Dimensions – 35th Edition

Ruling / Judgments under GST era:

1. M/s. Metro Dairy Ltd. – West Bengal[1]	
Issue for Consideration	To what extent can the input tax credit ('ITC') be availed on capital goods and input services which are procured for the production of both taxable and exempted goods?
Discussion & Ruling	**Discussion:** • The Applicant had procured capital goods and input services which would be used to manufacture both taxable and exempted goods. The commercial production of certain taxable goods started from December 2018, but the commercial production of exempted goods did not begin in the year 2018-19. • The Applicant approached the Authority to know to what extent and in what proportion the ITC is admissible on such capital goods and input services. • The Applicant submitted the following: - In terms of rule 43(1)(c) of the CGST Rules, the useful life of the capital goods is taken as five years from the date of invoice; - The formula prescribed under rule 43 of the CGST Rules, is applicable only after the commencement of the commercial production. The useful life of the capital goods should, therefore, be calculated from the date of commercial production. - In terms of rule 42 of the CGST Rules, the amount of ITC attributable to exempt supplies should be computed every month and thereafter, for the entire financial year to which such ITC relates. Since the commercial production of exempt goods did not begin in the year 2018-19 then the entire ITC on input services should be eligible.

[1] Order No. 23/WBAAR/2019-20 dated September 23, 2019

	• The Authority observed as follows: - The Applicant claimed the entire ITC when the production of taxable goods commenced, in terms of rule 43(1)(b) of the CGST Rules; - However, when such capital goods are used for manufacture of exempted goods the amount ITC to be attributed to the period when such capital goods were used for manufacturing taxable goods should be determined in terms of rule 43(1)(c) of the CGST Rules; - The balance of the ITC should be apportioned in terms of rule 43(1)(e), (f) and (g) of the CGST Rules over the useful life of the asset from the date of the invoice; - There is no common ITC of input services during the year 2018-19 since there were no exempted goods manufactured in the year 2018-19. **Ruling:** • The Applicant is required to compute the admissible amount of the input tax credit on the capital goods used for both taxable and exempt supplies in the tax periods over the useful life of the goods, calculated from the date of invoice. • The entire ITC on input services availed during the year 2018-19 is eligible.
Dhruva Comments / observations	The GST law does not have any concept for availing the credit based on the commencement of commercial production. The above ruling is in line with the GST provisions.

2. Assistant Commissioner v. Bengal Peerless Housing Development Company Ltd. – West Bengal[2]	
Issue for Consideration	Whether provision of construction service along with preferential location services ('PLS') including floor rise, directional advantage would constitute a composite supply with the construction service as principal supply?
Discussion & Order	**Discussion:** • The Respondent is engaged in the supply of construction of residential dwelling units and also provides PLS to the buyers of the units. • The West Bengal Authority for Advance Ruling ('Authority') had held that the supply of construction service along with PLS are naturally bundled and the PLS has to be bought as a package, where the construction service remains the principal supply. The Authority also passed the ruling to treat the charges paid for "right to use car parking space" as composite supply though the same was not a part of PLS. • The Appellant approached the West Bengal Appellate Authority for Advance Ruling ('Appellate Authority') to contend that the Authority has erred in treating the PLS as a composite supply with the construction service being principal supply and by providing the abatement on the entire value in terms of notification no. 11/2017 - Central Tax (Rate) dated June 28, 2017 ('notification') would cost dear to the Government.

Order no. 09/WBAAAR/Appeal/2019 dated September 25, 2019

	• The Appellant placed reliance upon the judgment of Hon'ble Delhi High Court in the case of *Suresh Kumar Bansal* v. *UOI* [2016 (43) STR 3 (Del)], wherein it was held that the preferential location charges cannot be traced directly to the value of any goods or value of land but are a result of the development of the complex as a whole and the position of a particular unit in context with that of the complex. • The Respondent contended as follows: - The supplies of floor rise and directional advantage are integral to the principal supply of construction service and in the absence of anyone, the principal supply of any one cannot be effected and therefore stated that these services are naturally bundled in the ordinary course of business; - Reliance was placed upon the CESTAT judgment in the case of *Logix Infrastructure* v. *CCEx. & S.T. Noida* [2019 (25) GSTL 59 (Tri – All)] wherein it was held that PLS, external development charges etc. are integral to the main services which is construction of residential complex service and therefore, the entire consideration received by the Appellants are eligible for abatement; - Reliance placed upon Suresh Kumar Bansal (supra) is misplaced as the same pertains to the period prior to July 01, 2012. • The Appellate Authority observed as under: - PLS is attributable to the choice of the purchaser in respect of floor rise and directional advantage and cannot be treated as naturally bundled with construction service in the ordinary course of business; - During the erstwhile Service tax regime there was a specific category of PLS (section 65(105) (zzzzu) of Finance Act, 1994) on which no abatement was available. Service tax has been imbibed into GST and accordingly, the same treatment to PLS should be applicable under GST; - Respondent has raised separate invoice for sale of units and PLS, which helps to conclude that PLS is not associated with land. Thus, the abatement cannot be allowed on the PLS, which is altogether a separate service; - PLS falls under SI. No. 3(iii) of the notification *(supra)* for which no abatement has been provided. **Order:** • Construction service and PLS are not naturally bundled. Accordingly, the benefit of abatement, in terms of the notification *(supra)* should not be available in respect of PLS. • Charges collected for car parking space would also not be eligible for abatement.
Dhruva Comments / Observations	• SI. no. 3(iii) of the notification as referred to in the above ruling is the one as existed at the time of introduction of GST. The said SI. no. 3 has undergone significant changes thereafter. Further, the said SI. no. 3(iii) has been substituted w.e.f. August 22, 2017. • Further, the Government vide notification no. 3/2019 – Central Tax (Rate) dated March 29, 2019 has included various charges such as preferential location charges, development charges, parking charges, etc. within the meaning of "gross amount"

	charged for construction of "affordable residential apartment". Thus, the Government has included the charges collected for PLS as a part of the construction service. The said amendment was not considered in the above ruling. On this sole ground, it needs to be deliberated as to whether the Order requires a reconsideration or could be distinguished. • Levy of tax on PLS has been a subject matter of dispute during the Pre GST era and also the judgment of Suresh Kumar Bansal *(supra)* has been admitted by the Hon'ble Supreme Court and is pending for hearing.

Judgment under Pre-GST era:

3. State of West Bengal & Ors. v. Calcutta Club Limited [3]	
Issues for Consideration	• Whether the doctrine of mutuality is still applicable to incorporated clubs or any club after the 46th Amendment to Article 366(29-A) of the Constitution of India? • Whether the supply of food and drinks by incorporated club to its permanent member liable to Sales tax and whether the contributions of members to their club are chargeable to Service tax?
Discussion & Judgment	**Discussion:** • The Respondents argued that there is no transfer of property from one person to another so as to be construed as sale and eventually exigible to Sales tax. The club, whether or not incorporated, is only acting as an agent for its members and does not amount to sale of preparations supplied in absence of element of transfer. • The Hon'ble Supreme Court referring to several judgments and in particular the Supreme Court judgment in case of *C.T.O.* v. *Young Men's Indian Association* [(1970) 1 SCC 462] held that there is no distinction between a club in the corporate form or by way of a registered society or incorporated by a deed of Trust. • Further, it is held that property held should be for and on behalf of the members of the club and there is no transfer of property from one to another. • The next issue before the Court was applicability of doctrine of mutuality considering Young Men's Indian Association and other judgments post introduction of 46th Constitutional Amendment which read as under: *"366. (29-A) "tax on the sale or purchase of goods" includes—* *(a) to (d) …* *(e) a tax on the supply of goods by* ***any unincorporated association or body of persons*** *to a member thereof for cash, deferred payment or other valuable consideration"* • The Court observed that the legislators while framing the aforesaid amendment assumed that sale by a club having corporate status is liable to Sales tax. On this premise, provisions were framed to tax sales by unincorporated clubs to its members.

[3] 2019-VIL-34-SC-ST – The Supreme Court of India

	• Even assuming that the term "unincorporated association or body of persons" must be read disjunctively, the term "body of persons" would not refer to corporate form unless accompanied by the expression "whether incorporated or not". • There cannot be a sale of goods to oneself. The ratio laid down by *Young Men's Indian Association* (*supra*) holds good and cannot be done away by limited fiction introduced by Article 366(29-A) (e). • On Service tax front, the law provided for the taxable category of "club or association service" which excluded anybody established or constituted by or under any law for the time being in force. It is held that since companies / cooperative societies are constituted under respective Acts, such incorporated clubs were not liable to tax during pre-negative list regime. With effect from July 1, 2012, the definition of service contained an explanation which considered unincorporated association or body of persons and their members as distinct persons. Interestingly, the expression "a body of persons" juxtaposed with "an unincorporated association" does not state "body of persons, whether incorporated or not". Thus, since similar provisions existed pre / post negative list regime, doctrine of mutuality continues to apply, and no Service tax apply on incorporated member's club. **Judgment:** The judgment upheld the view taken by Hon'ble Jharkhand and Gujarat High Court following *Young Men's Indian Association (supra)*.
Dhruva Comments / Observations	Applicability of doctrine of mutuality has been a subject of judicial interpretation time and again. It would be interesting to have a relook at Corporate / Society / Trust structures and examine GST implications considering the doctrine of mutuality.

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