of agricultural produce" from GST. Thus, the 'services' provided by the commission agent for sale or purchase of agricultural produce is exempted. Such commission agents (even when they qualify as agent under Schedule I) are not liable to be registered according to sub-clause (*a*) of sub-section (1) of section 23 of the CGST Act, if the supply of the agricultural produce, and / or other goods or services supplied by them are not liable to tax or wholly exempt under GST. However, in cases where the supply of agricultural produce is not exempted and liable to tax, such commission agent shall be liable for compulsory registration under sub-section (*vii*) of section 24 of the CGST Act.

10. It is requested that suitable trade notices may be issued to publicize the contents of this Circular.

11. Difficulty, if any, in implementation of this Circular may please be brought to the notice of the Board. ❖❖❖

Recovery of arrears of wrongly availed CENVAT credit under the existing law and inadmissible transitional credit – *Circular No. 58/32/2018-GST dated 4th September 2018*

Various representations have been received seeking clarification on the process of recovery of arrears of wrongly availed CENVAT credit under the existing law and CENVAT credit wrongly carried forward as transitional credit in the GST regime. In order to ensure uniformity in the implementation of the provisions of the law across the field formations, the Board, in exercise of its powers conferred under section 168(1) of the Central Goods and Services Tax Act, 2017 ('the CGST

Act'), hereby specifies the process of recovery of the said arrears and inadmissible transitional credit in the succeeding paragraphs.

2. The Board vide Circular No. 42/16/2018-GST dated 13th April, 2018, has clarified that the recovery of arrears arising under the existing law shall be made as central tax liability to be paid through the utilisation of the amount available in the electronic credit ledger or electronic cash ledger of the registered person, and the same shall be recorded in Part II of the Electronic Liability Register (Form GST PMT-01).

3. Currently, the functionality to record this liability in the electronic liability register is not available on the common portal. Therefore, it is clarified that as an alternative method, taxpayers may reverse the wrongly availed CENVAT credit under the existing law and inadmissible transitional credit through Table 4(B)(2) of Form GSTR-3B. The applicable interest and penalty shall apply on all such reversals which shall be paid through entry in column 9 of Table 6.1 of Form GSTR-3B.

4. It is requested that suitable trade notices may be issued to publicize the contents of this Circular.

5. Difficulty, if any, in implementation of this Circular may please be brought to the notice of the Board. ❖❖❖

Clarification on refund related issues – *Circular No. 59/33/2018-GST dated 4th September 2018*

Various representations have been received seeking clarification on issues relating to refund. In order to clarify these issues and to ensure uniformity in the implementation of the provisions of law across the field formations, the Board, in exercise of its powers conferred by section 168 (1) of the Central Goods and Services Tax Act, 2017 ('CGST Act'), hereby clarifies the issues as detailed hereunder :

2. Submission of invoices for processing of claims of refund :

2.1 It was clarified *vide* Circular No. 37/11/2018-GST dated 15th March, 2018 that since the refund claims were being filed in a semi-electronic environment and the processing was completely based on the information provided by the claimants, it becomes necessary that invoices are scrutinised. Accordingly, it was clarified that the invoices relating to inputs, input services and capital goods were to be submitted for processing of claims for refund of integrated tax where services are exported with payment of integrated tax; and invoices relating to inputs and

input services were to be submitted for processing of claims for refund of input tax credit where goods or services are exported without payment of integrated tax.

2.2 In this regard, trade and industry have represented that such requirement is cumbersome and increases their compliance cost, especially where the number of invoices is large.

2.3 In view of the difficulties being faced by the claimants of refund, it has been decided that the refund claim shall be accompanied by a print-out of Form GSTR-2A of the claimant for the relevant period for which the refund is claimed. The proper officer shall rely upon Form GSTR-2A as an evidence of the accountal of the supply by the corresponding supplier in relation to which the input tax credit has been availed by the claimant. It may be noted that there may be situations in which Form GSTR-2A may not contain the details of all the invoices relating to the input tax credit availed, possibly because the supplier's Form GSTR-1 was delayed or not filed. In such situations, the proper officer may call for the hard copies of such invoices if he deems it necessary for the examination of the claim for refund. It is emphasised that the proper officer shall not insist on the submission of an invoice (either original or duplicate) the details of which are present in Form GSTR-2A of the relevant period submitted by the claimant.

2.4 The claimant shall also submit the details of the invoices on the basis of which input tax credit had been availed during the relevant period for which the refund is being claimed, in the format enclosed as Annexure A manually along with the application for refund claim in Form GST RFD-01A and the Application Reference Number (ARN). The claimant shall also declare the eligibility or otherwise of the input tax credit availed against the invoices related to the claim period in the said Annexure for enabling the proper officer to determine the same.

3. System validations in calculating refund amount

3.1 Currently, in case of refund of unutilized input tax credit ('ITC'), the common portal calculates the refundable amount as the least of the following amounts:

(*a*) The maximum refund amount as per the formula in rule 89(4) or rule 89(5) of the Central Goods and Services Tax Rules, 2017 ('the CGST Rules') [formula is applied on the consolidated amount of ITC, *i.e.*, Central tax + State tax/Union Territory tax + Integrated tax + Cess (wherever applicable)];

(*b*) The balance in the electronic credit ledger of the claimant at the end of the tax period for which the refund claim is being filed after the return for the said period has been filed; and

(*c*) The balance in the electronic credit ledger of the claimant at the time of filing the refund application.

3.2 After calculating the least of the three amounts, as detailed above, the equivalent amount is to be debited from the electronic credit ledger of the claimant in the following order:

(*a*) Integrated tax, to the extent of balance available;

(*b*) Central tax and State tax/Union Territory tax, equally to the extent of balance available and in the event of a shortfall in the balance available in a particular electronic credit ledger (say, Central tax), the differential amount is to be debited from the other electronic credit ledger (*i.e.*, State tax/Union Territory tax, in this case).

3.3 The procedure described in para 3.2 above, however, is not presently available on the common portal. Till the time such facility is made available on the common portal, the taxpayers are advised to follow the order as explained above for all refund applications filed after the date of issue of this Circular. However, for applications already filed and pending with the tax authorities, where this order is not adhered to by the claimant, no adverse view may be taken by the tax authorities.

3.4 The above system validations are being clarified so that there is no ambiguity in relation to the process through which an application in Form GST RFD-01A is generated.

3.5 Further, it may be noted that the refund application can be filed only after the electronic credit ledger has been debited in the manner specified in para 3.2 (read with para 3.3) above, and the ARN is generated on the common portal.

4. Re-credit of electronic credit ledger in case of rejection of refund claim:

4.1 In case of rejection of claim for refund of unutilised input tax credit on account of ineligibility of the said credit under sub-sections (1), (2) or (5) of section 17 of the CGST Act, or under any other provision of the Act and rules made thereunder the proper officer shall order for the rejected amount to be re-credited to the electronic credit ledger of the claimant using Form GST RFD-01B. For recovery of this amount, a demand notice shall have to be simultaneously issued to the claimant under section 73 or 74 of the CGST Act, as the case may be. In case the demand is confirmed by an order issued under sub-section (9) of section 73, or sub-section (9) of section 74 of the CGST Act, as the case may be, the said amount shall be added to the electronic liability register of the claimant through Form GST DRC-07. Alternatively, the claimant can voluntarily pay this amount, along with interest and penalty, if applicable, before service of the demand notice,

and intimate the same to the proper officer in Form GST DRC-03 in accordance with sub-section (5) of section 73 or sub-section (5) of section 74 of the CGST Act, as the case may be, read with sub-rule (2) of rule 142 of the CGST Rules. In such cases, the need for serving a demand notice will be obviated.

4.2 In case of rejection of claim for refund of unutilised input tax credit, on account of any reason other than the eligibility of credit, the rejected amount shall be re-credited to the electronic credit ledger of the claimant using Form GST RFD-01B only after the receipt of an undertaking from the claimant to the effect that he shall not file an appeal against the said rejection or in case he files an appeal, the same is finally decided against the claimant, as has been laid down in rule 93 of the CGST Rules.

4.3 Consider an example where against a refund claim of Rs.100, only Rs.80 is sanctioned (Rs.15 is rejected on account of ineligible ITC and Rs.5 is rejected on account of any other reason). As described above, Rs.15 would be re-credited with simultaneous issue of notice under section 73 or 74 of the CGST Act for recovery of ineligible ITC. Rs.5 would be re-credited (through Form GST RFD-01B) only after the receipt of an undertaking from the claimant to the effect that he shall not file an appeal or in case he files an appeal, the same is finally decided against the claimant.

5. Scope of rule 96(10) of the CGST Rules :

5.1 Rule 96(10) of the CGST Rules, as amended retrospectively by notification No. 39/2018-Central Tax, dated 4th September, 2018 provides that registered persons, including importers, who are directly purchasing/importing supplies on which the benefit of reduced tax incidence or no tax incidence under certain specified notifications has been availed, shall not be eligible for refund of integrated tax paid on export of goods or services. For example, an importer (X) who is importing goods under the benefit of Advance Authorization/EPCG, is directly purchasing/importing supplies on which the benefit of reduced/Nil incidence of tax under the specified notifications has been availed. In this case, the restriction under rule 96(10) of the CGST Rules is applicable to X. However, if X supplies the said goods, after importation, to a domestic buyer (Y), on payment of full tax, then Y can rightfully export these goods under payment of integrated tax and claim refund of the integrated tax so paid. However, in the said example if Y purchases these goods from X after availing the benefit of specified notifications, then Y also will not be eligible to claim refund of integrated tax paid on export of goods or services.

5.2 Overall, it is clarified that the restriction under rule 96(10) of the CGST Rules,

as amended retrospectively by notification No. 39/2018-Central Tax, dated 4th September, 2018, applies only to those purchasers/importers who are directly purchasing/importing supplies on which the benefit of certain notifications, as specified in the said sub-rule, has been availed.

6. Disbursal of refund amount after sanctioning by the proper officer :

6.1 A few cases have come to notice where a tax authority, after receiving a sanction order from the counterpart tax authority (Centre or State), has refused to disburse the relevant sanctioned amount calling into question the validity of the sanction order on certain grounds.

E.g., a tax officer of one administration has sanctioned, on a provisional basis, 90 per cent of the amount claimed in a refund application for unutilised ITC on account of exports. On receipt of the provisional sanction order, the tax officer of the counterpart administration has observed that the provisional refund of input tax credit has been incorrectly sanctioned for ineligible input tax credit and has therefore, refused to disburse the tax amount pertaining to the same.

6.2 It is clarified that the remedy for correction of an incorrect or erroneous sanction order lies in filing an appeal against such order and not in withholding of the disbursement of the sanctioned amount. If any discrepancy is noticed by the disbursing authority, the same should be brought to the notice of the counterpart refund sanctioning authority, the concerned counterpart reviewing authority and the nodal officer, but the disbursal of the refund should not be withheld. It is hereby clarified that neither the State nor the Central tax authorities shall refuse to disburse the amount sanctioned by the counterpart tax authority on any grounds whatsoever, except under sub-section (11) of section 54 of the CGST Act. It is further clarified that any adjustment of the amount sanctioned as refund against any outstanding demand against the claimant can be carried out by the refund disbursing authority if not already done by the refund sanctioning authority.

7. Status of refund claim after issuance of deficiency memo :

7.1 Rule 90(3) of the CGST Rules provides that where any deficiencies in the application for refund are noticed, the proper officer shall communicate the deficiencies to the claimant in Form GST RFD-03, requiring him to file a fresh refund application after rectification of such deficiencies. Further, rule 93(1) of the CGST Rules provides that where any deficiencies have been communicated under rule 90(3), the amount debited under rule 89 (3) shall be recredited to the electronic credit ledger. Therefore, the intent of the law is very clear that in case a deficiency memo in Form GST RFD-03 has been issued, the refund claim will have to be filed afresh.

7.2 It has been learnt that certain field formations are issuing show cause notices to the claimants in cases where the refund application is not re-submitted after the issuance of a deficiency memo. These show-cause-notices are being subsequently adjudicated and orders are being passed in Form GST RFD-04/06. It is clarified that show-cause-notices are not required to be issued where deficiency memos have been issued. A refund application which is re-submitted after the issuance of a deficiency memo shall have to be treated as a fresh application. No order in Form GST RFD-04/06 can be issued in respect of an application against which a deficiency memo has been issued and which has not been resubmitted subsequently.

8. Treatment of refund applications where the amount claimed is less than rupees one thousand :

8.1 Sub-section (14) of section 54 of the CGST Act provides that no refund under sub-section (5) or sub-section (6) of section 54 shall be paid to an applicant, if the amount is less than one thousand rupees.

8.2 In this regard, it is clarified that the limit of rupees one thousand shall be applied for each tax head separately and not cumulatively. The limit would not apply in cases of refund of excess balance in the electronic cash ledger. All field formations are requested to reject claims of refund from the electronic credit ledger for less than one thousand rupees and recredit such amount by issuing an order in Form GST RFD-01B.

9. It is requested that suitable trade notices may be issued to publicize the contents of this Circular.

10. Difficulty, if any, in implementation of this Circular may please be brought to the notice of the Board.

For Annexure A refer www.cbec.gov.in ❖❖❖

Processing of refund applications filed by Canteen Stores Department – *Circular No. 60/34/2018-GST dated 4th September 2018*

Vide notifications No. 6/2017-Central Tax (Rate), No. 6/2017-Integrated Tax (Rate) and No. 6/2017-Union territory Tax (Rate), all dated 28th June 2017, the Central Government has specified the Canteen Stores Department ('CSD'), under the Ministry of Defence, as a person who shall be entitled to claim a refund of fifty per cent. of the applicable central tax, integrated tax and Union territory tax paid by the CSD on all inward supplies of goods received by the CSD for the purposes of subsequent supply of such goods to the Unit Run Canteens of the

CSD or to the authorised customers of the CSD. Identical notifications have been issued by the State Governments allowing refund of fifty per cent of the State tax paid by the CSD on the inward supply of goods received by it and supplied subsequently as stated above.

2. With a view to ensuring expeditious processing of refund claims, the Board, in exercise of its powers conferred under section 168(1) of the Central Goods and Services Tax Act, 2017 ('the CGST Act'), hereby specifies the manner and procedure for filing and processing of such refund claims as below :

3. Filing application for refund :

3.1 Invoice-based refund: It is clarified that the instant refund to be granted to the CSD is not for the accumulated input tax credit but refund based on the invoices of the inward supplies of goods received by them.

3.2 *Manual filing of claims on a quarterly basis* : In terms of rule 95 of the Central Goods and Services Tax Rules, 2017 ('the CGST Rules'), the CSD are required to apply for refund on a quarterly basis. Till the time the online utility for filing the refund claim is made available on the common portal, the CSD shall apply for refund by filing an application in Form GST RFD-10A (Annexure A to this Circular) manually to the jurisdictional tax office.

The said form shall be accompanied with the following documents:

(*i*) An undertaking stating that the goods on which refund is being claimed have been received by the CSD;

(*ii*) A declaration stating that no refund has been claimed earlier against the invoices on which the refund is being claimed;

(*iii*) Copies of the valid return filed in Form GSTR-3B by the CSD for the period covered in the refund claim;

(*iv*) Copies of Form GSTR-2A of the CSD for the period covered in the refund claim along with the attested hard copies of the invoices on which refund is claimed but which are not reflected in Form GSTR-2A;

(*v*) Details of the bank account in which the refund amount is to be credited.

4. Processing and sanction of the refund claim

4.1 Upon receipt of the complete application in Form GST RFD-10A, an acknowledgement shall be issued manually within 15 days of the receipt of the application in Form GST RFD-02 by the proper officer. In case of any deficiencies in the requisite documentary evidences to be submitted as detailed in para 3.2 above, the same shall be communicated to the CSD by issuing a deficiency memo

manually in Form GST RFD-03 by the proper officer within 15 days of the receipt of the refund application. Only one deficiency memo should be issued which should be complete in all respects.

4.2 The proper officer shall validate the GSTIN details on the common portal to ascertain whether the return in Form GSTR- 3B has been filed by the CSD. The proper officer may scrutinize the details contained in Form RFD-10A, Form GSTR-3B and Form GSTR-2A. The proper officer may rely upon Form GSTR-2A as an evidence of the accountal of the supply made by the corresponding suppliers to the CSD in relation to which the refund has been claimed by the CSD.

4.3 The proper officer should ensure that the amount of refund sanctioned is 50% of the Central tax, State tax, Union territory tax and integrated tax paid on the supplies received by CSD. The proper officer shall issue the refund sanction/ rejection order manually in Form GST RFD-06 along with the payment advice manually in Form GST RFD-05 for each tax head separately. The amount of sanctioned refund in respect of central tax/integrated tax along with the bank account details of the CSD shall be manually submitted in the PFMS system by the jurisdictional Division's DDO and a signed copy of the sanction order shall be sent to the PAO for release of the said amount.

5. It is clarified that the CSD will apply for refund with the jurisdictional Central tax/State tax authority to whom the CSD has been assigned. However, the payment of the sanctioned refund amount in relation to central tax/integrated tax shall be made by the Central tax authority while payment of the sanctioned refund amount in relation to State Tax / Union Territory Tax shall be made by the State tax/ Union Territory tax authority. It therefore, becomes necessary that the refund order issued by the proper officer of any tax authority is duly communicated to the concerned counter-part tax authority within seven days for the purpose of payment of the remaining sanctioned refund amount. The procedure outlined in para 6.0 of Circular No.24/24/2017-GST dated 21st December 2017 should be followed in this regard.

6. It is requested that suitable trade notices may be issued to publicize the contents of this Circular.

7. Difficulty, if any, in implementation of this Circular may please be brought to the notice of the Board. ❖❖❖

E-way bill in case of storing of goods in godown of transporter – *Circular No. 61/35/2018-GST dated 4th September 2018*

Various representations have been received on the matter pertaining to the textile sector and problems being faced by weavers & artisans regarding storage of their

goods in the warehouse of the transporter. It has been stated that textile traders use transporters' godown for storage of their goods due to their weak financial conditions. The transporters providing such warehousing facility will have to get themselves registered under GST and maintain detailed records in cases where the transporter takes delivery of the goods and temporarily stores them in his warehouse for further transportation of the goods till the consignee/recipient taxpayer's premises. The transport industry is facing difficulties due to the same and a request has been made to treat these godowns as transit godowns.

2. In view of the difficulties being faced by the transporters and the consignee/ recipient taxpayer and to ensure uniformity in the procedure across the sectors and the country, the Board in exercise of its power conferred under section 168(1) of the Central Goods and Services Tax Act, 2017 ('the CGST Act') hereby clarifies the issues in the succeeding paragraphs. 3. As per rule 138 of the Central Goods and Services Tax Rules, 2017 ('the CGST Rules') e-way bill is a document which is required for the movement of goods from the supplier's place of business to the recipient taxpayer's place of business. Therefore, the goods in movement including when they are stored in the transporter's godown (even if the godown is located in the recipient taxpayer's city/town) prior to delivery shall always be accompanied by a valid e-way bill.

4. Further, section 2(85) of the CGST Act defines the "place of business" to include "a place from where the business is ordinarily carried out, and includes a warehouse, a godown or any other place where a taxable person stores his goods, supplies or receives goods or services or Circular No. 61/35/2018-GST both". An additional place of business is the place of business from where taxpayer carries out business related activities within the State, in addition to the principal place of business.

5. Thus, in case the consignee/recipient taxpayer stores his goods in the godown of the transporter, then the transporter's godown has to be declared as an additional place of business by the recipient taxpayer. In such cases, mere declaration by the recipient taxpayer to this effect with the concurrence of the transporter in the said declaration will suffice. Where the transporter's godown has been declared as the additional place of business by the recipient taxpayer, the transportation under the e-way bill shall be deemed to be concluded once the goods have reached the transporter's godown (recipient taxpayer' additional place of business). Hence, e-way bill validity in such cases will not be required to be extended.

6. Further, whenever the goods are transported from the transporters' godown, which has been declared as the additional place of business of the recipient taxpayer, to any other premises of the recipient taxpayer then, the relevant

provisions of the e-way bill rules shall apply. Hence, whenever the goods move from the transporter's godown (*i.e.*, recipient taxpayer's additional place of business) to the recipient taxpayer's any other place of business, a valid e-way bill shall be required, as per the extant State-specific e-way bill rules.

7. Further, the obligation of the transporter to maintain accounts and records as specified in section 35 of the CGST Act read with rule 58 of the CGST Rules shall continue as a warehousekeeper. Furthermore, the recipient taxpayer shall also maintain accounts and records as required under rules 56 and 57 of the CGST Rules. Furthermore, as per rule 56 (7) of the CGST Rules, books of accounts in relation to goods stored at the transporter's godown (*i.e.*, the recipient taxpayer's additional place of business) by the recipient taxpayer may be maintained by him at his principal place of business. It may be noted that the facility of declaring additional place of business by the recipient taxpayer is in no way putting any additional compliance requirement on the transporters.

8. It is requested that suitable trade notices may be issued to publicize the contents of this Circular.

9. Difficulty, if any, in implementation of this Circular may please be brought to the notice of the Board. ❖❖❖

[2018] 4 GSTPT (GSTL) 65

SUMMARY OF NOTIFICATIONS ISSUED UNDER GST LEGISLATIONS

CENTRAL TAX NOTIFICATIONS (ASPECTS OTHER THAN RATE)

Notification	*Date*	*Summary*
32/2018	10-08-2018	Seeks to prescribe the due dates for furnishing of Form GSTR-1 for those taxpayers with aggregate turnover of more than Rs. 1.5 crore for the months from July 2018 to March 2019
33/2018	10-08-2018	Seeks to prescribe the due dates for quarterly furnishing of Form GSTR-1 for those taxpayers with aggregate turnover of upto Rs.1.5 crore for the period from July 2018 to March 2019
34/2018	10-08-2018	Seeks to prescribe the due dates for filing Form GSTR-3B for the months from July 2018 to March 2019
35/2018	21-08-2018	Seeks to extend the due date for filing of Form GSTR-3B for the month of July 2018
36/2018-	24-08-2018	Seeks to extend the due dates for filing Form GSTR-3B for the months of July 2018 and August 2018
37/2018	24-08-2018	Seeks to prescribe the due dates for furnishing of Form GSTR-1 for those taxpayers with aggregate turnover of more than Rs. 1.5 crore for the months of July 2018 and August 2018
38/2018-	24-08-2018	Seeks to prescribe the due dates for quarterly furnishing of Form GSTR-1 for those taxpayers with aggregate turnover of upto Rs.1.5 crore for the quarter July 2018 to September 2018

39/2018-	04-09-2018	Seeks to make amendments (Eighth Amendment, 2018) to the CGST Rules, 2017
40/2018-	04-09-2018	Seeks to extend the time limit for making the declaration in Form GST ITC-04
41/2018-	04-09-2018	Seeks to waive the late fee paid for specified classes of taxpayers for Form GSTR-3B, Form GSTR-4 and Form GSTR-6
42/2018-	04-09-2018	Seeks to extend the time limit for making the declaration in Form GST ITC-01 for specified classes of taxpayers

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[2018] 4 GSTPT (PV) 13

Exemption Notifications must be interpreted strictly – Rules Supreme Court Constitution Bench

*Shivashish Karnani**

The Constitution Bench of the Supreme Court in the case of* Commissioner of Customs *v.* Dilip Kumar *[Civil Appeal No.3327 of 2007 dated 30th July 2018] has held that the benefit of ambiguity in exemption notification cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue/state and the exemption notifications are subject to strict interpretation. In this article, the author makes an attempt to analyse the judgment.

Question for consideration

1. What is the interpretative rule to be applied while interpreting a tax exemption provision/notification when there is an ambiguity as to its applicability with reference to the entitlement of the assessee or the rate of tax to be applied?

Supreme Court's earlier judgment on the same question

2. In *Sun Export Corporation, Bombay* v. *Collector of Customs* [1997] 6 SCC 564 ("Sun Export"), a three Judge Bench ruled that an ambiguity in a tax exemption provision or notification must be interpreted so as to favour the assessee claiming the benefit of such exemption. *Sun Export* (*supra*) was a case against the judgment of the High Court of Bombay. It was concerned with the interpretation of tax exemption notification, being Notification No. 234/1982-CE, dated 1st November, 1982, issued by the Central Government under sub-section (1) of section 25 of the Customs Act. The High Court considered the issue whether Vitamin AD-3 mix (feed grade)/animal feed supplement could be included under the head 'animal feed, including compound livestock feed'. The Bombay High Court decided, in the affirmative, in favour of the assessee. The case then landed in Supreme Court, which was persuaded to expand the meaning of 'animal feed' in the light of subsequent notification issued in 1984, which largely expanded the scope of exemption to the effect that 'animal feed, including compound livestock

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feed, animal feed supplements and animal feed concentrates. The court indeed countenanced the plea, namely, whenever there is ambiguity as to whether the subject matter was included or not, then the benefit of the same should be conferred on the assessee. Expressing its agreement with the above view expressed by the Bombay High Court, the court observed that even assuming that there are two views possible, it is well settled that one favourable to the assessee in matters of taxation has to be preferred."

Facts of the present case

3. The respondents ('Dilip Kumar & Co.') imported a consignment of Vitamin-E50 powder (feed grade) in 1999. They claimed the benefit of concessional rate of duty at 5 per cent, instead of standard 30 per cent, as per the Customs Notification No. 20/1999 and classified the product under Chapter 2309.90 which admittedly pertains to prawn feed. They relied on the ratio in *Sun Export* (*supra*) and claimed the benefit of exemption. The benefit of Customs Notification No. 20/1999 was, however, denied to the respondents on the plea of the department that the goods under import contained chemical ingredients for animal feed and not animal feed/ prawn feed, as such, the concessional rate of duty under the extant notification was not available. The department classified the consignment under Chapter 29 which attracts standard rate of customs duty. The adjudicating authority, namely, the Assistant Commissioner of Customs, distinguished *Sun Export* (*supra*), while accepting the plea of the department to deny the concessional rate. The Commissioner of Customs (Appeals) reversed the order of the Assistant Commissioner and came to the conclusion that *Sun Export* (*supra*) was indeed applicable. The department then approached the Customs, Excise and Service Tax Tribunal (CESTAT), which affirmed the order of the Commissioner of Customs (Appeals). Aggrieved thereby, the present appeal is filed.

General principles of interpretation

4. It is well settled principle that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In *Kanai Lal Sur* v. *Paramnidhi Sadhukhan* AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

4.1 In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose. Not only that, if the plain construction leads to anomaly and absurdity, the court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation. Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect to taxation.

4.2 In construing penal statutes and taxation statutes, the court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocents might become victims of discretionary decision making. Insofar as taxation statutes are concerned article 265 of the Constitution prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the Legislature.

4.3 It is to be noted that the principle of 'literal interpretation' and the principle of 'strict interpretation' are sometimes used interchangeably. This principle, however, may not be sustainable in all contexts and situations. There is certainly scope to sustain an argument that all cases of literal interpretation would involve strict rule of interpretation, but strict rule may not necessarily involve the former, especially in the area of taxation. The decision of the court in *Punjab Land Development & Reclamation Corporation Ltd.* v. *Presiding Officer* [1990] 3 SCC 682, made the said distinction, and explained the literal rule as follows :

> 'The literal rules of construction require the wording of the Act to be construed according to its literal and grammatical meaning whatever the result may be. Unless otherwise provided, the same word must normally be construed throughout the Act in the same sense, and in the case of old statutes regard must be had to its contemporary meaning if there has been no change with the passage of time. Strict interpretation does not encompass strict-literalism into its fold. It may be relevant to note that simply juxtaposing "strict interpretation" with "literal rule" would result in ignoring an important aspect that is "apparent legislative intent". We are alive to the fact that there may be overlapping in

some cases between the aforesaid two rules. With certainty, we can observe that, 'strict interpretation' does not encompass such literalism, which lead to absurdity and go against the legislative intent. As noted above, if literalism is at the far end of the spectrum, wherein it accepts no implications or inferences, then "strict interpretation" can be implied to accept some form of essential inferences which literal rule may not accept.' Justice G P Singh, in his treatise 'Principles of Statutory Interpretation' after referring to various SC Judgments stated "….in all tax matters one has to interpret the taxation statute strictly….".

It is well settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute.

In the case of *State of West Bengal* v. *Kesoram Industries Ltd.* [2004] 10 SCC 201, seven judges bench of SC after citing the passages from Justice G P Singh's treatise, summed up the following principles applicable to the interpretation of a taxing statute :

- In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed ; it cannot imply anything which is not expressed ; it cannot import provisions in the statute so as to supply any deficiency.
- Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section.
- If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly.

Core issue

5. In the judgment of two learned Judges in *Union of India* v. *Wood Papers Ltd.* [1990] 4 SCC 256, a distinction between stage of finding out the eligibility to seek exemption and stage of applying the nature of exemption was made. Relying on the decision in *Collector of Central Excise* v. *Parle Exports (P) Ltd.* [1989] 1 SCC 345, the court observed that there is no need to extend or widen the ambit at the stage of applicability. But once that hurdle is crossed, construe it liberally.

The reasoning for arriving at such conclusion is found in para 4 of *Wood Papers Ltd.* (*supra*), which reads as follows :

> "Literally exemption is freedom from liability, tax or duty. Fiscally, it may assume varying shapes, specially, in a growing economy. For instance, tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective etc. That is why its construction, unlike charging provision, has to be tested on different touchstone. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principles requires it to be construed strictly. Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject, but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction...."

5.1 The Constitution Bench in the case of *CCE Excise* v. *Hari Chand Shri Gopal* [2011] 1 SCC 236 followed the ratio of in *Hansraj Gordhandas* (*supra*), to reiterate the law on the aspect of interpretation of exemption clause in para 29 as follows :

> "The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, thought at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption.
>
> …..The critical question to be examined is whether the requirements relate to the "substance" or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the

orderly conduct of business, they may be fulfilled by substantial, if not strict compliance…."

Ruling of Supreme Court

6. The ratio in *Sun Export* (*supra*) is not correct and all the decisions which took similar view as in *Sun Export* (*supra*) stands overruled. Exemptions from taxation have tendency to increase the burden on the other unexempted class of tax payers. A person claiming exemption, therefore, has to establish that his case squarely falls within the exemption notification, and while doing so, a notification should be construed against the subject in case of ambiguity. Every taxing statue including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.

Conclusion

7. Under GST law also, there are various exemption notifications issued. One such can be notification No. 45-Central Tax (Rate) where supplier can charge concessional rate of 5 per cent where specified goods are supplied to specified recipients such as research institutions, public funded research institutions, IIT, medical centers, universities, etc., on the basis certificates furnished. Post this judgment it clearly signifies that if the goods do not fall within the list of specified goods or list of specified recipients, benefit of concessional rate can be denied to the supplier (even when the certificates are furnished) since responsibility to charge correct rate of tax is cast on him. ❖❖❖

[2018] 4 GSTPT (WA) 13

PRACTICAL QUERIES*

ANSWER BY CA DEVENDER SHARMA, FARIDABAD

After closing its business firm individual sold its fixed assets to a private limited company. Firm deals in readymade garments. Do firm has to charge GST on sale of asset. What if there is no consideration paid (as purchasing company is of same individual)?

You will have to charge GST and take credit in private limited.

Will credit note issued for sales made during service tax regime have to be shown under GSTR-1 and if yes then where?

Yes certainly, fill data in CDNR sheet and select pre-GST period in last column.

We are providing transport services also to the customer but GST not levied on that transport portion in the invoice. Can we issue a debit note for collecting tax amount on transport charges.

Yes, you can make amendment in original invoice while filling GSTR-1

ANSWERED BY CA RAJESH KUMAR KHANDELWAL, FARIDABAD

One of my clients is moving his godown from one place to another place that is just 5 kms. away in the same city. What is the procedure we should follow to comply with GST law if any

You are required to prepare both the delivery challan and e-way bill. For e-way bill kindly refer rule 138 of the CGST Act.

ANSWERED BY CA RAMAN KHATUWALA, RAJENDRA PLACE

The actual supply for the year ending 31st March, 2018 is 25.50 lakh. Whereas, on compiling GSTR1 and GSTR3B, the total value shown by the client is only 21.75 lakh. What remedies are available to the client.

If the mistake has been committed both in 3B and GSTR 1, then you need to show the balance amount in 3B and pay the addition tax along with interest. In GSTR 1, rectify the invoice through Col. 9.

**Edited extracts from www.expertspanel.in*

Can a GTA claim input credit if it has trucks/lorry also and GST is paid on spare parts?

Yes, but only if he is not opting for 5 per cent tax rate. He needs to pay 12 per cent tax on forward charge basis for claiming ITC.

A partnership firm (floor covering export house) sold Toyota Fortuner and received payment of Rs. 9 lakh through RTGS on 31st October, 2017. Firm did not charge GST from the buyer. Please explain what rate of GST is to be charged and how to discharge GST liability now.

Please refer Notification No.8/2018 dated 23rd January, 2018. Car sale is a supply and taxable.

ANSWERED BY CA ASHU GARG, DELHI

An assesee is trading in fabric material and he purchases from various suppliers. Prior to GST no taxes were applicable on trading of fabrics. Assesse is purchasing the material from mills but sometimes the material received from mills is in excess of billed quantity. Say if purchased 2,000 metres of a fabric, actual material received is 2,004 metres but bill is only of 2,000 metres. While creating sales bill, the material has been billed to customer for 2,004 metres. How to account for this in books prior to GST and what shall be implications post GST for this?

This is a mistake on the part of supplier. But, you can show the same as free supply received from your supplier and can record the same in your stock record and in your books. No need of any specific treatment under GST.

My client is a practicing doctor having total receipts from profession of Rs. 21,50,000. He has received a free foreign tour valued at Rs. 1,25,600. Is he required to take registration under GST?

This is your inward supply and on your inward supply you are liable to pay GST under section 9(3) on specified supplies and section 9(4) has been suspended till 30th September, 2019. Since service do not come under any clause of section 9(3), you are not liable to pay GST on the same. (assuming not an import of services, *i.e.,* Indian supplier)

As we know that services are notified for reverse charge under section 9(3) of the CGST Act, out of which one service is services supplied by a director of a company or a body corporate to that company or the body corporate. Services of director, like sitting fees, commission, services charges for giving guarantee

for loan taken by company has been covered under the Government notified service. Whether commission paid to whole-time director (as he is an employee of the company) will come under reverse charge?

Any amount received in the capacity of director is under reverse charge. If any amount received does not fall under it, is not covered under reverse charge. Any commission paid to employee in relation to employment contract is not a supply as per Schedule III, Similarly, if commission is in relation to employment contract with whole-time director, then same is also exempt.

A dealer wants to participate in trade exhibition/fair being conducted in the same State as his registration. What kind of intimation is required to be given to GST department? Whether it should be shown as additional place of business and then again form needs to be filed after the event is over for removal of such additional place? The exhibition is for 3-4 days.

You have to show the same as your additional place of business and apply for removal of the same after exhibition.

ANSWERED BY CA ARCHANA JAIN, NEW DELHI

A travel agency is arranging tour packages and charging 5 per cent GST from its customers. It has purchased a bus to be used in its business. Whether ITC can be availed by the travel agency.

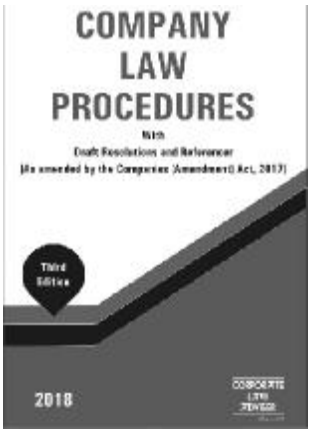
Yes, there is no bar under section 17(5) of the CGST Act.

ANSWERED BY CA PRAKHAR BANSAL, BILASPUR

If a private company is covered under section 44AB of the Income-tax Act (tax audit), is it required to get its account audited under section 35 of the CGST Act?

The requirement for audit under CGST Act is independent and in addition to the audit requirement under section 44AB. Therefore, even if a private company is covered under 44AB Audit, it will be required to get accounts audited under GST as well, if the prescribed limits are exceeded. ❖❖❖

ABOUT THE BOOK



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(*ii*) In *CCE* v. *ACE Designers Ltd*. 2012 (26) STR 193 (Kar), it has been held as under :

'5. While considering the issue whether the services utilised by the assessee is in the course of manufacturing of a final product or not, the court held as follows :

As is clear from the definition any service used by the manufacturer whether directly or indirectly in or in relation to the manufacture of final products constitutes input service. Various services are set out in the definition expressly, as constituting input service. It also includes transportation of inputs or capital goods and outward transportation up to the place of removal.

Therefore, the test is whether the service utilised by the assessee is for the manufacture of final product. Such service may be utilised directly or indirectly. Such service may be in the nature of transportation of inputs or capital goods, up to the factory premises or if the final product is removed from the factory premises for outward transportation up to the place of removal. It is only an inclusive definition. The services mentioned in the section are only illustrative and it is not exhaustive. Therefore, when a particular service not mentioned in the definition clause is utilised by the assessee/manufacturer and service tax paid on such service is claimed as Cenvat Credit, that the question is what are the ingredients that are to be satisfied for availing such credit. If the credit is availed by the manufacturer, then the said service should have been utilised by the manufacturer directly or indirectly in or in relation to the manufacture of final products or used in relation to activities relating to business. If any one of these two tests is satisfied, then such a service falls within the definition of "input service" and the manufacturer is eligible to avail Cenvat credit of the service tax paid on such service....

Canteen service

10. It is in this context that when the assessee provides outdoor canteen facilities because of a statutory obligation imposed on him under Section 46 of the Factories Act it becomes a condition of service as far as the employees are concerned. He has paid the service tax on outdoor canteen services. The said expenses incurred by the assessee will also be taken into consideration before fixing the price of the final product. It may be a welfare measure but certainly it is not a charity provided by the employer to the employees. It is an onerous legal obligation imposed on him....

13. Therefore, merely because these services are not expressly mentioned in the definition of input service it cannot be said that they do not constitute input service and the assessee is not entitled to the benefit of Cenvat credit. In fact,

rule 3 of the Cenvat Rules, 2004, specifically provides that the manufacturer of final products shall be allowed to take credit. The service tax is leviable under section 66 of the Finance Act and paid on any input service received by the manufacturer of a final product. Therefore, under the scheme of the Cenvat Credit Rules, 2004, the service tax paid on all those services which the assessee has utilised directly or indirectly in or in relation to the final product is entitled to claim the credit. Therefore, the judgment of the Tribunal is legal and valid and is in accordance with law and does not suffer from any legal infirmity which calls for any interference. Hence, the substantial questions of law framed in these appeals are answered against the revenue and in favour of the assessee.

6. Therefore, the question that arises for consideration in this appeal having since been answered by the Division Bench of this court in the aforesaid judgment, this appeal is disposed of on the very same terms as in CEA Nos. 96/2009 c/w 97/2009, 98/2009, 99/2009, 124/2009 and 125/2009.'

(*iii*) In *CCE* v. *Ferromatik Milacron India Ltd.* 2011 (21) STR 8 (Guj.), it has been held as under:-

'5. "Input service" is defined under rule 2(*l*) of the Rules, which insofar as the same is relevant for the purpose of the present appeal, reads, thus :

(*l*) "input service" means any service, –....

(*ii*) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes the services in relation to setting up, modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal.

6. As noted hereinabove, under the provisions of section 46 of the Factories Act, it is mandatory for the employer to provide canteen services to the staff. Thus, provision of canteen services is a statutory requirement. Provision of canteen services being indispensable, it is incumbent on a manufacturer of goods, to provide the same if he desires to run his factory. In view of the definition of "Input service" which means any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products, the

input service does not have to used directly in the manufacture of final products, it may be a service which is only indirectly used in relation to the manufacture of final products. In the circumstances, canteen services which are indispensable in relation to manufacture of the final products would certainly fall within the ambit of "input service" as defined under the Rules.

7. Moreover, rule 3 of the Rules insofar as the same is relevant for the present purpose provides that the manufacturer shall be allowed to take credit of the service tax leviable under section 66 of the Finance Act ; paid on any input service received by the manufacturer of final product on or after the 10th day of September, 2004. A plain reading of the said rule makes it clear that the said provision does not qualify the nature of input service availed of by the manufacturer.

8. In the above factual and legal background, the Tribunal was justified in holding that the service tax paid on outdoor catering services by the canteen located in the respondent's manufacturing premises has to be considered as an input service relating to business and that Cenvat credit is admissible in respect of the same. The view taken by the Tribunal being in consonance with the provisions of the Rules does not suffer from any legal infirmity so as to warrant interference. In absence of any question of law, much less any substantial question of law, the appeal is dismissed.'

(*iv*) In *CCE* v. *Stanzen Toyotetsu India Pvt. Ltd*. (2011) 32 STT 244 (Kar), it has been held as under :

"12. It is in this context that when the Assessee provides outdoor canteen facilities because of a statutory obligation imposed on him under section 46 of the Factories Act, it becomes a condition of service as far as the employees are concerned. He has paid the service tax on outdoor canteen services. The said expenses incurred by the Assessee will also be taken into consideration before fixing the price of the final product. It may be a welfare measure but certainly it is not a charity provided by the employer to the employees. It is an onerous legal obligation imposed on him. The cost incurred in rendering such service will be included in the cost of production."

Clearing and Forwarding Services

(*i*) In *CCE* v. *Cadila Health Care Ltd*. 2013 (30) STR 3 (Guj.), it has been held as under :

"5.4 *Clearing and forwarding services* : In this regard it was the case of the assessee that service rendered by C&F agents were in relation to sales promotion and, therefore, input service. The adjudicating authority after considering the

definition of clearing and forwarding agent as defined under section 65(*25*) of the Finance Act, 1994 found that the contention that the services rendered as C&F agents were in relation to sales promotion was not acceptable. The assessee in its reply had stated that Cenvat credit availed by it was towards C&F services provided by various C & F agents in different states in India for activities related to sale of goods in domestic market. The adjudicating authority was of the view that the role of C&F agent here is in the sale of goods as admitted by the assessee. Such service would commence only after clearance of final product. According to the adjudicating authority, the service tax paid in respect of post clearance activity is not in relation to the manufacture of final product and, therefore, not an input service. The assessee was, therefore, not eligible to avail of Cenvat credit on the service tax paid towards Commission paid to C&F agents.

(*i*) The Tribunal was of the view that C&F agents have a definite role to play in promotion of sales by storing goods and supplying the same to customers. Thus, he is actually promoting sales.

(*ii*) The learned counsel for the appellant submitted that the service rendered by the C&F agents is also related to sales. It is used after the manufacturing activity is over and after clearance of the final products, that is, after the place of removal, therefore, it does not fall in the main part of the definition of input service and is also not in relation to any of the activities specified in the inclusive part of the definition. It was further submitted that the services rendered by C&F agents can in no manner said to be sales promotion so as to fall within the ambit of the expression input service. On the other hand the learned counsel for the assessee submitted that the respondent appointed C&F agents in different States for the purpose of sale of the respondents final products. The goods are stock transferred to the C&F agents who store the same and thereafter sell them. In these cases there is no sale from the respondents factory gate. The goods are sold from the premises of the C&F agents. Accordingly, in these cases the place of removal is the premises of the C&F agents. As per section 4(3)*iii*) of the Central Excise Act, where goods are sold from the premises of the consignment agent or any other place or premises after clearance from the factory, such premises from where the goods are sold is the place of removal. The services of the C&F agents are, therefore, received for clearance of goods at the place of removal. The same is, therefore, input service in terms of the means potion of the definition.

(*iii*) In the backdrop of the above facts and contentions reference may be made

to the definition of clearing and forwarding agent as defined under section 65(*25*) of the Finance Act, 1994 which reads, thus :

Clearing and forwarding agent means any person who is engaged in providing any service, either directly or indirectly connected with the clearing and forwarding operations in any manner to any other person and includes a consignment agent.

(*iv*) Ordinarily, a C&F agent receives goods from the factory or premises of the manufacturer (the Principal) or his agents and stores these goods, dispatches these goods as per orders received from the Principal, arranges transport, etc., for the purpose and prepares invoices on behalf of the Principal. In respect of such service, the C&F agent receives commission on the basis of agreed terms. Therefore, an essential characteristic of any service, to fall in the category of C&F agent, is that the relationship between the service provider and receiver should be in the nature of principal (owner) and agent. The C&F agent carries out all activities in respect of goods right from the stage of their clearances from the premises of the principal to its storage and delivery to the customers.

(*v*) At this stage reference may be made to the definition of the expression place of removal as defined under clause (*c*) of sub-section (3) of section 4 of the Act which reads, thus :

(*c*) place of removal means –

(*i*) a factory or any other place or premises of production or manufacture of excisable goods ;

(*ii*) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty ;

(*iii*) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory ; from where such goods are removed.

(*vi*) Thus, the clearing and forwarding agent is an agent of the principal. The goods stored by him after clearance from the factory would, therefore, be stored on behalf of the principal, and as such the place where such goods are stored by the C&F agent would fall within the purview of sub-clause (*iii*) of clause (*c*) of section 4(3) of the Act and as such would

be the place of removal. Viewed from that light the services rendered by the C&F agent of clearing the goods from the factory premises, storing the same and delivering the same to the customer would fall within the ambit of rule 2(1) of the Rules as it stood prior to its amendment with effect from 1-4-2008, namely clearance of final products from the place of removal. However, this court is not in agreement with the view adopted by the Tribunal that such services would amount to sales promotion and is, therefore, an input service. For the reasons stated while discussing the issue as regards service commission paid to foreign agent, the services rendered by the C&F agents cannot be said to be in the nature of sales promotion. This issue stands answered accordingly, in favour of the assessee and against the revenue."

Cargo Handling Services

(*i*) In *CCE* v. *Inductotherm India Pvt. Ltd*. 2014 (36) STR 994 (Guj.), it has been held as under :

23. Admittedly, cargo handling services are utilised for the purpose of export of final product where the place of removal for the purpose of export shall necessarily have to be the port and, therefore, any service availed by the exporters until the goods left India from the port are the service used in relation to clearance of final products upto the place of removal. If at this stage, the definition of input service is recollected, it includes services used by the manufacturer directly or indirectly in or in relation to manufacture of the final product and in relation to clearance of final product from the place of removal. Definition of term "input service" being very wide in its expression, wherein number of services used by manufacturer are included in the same, used directly or indirectly.

24. This Court in the case of Parth Poly Wooven (P.) Ltd. (supra) has held that when the manufacturer transports his finished goods from the factory, without clearance to any other place such as, godown, warehouse, etc., from where it would be ultimately removed, such service is covered in the expression "outward transportation up to the place of removal" since such place other than factory gate would be the place of removal. It had been in clear terms held that outward transport service used by the manufacturer for transportation of finished goods from the place of removal up to the premises of the purchaser is covered within the definition of "input service" provided in rule 2(*l*) of the Cenvat Credit Rules. Taking this analogy further, the cargo handling service

is availed essentially for the purpose of exporting the goods and in such case, the services of cargo handling used by the manufacturer for transportation of the finished goods from the place of removal shall have to be essentially the port from where goods are actually taken out of the country.

25. Both the authorities have rightly held that tax paid by the service providers under this category of cargo handling service, therefore, would be inclusive in the definition of "input service". There is no dispute on the part of the Revenue that such services were availed by the respondents in clearing the goods from the factory premises and for the purpose of export. Accordingly, Tax Appeal is dismissed.'

Rent a Cab Services

(*i*) In *CCE* v. *Stanzen Toyotetsu India Pvt. Ltd.* (2011) 32 STT 244 (Kar.), it has been held as under:-

"13. Rent a Cab Service is provided by the assessee to these workers to reach the factory premises in-time which has a direct bearing on the manufacturing activity. In fact the employee is also entitled to conveyance allowance. It also would form part of a condition of service and the amounts spent on the conveyance of the employees is also a factor which will be taken into consideration by the employees in fixing the price of the final product. By no stretch of imagination can it be construed as a welfare measure. It is a basic necessity. To ensure that the work force comes on time at the work place, the employers have taken this measure which has a direct bearing on the manufacturing activity. At any rate it is an activity relating to business."

Insurance

(*I*) In *CCE* v. *Stanzen Toyotetsu India Pvt. Ltd.* (2011) 32 STT 244 (Kar), it has been held as under:-

"Insofar as Insurance coverage to the employees is concerned in the course of employment if the employees suffer injury or dies, there is a vicarious liability imposed on the employer to compensate the employee. If the employer employs its own transportation facility in order to cover the risk which also includes the risk of workers who are covered in that statutory establishment. He has to take the insurance policy without which the vehicle cannot go on the road. Under the workman's compensation Act he has to obtain the insurance Policy covering the risk of the employees. The employee State Insurance Act takes care of the health of the employees also and casts an obligation on the employer to provide insurance services. Under these circumstances, this Group Insurance Health Policy though is also a welfare measure is an obligation which is cast

under the Statute that the employer has to obey. Section 38 of the Employees State Insurance Act, 1948, mandates that subject to the provisions of the Act, all employees in factories or establishments to which this Act applies shall be insured in the manner provided by this Act. May be the employees also have to contribute but the employer is under an obligation to take an Insurance policy and contribute his share. Therefore, the said Group Insurance Health Policy taken by the assessee is a service which would constitute an activity relating to business which is specifically included in the input service definition."

9. Counsel for the appellant, Mr. Kinshuk Jain, stated as under :

1. That the expression relating to business used in the above said rule 2(*l*) clearly refers to the activities which are integrally related to the business activity of the assessee in relation to manufacture and clearances of the excisable goods. For example, recruitment services are required for procuring manpower to carry out manufacturing activities and in the office managing day to day work relating to such activities, similarly services relating to quality control is required to maintain/ ensure the quality of the goods to be manufactured, similarly inward / outward transportation service (GTA) is required in procuring raw materials/ consumables / inputs/ capital goods for the manufacturing of the final products and for sending the manufactured/ other goods. Evidently, use of the input service must be integrally connected with the business related to the manufacture of the final product. In a recent judgment in the case of *CCE Chennai* v. *Sundaram Brake Lining Ltd.* [2010 (019) STR 0172 (T)], the hon'ble CESTAT, Chennai held as under :

   'The test laid down in *Maruti Suzuki* (*supra*) for interpreting the expression " used in, or relation to the manufacturer of excisable goods" would have to be followed in respect of input services also. The law permits credit of duty/tax in respect of inputs/inputs services only when the said are used in, or in relation to manufacturer of excisable goods. The law does not provide any other basis. It does not provide for credit on the basis that the value of input/ input service is included in the value of finished excisable goods. Hence, the tests laid down in *Maruti Suzuki* (*supra*) cannot be overlooked. Use of the input service must be integrally connected with the manufacturer of the final product. The input service must have nexus with the process of manufacturer. It has to be necessarily established that the input service is used in or in relation to the manufacturer of the final product. The relevant test would be can the final product emerge without the use of input service in question. When these tests are applied following

the decision of the hon'ble Supreme Court in *Maruti Suzuki* (*supra*), one finds that the impugned outdoor catering service does not meet the same in relation to manufacturer of the finished excisable goods listed in the table in paragraph 2 (para No. 19 of the judgment)'

2. That on the issue of Cenvat Credit pertaining to Outdoor Catering Service, the hon'ble CESTAT, Chennai in the case of *Sundaram Brake Lining Ltd.* ('SBL') (*supra*)] has held that the outdoor catering service cannot be considered as "input service" relating to the business. The CESTAT has observed, inter alia, that the caterers engaged by the respondent supply various food items for consumption by the workers and the staff. It is no one's case that the good items could even be remotely considered as inputs for the various finished excisable goods manufactured by the respondents which are listed in the said table. The decision of the said case has been upheld by the hon'ble Court, Madras [2014 (36) STR 112 (Mad.)] who had dismissed the petition/appeal filed by the appellant against the said judgment of SBL Ltd. In the said case, the CESTAT Chennai has distinguished the case of *GTC Industries* [2008 (012) STR 0468 (Tribunal-LB)] which was subsequently negated by the hon'ble Apex Court in the case of *Maruti Suzuki* (under para 14 of the order). For example, one of the food items "biscuits" is an excisable product on which duty is paid. Neither biscuits can be considered to be input for manufacture of cement, nor the duty paid on biscuits can be allowed as credit for paying duty on such cement.

   The department's case is that when biscuits are not inputs for cement, the service tax paid for supply of biscuits cannot be allowed for paying duty on the cement. Hence, supply of biscuits to the workers engaged in the manufacture of cement cannot be considered as an input service by any stretch of imagination unless the biscuits eaten by the workers can be said to be integrally connected to the manufacture of the finished goods like cement. Moreover, the example also illustrates that the eligibility of credit in respect of any particular input or input service has to be examined not in a general way but only with reference to the particular finished excisable goods and the manufacturing process involved.

3. That while deciding the issue of admissibility of Cenvat credit service tax paid on fright for outward transportation, the Tribunal allowed the credit of service tax paid on fright on outward transportation beyond the place of removal *i.e.* Factory gate or Depot as the case may to the buyer's premises on FOR destination basis. While granting the benefit of credit

of service tax paid on outward freight till the buyer's premises on FOR destination basis, for the period from April 2010 to September 2011, the Tribunal relied on clarification issued in para 8.2 of the CBEC Master Circular No. 97/8/2007 dated 23rd August, 2007 which is as under :

"…….. That for a manufacturer/ consignor, the eligibility to avail credit of the service tax paid on the transportation during the removal of excisable goods would depend upon the place of removal as per the definition. In case of a factory gate sale, from a non duty paid warehouse, or from a duty paid depot (from where the excisable goods are sold, after their clearance from the factory), the determination of the place of removal does not pose much problem. However, there may be situations where the manufacturer/ consignor may claim that the sale has taken place at the destination point because in terms of the said contract/agreement (*i*) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his doorstep ; (*ii*) the seller bore the risk of loss of or damage to the goods during transit to the destination and ; (*iii*) the freight charges were an integral part of the price of goods. In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it case be established by the claimant of such credit that the sale and the transfer of property in goods (in terms of the definition as under section 2 of the Central Excise Act, 1944 as also in terms of the provision under the Sale of Goods Act 1930.)"

4. That whereas with effect from 1st April, 2008, after the amendment, *i.e.,* Substitution of clearance of final product from the place of removal by clearance of final product upto the place of removal, inserted vide Notification No. 10/2008- CE (NT) dated 1st March, 2008 in rule 2(*l*) of the Cenvat Credit Rules, 2004, the clarification issued *vide* para 8.2 of the CBEC Master Circular number 97/8/2007 dated 23rd August, 2007, is applicable in the situation prior to the amendment of rule 2(I) of the Cenvat Credit Rules, 2004 by notification number 10/2008-CE (NT) dated 1st March, 2008.

5. That in this case the Tribunal erred in allowing the credit of Service Tax paid on fright on outward transportation beyond the place of removal, *i.e.,* Factory gate or Depot as the case may be to the buyer's premises on FOR destination basis for the period from April 2010 to September 2011, *i.e.,* after the amendment of rule (*l*) of the Cenvat Credit Rules, 2004. The amendment by notification number 10/2008-CE(NT) dated 1st March, 2008 withe effect from 1st March, 2008 in the rule 2(*l*) *ibid*, was changed

from clearance of final product from the place of removal substituting by clearance of final product up to the place of removal. Therefore, the credit of service tax paid on freight on outward transportation beyond the place of removal, *i.e.,* Factory gate or Depot as the case may be to the buyer's premises on FOR destination basis does not appear to be permissible in law.

6. That Rent-a-cab service is more in the nature of the facility extended to the employees and not in relation to business of manufacture and, therefore, would not qualify as input service. Furthermore, the assessee has not submitted the bifurcation of use of cabs for business purpose or otherwise. It is clearly stated in office order that on perusal of the bills, it was observed that the taxies were engaged by the persons who were not the employees of the assessee and, therefore, it cannot be treated to be used directly or indirectly, in or in relation to manufacture of final product.

7. Auction and Club House service may be useful to the assessee but they fail to be an integral part of the business to effect its efficacy and quality. The business of the assessee can function equally well without these services. The contention of the assessee that the expenses pertained to visits of their employee outside city area in relation to business finds no substance as the expenses incurred relates to recreation and entertainment of the employees.

10. We have heard both the sides.

11. Before coming to the issues of services which are anciliary to the activities which are carried out by the assessee is the main core of the argument of the whole appeal.

12. The question come first is whether rule 4(*c*) will come into operation or not. In view of section 2(*t*), it is very clear that the meaning does not define under the Cenvat Credit Rules, 2004 then the meaning is to be derived from the provisions of the Act.

13. In that view of the matter, though Mr. Ranka contended that 3(2) prohibits it only for the purpose of defence services under 4(*c*) since no other place, the word 'removal' has been defined. In that view of the matter to come out to a conclusion for removal of the goods, the meaning which has been defined under 4(*c*) is required to take into account. Regarding rule 9 which is for the registration, in our considered opinion, the rule 9 of Registration will apply only in a case where assessee deferred payment of excise duty at the time of delivery. In that case, the

registration is required to be given for the purpose of payment of excise duty while taking benefit under the Cenvat Credit Rules, 2004, the assesee has to fulfill the conditions which are required to be operating under the Rules more particularly the input services which is defined under 2(*l*), taking into consideration 2(*t*), the interpretation put forth by the Tribunal issue wise, on the first issue GTA services in view of five High Court judgments referred above, taking view in favour of the assessee, the service which are required to be for the purpose of manufacturing and delivering will come within the purview of 2(*l*), outdoor catering services are also required to be carried out for delivering or manufacturing his also governed by the different four high courts judgments Bombay High Court and Gujarat.

14. In that view of the matter, the same is also required to be decided in favour of assessee.

15. Regarding clearing forward agency, the Tribunal has recorded a finding that from the verification of bills, it is found that transport charges are required to be borne out by the assessee. Therefore, that issue is also required to be decided in favour of assessee.

16. Regarding Cargo Handling Services & Insurance, in view of Gujarat High Court decision (*supra*), the issue is required to be answered in favour of assessee. Regarding Rent a Cab in view of Karnataka High Court decision (*supra*), the issue is required to be answered in favour of assessee.

17. Regarding the issue which has been put forward by Mr. Kinshuk Jain while reading paras 3, 4 of the tribunal, it is clear that it is club activities for going for a sale or any other assigned work. It will be operational, manufacturing activity.

18. In that view of the matter, we confirm the view taken by the Tribunal. The appeals of the Department are required to be dismissed. All the issues are answered in favour of the assessee and against the department.

20. The appeals are dismissed. ❖❖❖

CENTRAL EXCISE ACT

[2018] 4 GSTPT 129 (SC)

SUPREME COURT OF INDIA

CCE

v.

GRASIM INDUSTRIES LTD.

Civil Appeal No.3159 of 2004 with CA Nos.3455/2004, 7272/2005, 2982-2985/2005, 2986/2005, 7143/2005, 2261/2006, 2246-2247/2008, 2934-2935/2008, 3528/2008, 4820/2008, 6695/2008, 2534/2009, 253/2010, 8541/2009, 445/2010, 1382/2010, 2003-2004/2010, 2430/2010, 2363/2010, 7174-7175/2010, 4696/2011, 6984/2011, 2705/2012

Ranjan Gogoi, N V Ramana, R Banumathi, Mohan M. Shantanagoudar, & S Abdul Nazeer

11th May 2018

Section 4(3)(d) defines 'transactional value' by specifically including all value additions made to the manufactured article prior to its clearance as permissible additions to be priced charged for purpose of levy.

Central Excise Act, 1944 – Section 4, read with section 3[corresponds to section 15 of CGST ACT, 2017] – Supply – Taxable Supply, value of – Whether amendment to section 3 by substitution of words 'a duty of excise on all excisable goods' by words 'a duty of excise to be called CENVAT on all excisable goods', not only incorporate essentials of a changed concept of charging of tax on addition to value of goods and services of each stage of production but also envisages in statute what was judicially held to be permissible additions to manufacturing cost and profit.

At this stage, the amendment to section 3 by substitution of the words "a duty of excise on all excisable goods" by the words "a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods" is conspicuous. The amendment of section 3 not only incorporates the essentials of a changed concept of charging of tax on additions to the value of goods and services at each stage of production but also engrafts in the statute what was judicially held to be permissible additions to the manufacturing cost and manufacturing profit in as held in *Bombay Tyre International Ltd*. [1975] 1 SCC 499.This fundamental change by

introduction of the concept underlying value-added taxation in the provisions of section 3 really find reflection in the definition of 'transaction value' as defined by section 4(3)(d) besides incorporating what was explicitly held to be permissible in *Bombay Tyre International Ltd.* (*supra*). Section 4(3)(d), thus, defines 'transaction value' by specifically including all value additions made to the manufactured article prior to its clearance, as permissible additions to be price charged for purpose of the levy.

Accordingly, the Supreme Court answered the reference by holding that the measure of the levy contemplated in section 4 will not be controlled by the nature of the levy. So long a reasonable nexus is discernible between the measure and the nature of the levy both sections 3 and 4 would operate in their respective fields. The view expressed in *Bombay Tyre International Ltd*. (*supra*) is the correct exposition of the law in this regard. Further, 'transaction value', as defined in section 4(3)(*d*) brought into force by the Amendment Act, 2000, statutorily engrafts the additions to the 'normal price' under the old section 4 as held to be permissible in *Bombay Tyre International Ltd***.** (*supra*) besides giving effect to the changed description of the levy of excise introduced in section 3 by the Amendment of 2000. In fact, there is no discernible difference in the statutory concept of 'transaction value' and the judicially evolved meaning of 'normal price'.

Cases referred :

A K Roy v. *Voltas Ltd.* [1973] 3 SCC 503.

Atic Industries Ltd. v. *H H Dewa, Asstt. CCE* [1975] 1 SCC 499.

CCE v. *Acer India Ltd.* [2004] 8 SCC 173.

Governor-General in Council v. *Province of Madras* AIR (32) 1945 PC 98.

Province of Madras v. *Messrs. Boddu Paidanna & Sons* AIR (29) 1942 FC 33.

Union of India v. *Bombay Tyre International Ltd.* [1980] 1 SCC 467.

JUDGMENT

RANJAN GOGOI, J

1. First, the facts :

The respondent-Assessees are manufacturers of dissolved and compressed industrial gases, liquid chlorine and other allied products. Cotton yarn and Post Mix Concentrate manufactured by two other individual assessees are also in issue. These articles are supplied to the customers in tonners, cylinders, carboys, paper cones and HDPE bags, BIBs, pipeline and canisters, which may be more

conveniently referred to as "containers". In some cases the containers are provided by the Assessees to the customers on rent whereas in others the customers bring their own containers. For making available or for filling up the containers provided by the customers the Assessees charge the customers certain amounts under different heads, *viz*., packing charges, wear and tear charges, facility charges, service charges, delivery and collection charges, rental charges, repair and testing charges. The Assessees treat the said amounts as their income from ancillary or allied ventures.

2. The issue arising is whether the aforesaid charges realised by the Assessees are liable to be taken into account for determination of value for the purpose of levy of duty in terms of section 4 of the Central Excise Act, 1944 ('the Act') as amended with effect from 1st July, 2000.

3. Perceiving a conflict between the two decisions of this court in *Union of India* v. *Bombay Tyre International Ltd*. [1980] 1 SCC 467 and *Commissioner of Central Excise, Pondicherry* v. *Acer India Ltd*. [2004] 8 SCC 173, a two judge Bench of this Court by order dated 30th July, 2009 {[2009] 14 SCC 596} referred the following questions for an answer by a larger bench:

"1. Whether section 4 of the Central Excise Act, 1944 (as substituted with effect from 1st July, 2000) and the definition of "transaction value" in clause (*d*) of subsection (3) of section 4 are subject to section 3 of the Act?

2. Whether sections 3 and 4 of the Central Excise Act, despite being interlinked, operate in different fields and what is their real scope and ambit?

3. Whether the concept of "transaction value" makes any material departure from the deemed normal price concept of the erstwhile section 4(1)(*a*) of the Act?"

4. As the decisions in *Bombay Tyre International Ltd*. (*supra*) and *Acer India Ltd*. (*supra*) were rendered by Benches of Three hon'ble Judges of this Court, the above questions were referred by order dated 30th March, 2016 {[2016] 6 SCC 391} to an even larger Bench. This is how we are in seisin of the matter.

5. What is excise duty and what is the relationship between the nature of the duty and the measure of the levy are the two precise questions that would arise for determination in the present reference.

6. On first principles, there can be no dispute. Excise is a levy on manufacture

and upon the manufacturer who is entitled under law to pass on the burden to the first purchaser of the manufactured goods. The levy of excise flows from a constitutional authorisation under Entry 84 of List I of the Seventh Schedule to the Constitution of India. The stage of collection of the levy and the measure thereof is, however, a statutory function. So long the statutory exercise in this regard is a competent exercise of legislative power, the legislative wisdom both with regard to the stage of collection and the measure of the levy must be allowed to prevail. The measure of the levy must not be confused with the nature thereof though there must be some nexus between the two. But the measure cannot be controlled by the rigors of the nature. These are some of the settled principles of laws emanating from a long line of decisions of this Court which we will take note of shortly. Do these principles that have withstood the test of time require a rethink is the question that poses for an answer in the present reference.

7. At this stage, it may be necessary to specifically take note of the provisions of sections 3 and 4 as originally enacted and as amended from time-to-time.

Section 3

Section 3 of the Act in force prior to amendment by Finance Act 2000 (Act 10 of 2000)	Relevant portion of section 3 as substituted/amended (with effect from 12th May. 2000) by section 92 of the Finance Act. 2000 (No.10 of 2000)
3. Duties specified in the First Schedule to be levied. - (1) There shall be levied and collected in such manner as may be prescribed,- (*a*) a duty of excise on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 ;....	*3. Duties specified in [the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985] to be levied.-* There shall be levied and collected in such manner as may be prescribed,- (*a*) a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods which are produced or manufactured in India as, and at the rates, set forth in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) ;....

Section 4

Section 4 as originally enacted (in the Central Excise and Salt Act, 1944),	Section 4 as amended by Amendment Act No.22 of 1973	Section 4 as amended by Finance Act, 2000 with effect from 1st July, 2000

Determination of value for the purposes of duty - Where under this Act any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be the wholesale cash price for which an article of the like kind and quality is sold or is capable of being sold for delivery at the place of manufacture and at the time of its removal therefrom, without any abatement of deduction whatever except trade discount and the amount of duty then payable.	*Valuation of excisable goods for purposes of charging of duty of excise.*- (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be- (a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale : Provided that- (*i*) where, in accordance with the normal practice of the wholesale trade in such goods, such goods are sold by the assessee at different prices to different classes of buyers (not being related persons) each such price shall, subject to the existence of the other circumstances specified in clause (a), be deemed to be the normal price of such goods in relation to each such class of buyers; (*ii*) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything contained in clause (*iii*) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;	*Valuation of excisable goods for purposes of charging of duty of excise.* - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall - (*a*) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of goods are not related and the price is the sole consideration for the sale, be the transaction value; (*b*) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed. (2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3. (3) For the purpose of this section,- (*a*) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent; (*b*) persons shall be deemed to be "related" if - (*i*) they are interconnected undertakings; (*ii*) they are relatives; (*iii*) amongst them the buyer is a relative and distributor of the assessee, or a subdistributor of such distributor; or

	(*iii*) where the assessee so arranges that the goods are generally not sold by him in the course of wholesale trade except to or through a related person, the normal price of the goods sold by the assessee to or through such related person shall be deemed to be the price at which they are ordinarily sold by the related person in the course of wholesale trade at the time of removal, to dealers (not being related persons) or where such goods are not sold to such dealers, to dealers (being related persons) who sell such goods in retail; (*b*) where the normal price of such goods is not ascertainable for the reason that such goods are not sold or for any other reason, the nearest ascertainable equivalent thereof determined in such manner as may be prescribed. (2) Where, in relation to any excisable goods the price thereof for delivery at the place of removal is not known and the value thereof is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery shall be excluded from such price. (3) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under subsection (2) of section 3. (4) For the purposes of this section,- (*a*) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent; (*b*) "place of removal" means- (*i*) a factory or any other place or premises of production or manufacture of the excisable goods; or	(*iv*) they are so associated that they have interest, directly or indirectly, in the business of each other. Explanation. - In this clause - (*i*)"inter-connected undertakings" shall have the meaning assigned to it in clause (*g*) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (64 of 1969) ; and (*ii*) "relative" shall have the meaning assigned to it in clause (41) of section 2 of the Companies Act, 1956 (1 of 1956); (*c*) "place of removal" means - (*i*) a factory or any other place or premises of production or manufacture of the excisable goods ; (*ii*) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed; (*d*) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising

	(*ii*) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty, from where such goods are removed; (*c*) "related person" means a person who is so associated with the assessee that they have interest, directly or indirectly, in the business of each other and includes a holding company, a subsidiary company, a relative and a distributor of the assessee, and any sub- distributor of such distributor. *Explanation*. – In this clause" holding company"," subsidiary company and" relative" have the same meanings as in the Companies Act, 1956 ; (1 of 1956) (*d*) "value", in relation to any excisable goods,- (*i*) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee. *Explanation*.- In this sub- clause," packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound; (*ii*) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale.	or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

	(*e*) "wholesale trade" means sales to dealers, industrial consumers, Government, local authorities and other buyers, who or which purchase their requirements/otherwise than in retail.	

8. It may be appropriate, at this stage, to make a brief narration of the developments in the particular branch of fiscal jurisprudence which is in issue in the present cases. The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, (Central Provinces and Berar Act No.XIV of 1938) authorised the levy and collection from every retail dealer, as defined by the Act, a tax on the retail sales of motor spirits and lubricants at the rate of five per cent on the value of such sales. The levy was challenged and what arose for decision before the Federal Court on a reference, made by the Governor General under section 213 of the Government of India Act, 1935 (often referred to as "the Constitution Act") is the question whether the said levy was a duty of excise under Entry 45 of List-I in the Seventh Schedule to the Constitution Act or a tax on sale of goods under Entry 48 of List II of the said Schedule. While the eventual answer in the reference holding the levy to be a tax on sale of goods and therefore within the competence of the Provincial Legislature is of no consequence to the present issue, what may require a specific notice is that Entry 45 which empowered the Federal Legislature to make laws with respect to "duties of excise on tobacco and other goods manufactured or produced in India; except..." corresponds to Entry 84 of List-I of the Seventh Schedule to the Constitution of India.

9. Some extracts from the opinion rendered by Chief Justice Gwyer (all the Judges on the Bench gave their own opinions while agreeing to the eventual conclusion) would throw light on the nature of the levy of excise and is, therefore, being recollected below :

> 'The federal legislative power extends to making laws with respect to duties of excise on goods manufactured or produced in India. "Excise" is stated in the Oxford Dictionary to have been originally accise", a word derived through the Dutch from the late Latin accensare, to tax; the modern form, which ousted accise" at an early date, being apparently due to a mistaken derivation from the Latin excidere, to cut out. It was at first a general word for a toll or tax, but since the 17th century it has acquired in the United Kingdom a particular, though not always precise, signification. *The primary meaning of "excise duty" or "duty of excise" has come to be that of a tax on certain articles of luxury (such as spirits, beer or tobacco) produced or manufactured in the United Kingdom,*

and it is used in contradistinction to customs duties on articles imported into the country from elsewhere. At a later date the licence fees payable by persons who produced or sold excisable articles also became known as duties of excise; and the expression was still later extended to licence fees imposed for revenue, administrative, or regulative purposes on persons engaged in a number of other trades or callings. Even the duty payable on payments for admission to places of entertainment in the United Kingdom is called a duty of excise; and, generally speaking, the expression is used to cover all duties and taxes which, together with customs duties, are collected and administered by the Commissioners of Customs and Excise. But *its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. I am satisfied that is also its primary and fundamental meaning in India; and no one has suggested that it has any other meaning in Entry (45)....*

...There can be no reason in theory why an excise duty should not be imposed even on the retail sale of an article, if the taxing Act so provides. S*ubject always to the legislative competence of the taxing authority, a duty on home produced goods will obviously be imposed at the stage which the authority find to be the most convenient and the most lucrative, wherever it may be; but that is a matter of the machinery of collection, and does not affect the essential nature of the tax.* The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends; and it continues to be an excise duty, that is, a duty on home-produced or home-manufactured goods, no matter at what stage it is collected. The definition of excise duties is, therefore, of little assistance in determining the extent of the legislative power to impose them; for the duty imposed by a restricted legislative power does not differ in essence from the duty imposed by an extended one.

It was argued on behalf of the Provincial Government that an excise duty was a tax on production or manufacture only and that it could not therefore be levied at any later stage. Whether or not there be any difference between a tax on production and a tax on the thing produced, this contention, no less than that of the Government of India, confuses the nature of the duty with the extent of the legislative power to impose it. Nor, for the reasons already given, is it possible to agree that in no circumstances could an excise duty be levied at a stage subsequent to production or manufacture." (emphasis supplied)

10. The issue was considered further in *The Province of Madras* v. *Messrs. Boddu Paidanna & Sons* AIR (29) 1942 FC 33 (from Madras. The following observation would be relevant.

"In 1939 FCR 18 the opinions expressed were advisory opinions only, but we do not think that we ought to regard them as any less binding upon us on that account. We accept, therefore, the general division between the Central and Provincial spheres of taxation which commended itself to the majority of the Court in that case.... They recognized that the expression 'duty of excise' is wide enough to include a tax on sales ; but where power is expressly given to another authority to levy a tax on sales, it is clear that "duty of excise" must be given a more restricted meaning than it might otherwise bear. On the other hand the fact that "duty of excise" is itself an expression of very general import is no reason at all for refusing to give to the expression "tax on sales" the meaning which it would ordinarily and naturally convey. In these circumstances the question at issue in the present appeal appears to us to lie within a very small compass.

The duties of excise which the Constitution Act assigns exclusively to the Central Legislature are,- according to the 1939 FCR 18, duties levied upon the manufacturer or producer in respect of the manufacture or production of the commodity taxed. The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods. Plainly a tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer ; but it is levied upon him qua seller and not qua manufacturer or producer.

.... If the taxpayer who pays a sales tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be an overlapping in one sense ; but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts. There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed, or given away. A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Excise Acts) when the commodity leaves the factory for the first time, and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example, been destroyed in the factory itself. It is the fact of manufacture which attracts the duty, even though it may be collected later ; and we may draw attention to the Sugar Excise Act in which it is specially provided that the duty is payable not only in respect of sugar which is issued from the factory but also in respect of sugar which is consumed within the factory. In the case of a sales tax, the liability to tax arises on the

occasion of a sale, and a sale has no necessary connexion with manufacture or production. The manufacturer or producer cannot of course sell his commodity unless he has first manufactured or produced it; but he is liable, if at all, to a sales tax because he sells and not because he manufactures or produces; and he would be free from liability if he chose to give away everything which came from his factory."

11. The early views on the nature of excise duty as a levy and the stage of collection thereof would make it clear that though the impost is on the manufacture of an article the point of collection of the same need not necessarily coincide with the time of manufacture. The stage of collection can and usually is a matter of administrative convenience and such stage, normally, is the stage of clearance of article when it, for the first time, enters the trade for sale. The above position was affirmed by the Privy Council in *Governor-General in Council* v. *Province of Madras* AIR (32) 1945 Privy Council 98 wherein it was, inter alia, held as follows :

"The term "duty of excise" is a somewhat flexible one: it may, no doubt, cover a tax on first and, perhaps, on other sales: it may in a proper context have an even wider meaning. An exhaustive discussion of this subject, from which their Lordships have obtained valuable assistance, is to be found in the judgment of the Federal Court in 1939 FCR. 18. Consistently with this decision, their Lordships are of opinion that a duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax upon goods not upon sales or the proceeds of sale of goods. Here again, their Lordships find themselves in complete accord with the reasoning and conclusions of the Federal Court in the *Boddu Paidanna* case. The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the exciseable article leaves the factory or workshop for the first time on the occasion of its sale. But that method of collecting the tax is an accident of administration; it is not of the essence of the duty of excise, which is attracted by the manufacture itself."

12. The above views received the consideration of this Court in *R C Jall Parsi* v. *Union of India* AIR 1962 SC 1281 wherein this court held that while excise duty is essentially a duty on manufacture which is passed on to the consumer, the stage of collection, subject to legislative competence of the taxing authority,

could be at any stage convenient so long the character of the levy i.e. duty on manufacture is not altogether lost. The further view expressed was to the effect that "the method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience."

13. It will hardly be necessary to reiterate the long lines of pronouncements that have consistently followed the above view, except to make a little detailed reference to *Bombay Tyre International Ltd.* (*supra*), not only because the true ratio of the decision in the said case has to be understood for the purpose of this reference so as to deal with the perceived conflict with *Acer India Ltd.* (*supra*) but also on account of the fact that the subject in issue had received a full and detailed consideration of this court.

14. In *Bombay Tyre International Ltd.* (*supra*) the issue, shortly put, was whether determination of assessable value for the levy of excise duty can be only on the manufacturing cost and the manufacturing profit. It was contended before this Court, by relying on the decision of this court in *A K Roy* v. *Voltas Ltd.* [1973] 3 SCC 503, that having regard to the character of the levy the measure must be restricted thereto. The contention was rejected by referring to a long line of precedents including those referred to herein above to hold that "the levy of a tax is defined by its nature. while the measure of the tax may be assessed by its own standard. It is true that the standard adopted as the measure of the levy may indicate the nature of the tax but it does not necessarily determine it.". The further view expressed in *Bombay Tyre International Ltd.* (*supra*) is that merely because excise is a levy on manufactured goods the value of the excisable article for the purpose of levy cannot be limited to only the manufacturing cost plus manufacturing profit. This Court went on to hold that "a broader based standard of reference may be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy."

15. A reading of section 4 of the Act, as originally enacted; as amended by 1973 Amendment; and as further amended by 2000 Amendment would clearly show that the value of the article for the purposes of levy of ad valorem duty was with reference to the price i.e. 'normal price' prior to the 2000 Amendment and thereafter with reference to the 'transaction value' which has been defined (already extracted) to mean "the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price.".

16. The measure for the purpose of the levy is, therefore, essentially the price charged in respect of a transaction which must necessarily be at arm's length. Inclusions and additions that enrich the value of the Article till its clearance are

permissible additions to the price that can be taken into account to determine 'value' under the old section 4 (prior to 2000) as well as the 'transaction value' under the amended section effective from 1st July, 2000. While such additions have been judicially held to be permissible under the old Act in *Bombay Tyre International Ltd*. (*supra*) the very same heads have been statutorily engrafted by the amendment made in 2000.

17. The price charged for a manufactured article at the stage when the article enters into the stream of trade in order to determine the value/transaction value for computation of the quantum of excise duty payable does not come into conflict with the essential character or nature of the levy. The measure is the value and value is related to price. The price charged at the stage of clearance, in addition to manufacturing cost and manufacturing profit, can include certain value additions and inclusions which enrich the value of the product to make it suitable for sale or to facilitate such sale. At this stage, impost has nothing to do with the sale. The impost is on manufacture. But it is the value upto the stage of the first sale that is taken as the measure. Doing so does not introduce any inconsistency between the nature and character of the levy and the measure adopted.

18. The above aspect had been considered in *Bombay Tyre International Ltd.* (*supra*) on a specific contention advanced on behalf of the Assessees that the deductions under the following heads should be made from the sale price in the following terms :

> '48. We now proceed to the question whether any post-manufacturing expenses are deductible from the price when determining the "value" of the excisable article. The old section 4 provided by the Explanation thereto that in determining the price of any article under that section no abatement or deduction would be allowed except in respect of trade discount and the amount of duty payable at the time of the removal of the article chargeable with duty from the factory or other premises aforesaid. The new section 4 provides by sub-section (2) that where the price of excisable goods for delivery at the place of removal is not known and the value is determined with reference to the price for delivery at a place other than the place of removal, the cost of transportation from the place of removal to the place of delivery has to be excluded from such price. The new section 4 also contains sub-section (4)(*d*)(*ii*) which declares that the expression "value" in relation to any excisable goods, does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such

goods sold or contracted for sale. Now these are clear provisions expressly providing for deduction, from the price, of certain items of expenditure. But learned counsel for the assessees contend that besides the heads so specified a proper construction of the section does not prohibit the deduction of other categories of post-manufacturing expenses. It is also urged that although the new section 4(4)(*d*)(*i*) declares that in computing the "value" of an excisable article, the cost of packing shall be included, the provision should be construed as confined to primary packing and as not extending to secondary packing. The heads under which the claim to deduction is made are detailed below:

(*1*) Storage charges.

(*2*) Freight or other transport charges, whether specific or equalised.

(*3*) Outward handling charges, whether specific or equalised.

(*4*) Interest on inventories (stocks carried by the manufacturer after clearance).

(*5*) Charges for other services after delivery to the buyer.

(*6*) Insurance after the goods have left the factory gate.

(*7*) *Packing charges.*

(*8*) Marketing and Selling Organisation expenses, including advertisement and publicity expenses. (emphsise supplied)

19. The above issue was answered by saying -

"50. We shall now examine the claim. It is apparent that for the purpose of determining the "value", broadly speaking both the old section 4(*a*) and the new section 4(1)(*a*) speak of the price for sale in the course of wholesale trade of an article for delivery at the time and place of removal, namely, the factory gate. Where the price contemplated under the old section 4(*a*) or under the new section 4(1)(*a*) is not ascertainable, the price is determined under the old section 4(*b*) or the new section 4(1)(*b*). *Now, the price of an article is related to its value (using this term in a general sense), and into that value have poured several components, including those which have enriched its value and given to the article its marketability in the trade. Therefore, the expenses incurred on account of the several factors which have contributed to its value upto the date of sale, which apparently would be the date of delivery, are liable to be included.* Consequently, where the sale is effected at the factory gate, expenses incurred by the assessee upto the date of delivery on account of storage charges, outward handling charges, interest on inventories (stocks carried by the manufacturer after clearance), charges for other services after delivery to

the buyer, namely aftersales service and marketing and selling organisation expenses including advertisement expenses cannot be deducted. *It will be noted that advertisement expenses, marketing and selling organisation expenses and after-sales service promote the marketability of the article and enter into its value in the trade.* Where the sale in the course of wholesale trade is effected by the assessee through its sales organisation at a place or places outside the factory gate, the expenses incurred by the assessee upto the date of delivery under the aforesaid heads cannot, on the same grounds, be deducted. But the assessee will be entitled to a deduction on account of the cost of transportation of the excisable article from the factory gate to the place or places where it is sold. The cost of transportation will include the cost of insurance on the freight for transportation of the goods from the factory gate to the place or places of delivery." (emphasis supplied)

20. We find no room whatsoever for any disagreement with the above view taken by this court in *Bombay Tyre International Ltd.* (*supra*). It is a view consistent with what was held by the Federal Court and the Privy Council in *Central Provinces and Berar* (*supra*), *Boddu Paidanna* (*supra*) and *Province of Madras* (*supra*) and the decisions that followed thereafter including the decision in *Voltas Ltd.* (*supra*) and *Atic Industries Ltd.* v. *H H Dewa, Asstt. Collector of Central Excise* [1975] 1 SCC 499 the true purport of which was explained in *Bombay Tyre International Ltd*. (*supra*). Both the above opinions were clarified to mean that neither of them lay down any proposition to the effect that the excise duty can be levied only on the manufacturing cost plus the manufacturing profit only.

21. At this stage, the amendment to section 3 by substitution of the words "a duty of excise on all excisable goods" by the words "a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods" is conspicuous. The amendment of section 3 to the Act not only incorporates the essentials of a changed concept of charging of tax on additions to the value of goods and services at each stage of production but also engrafts in the statute what was judicially held to be permissible additions to the manufacturing cost and manufacturing profit in *Bombay Tyre International Ltd*. (*supra*). This fundamental change by introduction of the concept underlying value-added taxation in the provisions of section 3 really find reflection in the definition of 'transaction value' as defined by section 4(3)(*d*) of the Act besides incorporating what was explicitly held to be permissible in *Bombay Tyre International Ltd.* (*supra*). Section 4(3)(*d*), thus, defines 'transaction value' by specifically including all value additions made to the manufactured article prior to its clearance, as permissible additions to be price charged for purpose of the levy.

22. This would bring us to a consideration of the decision of this Court in *Acer India Ltd*. (*supra*). The details need not detain us. Softwares which were duty free items and could be transacted as softwares came to be combined with the computer hardware which was a dutiable item for purposes of clearance. The Revenue sought to take into account the value of the computer software for the purposes of determination of 'transaction value' with regard to the computer. This Court negatived the stand of the Revenue taking the view that when software as a separate item was not dutiable its inclusion in the hard-disk of the computer cannot alter the duty liability of the software so as to permit the addition of the price/ value of the software for the purpose of levy of duty. It is in the above context that the decision of this court in *Acer India Ltd.* (*supra*) has to be understood. The observations made in paragraph 84 thereof to the effect that 'transaction value' defined in section 4(3)(*d*) of the Act would be subject to the charging provisions contained in section 3 of the Act will have viewed in the context of a situation where an addition of the value of a non-dutiable item was sought to be made to the value of a dutiable item for the purpose of determination of the transaction value of the composite item. This is the limited context in which the subservience of section 4(3)(d) to section 3 of the Act was expressed and has to be understood. If so understood, we do not see how the views expressed in paragraph 84 of *Acer India Ltd.* (*supra*) can be read to be in conflict with the decision of *Bombay Tyre International Ltd*. (*supra*).

23. Accordingly, we answer the reference by holding that the measure of the levy contemplated in section 4 of the Act will not be controlled by the nature of the levy. So long a reasonable nexus is discernible between the measure and the nature of the levy both section 3 and 4 would operate in their respective fields as indicated above. The view expressed in *Bombay Tyre International Ltd.* (*supra*) is the correct exposition of the law in this regard. Further, we hold that "transaction value" as defined in section 4(3)(d) brought into force by the Amendment Act, 2000, statutorily engrafts the additions to the 'normal price' under the old section 4 as held to be permissible in *Bombay Tyre International Ltd.* (*supra*) besides giving effect to the changed description of the levy of excise introduced in section 3 of the Act by the Amendment of 2000. Infact, we are of the view that there is no discernible difference in the statutory concept of 'transaction value' and the judicially evolved meaning of 'normal price'.

24. The above answers would comprehend the issues specifically arising in all the three questions that have been referred for our opinion.

IGST ACT

[2018] 4 GSTPT 145 (AAR)

AUTHORITY FOR ADVANCE RULING – WEST BENGAL

GLOBAL REACH EDUCATION SERVICES (P.) LTD., *In re.*

Case No. 05 of 2018

Vishwanath & Partha Sarathi Dey, Members

21st March, 2018

Services of the intermediary service provider to the foreign universities do not qualify as "export of service" and is, therefore, taxable under the Act.

IGST Act, 2017 – Section 13 – Place of supply – Intermediary service – Whether services of promotion of courses of foreign universities would amount to export of service or not.

The applicant is facilitating recruitment/enrolment of students to foreign universities. Promotional service is incidental and ancillary to the principal supply and the applicant is paid consideration in the form of commission, based on performance in recruiting students, as a percentage of the tuition fee collected from the students enrolled through the applicant. It is, therefore, clear that whatever services the applicant provisions are provided only as a representative of the university and not as an independent service provider. Being an intermediary service provider, the place of the applicant's supply shall be determined under section 13(8)(b) and not under section 13(2). The place of supply under the legal framework is the territory of India. As the condition under section 2(*6*)(*iii*) is not satisfied, the applicant's service to the foreign universities does not qualify as 'export of service', and is, therefore, taxable under the GST Act.

Applicant's representative heard Sri Pulak Kumar Saha, CFA, Partner, Price Waterhouse & Co LLP

JUDGMENT

1. The applicant states that it provides Overseas Education Advisory whereby it promotes the courses of foreign universities among prospective students and wants a ruling on whether the service provided to the Universities abroad is to be considered "export" within the meaning of section 2(6) of the Integrated Goods and Services Act, 2017, ('the IGST Act'), and, therefore, a zero-rated supply under the CGST / WBGST Act 2017 ('GST Act').

2. The applicant submits that it is providing the above services to the foreign universities, for which it receives consideration in convertible foreign exchange. The service recipient is located outside India and is not an establishment of a distinct person in accordance with *Explanation 1* to section 8 of the IGST Act. The place of supply of the services is outside India in terms of section 13(2) of the IGST Act. The supply of services by the applicant should, therefore, be treated as export of service within the meaning of section 2(6) of the IGST Act.

3. The argument of the applicant is based on the following premises. It is provisioning service of promotion of the university courses among the prospective students and receives consideration for it as an independent service provider. In other words, it is not providing any intermediary service. The place of supply should, therefore, be determined under section 13(2) and not under section 13(8) (*b*) of the IGST Act. The place of supply should, therefore, be the location of the recipient outside India. This being the case, its service to the foreign universities should be treated as export within the meaning of section 2(6) of the IGST Act.

4. The concerned officer has objected to admission of the application on the ground that determination of the place of supply is beyond the jurisdiction of the Advance Ruling Authority. The objection appears misplaced. Although place of supply is an important factor in determining whether a provisioning of service qualifies as export, the issue, in the present context, is not determination of place of supply, but whether the applicant is providing the recipient an intermediary service and making a taxable supply of service and liable to pay tax thereon. Advance ruling is admissible on this question under section 97(2)(*a*) and (*e*) of the GST Act.

5. There is no dispute regarding what the place of supply should be if the applicant is an agent providing an intermediary service to the foreign universities. Had there been such a dispute, this Authority would rather not provide a ruling on this issue at all. This Authority enters the question of whether the service provided by the applicant is classifiable as export from the limited angle of probing whether the applicant is providing an intermediary service.

6. The applicant also declares that the question raised in the Application is not pending or decided in any proceeding under any provision of the Acts referred to above. The Application is, therefore, admitted.

7. The applicant is stated to be engaged in Overseas Education Advisory whereby the various courses of foreign Universities are promoted in India among prospective students. The applicant has tied up with various Universities all over the world. These Universities engage entities like the applicant for promotional and marketing activities for promotion of the courses taught by them and making the prospective students aware about the course fee and other associated costs,

market intelligence about the latest educational trend in the territory and ensuring payment of the requisite fees to the Universities if the prospective students decide upon pursuing any course promoted by the applicant. The applicant receives consideration in the form of commission from the foreign University for these services rendered to prospective students. The applicant, therefore, submits that the principal supply, therefore, is the service of promoting the courses of the Universities abroad, and the services incidental thereto are naturally bundled to the composite supply of business auxiliary services.

8. The applicant further states that it is not acting as an intermediary or agent in terms of section 2(13) of the IGST Act, as it supplies the main service (*i.e.*, promotion of the University courses) on its own account. It does not facilitate provision of service by such Universities to the students. Its role is limited to only promoting the courses in India and thus, earns consideration out of it. The applicant says that the agreements between the Universities abroad and the applicant clarify that the relationship between them is not one of Principal and Agent. This being the case, the place of supply should be the location of the recipient outside India in terms of section 13(2) of the IGST Act.

9. The applicant submits at the time of Personal Hearing a copy of the Agreement with the Australian Catholic University ('the Agreement'), in support of its argument. Since this Agreement with a specific University, namely, Australian Catholic University, has been submitted by the applicant to further its arguments, the Agreement may be considered as the prototype of all Agreements made with the various Universities abroad and all discussions regarding the Agreement is to be taken as relevant to and applicable for all the Agreements entered into by the applicant with the Universities abroad.

10. The applicant further submits that it receives consideration for providing the above services to the foreign Universities, in convertible foreign exchange. The service recipient is located outside India and is not an establishment of a distinct person in accordance with *Explanation 1* to section 8 of the IGST Act. The place of supply of the services is outside India in terms of section 13(2) of the IGST Act. The supply of services by the applicant should, therefore, be treated as Export of Service within the meaning of section 2(6) of the IGST Act.

11. section 2(6) of the Integrated Goods And Services Tax Act, 2017, reads as "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;"

12. It is, thus, evident from the above citation that in the case of Export of Services all the conditions as laid down under section 2(6) of IGST Act 2017 is to be followed in totality without any violation, and that there is no scope of partial compliance of the conditions laid down therein.

13. In the copy of the Agreement the applicant is defined as an Education agent (Definition Clause 1.1). Under clause 2 of the Background forming part of the Agreement, it is stated that the University engages Education Agent to be its representative in the territory and on the terms set out in the Agreement. However, it is clarified under clause 2.3(*b*) that the Education Agent, engaged by the University is an independent contractor, is not an agent of the university. The two clauses are clearly contradictory.

14. Clause 2.3 of the Agreement is stated below for ready reference :

"2.3 The Education Agent is engaged as an independent contractor by the University. For the avoidance of doubt the relationship between the Education Agent engaged under this agreement under University :

(*a*) is not one of employer and employee ; and

(*b*) is not one of principal and agent."

15. The nature of the relationship should, therefore, be ascertained from other clauses of the Agreement.

Under Clause 3.1 of the Agreement the Education Agent must promote the courses of the University to find out suitable prospective students and assist in recruitment of students in accordance with the procedures and requirements of the University. The Education Agent must assist the prospective students with all necessary information and assistance in completing the forms and submitting them to the University. While doing so, the Education Agent must meet the enrolment and other performance targets mutually agreed upon. Clause 4.1 puts the Education Agent under obligation to collect all fees and charges payable from the prospective students and forward the same to the University and ensure that relevant fees and charges accompany all applications and acceptance of offer documents. The University pays consideration in the form of commission to the Education Agent under Clause 8 read with Schedule I of the Agreement as a percentage of

the tuition fee for each student recruited/enrolled through the Education Agent, provided, the University has received the respective course fees.

16. It is clear from the above discussion that the main service provided by the applicant is facilitating recruitment of students and the consideration is paid as commission on the basis of course fee and recruitment through the applicant. Promotion of the courses is incidental to the above principal supply. While providing the above service the applicant is subject to audit by the University under clause 9.2 of the Agreement, which includes fulfilling recruitment targets. The University will review the applicant's performance under clause 9.4, especially with respect to recruitment targets achieved. The applicant cannot claim any consideration for its promotional activity unless the students get enrolled through it. If the students get enrolled directly by the University through distant education or online services, the applicant will not be paid any consideration whether or not it has provided any promotional service (Clause 8.3 of the Agreement). In fact, the applicant is not allowed to undertake any promotional or advertising activity without prior written approval from the University [*clause 4.4(h) of the Agreement*]. Apart from the above consideration received from the University, the applicant is not allowed to receive any fees or charges from the students or deduct anything from the charges or fees payable by the students to the University [*clause 4.4(i) of the Agreement*].

17. The applicant argues at the time of Personal Hearing that payment of consideration based on recruitment is merely the mechanics for determining the quantum of consideration payable. It has no bearing on the applicant's standing as an independent service provider. We fail to appreciate the argument's merit. If promotion of university courses were the principal supply, the applicant should have been remunerated for its promotional activity no matter whether it facilitates recruitment or not. If the applicant receives 'commission' based on recruitment/enrolment through it, the principal supply is clearly facilitating the foreign university in recruitment/enrolment with promotional services ancillary to the principal supply.

18. It is evident from the above discussion that the applicant is facilitating recruitment/enrolment of students to foreign Universities. Promotional service is incidental and ancillary to the above principal supply and the applicant is paid consideration in the form of Commission, based on performance in recruiting students, as a percentage of the tuition fee collected from the students enrolled through the applicant. The applicant, therefore, represents the University in the territory of India and acts as its recruitment agent. In fact, clause 2.1 of the Background forming part of the Agreement clearly says, "The University engages

the Education Agent to be its representative to perform the Services from the commencement date in the Territory and on the terms set out in this Agreement until the Expiry date." It is, therefore, clear that whatever services the applicant provisions are provided only as a representative of the University and not as an independent service provider.

19. Being an intermediary service provider, the place of the applicant's supply shall be determined under section 13(8)(b) of the IGST Act and not under section 13(2) of the IGST Act. The place of supply under the above legal framework is the territory of India. As the condition under section 2(6)(*iii*) of the IGST Act is not satisfied, the applicant's service to the foreign universities does not qualify as "Export of Services", and is, therefore, taxable under the GST Act.

In view of the foregoing we rule as under

RULING

The services of the applicant are not "Export of Service" and are taxable under the GST Act.

This ruling is valid subject to the provisions under section 103(2) until and unless declared void under section 104(1) of the GST Act.

CGST ACT

[2018] 4 GSTPT 150 (AAR)

AUTHORITY FOR ADVANCE RULING – GUJARAT

R B CONSTRUCTION COMPANY, *In re.*

ADVANCE RULING NO. GUJ/GAAR/R/2017-18/3
(IN APPLICATION NO. Advance Ruling/SGST&CGST/2017-18/AR/5)

R B Mankodi & G C Jain, Members

17 January 2018

The work of laying of underground pipeline network falls under the definition of "work contract" provided under section 2(119) under the CGST Act, 2017 and the GGST Act, 2017. In respect of that part of supply wherein time of supply is on or after the appointed date, GST is required to be paid. The applicant is therefore, not entitled under section 140(6) to avail input tax credit.

CGST Act, 2017 – Section 2(119) read with Section 140. Works contract - whether work executed and invoices to be raised for pending event of testing and commissioning after implementation of GST amounted to support of works contract

The underground pipeline network created by joining the pipes either by lamination or welding cannot be dismantled without substantial damage and thus cannot be reassembled, therefore the pipeline network so created would be considered as immovable. As the applicant is engaged in the activity of construction of pipeline network which become immovable property wherein transfer of property in goods is involved, the said activity falls within the definition of "work contract". As per clause 6(a)of the Second Schedule read with section 7, the composite supply, named works contract as defined in clause (119) of section 2 shall be treated as a supply of services.

JUDGMENT / ORDER

1. The applicant submitted that they had bid in a tender issued by the Rajkot Municipal Corporation ('RMC') to supply pipes, lay the pipes in desired formation as planned by the Government and to test the pipes against the leakages and then commission the project. The work to be executed as per the tender was to construct a pipeline network as per the specifications and design of the RMC. The release of the payment of the applicant fixed by the RMC is as follows :-

Sl. No.	*Event / Milestone*	*% of payment released*
A	Supply of pipes at location specified by RMC	70
B	Laying of pipes	20
C	Testing and commissioning of network of pipeline	10

Out of each milestone, a certain portion of the payment is withheld by RMC as retention. Based on the schedule of payments, the applicant had to raise an invoice, out of which the Government would retain some part as retention and release the balance amount. Upon final completion and testing of the network of the pipeline, the balance dues of the applicant are released marking the completion of the project.

2. The applicant was holding registration under Gujarat Value Added Tax Act and was holding a permission to pay tax on a lump sum basis under the erstwhile provisions of the Gujarat Value Added Tax Act. The nature of the work of the tender being a works contract, the applicant used to discharge its liability as per

the rates specified in the Gujarat Value Added Tax Act without claiming any benefit of the input tax credit on any items purchased (big or small) and used in the work as specified in the tender.

3. The applicant submitted that they had bought pipes for the project of RMC. At the time of purchase, the applicant had paid Central Excise and VAT. Thereafter the applicant had undertaken excavation work whereby trenches are dug in order to lay the pipes. Once the desired level of depth of soil is dug, the work of laying of pipes started. A network of pipes is made by joining the pipes (either by lamination or welding) so that a permanent structure of pipeline network is formed. The inter-connection of the pipes is designed in such a way that the sewage/liquid/water passes through the network without any leakages. Out of the said network of pipes, the pipes can never be dismantled/ removed as such and in order to dismantle it, the entire pipe network has to be demolished and there is hardly any salvage. After the work of laying is over, the trenches are refilled (covered) and the pipeline network remains underground, invisible to the naked eye. Thereafter the work of testing of network takes place in order to check about leakages and achievement of desired flow of liquid/sewage/water (as the case may be).

4. The applicant submitted that while the project of RMC was unfinished, the Goods and Services Tax Act (GST) got implemented, posing a challenge to the applicant to enjoy the credit of material bought in pre-GST era as per the transition provisions. It is submitted that the milestones which are pending/complete are as below.

Event / Milestone	*Status*
Supply of pipes at location specified by RMC	Completed in pre-GST era
Laying of pipes	Completed in pre-GST era
Testing and commissioning of network of pipeline	Pending and will now be completed in Goods and Services Tax regime

5. In view of the foregoing facts, the applicant raised the following queries :

(*A*) Does the work executed and invoice to be raised for the pending event of testing and commissioning by the applicant after the implementation of the Goods and Services Tax Act amount to supply, and specifically supply of works contract ?

(*B*) Is the applicant entitled to enjoy proportionate credit worth 10 per cent duty of excise and VAT paid on materials bought vide invoices showing Excise and VAT separately, under the transition provisions so that there is no double taxation i.e. levy of tax on tax is avoided?

6. The applicant has submitted that the nature of the work is such that an immovable property is created by virtue of the work done by them and unless the specified milestones are completed, the work of the applicant would be incomplete and the property in the goods vests with the applicant. The milestones which are fixed ensure that the applicant never has an option to run away from the project midway. They submitted that in their opinion, the milestone which is yet to be achieved under the GST regime is an extension and inextricably linked with the other two milestones which have been completed. They referred to section 7 of the Central Goods and Services Tax Act, 2017 ('CGST Act, 2017') and Gujarat Goods and Services Tax Act, 2017 ('GGST Act, 2017') and submitted that the scope of the word 'supply' under the GST Act and the definition provided, in their opinion, makes it hard to define the nature of the work as supply as before the advent of GST, the structure of network is erected but the payment for the pipes cost is yet to be realized to the extent of balance payment being withheld.

7. The applicant submitted that without prejudice to the above, if at all the pending milestone is considered as a supply exigible to tax, it must be declared as a works contract because in pith and substance, the activity is nothing more but continuation of the creation of the immovable property, i.*e.*, network of pipelines. They referred to the definition of 'works contract' as provided under section 2(119) of the CGST Act, 2017 and the GGST Act, 2017 and submitted that the nature of the work executed by them safely leads one to the conclusion that an immovable property is constructed, *ipso facto.*

8. With respect to second query about the admissibility of the claim of input credit under transition provisions, they referred to section 140(6) of the CGST Act, 2017 and GGST Act, 2017 and submitted that they are in possession of the duty paid document and the element of Central Excise and VAT can be identified clearly. The recitals of the contract of RMC ensure that a sizeable cost of materials is not released to the applicant lest the project is abandoned half-way. It is submitted that the project being in a semi-finished stage, though physically, pipes are not visible as they are underground, entitles them to make a valid claim of credit of excise duty as well as VAT on the invoices of purchases of materials bought within 1 year before 1st July 2017. They submitted that the semi-finished stage of the project being a crucial fact enables the applicant to avail the credit in proportion of 10 per cent of the unfinished work of the project.

9. It has been informed by the Central Excise & GST, Ahmedabad South Commissionerate that from the details of work to be carried out by the party, for providing and laying, commissioning of pipeline for Government of Gujarat

(Rajkot Municpal Corporation) under tender, it appears to be falling under Works Contract and so far as matter related to benefit of tax credit under transitional provisions, the assessee may avail the benefit subject to the fulfillment of rule/ provisions/conditions of ITC under CGST Act, 2017.

10. We have considered the submissions made by the applicant in their application for advance ruling and additional submissions made vide letter dated 15.11.2017 at the time of personal hearing. We have also considered the information and views submitted by the Central Excise & GST, Ahmedabad South Commissionerate.

11.1 The definition of 'works contract' has been given under section 2(119) of the CGST Act, 2017 and GGST Act, 2017 as follows :

> '(119) "works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of suchcontract ;'

11.2 Thus, a contract for any immovable property wherein transfer of property in goods is involved in the execution of such contract fall within the definition of 'works contract'.

11.3 In the present case, the applicant had undertaken excavation work whereby trenches are dug and pipes are laid after desired level of depth of soil is dug and a network of pipes is made by joining the pipes either by lamination or welding so that a permanent structure of pipeline network is formed. After the work of laying of pipeline and joining them is over, the trenches are refilled with soil and the pipeline network so formed remains underground. Once the said network of pipes is created, the pipes cannot be dismantled or removed as such. In order to dismantle it, the entire pipe network has to be demolished and there is hardly any salvage.

11.4 We observe that the underground pipeline network created by joining the pipes either by lamination or welding cannot be dismantled without substantial damage and thus cannot be reassembled, therefore the pipeline network so created would be considered as immovable. As the applicant is engaged in the activity of construction of pipeline network which becomes immovable property wherein transfer of property in goods is involved, the said activity falls within the definition of "works contract" under the CGST Act, 2017 and the GGST Act,2017.

12.1 As per clause 6(*a*) of the Second Schedule read with section 7 of the

CGST Act, 2017 and the GGST Act, 2017, the composite supply, namely works contract as defined in clause (*119*) of section 2 shall be treated as a supply of services.

12.2 The provisions related to determination of time of supply of services are contained in section 13 of the CGST Act, 2017 and the GGST Act, 2017. As per sub-section (2) of section 13 *ibid,* the time of supply of services shall be the earliest of the following dates namely :

(*a*) the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier;or

(*b*) the date of provision of service, if the invoice is not issued within the period prescribed under sub-section (2) of section 31 or the date of receipt of payment, whichever is earlier;or

(*c*) the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (*a*) or clause (*b*) do not apply :

Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.

Explanation : For the purposes of clauses (*a*) and (*b*) –

(*i*) the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;

(*ii*) "the date of receipt of payment" shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier."

12.3 Therefore, the part of the supply made by the applicant wherein time of supply of service is after implementation of the CGST Act, 2017 and the GGST Act, 2017 are covered by the aforesaid provisions and the applicant is required to discharge Goods and Services Tax liability accordingly. Provisions have been made under sub-section (11) of section 142 of the CGST Act, 2017 and the GGST Act, 2017 to ensure that the tax is not levied under the existing laws (Chapter V of the Finance Act, 1994 and Gujarat Value Added Tax Act, 2005) as well as under the GSTLaws.

13.1 As regards the admissibility of input tax credit on pipes used in pipeline

network, the applicant has referred to sub-section (6) of section 140 of the CGST Act, 2017 and the GGST Act, 2017, which reads as follows :

"(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day subject to the following conditions, namely :

(*i*) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(*ii*) the said registered person is not paying tax under section 10 ;

(*iii*) the said registered person is eligible for input tax credit on such inputs under this Act ;

(*iv*) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs;and

(*v*) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day."

13.2 We are informed that the work of supply of pipes at the location specified by the Rajkot Municipal Corporation and the work of underground laying of pipes had already been completed before the appointed date and the work of testing and commissioning of network of pipeline was pending. As submitted by the applicant, only the work of Testing and Commissioning of network of pipeline was pending on the appointed date, for which no input in stock was required to be used on or after the appointed date. Therefore, the condition prescribed at clause (*i*) of sub-section (6) of section 140 *ibid* is not fulfilled. Testing and Commissioning of network of pipeline being part of the contract, Goods and Service Tax is leviable, however, since no input/material is required for such Testing and Commissioning of network of pipeline, transitional input tax credit is not allowable.

13.3 In view thereof, the applicant is not entitled to avail input tax credit under section 140(6) of the CGST Act, 2017 and the GGST Act,2017.

14. In view of above, we rule as under –

RULING

(*A*) The work of laying of underground pipeline network falls under the definition

of "works contract" provided under section 2(*119*) under the CGST Act, 2017 and the GGST Act, 2017. In respect of that part of supply wherein time of supply is on or after the appointed date, Goods and Services Tax is required to be paid.

(*B*) The applicant is not entitled under section 140(6) of the CGST Act, 2017 and the GGST Act, 2017 to avail input tax credit.

[2018] 4 GSTPT 157 (AAR)

AUTHORITY FOR ADVANCE RULING – WEST BENGAL

GKB LENS (P.) LTD., *IN RE.*

Case Number/ARN 10 of 2018

Vishwanath & Parthasarathi Dey, Members

30th May 2018

The applicant has the option of not supplying goods to its branches under the first proviso to rule 28 of CGST Rules, 2017 and is eligible to value these goods by applying the terms of the second proviso to that rule. The expression "where the recipient is eligible for full input tax credit", as used in the second proviso to rule 28 of CGST Rules, 2017, means that the recipient will be eligible to take full input tax credit of the amount of tax paid by the suppler as mentioned in the respective invoice or any other document valid under section 16(2)(a) of CGST Act.

CGST Act, 2017 – Sections 16-21 read with rules 28-06 CGST Rules, 2017 – Input tax credit – Whether the expression "where the recipient is eligible for full input tax credit" as used in the second proviso to rule 28, can be considered in the light of section 17.

The independently registered business establishments in States other than West Bengal, referred to as "branches" with head office in West Bengal, are eligible to avail of input tax credit in terms of section 16. Again, as per section 17(1) where the goods (or services, or both) are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business. In other words, the expression "where the recipient is eligible for full input tax credit", is to be considered, in the light of section 17(1), to mean that the recipient will be eligible to take full input tax credit of the amount of tax

paid by the supplier as mentioned in the respective invoice or any other document valid under section 16(2)(a).

Applicant's representative heard Sri Sandeep Kothari, CFA

ORDER

1. The applicant is stated to be a Re-seller and Importer of Sun Glasses, Frames, Lenses, Contact Lenses, etc., having Head Office in West Bengal. Goods, namely, Optical Lenses and Frames for Spectacles and Accessories, are transferred from the Head Office in West Bengal to its branches in other states. Advance Ruling has been sought on whether such goods supplied to the branches in states other than West Bengal can be valued in terms of the Cost Price under the Second Proviso to Rule 28 of CGST Rules, 2017, instead of 90% of MRP as required under the First Proviso of the same Rule.

Advance Ruling is admissible on this question under section 97(2)(*c*) of the CGST/ WBGST Act, 2017 ('the GST Act').

The officer concerned raises no objection to admission of the Application.

The Applicant declares that question raised is not already decided or pending in any proceedings under the GST Act.

The Application is, therefore, admitted.

2. The Applicant submits that so far the value of the trading goods supplied to branches in states other than West Bengal is being determined at 90 per cent of the MRP of the goods in terms of the First Proviso to rule 28 of the CGST/ WBGST Rules, 2017 ('Rule 28'). The Applicant wants to know whether the value of such supplies can be determined in terms of the Second Proviso to rule 28, instead. Clarification is also sought by the Applicant regarding the phrase "eligible for full input tax credit", especially in the context of the fact that apart from the trading goods, the Head Office also supplies to these branches non-trading stock like printing &stationery, office equipment, etc. The applicant states that these non-trading stock are transferred at zero value

3. Rule 28 deals with valuation of a supply when it is made between distinct or related persons. If a person obtains or is required to obtain more than one registration in more than one State and/or Union Territory, then, in accordance to the provisions under section 25 of the GST Act, each registration shall be treated as "distinct persons" for the purpose of the GST Act. The Applicant, at the time of Personal Hearing, has informed that separate registrations have been

obtained for business establishments in different states. These independently registered business establishments in states other than West Bengal are referred to as "branches" with Head Office in West Bengal.

Supplies to these branches, therefore, qualify as supplies made between the distinct persons, and provisions of Rule 28 will be applicable for valuation of such supplies.

4. Rule 28 provides that the value of a supply to a distinct person shall be the open market value, if available, of such supply.

The First Proviso states that "Provided that where the goods are intended for further supply as such by the recipients, the value shall, at the option of the supplier, be 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".

The Second Proviso to Rule 28 states "Provided further, 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. As input tax credit is not available unless there is an invoice or document of like nature [section 16(2) (*a*)], the above proviso has to be interpreted with reference to specific invoices. Hence all Invoices or documents of like nature under section 16 of GST Act, of goods for further retail sale or for use in the business (non-trading stock such as stationery and office equipment) transferred to branches considered as distinct persons being located in States other than West Bengal, are valid documents eligible for input tax credit.

5. The First Proviso to rule 28, thus, is clear that where goods are supplied to a recipient for further supply as such, the valuation of these goods when transferred from the supplier to the recipient may, at the option of the supplier, be determined at 90% of the price that will be charged by the recipient to its customer, not being a related person. The two clauses important to note in this Proviso are : (*a*) goods received by the recipient are to be sold to a customer not being a related person and b) the determination of value at 90 per cent of the price that will be charged by the recipient to this customer is an option. Whether or not the Supplier avails of this option is solely the discretion of the Supplier.

6. The Second Proviso to Rule 28 does not mention, unlike the First Proviso, "where goods are supplied to a recipient for further supply as such", nor is the Proviso barred to such goods when further supplied as such. In other words, the Second Proviso is applicable for both, goods further supplied to non related customers and to goods used in and for the course of business. It is stated that

the value declared in the invoices shall be deemed to be the open market value of the goods.

7. Chapter V of the GST Act in sections 16 to 21 are related to input tax credit. The independently registered business establishments in states other than West Bengal, referred to as "branches" with Head Office in West Bengal, are eligible to avail of input tax credit in terms of section 16 of GST Act. Again, as per section 17(1) where the goods (or services, or both) are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.

In other words, the expression "where the recipient is eligible for full input tax credit', is to be considered in the light of section 17(1) of GST Act, to mean that the recipient will be eligible to take full input tax credit of the amount of tax paid by the suppler as mention in the respective invoice or any other document valid under section 16(2)(*a*) of GST Act.

In view of the foregoing we rule as under

RULING

The applicant has the option of not supplying goods to its branches under the First Proviso of rule 28 and is eligible to value these goods by applying the terms of the Second Proviso to rule 28 of GST Act.

The expression "where the recipient is eligible for full input tax credit', as used in the Second Proviso to rule 28 of CGST Rules, 2017, means that the recipient will be eligible to take full input tax credit of the amount of tax paid by the suppler as mentioned in the respective invoice or any other document valid under section 16(2)(*a*) of GST Act.

This Ruling is valid subject to the provisions under section 103 until and unless declared void under section 104(1) of the GST Acts.

[2018] 4 GSTPT 161 (AAR)

AUTHORITY FOR ADVANCE RULING – WEST BENGAL

IAC ELECTRICALS (P.) LTD., *In re.*

Case No. 08 of 2018

Vishwanath & Parthasarathi Dey, Members

28th May 2018

Services of transportation, in-transit insurance and loading/unloading, being ancillary to the principal supply of goods, shall be treated to taxation under section 8 (a) of the GST Act, and the consideration receivable on that account is to be taxed accordingly.

CGST Act, 2017 – Section 8 read with section 2(30) – Supply – Severable/divisible contract – Taxability of services supplied – Whether service of transportation, in-transit insurance and loading/unloading, being ancillary to principal supply of goods, would be liable for taxtaion under section 8(a)

In terms of definition of 'severable/divisible contract', the cross fall break clause, in the present context, settles unambiguously that supply of goods and their transportation to the contractee's site are not two separate contracts but forms only parts of an indivisible composite contract with 'single source responsibility'. Composite nature of the contract is clear from the clause that defines satisfactory performance of the First Contract (supply of goods) as the time when the goods have been transported to the contractee's site under the second contract. In other words, the first contract cannot be performed satisfactorily unless the goods have been delivered to the contractee's site in terms of the second contract. The recipient has not contracted for ex-factory supply of materials, but for the composite supply involving delivery of the goods at the contractee's site, which includes transportation, in-transit insurance, etc. Terms of the contracts are such that all these supplies are inseparable and, therefore, naturally bundled.

While defining composite supply under section 2(30), the Legislature provides an illustration. It is specified therein that supply of goods, packed and transported with insurance, is a composite supply and supply of goods is the principal The illustration being part of the section, supplies as that of the applicant's should be construed as specifically mentioned under the GST Act as composite supply with supply of goods as the principal supply and services like transportation, in-transit insurance etc ancillary or incidental to the principal supply.

Applicant's representative Sri Biplab Paul, Accountant

ORDER

1. The applicant is stated to be a manufacturer of Overhead Power Transmission Line Hardware and Accessories. His question is related to contracts obtained from Power Grid Corporation of India ('the Contractee') who has entered into two separate contracts - one for supply of materials at ex-factory price ('the First Contract'), and the other for supply of allied services like transportation, insurance, loading/unloading etc for delivery of materials at the contractee's site ('the Second Contract'). The Applicant states that as per the Second Contract, since they are not a Goods Transport Agency they arrange for the supply and delivery of materials through various other suppliers of these services. The Contractee is charged for these services at a pre-fixed rate, irrespective of the actual cost incurred. However, the Contractee is unwilling to bear the cost of GST on such services provided to them by the Applicant through various Service Suppliers. The applicant, hence, wants a Ruling regarding the taxability of these services supplied by them.

Advance Ruling is admissible on this question under section 97(2)(*a*) & (*e*) of the CGST/ WBGST Act, 2017 ('the GST Act').

The officer concerned, in his written response, raises no objection to admission of the application.

The application is, therefore, admitted.

2. As per point No. 14 in Form GST ARA 01 submitted by the Applicant, the question on which Advance Ruling is required is the taxability of services supplied by them. The Applicant has drawn attention and referred to Facts as stated in Point No. 15 and Interpretation as stated in Point No. 16, of the Form.

3. According to the above submissions the Applicant is not a goods transport agency ('GTA') or engaged in the business of in-transit insurance and loading, which are naturally bundled with and dependent of the transportation services. He, according to the Application, arranges such services and pays the GST, as applicable, on the consideration paid to the suppliers of such services. The applicant is of the opinion that this service to the Contractee is exempt under the GST Act. According to the Applicant, it is a composite supply with road transportation as the principal supply, and loading/unloading, in-transit insurance etc as ancillary supplies to the transportation service. As the Applicant is not a GTA, his supply of transportation service is exempt. [Reference may be made to Serial no. 18 of Notification No. 12/2017-Central Tax (Rate) dated 28th June, 2017 (1136-FT dated 28/06/2017 under State Tax), 'Exemption Notification'].

The Principal Supply being thus exempted, the Applicant should not, according to his interpretation of GST law, be liable to pay tax on the ancillary or incidental services.

4. Serial No. 18 of the Exemption Notification exempts services by way of transportation of goods by road except the services of a GTA. In his written submission the Applicant admits that he is not transporting the goods, but hiring the service of a transport agency. Similarly, he is not providing the insurance service, but buying such services from an insurance service provider. The applicant is, therefore, the recipient of such services and not a supplier thereof. The question of the applicant providing transportation service, etc., therefore, does not arise. Hence the Exemption Notification is not applicable to the applicant.

5. Before deciding the issue of taxability of the consideration payable under the Second Contract for inland/local transportation and ancillary services like in-transit insurance, the two contracts referred to above need to be examined.

6. The Applicant has been awarded a package for supply of hardware fittings and accessories at different projects under two separate Notifications of Award ('NOA').

7. NOA No.CC-CS/651-SR1/HWF-3670/3/G2/NOA-I/7540 dated 12/12/ 2017 is the First Contract, involving ex-works supply of all equipment and materials. The scope of the work includes design, manufacture, testing and supply of hardware fittings and accessories. The consideration payable includes only the ex-work price component of the materials.

8. NOA No.CC-CS/651-SR1/HWF-3670/3/G2/NOA-II/7541 dated 12th December, 2017 is the Second Contract, which involves all other activities required to be performed for delivery of the goods to the Contractee's site. The consideration is a lump sum amount payable for inland/local transportation, in-transit insurance and loading/unloading charges.

9. It is immediately apparent that the First Contract cannot be executed independent of the Second Contract. There cannot be any 'supply of goods' without a place of supply. As the goods to be supplied under the First Contract involve movement and/or installation at the site, the place of supply shall be the location of the goods at the time when movement of the goods terminates for delivery to the recipient, or moved to the site for assembly or installation [refer to section 10(1)(*a*) and (*d*) of the IGST Act, 2017]. The First Contract, however, does not include the provision and cost of such transportation and delivery. It, therefore, does not amount to a contract for 'supply of goods' unless tied up with the Second Contract. In other

words, the First Contract has "no leg to stand on" unless supported by the Second Contract. It is no contract at all unless tied up with the Second Contract.

10. The Contractee is aware of such interdependence of the two contracts. Although he awards the contract under two separate NOAs, clause 3.2 of both of the NOAs makes it abundantly clear that "Notwithstanding the break-up of the Contract Price, the Contract shall, at all times, be construed as a single source responsibility Contract and any breach in any part of the Contract shall be treated as a breach of the entire Contract."

It is further elaborated under clause 2.2 of both the Contracts. Second paragraph of clause 2.2 of the First Contract says, "Notwithstanding the award of work under two separate Contracts in the aforesaid manner, you shall be overall responsible to ensure the execution of both the Contracts to achieve successful completion and taking over of the Goods under the package by the Purchaser as per the requirements stipulated in the Bidding Documents. It is expressly understood and agreed by you that any default or breach under the 'Second Contract' shall automatically be deemed as a default or breach of this 'First Contract' also and vice- versa, and any such default or breach or occurrence giving us a right to terminate the 'Second Contract', either in full or in part, and/or recover damages there under, shall give us an absolute right to terminate this Contract, at your risk, cost and responsibility, either in full or in part and/or recover damages under this 'First Contract' as well. However, such default or breach or occurrence in the 'Second Contract', shall not automatically relieve you of any of your obligations under this 'First Contract'. It is also expressly understood and agreed by you that the equipment/materials supplied by you under this 'First Contract', when inter alia transported to site by you under the 'Second Contract' shall give satisfactory performance in accordance with the provisions of the Contract."

Second paragraph of clause 2.2 of the Second Contract says, "Notwithstanding the award of work under two separate Contracts in the aforesaid manner, you shall be overall responsible to ensure the execution of both the Contracts to achieve successful completion and taking over of the Goods under the package by the Purchaser as per the requirements stipulated in the Bidding Documents. It is expressly understood and agreed by you that any default or breach under the 'First Contract' shall automatically be deemed as a default or breach of this 'Second Contract' also and vice-versa, and any such default or breach or occurrence giving us a right to terminate the 'First Contract', either in full or in part, and/ or recover damages there under, shall give us an absolute right to terminate this Contract, at your risk, cost and responsibility, either in full or in part and/or recover damages under this 'Second Contract' as well. However, such default or breach

or occurrence in the 'First Contract', shall not automatically relieve you of any of your obligations under this 'Second Contract'. It is also expressly understood and agreed by you that the equipment/materials supplied by you under the 'First Contract', when, inter alia, transported by you under the 'Second Contract' shall give satisfactory performance in accordance with the provisions of the Contract."

11. The two contracts are, therefore, linked by a cross fall breach clause that specifies that breach of one contract will be deemed to be a breach of the other contract, and thereby turn them into a single source responsibility contract. Black's Law Dictionary defines that "a severable contract, also termed as divisible contract, is a contract that includes two or more promises each of which can be enforced separately, so that failure to perform one of the promises does not necessarily put the promises in breach of the entire contract". In terms of this definition, the 'cross fall breach clause', in the present context, settles unambiguously that supply of goods and their transportation to the Contractee's site are not two separate contracts but forms only parts of an indivisible composite contract with 'single source responsibility'. Composite nature of the contract is clear from the clause that defines satisfactory performance of the First Contract (supply of goods) as the time when the goods have been transported to the Contractee's site under the Second Contract. In other words, the First Contract cannot be performed satisfactorily unless the goods have been delivered to the Contractee's site in terms of the Second Contract. Moreover, the discussion in paragraph no. 8 above settles that the First Contract is no contract at all unless tied up with the Second Contract. The two promises - supply of the goods and their transportation to the Contractee's site - are, therefore, not separately enforceable in the present context. The supplies of goods and services of transportation etc are, therefore, naturally bundled. The recipient has not contracted for ex-factory supply of materials, but for the composite supply involving delivery of the goods at the contractee's site, which includes transportation, in-transit insurance etc. Terms of the contracts are such that all these supplies are inseparable and, therefore, naturally bundled.

12. While defining Composite Supply under section 2(30) of the GST Act, the legislature provides an illustration. It is specified therein that supply of goods, packed and transported with insurance, is a composite supply and supply of goods is the principal supply. The illustration being part of the section, supplies as that of the applicant's should be construed as specifically mentioned under the GST Act as Composite Supply with supply of goods as the principal supply and services like transportation, in-transit insurance etc ancillary or incidental to the principal supply.

In view of the foregoing we rule as under :

RULING

Services of transportation, in-transit insurance and loading/unloading, being ancillary to the principal supply of goods, shall be treated to taxation under section 8(*a*) of the GST Act, and the consideration receivable on that account be taxed accordingly.

This Ruling is valid subject to the provisions under section 103 until and unless declared void under section 104(1) of the GST Act.

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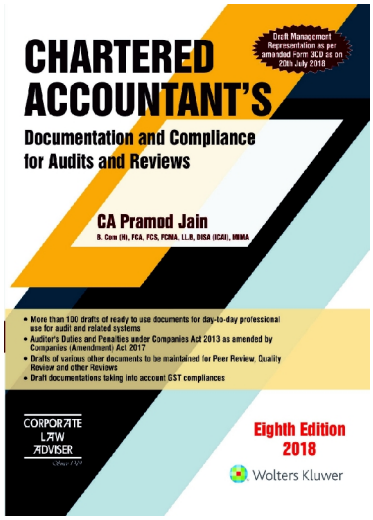

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