



Dimensions – 126th Edition

Rulings under GST era

M/s. Kanayalal Pahilajrai Balwani – Authority for Advance Ruling, Gujarat¹

Issue for Consideration

Whether the Applicant is required to reverse input tax credit (“ITC”) on raw material used in manufacturing of cakes and pastries which are sent for display and cannot be sold after the expiry period?

Discussion

- The Applicant is engaged in the business of manufacturing and distribution of cakes and pastries.
- The cakes and pastries are sent to distributors for display to attract customers.
- The cakes and pastries, being perishable in nature, cannot be preserved for a longer period. Hence, they are replaced their expiry.
- The Applicant approached the Gujarat Authority for Advance Ruling (“the Authority”) and contended as follows:
 - The extra cakes and pastries are supplied with a tax invoice, in which such supply is considered as taxable supply of goods.

- If the said cakes and pastries are returned, the Applicant issues a credit note for the same.
- Therefore, there is no free / sample supply of goods in terms of section 17(5)(h) of The Central Goods and Services Tax Act, 2017 (“CGST Act”).
- After considering the facts of the case, the Authority observed as follows:
 - The subject cakes and pastries kept on display to attract customers are of perishable nature and cannot be preserved for a longer period.
 - The subject cakes and pastries are thrown away after their expiry.
 - Since they have a limited shelf life they are prohibited from sale after their expiry.
 - Further, the Indian penal code criminalizes the act of sale of harmful perishable food products.
 - The throwing away of the subject cakes and pastries is similar to destroying the expired foods.
 - Further, on perusal of section 16, 18 and 17(5)(b) of the CGST Act, it should be noted that:

¹ Advance Ruling No. GUJ/GAAR/R/16/2021 dated June 30, 2021



- Section 17(5)(b) of the CGST Act is a non-obstante clause and overrides section 16 and 18 of the CGST Act.
- The subject goods being destroyed are covered under section 17(5)(h) of the CGST Act.
- Reference is drawn to the circular² issued on time expired drugs or medicines. This circular, though it discusses scenarios in relation to return of goods on account of their expiry, is applicable to other scenarios where goods are returned on account of other reasons. The facts of the current case are similar to the scenario envisaged in the circular.

Ruling

The subject matter gets covered under section 17(5)(h) of the CGST Act and hence, the ITC on inputs used in manufacturing of cakes which expires before being sold / consumed and pastries need to be reversed.

Dhruva Comments:

The inputs used in the manufacture of cakes and pastries are used in the course or furtherance of business. Inputs once used in the manufacture of goods lose their own identity / existence and accordingly cannot be said to be destroyed. It needs to be seen how the judiciary would interpret the provisions of section 17 of the CGST Act when such inputs are used in the manufacture of goods and the final manufactured product is lost / destroyed or given as free samples.

M/s. Airport Authority of India - Authority for Advance Ruling, Gujarat³

Issues for Consideration

- Issue 1 - Whether the transfer of business by the Airport Authority of India ('AAI') to the M/s. Adani Ahmedabad International Airport Limited ('the Company') can be treated as supply under section

7 of the Central Goods and Services Tax Act, 2017 (the 'CGST Act') vis-à-vis the Gujarat State Goods and Services Tax Act, 2017 (the 'GSGST Act')?

- Issue 2 - Whether the transfer of business by the AAI to the Company can be treated as supply as going concern and covered in clause 4 of Schedule II of the CGST Act vis-à-vis the GSGT Act?
- Issue 3 - Whether the transfer of business by the AAI to the Company is covered under the entry No. 2 of the exemption notification no. 12/2017-Central Tax (Rate) dated June 28, 2017 issued under section 11 of the CGST Act, 2017?
- Issue 4 - If the answer to issue 3 is negative, then whether GST is leviable on the transfer of regulatory asset base, aeronautical assets, non-aeronautical assets, and capital work in progress by the AAI to the Company?
- Issue 5 - Whether the aforesaid transfer of assets be treated as services and if yes, the classification for the same?
- Issue 6 - Whether the concession fees paid by the Company to the AAI can be treated as consideration for transfer of business?
- Issue 7 - Whether GST is applicable on monthly / annual concession fees charged by the AAI from the Company?
- Issue 8 - Whether GST is leviable on the invoice raised by the AAI for reimbursement of the salary / staff cost on the Company? If yes, at what rate?
- Issue 9 - Whether GST is applicable on the reimbursement claimed of Municipal tax, Property Tax and Water Charges by the AAI from the Company? If yes, at what rate?
- Issue 10 - Whether GST is applicable on transfer of spares and consumables for consideration by the AAI to the Company? If yes, at what rate?

² Circular No. 72/46/2018-GST dated October 26, 2018

³ Advance Ruling No. GUJ/GAAR/R/46/2021 dated September 02, 2021



Discussion

- The Applicant is an authority created under the Airport Authority of India Act, 1994 (the 'AAI Act') for the purpose of establishing or assisting in the establishment of the airport and for the matters connected thereto.
- The Applicant approached the Gujarat Authority for Advance Ruling ('the Authority') in respect of the aforementioned issues and submitted the relevant facts as follows:
 - Section 12A of the AAI Act allows the Applicant, in the public interest or in the interest of better management of airports, to make lease of the premises of an Airport (including building and structures thereon and appertaining thereof) to carry out some of its functions under Section 12 as the AAI may deem fit.
 - In the pursuance of Section 12A of the AAI Act, the Applicant invited bids for undertaking the operation, management, and development of the Sardar Vallabhbhai Patel Airport located in Ahmedabad, Gujarat on a lease period of 50 years to bring efficiency in service delivery, expertise, enterprise, and professionalism and to harness necessary investment.
 - In 2019, M/s. Adani Enterprises Limited ('the Concessionaire') an Ahmedabad based business conglomerate had won the bid of the airport by quoting the highest bid among all bidders.
 - The Concessionaire through a special purpose vehicle ('SPV') entered into a concessionaire agreement towards operation management and development of the airport with the Applicant. The said agreement included civil, mechanical, electrical works, terminal building, cargo facilities, runway, and all other project assets for a period of 50 years subject to the compliance of various terms and conditions as set forth in the concessionaire agreement.
- The Applicant submitted the following contentions, in respect of the aforementioned issues, with the Authority:
 - With regards to issues 1 to 6, the Applicant submitted that in common parlance, it can be said that the present transaction amounts to 'transfer of business', from the Applicant to the Concessionaire.
 - The Applicant submitted that for anything to be considered goods under GST Laws, it must be any movable property. As business cannot be said to be movable, transfer of business cannot be said to be a transfer of goods.
 - The Applicant further submitted that since the Notification No. 12/2017-Central Tax (Rate) dated 28 June 2017 ('exemption notification') provides an exemption in respect of the entire GST amount leviable on supply of services by way of transfer of a going concern, as a whole or independent part thereof, it can be stated that any transfer on going concern basis is a supply of services and that the same has been specifically exempted from the levy of GST vide aforesaid notification.
 - The Applicant stated that in order to understand whether the transfer of business by the Applicant to the Concessionaire qualifies for exemption under the exemption notification, the following conditions need to be satisfied:
 - *Service has to be by way of transfer.*
 - *The transfer should be of going concern.*
 - *Such transfer must be as a whole or an independent part thereof.*
 - The Applicant submitted the following in respect to each of the aforementioned conditions:

Service has to be by way of transfer:

 - Here, the Applicant stated that what needs to be understood is whether the word 'transfer' in the said exemption notification only includes permanent transfer or temporary transfer as well.



- This is because, in the present case, there is a transfer of the business of operating, managing and developing of the airport for the period of 50 years as the concession agreement and the rights of the Concessionaire shall lapse after the said period and will be transferred back to the Applicant. Accordingly, there is a temporary transfer of business.
- The Applicant added that there is no specific mention under entry 2 to the exemption to cover only permanent transfer.
- The Applicant also submitted that the Supreme Court, in the case of the *Union of India v. Dr. Maqsood Ahmed*⁴, has held that, “the word ‘transfer’ is a larger word, and the word ‘sale’ is a specific word. A transfer may be by means of lease, mortgage or sale or in any other mode”
- The Applicant further submitted that it is worthwhile to note that the definition of supply includes the word sale, but the exemption notification does not refer to sale, but instead transfer of a going concern to be exempted. Hence, it can be stated that even temporary transfers are covered by the same entry.
- Furthermore, given that there is no definition of ‘transfer’, two views are possible: the first is to limit the meaning to the outright sale and the second view could be that it may not necessarily mean outright sale because if the intention of the legislature was to exempt the sale of going concern, it could have used the term sale and not transfer of going concern in the exemption notification.
- The Applicant also submitted that it is settled law that the words not defined shall be interpreted with their literal meaning.
- The Applicant, in this regard, referred to the definition of the word transfer under the Arms Act, 1959, Foreign Exchange Management Act, 1999, Prevention of Money Laundering Act,

- 2003, Corous Juris Secundum 6th edition as cited in 20th Century Finance Corporation Ltd. (2000) 6 SCC 12 stated that the general meaning of the word ‘transfer’, as well as its definitions in various Acts, suggests that it is not restricted to permanent transfer.
- The Applicant further referred to the rulings pronounced by the:
 - Andhra Pradesh High Court in the case of *Rashtriya Ispat Nigam Ltd. v. Commercial Tax Officer, Company Circle, Vishakhapatnam*⁵ as upheld by Supreme Court⁶,
 - Supreme Court in case of *Bharat Sanchar Nigam Ltd. v. UOI*⁷,
 - Karnataka High Court in case of *Indus Towers Ltd. v. Deputy Commissioner of Commercial Taxes, Enforcement 1, Bangalore, and Others*⁸.
- On the basis of the aforesaid definitions and the rulings pronounced by various courts; the Applicant stated that it can be inferred that the term transfer as stated in entry 2 to the exemption notification includes temporary transfers also.

The transfer should be of going concern:

- With regards to whether the said transfer is a going concern or not, the Applicant contended that the term ‘Going Concern’ is not defined under the CGST Act. However, the Applicant stated that going concern is an ‘accounting principle’ which indicates that the business would continue, and management is not intending to liquidate or stop business in the near future.
- The Applicant also referred to the text of the Accounting Standard I, issued by the Institute of Chartered Accountants of India, and stated that

⁴ AIR 1963 Bom 110, 114

⁵ (1990) 77 STC 182(AP)

⁶ Appeal (Civil) 31 of 1991

⁷ [2006] 3 STT 245 (SC)

⁸ [2012] 56 VST 369 (Kar)



on the basis of the reading of the said accounting standard I, it implies that the business should continue in the new hands with regularity and a nature of permanency.

- The Applicant stated that in the present case the same is being satisfied since even after transfer, the Concessionaire will be in the position to manage, operate the airport and undertake the functions, in a manner, as were undertaken by the Applicant. Also, there will not be any interruption in the operations of the airport on account of the underlying transaction and the condition as to permanency is satisfied in the present transfer by the Applicant to the Concessionaire.

Such transfer must be as a whole or an independent part thereof:

- In this regard, the Applicant submitted that it is not transferring the entire business, however, the Applicant is transferring rights to operate, manage and maintain its independent unit i.e., Sardar Vallabhbhai Patel Airport.
- The said airport is one of the independent unit / parts of the Applicant. However, since only rights to operate, manage and maintain the airport will be transferred, it is necessary to determine whether the operation of the airport can be said to be an independent part of a going concern of the Applicant.
- In this regard, the Applicant submits that the word ‘independent’ in common parlance denotes the stand alone or capable of being functioning individually.
- The Applicant placed reliance on the Advance Ruling pronounced by the Karnataka Authority for Advance Rulings in the case of *M/s. Rajashri Foods Pvt. Ltd.*⁹ wherein the said authority analysed the concept of going concern as under:

“9. A going concern is a concept of accounting and applies to the business of the company as a whole. Transfer of a going concern means transfer of running business which is capable of being carried on by the purchaser as an independent business. Such transfer of business as a whole will comprise comprehensive transfer of immovable property, goods, and transfer of unexecuted orders, employees, goodwill etc.”

- The Applicant further submitted that in another advance ruling decision rendered in the case of *M/s. Innovative Textiles Ltd.* (Uttarakhand AAR)¹⁰, internationally accepted guidelines were discussed (issued by His Majesty’s Revenue & Customs (HRMC)) to treat the transfer of a business as a going concern as under:
 - *The asset must be sold as a part of ‘business’ as a ‘going concern’.*
 - *The purchaser intends to use the assets to carry on the same kind of business as the seller.*
 - *Where only part of the business is sold it must be capable of a separate operation.*
 - *There must not be a series of immediately consecutive transfers.*
- The Applicant also referred to the international jurisprudence in this regard
 - The Hon’ble Constitutional court of South Africa in case of *Aviation Union of South Africa and Another v. South Africa Airways (Pty) Ltd. and Others*¹¹, held that the transfer of operations of the airport from the first person to second and subsequently from the second person to first amounts to transfer of business by one person to another as a going concern.
 - Furthermore, the Hon’ble United Kingdom First Tier Tribunal in the case of *Robinson Family Limited vs the Commissioners for*

⁹ 2018-VIL-37-AAR

¹⁰ 2019 (24) G. S. T. L. 480 (A. A. R. - GST)

¹¹ MANU/SACC/0030/2011



Her Majesty's Revenue and Customs¹² has held that transfer of property by way of lease for the letting business amounts to transfer of a going concern.

- On the basis of the aforesaid, the Applicant submitted that the intention of the concessionaire agreement is that the business so transferred is carried on with regularity and with the nature of permanency during the concession period and also the airport is capable of operating as an independent unit since the said operation of airport can generate revenue and therefore the business, as being transferred, is an independent part of a going concern of the Applicant.
 - The Applicant, therefore, submitted that the view can be taken that the transaction amounts to a service by way of transfer of a going concern, as a whole or an independent part thereof which is covered in entry 2 of the exemption notification.
 - With regard to issue 7 relating to taxability of monthly concession fees payable by the Concessionaire to the Applicant, the Applicant submitted that the said consideration is for granting lease right of land, building and the immovable assets and that the said lease is for a period of 50 years.
 - The Applicant stated that though the consideration is being received for the lease right, since the same is a long-term lease for a period exceeding 30 years it will tantamount to the sale of the immovable property since the lessor is deprived of the right to use, enjoy, and possess the property once the said lease has been granted.
 - With regard to issue 8 relating to the invoice to be raised by the Applicant for reimbursement of the salary / staff cost on Concessionaire, the Applicant submitted that the said invoice is raised to cover the emoluments if the Government employees are transferred under the concessionaire agreement and hence if the said transfer of business is exempt vide entry no. 2 to the exemption notification as transfer of going concern, then the reimbursement of the salary / staff cost to be claimed from the Concessionaire shall also be considered as covered by the same.
 - With regard to issue 9 relating to the reimbursement claimed of Municipal tax, Property Tax and Water Charges proposed to be claimed by the Applicant from the Concessionaire, the Applicant submitted that the said reimbursements are in the nature of pure agents and thus cannot be treated as supply under Section 7 of the CGST Act.
 - Issue 10 relating to the transfer of spares and consumables for consideration by the Applicant to the Concessionaire was withdrawn by the Applicant during the personal hearing.
- The Authority after considering the facts of the case observed as follows:
 - The Accounting Standard-I issued by the ICAI states that there is a fundamental accounting assumption of 'Going Concern' according to which *"The enterprise is normally viewed as a Going Concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither intention nor the necessity of liquidation or of curtailing materially the scale of operations"*.
 - The transfer of a Going Concern means transfer of a running business which is capable of being carried on by the transferee as an independent business in continuity without any hindrance for a foreseeable period and such transfer will comprise transfer of assets for running the business and may involve transfer of employees as requisite to carry on the business without interruption.
 - In effect, it implies that the business will continue in the new hands with regularity and a nature of permanency.

¹² 20121 UKFTT 360 GC



- The Authority further discussed and considered the following grounds present in the transaction between the Applicant and the Concessionaire to provide whether the transaction qualifies as a transfer of independent part of going concern.
 - o Foreseeable future: - The subject business arrangement has been set in place for 50 years, which is for a foreseeable future spanning 5 decades.
 - o Transfer of assets and liabilities: - It is not essential to transfer all assets and liabilities for a transaction to qualify for a transfer of business. That is to say that even if some assets are retained by the Applicant, and the SPV after such transfer carries out subject business activities without any obstruction it shall still qualify as a transfer of business. The Authority added that the said view is in compliance with judicial discipline as laid down by the Hon'ble Bombay High Court in the case of *Sunderdas Harjiwan*¹³.
 - o Legal backing for transfer of functions to the Concessionaire: - Section 12A of the AAI Act provides that AAI may lease premises of an airport (including buildings and structures thereon and appertaining thereto) accordingly the same has the legal backing of the statutory provision.
 - o Transfer of employees from the Applicant to the Concessionaire: - The Concessionaire is also liable to bear the select employee costs, as set forth in the concession agreement.
 - o Steps taken by the Concessionaire for business continuity: - The Authority noted that all existing contracts entered by the AAI have been novated and the requisite insurance has been taken by the SPV.

Ruling

Regarding issues 1 to 3:

- The Authority held that the business is 'service', and the transfer of business is a supply of services.
- The transfer of business may be by way of sale, gift, lease, leave and licence, hire, or any other manner whatsoever. The wordings used in the exemption notification is a 'transfer' of business and not the 'sale' of business.
- Since the subject transfer of business is for the period of fifty years and still, the Applicant has not ceased to be a registered person under GST after the transfer of a going concern to the Concessionaire, the subject supply is the transfer of going concern of an independent part of the operations of the business of the Applicant.

Regarding issues 4 and 5:

- Since the ruling under issues 1 to 3 is affirmative, issues 4 and 5 are not discussed.

Regarding issues 6 to 10:

- The payments made by the Concessionaire to the Applicant including but not limited to concession fees are as per the terms and conditions of the contract.
- Furthermore, the considerations to be paid by the Concessionaire to the Applicant for the execution of the entire contract may be as per the terms and conditions of the contract and there are no restrictions on the consideration being upfront/one time/ in instalments/ as per the agreed terms of the contract.
- The issue of reimbursement of staff and other costs has arisen in pursuance to the terms of the subject concessionaire agreement between the Applicant and the Concessionaire wherein the supply of transfer of going concern services is exempt from

¹³ 1986 (3) TMI 321



the levy of GST. Therefore, the reimbursement of cost is also exempt from GST.

Regarding issue 10:

- GST on supply of spares and consumables by the AAI to the SPV, being outside the scope of the subject contract, is leviable to tax as per the law.

Dhruva Comments:

It can be stated that the advance ruling pronounced by Gujarat AAR has highlighted many critical aspects, including but not limited to the acceptance of the Applicant's contention by the AAR that the transfer of business, if for a considerable period of time, may not necessarily be by way of 'sale' but could be by way of 'lease', 'leave and licence', 'hire', 'gift' or any other manner whatsoever, since the wordings used in the exemption notification is the transfer of business which is wide in nature and not the sale of business.

Here, it is pertinent to note that the term 'transfer of going concern' is not defined under the GST Laws, however, it is an important and widely discussed concept under the Income Tax Act, 1961 (the 'IT Act'). Furthermore, the said concept is also not defined under the IT Act but has evolved based on the judicial precedents thereunder. However, it is pertinent to note that the aforesaid contention and acceptance thereof by the Authority of Advance Ruling that the transfer of a going concern may be by way of lease, or any other manner has not been tested or discussed before and, therefore, this ruling is unique and will have persuasive value not only under the GST Laws but also under the IT Act.

Rajkot Nagarik Sahakari Bank Ltd. – Authority for Advance Ruling, Gujarat¹⁴

Issue for Consideration

Whether incentives received under a scheme of the Government is to be included in the 'consideration' and liable to tax under the CGST Act, 2017 ('the Act')?

Discussion

- The Applicant is a multi-state scheduled co-operative bank. As per the *Atma Nirbhar Gujarat Sahay Yojna* ('scheme') announced by the Gujarat state government, co-operative banks which provide loans up to Rs. 1,00,000 at the rate of 8% p.a. are eligible to receive 6% interest amount from the state government. A balance of 2% is charged to the customers.
- In addition to the interest subsidy of 6%, the Applicant was also eligible to receive a one-time incentive from the Government in the range of 2% to 4% depending upon the loan amounts disbursed under the scheme.
- The Applicant has approached the Gujarat Authority for Advance Ruling ('the Authority') to determine the taxability of the incentives received and contended as follows:
 - Section 2(31) of the Act specifies that any subsidy received from the Central Government or a State Government shall not form part of 'consideration' and hence the subsidy received by the Applicant in the form of incentive shall not be chargeable to GST.
 - Since the word 'incentive' has not been defined under the Act, its dictionary meaning must be referred to, in order to contend that the amounts received in the present case are nothing but a subsidy provided by the state government to achieve its desired objectives.
 - The Applicant has been charging interest on loans at higher than 8% as per the schedule of interest and hence the incentive amounts have a direct nexus with the loss of interest accruing

¹⁴ TS-445-AAR(GUJ)-2021-GST



to them on loans disbursed under the scheme. The incentive is provided to compensate for the said loss and can be termed as additional interest for the loans disbursed by them and accordingly, should not be subject to GST as interest on loans are exempt from tax.

- The eligibility of claiming the incentive is subject to fulfilment of conditions as prescribed under the scheme creating a beneficial interest amounting to an actionable claim which is not a supply of goods or services under Schedule III of the Act.
- The department submitted that the incentives are in the nature of subsidies provided by the government and hence do not form part of a ‘consideration’ defined under section 2(31) of the Act. A subsidy received from the State or Central Government is also excluded from the value of supply under section 15 of the Act.
- The Authority considered the issue and observed that:
 - The issue is regarding the taxability of the incentive received in excess of the reimbursement of 6% interest amounts. The department has misconstrued the issue involved and has made its contention regarding the 6% interest reimbursed by the government and not the incentive received.
 - The eligibility of the incentive is solely dependent on the quantum of loans disbursed by the Applicant and does not lessen the burden of the customers as they are still liable to pay the balance of 2% interest on the loan amounts.
 - The incentive amounts are provided by the government to enhance the performance of the banks under the scheme. The incentives thus do not benefit the customers and hence cannot be held as a ‘subsidy’ granted by the government.
 - The schedule of interest submitted by the Applicant pertains to the overdraft facility provided to current accounts and not for interest

on loans disbursed by the bank. Accordingly, the Applicant’s contention that the incentive is provided to compensate for the loss of interest is not tenable.

- The issue involved in the present case does not involve supply of an actionable claim as the incentive amount forms the consideration as a *quid pro quo* for achieving the performance conditions laid out under the scheme.
- The advance ruling pronounced in the case of *Rashmi Hospitality Services Pvt. Ltd.* involved a subsidy received from the government being passed on to end-users by way of providing food at lower cost. In the present case, the incentive is not passed on to the Applicant’s customers and hence the ratio of this advance ruling cannot be applied

Ruling

The Authority held that the incentive amounts received under a scheme of the Government qualify as a ‘supply’ liable to tax under GST. They cannot be termed as a ‘subsidy’ and hence cannot be excluded from the value of supply under GST.

Dhruva Comments:

Government subsidies are provided so that goods or services reach the public at lower costs keeping in mind the larger interests of the public. The costs can be lowered by not charging the market rate and it is not necessary that the same needs to be demonstrated by overtly reducing the price charged to the customers. Moreover, the exclusion of ‘subsidy’ from consideration does not specifically provide that it has to be passed on to the customers as a pre-condition for exclusion.





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