



## Dimensions – 23<sup>rd</sup> Edition

### Rulings / Judgments under GST era:

#### 1. Nagpur Integrated Township Pvt Ltd. - Maharashtra<sup>1</sup>

<b>Issues for Consideration</b>	<ul style="list-style-type: none"> <li>Whether the act of providing under-construction flats on lease basis would be outside the purview of GST as transaction in immovable property?</li> <li>If not, then what is the correct classification and GST rate for such transaction?</li> </ul>
<b>Discussion &amp; Ruling</b>	<p><b>Discussion:</b></p> <ul style="list-style-type: none"> <li>The Applicant is engaged in the business of development of land and construction of flats. The Applicant has obtained developmental rights from Maharashtra Airport Development Company Ltd. in respect of land situated at Multi Modal International Hub Airport, Nagpur Project.</li> <li>The Applicant has exclusive rights to design, finance and develop the property by construction of commercial and residential units and integrated facilities.</li> <li>The Applicant enters into long term lease agreements with customers for the respective flat. Some of the features of the said agreements are as follows:               <ul style="list-style-type: none"> <li>- The customer cannot suggest any changes to the plan;</li> <li>- Advance payment should be made followed by the agreed instalments;</li> <li>- The buyer is liable to pay stamp duty and registration charges as applicable. It should also pay the maintenance charges;</li> <li>- The lease of the property would be registered in the name of the buyer on payment of consideration as scheduled;</li> </ul> </li> <li>The Applicant has approached the Authority to know whether GST is liable to be paid on such transaction. The Applicant has contended as follows:</li> </ul>

<sup>1</sup> Order no. GST-ARA-107/2018-19/B-35 dated April 2, 2019



- Clause 5 of Schedule III of the CGST Act states that the following activities are not to be treated as supply of goods or services:
  - o sale of land; and
  - o subject to paragraph 5(b) of Schedule II of CGST Act, sale of building.
- There is no transfer of ownership in the present case and accordingly, the exclusion of 'sale of land' is not applicable.
- Further, paragraph 5(b) of Schedule II of CGST Act provides that there should be construction of a complex, building, civil structure or a part thereof **intended for sale** would be regarded as supply of service where consideration is received after issuance of Occupation certificate (OC). In the present case, the relationship is of builder and lessee, and the construction is not intended for sale to the customer and accordingly, the present transaction would not fall under the paragraph 5(b) of Schedule II of CGST Act. Also, there is no sale of building.
- Thus, the present transaction is **not falling outside** the purview of GST in terms of Schedule III of the CGST Act.
- The act of leasing is a service. The flat is provided for residential purpose which is exempted vide notification no. 12/2017 Central Tax (Rate) dated June 28, 2017.
- The Applicant additionally also submitted the sale price of the residential flats in the vicinity of the proposed residential project.
- The department contended as follows:
  - The Applicant is going to construct the said property for the prospective lessees;
  - The transaction falls under the definition of 'works contract' as per section 2(119) of the CGST Act. Reliance was placed upon the Supreme Court judgment in the case of Larsen and Toubro [(2014) 1 SCC 708];
  - The lease agreement between the Applicant and prospective lessee is for works contract service;
  - GST will be applicable on such construction service since the entire consideration is paid prior to the issue of OC.
- The Authority observed as follows:
  - In normal circumstances, flats are generally taken on lease only when the lessee intends to stay therein. Thus, flats given on lease would mean completed units with OC and lessee customers who take flats on lease would generally prefer to use the same;
  - The Applicant receives the lease payment during the construction process as and when the slabs are completed, and such type of payments are made only when a person has entered into an agreement with a builder/developer to purchase flats in an ongoing project. This type of payment is liable to tax under GST, but the Applicant has shown them as lease payments;



- Based on the comparison of the prices of ready to move in flats in the vicinity of the Applicant's project and that being charged by the Applicant, the present transaction is only being given a colour of a lease transaction;
- The lessee is also paying the maintenance charges whereas, generally in the case of lease transactions it is the flat owner who pays these charges;
- In the subject matter, there is a composite supply of works contract in relation to construction of a complex, building, etc. which is intended to be handed over to the buyer. The agreement shows the transaction as a lease and not sale. The entire consideration is received by the Applicant prior to the issue of the OC.
- The transaction of sale of flats in a building under construction is being projected as a lease transaction of residential units by the Applicant;

**Ruling:**

- The transaction is in the form of construction of complex, building etc. which is intended to be to be handed over to the buyer, for which consideration is received by the Applicant in instalments, slab wise.
- The said construction service falls under the definition of a works contract under section 2(119) of the CGST Act chargeable to tax at the rate of 18%.

**Dhruva  
Comments/  
Observations**

- The ruling remains silent on certain factual aspects like lease tenure, rentals to be paid subsequent to possession, if any etc.
- The Authority has classified the transaction as works contract. It is interesting to note that the definition of 'works contract' provides for transfer of property in the goods in a contract which may not be the case in a lease contract. Hence, it needs to be seen as to how such services would be classified in the event these services are taken out of the ambit of works contract.
- It is worth deliberating on the subject transaction as to who receives the construction service i.e. is it the lessees or does it constitute self-service on the part of the developers. Also, can there be a collection of lease rentals whilst the property is still under construction?

**2. Golden Tobacco Ltd. - Maharashtra<sup>2</sup>**

**Issues for  
Consideration**

- Whether the supply of extra packs of cigarettes (quantity discount) by the Applicant to its distributors in addition to the normal quantity without receiving any additional consideration would be leviable to GST?
- If the answer to the above is in affirmative, what would be the taxable value attributable to such extra packs of cigarettes for the purpose of levy of GST?
- Whether the extra packs of cigarettes would be considered as exempt supplies or free samples and thereby attract the provisions of section 17(2) of the CGST Act read with rule 42 of the CGST Rules or section 17(5)(h) of CGST Act?

<sup>2</sup> Order No. GST-ARA-121/2018-19/B-52 dated May 04, 2019



## Discussion & Ruling

### Discussion:

- The Applicant is the owner of famous cigarette brands such as 'Gold Flake', 'Panama' etc. which falls under the HSN 2402 of GST Tariff. Such goods are leviable to GST at the rate of 28% and compensation cess is also applicable. The Applicant supplies its goods from its depots located in Maharashtra while they are manufactured in other States and are transferred to the Applicant on stock transfer basis.
- The Applicant proposes to introduce a steady discount scheme and a staggered discount scheme wherein it intends to offer discount in the following manner:
  - Steady discount scheme: For an order of 100 packs of Cigarettes against a total value of ₹15,000, the Applicant would supply 110 packs against the same taxable value of ₹15,000/-.
  - Staggered discount scheme: For an order of ₹5,000 from Distributor 'A', the Applicant would provide 10% discount. Whereas, for an order of ₹10,000 from Distributor 'B' the discount would be 20%.
- The Applicant would be discharging GST along with compensation cess on the consideration received towards the supply of regular quantity size.
- The Applicant submitted that the additional packs of cigarettes supplied to its distributors should not be leviable to GST on the following basis:
  - The Applicant submitted that supply of additional packs to its distributors would not fall within the scope of the clauses mentioned in Schedule I of the CGST Act;
  - The Applicant also contended that since the entire quantity (including the additional quantity) and its taxable value would get reflected in the invoice, it can be said that the taxable value mentioned in the invoice is attributable to the entire quantity (including the additional quantity) as per section 15(1) of the CGST Act. Hence, it cannot be a case of free supply without consideration or exempted supplies. Thereby, the provisions of section 17(2) and section 17(5)(h) of the CGST Act would also not get attracted;
  - The Applicant referred to a circular no. 92/11/2019-GST dated March 07, 2019 issued by the CBIC clarifying the treatment of various sales promotion schemes under GST. The said circular clarified the following with regards to the 'Buy one get one offer':
    - As per Section 7(1)(a) of the CGST Act, goods and services supplied free of cost (without any consideration) shall not be treated as supply under GST (except when covered by Schedule I of the said Act). However, the free goods supplied under the said offer is not an individual supply of free goods but a case of two or more individual supplies where a single price is being charged for the entire supply. It can be treated as supply of two goods at the price of one;
    - Its taxability shall depend on whether the supply is a composite supply, or a mixed supply and the rate shall be determined as per section 8 of the CGST Act;



- Input tax credit (ITC) shall be available to the supplier in respect of the inputs, input services and capital goods used in relation to supply made as part of such offer.
- Accordingly, the Applicant contended that the scheme of offering extra quantities with normal quantities is similar to the aforementioned 'Buy one get one offer' and therefore the consideration received for normal quantity shall be deemed to be inclusive of the consideration for additional quantity. Further, GST paid in respect of inputs, input services and capital goods should also be eligible as ITC.
- The Applicant also referred to the clarification in respect of staggered discount given by the aforementioned circular wherein it was stated that such discount shall be excluded from the value of supply provided it satisfies the parameters laid down in Section 15(3) of the CGST Act.
- The Applicant also contended that the value attributable to the additional quantity of cigarettes can be considered as discount given to the distributors at the time of supply itself as per the provisions of section 15(3) of the CGST Act. The Applicant also submitted that as per section 15(3)(a) of the CGST Act, if discount is displayed on face of invoice it must be excluded from the value of goods. Further, there is no requirement of ITC reversal where discounts are recorded on the invoices issued at the time of supply of goods.
- The Authority observed as follows:
  - The circular referred by the Applicant is clearly applicable in the instant case. It stated that the scheme of 'Buy 100 get 10 free' is clearly covered by the said circular and therefore it will not be an individual supply of free goods but a case of two or more individual supplies where a single price is being charged for the entire supply.
  - The taxability would depend upon whether the supply is a composite supply, or a mixed supply and the GST rate shall be determined as per section 8 of CGST Act.
  - The GST paid in respect of the inputs, input services and capital goods used in relation to supply of goods as part if such offers shall be available as ITC to the supplier.

**Ruling:**

- No GST would be leviable on the extra packs of cigarettes supplied by the Applicant to its distributors in addition to the normal quantity without receiving any additional consideration.
- The extra packs of cigarettes will not be considered as exempt supplies or free samples and hence the provisions of section 17(2) of the CGST Act read with Rule 42 of CGST Rules 2017 or section 17(5)(h) of the CGST Act will also not be applicable.

**Dhruva  
Comments:**

Taxability of products supplied as free / under promotional schemes has been a subject matter of divergent interpretation. The instant AAR is a welcome ruling and reinforces the interpretation provided by the CBIC circular.



### 3. E-DP Marketing Private Limited – Madhya Pradesh<sup>3</sup>

#### Issues for Consideration

- Whether the applicant/importer is again required to pay IGST on the component of ocean freight under RCM mechanism on deemed amount which will amount to double taxation of IGST on the deemed component of ocean freight of the imported goods?

#### Discussion & Ruling

##### Discussion:

- The Applicant intends to import goods on CIF basis (Cost + Insurance + Freight). The Applicant will authorize the supplier of goods located in non-taxable territory for transporting goods by a vessel from supplier's place upto the Indian custom territory. The payment of ocean freight will be made by the seller located outside India.
- Since CNF/CF value includes component of ocean freight, therefore, the applicant is required to pay IGST on this ocean freight component also along with other duties of customs. The Applicant also submitted certain Bills of Entry evidencing payment of IGST on ocean freight component
- As per Notification No. 8/2017 – Integrated tax (Rate) dated June 28, 2017, the importer of goods is required to pay IGST on reverse charge mechanism on the amount of deemed ocean freight equal to 10% of value of goods imported.
- The concerned Departmental officer submitted that the Applicant is required to pay IGST under RCM irrespective of the fact that ocean freight component is a part of CIF value.

##### Ruling:

- In view of the aforesaid notifications, the Authority ruled that there is no ambiguity whatsoever regarding payment of IGST on ocean freight. As per GST law, the Applicant is required to pay IGST on ocean freight under reverse charge mechanism, irrespective of the fact that such freight charges are included in the intrinsic CIF value;
- The Authority also observed that the Applicant had questioned the levy under RCM as being without jurisdiction. The Authority held that it does not have any jurisdiction or authority to dwell in this question.

#### Dhruva Comments/ Observations

- The Authorities have passed a similar ruling in the case of *M/s. Chambal Fertilisers & Chemicals Ltd.* [Order no. RAJ/AAR/2018-19/14, dated 25th August, 2018] and *M/s. Bahl Paper Mills Ltd.* [Order no. 03/2018-19 dated 4th May, 2018] wherein the Authority had held that Applicant is required to make payment under reverse charge basis even if IGST has already been paid on CIF value of imported goods.
- Recently, there have been several writ petitions being filed in High Courts challenging the constitutional validity of ocean freight on reverse charge basis. It would be relevant to closely monitor the developments in this regard as it would have industry wide implications.

<sup>3</sup> Order No. 05/2019 dated May 2, 2019



#### 4. General Manager Ordnance Factory Bhandara - Maharashtra<sup>4</sup>

##### Issues for Consideration

The Applicant has approached the Authority to obtain an advance ruling in respect of various issues pertaining to payment of GST on supply of certain services, eligibility of ITC, issuance of e-way bills, exemptions from payment of GST under reverse charge, etc. Each of these issues have been discussed below.

##### Discussion & Ruling

###### Discussion:

- The Applicant is a unit of Ordnance Factories Board (OFB) functioning under the Department of Defence Production and Supply of Ministry of Defence, Government of India.
- The Applicant has contended that it is a 'Government' as per section 2(53) of the CGST Act, since all the powers provided to the organisation's officers and decisions taken in the organisation are on behalf of the President of India. Thus, OFB is a part of the Central Government.
- Basis the above fact, the advance ruling sought on various issues and the rulings given by the Authority are as follows:

###### A. Levy of GST:

Sr. No.	Type of Supply	Reason for non-payment of GST
a.	Liquidated damages (LD) deducted from the payments made to the suppliers in case of delayed delivery of goods	Sr. No. 62 of notification no. 12/2017 Central Tax (Rate) dated June 28, 2017 ('exemption notification') exempts services provided by Central Government by way of tolerating non-performance of a contract for which consideration in the form of liquidated damages.
b.	Security deposit given by the suppliers forfeited due to non-fulfilment of certain contract conditions	
c.	Food and beverages supplied at industrial canteen inside the factory premises	- Sr. No. 6 of exemption notification, exempts the services provided by Central Government other than specified services [viz. postal services, services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport, transport of goods/ passengers] to non-business entities. Since the Applicant is providing the services to employees i.e. non-business entities, the supply is exempt;
d.	Community hall provided on rental basis to employees of the factory	
e.	School bus facility provided to children of the employees	
f.	Rent recovered from residential quarters of employees	

<sup>4</sup> Order no. GST-ARA-79/2018-19/B-168 dated December 24, 2018



		- Further, renting of immovable property for residential purpose is an exempt service.
g.	Conducting exams for various vacancies in the factory	Same as above, since the candidates are non-business entities.
h.	Security deposit left unclaimed by the suppliers and recognised as income after 3 years	As per the OFB norms, such deposit can be claimed by the supplier after any interval of time and the same should be mandatorily returned. Accordingly, such deposits to not fall under the category of toleration of an act and is not a service.

**Ruling:**

- The Applicant is not created by the Constitution of India as a legislative, executive or judicial authority of the country. Accordingly, it cannot be treated as a Government under section 2(53) of the CGST Act.;
- Since the Applicant cannot be regarded as 'Government', the exemptions claimed under sr. no. 62 and 6 of the exemption notification, would not be available and the tax should be applicable;
- In respect of renting of immovable service, since the same is provided for use as residence, it is exempted vide sr. no. 12 of the exemption notification;
- In respect of security deposit, which is unclaimed by the supplier, it cannot be regarded as consideration since there is no intention of the Applicant to forfeit the same. Therefore, no GST should be payable on the same;

**B. Eligibility of ITC:**

Sr. No.	Type of expense	Reason for eligibility
a.	Maintenance of gardens inside the factory premises where manufacturing activity carried out which also has an administrative building	<ul style="list-style-type: none"> <li>- The said service has been used in the course of furtherance of business [section 16(1) of CGST Act];</li> <li>- It's a requirement under the Maharashtra Pollution Control Board to maintain quality of air and prevent air pollution;</li> <li>- During the Pre GST era various CESTAT's and High Court have allowed the credit of the same.</li> </ul>
b.	(i) Maintenance, repair, security, etc. procured in respect of residential quarters of employees, market area, places	- Such services are required since factory is located at a remote area;



	of worship, playground, school, etc. which are outside the factory but within the factory estate	<ul style="list-style-type: none"><li>- The residential colony is an 'industrial township' and the appellant is responsible to provide all types of municipal services in the colony;</li><li>- Such services help in maintaining the basic living standard of the employees who in turn are responsible for running the day-to-day business of the factory;</li><li>- Reliance was also placed on various Pre GST judgments wherein the impugned credit was allowed.</li></ul>
	(ii) Repair and maintenance in respect of shops given on rent	GST is collected on renting of such shops and it is directly related to the business of renting of immovable property
	(iii) Construction, repair, maintenance of interconnected roads between the factory premises and other establishments like residential quarter, etc.	<ul style="list-style-type: none"><li>- The roads are used for inward and outward transportation of raw materials and finished goods. Thus, it is in the course of furtherance of business;</li><li>- The cost of such services forms part of the final products;</li><li>- The road in factory estate are used for business purpose as explained in point (b) above.</li></ul>
	(iv) Maintenance of land that is currently not used in factory estate	<ul style="list-style-type: none"><li>- Services are required to cut wild grass and other vegetation so as to keep area neat and clean and to ensure it does not spill over to obstruct roads used for communication;</li><li>- The cost of such services forms part of the final products.</li></ul>
c.	Medicines and maintenance of hospitals	<ul style="list-style-type: none"><li>- Hospitals keep employees fit and contribute in furtherance of business;</li><li>- It is necessary to provide basic medicinal facilities as it is in remote area.</li></ul>
d.	Maintenance of guest house in factory estate for employees and guests	<ul style="list-style-type: none"><li>- Guests visit the factories for various business purposes and thus, it is in the course of furtherance of business;</li><li>- Reliance was also placed on various Pre GST judgments wherein the impugned credit was allowed.</li></ul>



e.	Expenditure related to purchase of LPG cylinders used within industrial canteen	<ul style="list-style-type: none"><li>- Canteen is used for providing food and beverages at subsidised rates to employees. It is for the furtherance of business;</li><li>- Maintenance of the canteen is a statutory requirement under the factories Act, 1948;</li></ul>
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**Ruling:**

- Maintenance of garden inside the factory premises cannot be considered as a supply used or intended to be used in the course of furtherance of the business and the ITC should not be eligible;
- Maintenance, repair, security, etc. services procured in respect of residential quarters of employees, market area, places of worship, shops, etc. are carried outside the factory premises and can be termed as social or welfare activities not related to the business and thus, the ITC should not be eligible;
- Hospital / dispensary maintained for the employees come within the definition of 'clinical establishment' as defined in the exemption notification and are exempted under sr. no .74 of the exemption notification. Thus, ITC on such exempted supply of services is not available to Applicant under sub section (2) of section 17 of the CGST Act, 2017
- Guest house are perquisite for employees. Provision of guest house cannot be treated as an activity in course or furtherance of business. Further, they are used for the personal consumption of the employees. In terms of section 17(5)(g) of CGST Act, ITC should not be available;
- As stated above, the canteen services are taxable, the ITC on the expenses incurred for such canteen services should be eligible.

**C. Exemption from issue of E-way bills**

- Para 14(k) of Rule 138 of CGST Rules states that no e-way bill is required to be generated where the movement of goods is caused by 'defence formation' under Ministry of Defence as a consignor or consignee.
- The Applicant contended that it is a 'defence formation' since it is formed under the Ministry of Defence it is not required to issue a e-way bill.

**Ruling:**

The contention of the Applicant is correct



**D. Exemption from payment of GST under reverse charge when the services of Goods Transport Agency (GTA) are used for transporting military or defence equipments**

- Sr. no. 21(h) of the exemption notification, exempts the services provided by GTA in relation to transport of defence and military equipments.
- The Applicant contended that since the goods transported are in relation to defence and military equipments the said services are exempt, and no tax is payable under reverse charge.

**Ruling:**

The contention of the Applicant is correct

**E. Whether ITC can be claimed on the goods destroyed during testing?**

- The samples of finished goods sent to proof establishments, are completely destroyed during testing. As per section 17(5)(h) of CGST Act, the ITC should not be available where the goods are lost, stolen or destroyed.
- The Applicant contended that the section does not deal with that situation where the inputs, capital goods or services have been used in the production of final products. If the finished goods are destroyed, then the reversal should not be required. There is no provision for demanding the ITC on inputs, capital goods and input services that have already been used for the manufacture of finished goods that are lost or stolen or damaged.

**Ruling:**

No reversal is required of the goods destroyed during testing since the goods are actually used in the manufacture of final goods which are sent for testing.

**F. Whether proportionate ITC is to be reversed where lesser payment is made to the supplier due to reduction on account of LD from supplier's dues?**

- As per 2<sup>nd</sup> proviso to section 16(2) of CGST Act, if the payment is not made to the supplier within 180 days then the ITC availed should be proportionately reversed.
- The Applicant contended that the said proviso should not be applicable when the LD charges are deducted from the payment made to the supplier since the LD represents toleration of an act and the taxable value does not change due to LD.



**Ruling:**

ITC would be required to be proportionately reversed where lesser payment is made to the supplier since the Applicant would be making lesser payment to the supplier which would result in lesser payment being made by the supplier towards GST.

**Dhruva  
Comments/  
Observations**

- As per Article 77 of the Constitution of India, all executive actions of the Government of India shall be expressed to be taken in the name of the President. The supreme command of the Armed forces is with the President of India and the responsibility of the same is discharged through the Ministry of Defence (MoD). The MoD comprises of four departments, one of which is Department of Defence Production. The Ordnance Factory Board (OFB) functions under the Department of Defence Production of the MoD. In this backdrop, could it be argued that the OFB is an office under Government of India?
- In respect of the claim of ITC on guest house expenses, a similar ruling passed by the Appellate Authority in the case of *M/s National Aluminium Company Limited* [Order no. 02-03/ Odisha-AAAR/Appeal/2018-19 dated January 21, 2019] whereby the ITC was denied in respect of input and input services for maintenance of guest house. However, the said ruling allowed the ITC in respect of the plantation and gardening within the plant area.
- Further, the lesser payment made to a supplier due to reduction on account of LD charges should not lead to reversal of credits under section 16(2) of the CGST Act, as it is only a method settlement of accounts. The GST liability of the supplier should not be affected due to the same.
- In respect of forfeiture of security deposit of suppliers, there appears to be an error apparent on record, as in the instant case there is no supply of goods by the Applicant so as to be construed as additional consideration for any supply. The original supplies have been made by the suppliers whose deposit has been forfeited.



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