Dimensions – 26th Edition

Rulings / Judgments under GST era:

1. Terna Public Charitable Trust – Maharashtra[1]	
Issues for Consideration	Whether the supply of medicines, surgical items, etc. provided by the pharmacy owned and run by a hospital to: • In-house patients along with food and room rent are a part of composite supply of health care treatment and not taxable under GST? • Outpatients are a part of composite supply of health care treatment and not taxable under GST?
Discussion and Ruling	**Discussion:** • The Applicant runs a hospital in which it also owns and runs a pharmacy. There are two types of patients who come to the hospital, namely: - In-house patients, who are admitted into the hospital for the required treatment. They are provided with stay facilities, medicines/surgery items from the pharmacy, dietary food (as per the nutritionist) as required, based on the treatment. - Outpatients (OPD patients) visit the hospital for routine check-ups or clinical visits. A doctor gives prescriptions to these patients and they are free to procure the medicines and allied items either from the hospital pharmacy or from outside medical stores. The hospital has no control over their continuous treatment; • There are also walk-in customers who purchase the medicines from the pharmacy, but the prescription is of outside doctors.

[1] Order no. GST-ARA-135/2018-19/B-55 dated May 21, 2019

- Presently, the Applicant is not charging GST on the medicines sold through the pharmacy along with the food and room rent to the in-house patients but is charging GST on the medicines sold through the pharmacy to the outpatients/walk in customers.
- The Applicant has approached the Authority to provide ruling in respect of the above questions. The Applicant contended as follows:
  - The various supplies made to the in-house patients i.e. stay, food, medicines are indispensable items and is a composite supply to facilitate health care services
  - Health care services provided by a '*clinical establishment*' are exempt vide sl. no. 74 of notification no. 12/2017-CT(Rate) dated June 28, 2017 and the hospital is covered within the definition of '*clinical establishment*' as mentioned in this notification;
  - The Government has clarified that food supplied to in-house patients is a part of composite supply of health care services and exempted [ref: Circular No. 32/06/2018-GST dated February 12, 2018]. Further, it has also been clarified that room rents to in-house patients in hospital is exempted from GST [ref: Circular No. 27/01/2018-GST dated January 04, 2018];
  - Reliance was placed upon the rulings in the case of *M/s KIMS Health Care Management Ltd* [Order no. KER/16/2018 dated September 19, 2018] and *M/s Ernakulam Medical Centre Pvt. Ltd*. [Order no. KER/17/2018 dated October 20, 2018] wherein, the supplies made of food, medicines and room rent to the in-house patients were held to be composite supply and part of health care services;
  - Medicines and other allied items supplied through the pharmacy to the outpatients are also incidental to the healthcare services and are composite supplies.
- The Authority observed as follows:
  - In-house patients:
    - The supplies made of medicines and other items from the pharmacy along with the food and room rent to in house patients are a part of composite supply of health care treatment;
  - Outpatients:
    - Hospitals are providing health care services only to the extent of writing of the prescriptions because once the prescription is made, the patient is free to purchase the medicines from pharmacy of their choice;
    - This is comparable to the sale of medicines by any other pharmacy situated outside the hospital who are liable to pay GST;
    - It is an individual supply of medicine and it is not a complete full chain of treatment activity as given to the in-house patients for the specific illness;
    - The condition of the exemption notification (supra) is not satisfied.

	Ruling: • The supply of medicines, surgical items, etc. provided to in-house patients by the hospital owned pharmacy along with food and room rent is a part of composite supply of health care treatment and not taxable under GST. • The medicines supplied to the outpatients through the hospital owned pharmacy is not a part of composite supply of health care treatment and is taxable under GST.
Dhruva Comments / observations	• In the case of *M/s Ernakulam Medical Centre Pvt. Ltd.* (*supra*) the Authority had stated that the medicines supplied to the outpatients through the hospital pharmacy is not healthcare services. This ruling was also upheld by the Appellate Authority [Order no. AAR/03/2018 dated December 14, 2018]. • Various similar rulings have been passed in the case of the various supplies made to in-house patients which now appears to be a settled issue. A similar tax position has been adopted by High Courts under the erstwhile VAT regime. • Hospitals / nursing homes would need to identify appropriate amount of input tax credit as certain transactions which are taxable for outpatient become exempt in the case of in-house patients.

2. Navi Mumbai Municipal Corporation – Maharashtra[2]	
Issues for Consideration	• Whether online tendering to be considered as supply of goods or services? • Whether offline tendering to be considered as supply of goods or services? • Under which tariff head online and offline tendering should be taxed? • If tendering is services, whether it will be considered as administrative or specific service?
Discussion and Ruling	**Discussion:** • The Applicant is a Municipal Corporation which caters to civic services to the residents of city such as water supply, public health, sanitation conservancy, solid waste management or slum improvement and upgradation of Health services, etc.; • While developing various facilities or to run useful activities for public, Applicant procures various services, goods from contractors and vendors. Such procurement of goods and services were awarded through tendering process which includes online and offline tendering; • **Online tendering** – Requirement is raised online, and all the processes related to tendering (application, payment of fees, submission of technical bid & financial bid, etc.) is done online; • **Offline tendering** – Requirement is raised through a manual process. All the process related to tendering (application, payment of fees, submission of technical & Financial

[2] Order no. GST-ARA-122/2018-19/B-68 dated June 10, 2019

	bid, etc.) along with submission copies of technical & financial bid will be done manually by way of hard copies; • The Applicant submitted that online tendering should be considered as supply of services and offline tendering as supply of goods. Applicant also submitted that tendering is a specific service; • The concerned officer submitted following: - Online tendering will qualify as supply of services and GST will be applicable @18%; - Sale of manual tender form will qualify as supply of goods, and tender fees for submission of tender is supply of services; **Ruling:** • The Authority observed that online tendering does not get covered by the definition of goods. It was held that the provisions of e-tender, which is intangible is delivered through telecommunication network or internet. Thus, the intention of the legislature is very clear, to treat such activities as supply of services; • The Authority further held that offline tendering also does not fulfil the definition of goods in its entirety, hence, offline tendering will also be considered as services; • The Authority observed that the service of tendering is not specifically covered under any tariff heading, hence, will be taxed under Heading 9997.
Dhruva Comments / observations	• The aforesaid advance ruling provides clarity on classification and taxability of various amounts collected in the tender / bidding process (online / offline) when floated by various Government / private agencies. • Interestingly, the ruling does not comment on taxability or otherwise of these services considering exemptions granted in relation to functions entrusted under Article 243W of Constitution of India. Also, there are no comments on applicability of reverse charge provisions.

3. TVH Lumbini Square Owners Association - Tamil Nadu[3]	
Issue for Consideration	Whether the member of Residential Welfare Association ('RWA') liable to pay GST only on the amount in excess of ₹7,500 or on the entire amount?
Discussion & Ruling	**Discussion:** • The Applicant is an RWA registered under the Societies Act. It procures various services from third party such as management services, maintenance of elevators, swimming pool, etc. for the common use of its members. • The Applicant collects maintenance charges on a quarterly basis along with applicable GST, if any. • The Applicant is currently claiming exemption of ₹7,500 as per sl. no. 77 of notification no. 12/2017-Central Tax (Rate) dated June 28, 2017 as amended in respect of those

[3] Order No. 25/AAR/ 2019 dated June 21, 2019

	members whose contribution towards maintenance charges does not exceed ₹7,500 per month. • The Applicant contended the following: - There are two possible interpretations regarding the correct method of claiming the exemption under the aforementioned notification. If the maintenance charges exceed ₹7,500 per month per member, then, GST should be leviable either on the entire amount or only on the amount exceeding ₹7,500; - The aforesaid notification uses the words ***'up to an amount*** *of five thousand rupees per month per member'* which was later substituted to *'seven thousand and five hundred'*; - In view of the above, it can be said that the exemption is up to ₹7,500 and it would not be lost even if the amount exceeds ₹7,500; - The e-flier on Co-operative Housing Societies issued by the CBIC also endorses the above view. • The Authority observed the following: - The description of service given under sl. no. 77(c) is *'Service by an unincorporated body or a non-profit entity registered under any law for the time being in force, to its own members by way pf reimbursement of charges or share of contribution* ***up to an amount of ₹7,500 per month per member*** *for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex';* - The exemption under sl. no. 77 applies only to those services which exactly match the above description. Hence, the said exemption applies only when the maintenance charges are **up to an amount of ₹7,500**. In the event, the charges or share of contribution exceeds ₹7,500 per month per member, then, such service shall not fit into the above description and hence shall not be exempt under GST; - Any service either falls within the scope of description in column (3) or it does not. The taxpayer does not have any option to pick and choose from the description of the services to make any service partly exempt and partly taxable. **Ruling:** • Services provided by the Applicant to its members by way of reimbursement of charges exceeding ₹7,500 per month per member for sourcing of goods or services from third person for common use of its members, squarely falls outside the purview of aforesaid exemption. Thus, CGST and SGST at appropriate rates shall be paid by members on full amount if charges exceed ₹7,500 per month per member.
Dhruva Comments / observations	Recently, the CBIC has also issued a circular [Circular No. 109/28/2019-GST dated July 22, 2019] wherein it is clarified that the aforesaid exemption is available only when the maintenance charges does not exceed ₹7,500 per month per member. In case, these charges exceed ₹7,500/- per month per member, the entire amount is taxable.

4. National Institute of Bank Management – Maharashtra[4]	
Issue for Consideration	Whether subscription or contribution paid by the members to the Applicant for its recurring and non-recurring expenses is leviable to GST?
Discussion and Ruling	**Discussion:** • The Applicant is a premier Academic cum Training Institute. Reserve Bank of India ('RBI'), State Bank of India ('SBI') and other Public Sector Banks were its first members and were entrusted with the management of the Applicant's affairs. • The aforesaid members contribute annually an amount of ₹100 lakhs towards recurring expenses and also contribute the entire capital expenditure at actuals. The said contributions are made in the ratio of RBI - 40%, SBI - 20% and other Public Sector Banks - 40%. • As per the Memorandum of Association ('MOA'), the Applicant would undertake activities such as promoting and conducting of research for improvement of banking operations; assisting the banking and financial institutions in matters such as designing measurement tests for employee selection, appraisal programs, etc.; promoting and undertaking faculty development programmes; maintaining liaison with banking and financial institutions. • The Applicant offers various services in the nature of training, coaching, research, consultancy to members for which separate fees are charged and GST is levied thereon. • The Applicant contended the following: - There is no supply of goods/services as per section 7 of the CGST Act since: o The members contribute not as per their will but as per the resolution passed by the Governing Board and therefore it is more in the nature of aid/ grant/ subsidy and cannot be construed as consideration. The unspent contribution of one year is treated as 'income received in advance' and adjusted against the contribution of subsequent year; o In order to satisfy the term 'business' there must be some benefit / facility provided to the members which is not so in the instant case; o There is no direct nexus between the contribution received from the members and the services offered to them. - The principle of mutuality is applicable in the instant case since the contributions made are utilised as per the terms mentioned in the MOA without earning any profit; - Additionally, the Applicant relied on the following judicial decisions and advance rulings: o *Cultural Society of Angamally* v. *CCE* [(2008) 13 STT 277 (CESTAT)]; o *Public Health Foundation of India* v. *Commissioner of Service Tax, Delhi* [2015 (38) S.T.R. 447 (Tri. - Del.)];

[4] Order No. GST-ARA-139/2018-19/B-75 dated June 25, 2019

	○ *Lions Club of Poona Kothrud* [Order No. GST-ARA-33/2018-19/B-100 dated August 28, 2018]. • The Authority observed the following: - The activities undertaken by the Applicant can be construed as supply in terms of section 7 of the CGST Act since: ○ The contributions are received to carry out the activities specified in MOA. Hence, it can be construed as 'consideration' under GST law; ○ The services provided by the Applicant to its members as per the MOA falls under the term 'business'. - The principle of mutuality is not applicable in the instant case since as per the definition of the term 'person' under the CGST Act, the Applicant and the members can be construed as two different persons. Further, activities undertaken by the Applicant can be considered as service due to the wide definition of 'services' under the CGST Act. **Ruling:** • The contributions received from the members can be construed as consideration for the services supplied by the Applicant as stated in the MOA. Further, GST is payable on such contributions.
Dhruva Comments / observations	• A similar ruling is pronounced by the Mumbai Bench in case of *Rotary Club of Mumbai Queens Necklace* [Order No. GST-ARA-118/2018-19/B-46 dated April 30, 2019]. Further, decision relied in case of *Lions Club of Poona Kothrud (supra)*, relied upon by the Applicant stands overruled by the Appellate Authority for Advance Ruling. • The principles of mutuality are well recognised by the Courts under the pre-GST era. It will be interesting to see how the judiciary evolves on this contentious matter under the GST regime.

5. M/s Commercial Steel Engineering Corporation v. The State of Bihar and 2 others[5]	
Issues for Consideration	• Whether the reflection of input tax credit ('ITC') in the electronic credit ledger constitutes a confirmation of availment or utilization of credit? • Whether the Petitioner could be subjected to a proceeding under section 73 of the Bihar Goods and Services Act, 2017 ('BGST Act') for the entire amount of credit reflected in the electronic credit ledger without quantification of the amount which has been availed or utilized?
Discussion and Judgment	**Discussion:** • The Petitioner is a partnership firm in Bihar. The assessment orders passed under the VAT Act for the FY 2007-08 and FY 2011-12 show ITC admissible to the Petitioner amounting to ₹18.33 lakhs and ₹20.79 lakhs respectively.

[5] 2019-VIL-348-PAT – The High Court of Judicature at Patna

- The Petitioner was entitled to carry forward the ITC, but it was not reflected in the returns filed for subsequent years and was only detected in the year 2017. The Petitioner filed a refund application for the missed ITC and the refund application for the FY 2007-08 was rejected on the grounds that it was time-barred. Furthermore, the Petitioner has no information regarding the refund application for FY 2011-12.
- Post introduction of the BGST Act, the Petitioner filed an application in Form TRAN-1 under section 140 of the BGST Act to take credit for FY 2007-08 and FY 2011-12 and carry it forward in their electronic credit ledger. A certain portion of this ITC was utilized but was then remitted in a subsequent return.
- The application under section 140 of the BGST Act was rejected by the authorities and an order was passed raising a tax demand to the tune of transitional credit claimed in relation to FY 2007-08 and 2011-12 along with interest and penalty.
- The Petitioner made the following submissions:
  - The application to carry forward the ITC to their electronic credit ledgers under the pre-GST regime was filed within the due date in accordance with the provisions contained under section 140 of the BGST Act. The authorities while rejecting the application have wrongly exercised the powers under section 73 of the BGST Act. In the event of the application not being legally sustainable, the application was liable for rejection and did not warrant a commencement of proceedings under section 73 of the BGST Act for assessment of liability along with interest and penalty;
  - The assessment orders confirm the admissibility of ITC for the FY 2007-08 and 2011-12 and it is a matter of record. Even if the refund application was rejected, no proceeding under section 73 of the BGST Act is sustainable unless it can be demonstrated that the Petitioner has either availed or utilized the said transitional credit. Further, mere reflection of the transitional credits in the application would not amount to its availment or utilization.
- The main thrust of the Respondent's argument was that the moment transitional credits are reflected in the electronic credit ledger upon filing of the application under section 140 of the BGST Act, it amounts to availment of the credit. Further, since the Petitioner wrongly availed the ITC, they were liable to be proceeded against in terms of section 73 of the BGST Act. The Respondent also relied on the judgment of the Hon'ble Supreme Court in the case of *Union of India & Ors.* v. *Ind. Swift Laboratories Ltd.* [2011-VIL-04-SC-CE].
- The Hon'ble High Court referred to section 73 of the BGST Act and rules 117 and 121 framed under the said Act in order to determine whether the credit was availed by the Petitioner, for which the proceedings were initiated. The High Court made the following observations:
  - Section 73 makes a dealer liable for proceedings in case of short payment of taxes or erroneous refunds or for wrongly availing or utilizing ITC for reasons other than fraud, wilful misstatement or suppression of facts;

	- Wrong availment or utilization of ITC is a positive act and only when such act is substantiated makes the concerned party liable for recovery of such amount of tax as availed. The tax available at the credit of the party should have been brought into use in order to reduce tax liability through its reflection in the return filed for any financial year, thus reducing the available credit balance; - It would be stretching the term 'availment' beyond prudence to treat the mere reflection of the transitional credit in the electronic credit ledger as an act of availment for drawing proceedings under section 73 of the BGST Act; - The reliance placed by the Respondent upon the judgment in the case of *Ind. Swift Laboratories Ltd.* (*supra*) was also distinguished by the Hon'ble High Court since the judgment involved an expression on credit which had been utilized by a dealer against credit availed instant case; - On a purposeful reading of sections 73 and 140 of the BGST Act along with rules 117 and 121 thereunder, it can be construed that wrongly reflected transitional credit in an electronic credit ledger on its own is not sufficient to draw penal proceedings until the same or any portion thereof is put to use so as to become recoverable. **Judgment:** • The order passed by the authorities in exercise of powers outlined under section 73 of the BGST Act was held to be illegal and an abuse of statutory jurisdiction and subsequently quashed.
Dhruva Comments / observations	The term 'availment' has not been defined under the GST law. The instant judgment equates availment to utilisation, and states that unless the positive act of availment results in reducing tax liability through its reflection in the return, it cannot be regarded as either availment or utilization. A similar interpretation was also adopted by the Hon'ble Karnataka High Court in the case of Bill Forge Pvt Ltd with respect to wrong entry in the books of accounts and its reversal before utilisation does not result in credits wrongly taken to trigger interest, being compensatory in character.

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