



Dimensions – 75th Edition

Rulings under GST era

M/s Atriwal Amusement Park - Authority for Advance Ruling, Madhya Pradesh¹

Issue for Consideration

Whether input tax credit (“ITC”) can be availed on the below mentioned goods / services used for construction of a water park:

- Water slides;
- Steel and civil structures used in construction for supporting the structure of water slides;
- Area development and preparation of land on which water slides are erected;
- Construction of swimming pool or wave pool.

Discussion

- The Applicant proposes to undertake an activity of construction of a water park for which various taxable components or services will be used.
- The Applicant approached the Authority for an Advance Ruling (“the Authority”) in respect of the availment of ITC on goods / services mentioned above and contended as follows:

- Applicant is required to procure various goods, such as water slides, kids play slide, wave generation machine and other machines that are used to provide the output services. These goods are covered under the definition of ‘plant and machinery’ (as per explanation to section 17 of the CGST Act, 2017). Accordingly, the ITC on these goods is admissible.
- A support structure (commonly known as Tower) made up of steel, iron and other civil work is constructed by the Applicant to install the water slides. Also, without such a support structure, the slides cannot be installed. Further, in order to install the machines, a machine foundation and a room for its protection is required to be constructed, as without it the machine cannot be operated effectively. The definition of ‘plant and machinery’ includes **foundation or structural support**, and accordingly, the ITC of such steel and civil structure, machine foundation and room should be allowed.
- In order to install the water slides and the structural support for water slides, a strong base is required to be constructed, which

¹ 2020-VIL-218-AAR



- involves area development, digging process and creation of a base. It is the foundation for water slides, which will be attached to the base with screws. As the definition of 'plant and machinery' includes **foundation or structural support**, the ITC should be admissible.
- Swimming pool and wave pools are an integral part of water slides and should be considered as single unit, as without them there is no use of water slides. Hence, they form the support structure for water slides because they are directly connected to the swimming pool / wave pool. Accordingly, the ITC should be eligible.
 - After considering the submissions of the Applicant, the Authority observed as follows:
 - The explanation of the term 'plant and machinery' under section 17(6) of CGST Act, 2017 includes 'foundation and structural support used to fix apparatus, equipment or machinery. However, the explanation excludes **'land, building and other civil structures'** from 'plant and machinery. Thus, prima facie, there appears to be a contradiction in the inclusion of 'foundation and structural support' and exclusion of 'building and other civil structures'.
 - As per the meaning of foundation², it is a civil structure that forms the base of a structure. This structure can be a building or a support structure. Therefore, there is no doubt that a foundation is a sub-specie of the genus civil structure.
 - However, the contradiction is negated by the fact that the exclusion of building or civil structure is for plant and machinery *per se*, while the inclusion of foundation or structural support is to the extent that they are used to install apparatus, equipment and machinery to earth. Thus, if the foundation or structural support that is used to fasten the machinery, apparatus or equipment to the earth, then such foundation or civil structure shall be included in 'plant and machinery'.
 - It is necessary to determine why 'building and civil structure' has been excluded from 'plant and machinery'. The term plant has a wide meaning and its interpretation varies depending upon the context and the law in which matter arises. Reference was made to various dictionary definitions of the term 'plant' and also case laws (including international) whereby, the term 'plant' has been given a very wide meaning and could include sanitary fittings of a bathroom in a hotel, cement used for setting up of a cement plant, a building used for carrying on business or manufacturing activity, plant is not confined to an apparatus used for mechanical operations or processes, walls and structures of a freezing chamber, factory building, dry docks, etc.
 - Thus, the exclusion was necessary since there should be clarity regarding the classification of building and civil structures that were until now treated as 'plant' in various context and laws. Hence, the term 'plant and machinery' under section 17(6) of the CGST Act, 2017 specifically excludes buildings and other civil structures from the meaning of term 'plant'.
 - However, it has been also accepted that in many cases plant and machinery requires a support structure and / or foundation for installation and cannot work otherwise. Hence, civil structures and foundation as supporting structures for fastening the plant and machinery to the earth has been included as a part of 'plant and machinery'.

Ruling

The Authority passed the following order:

- Water slides fall under the term apparatus, equipment and machinery, and hence it shall be eligible for the claim of ITC.
- Since slides are fastened to the steel and civil structures and they are affixed to the earth through the said structure, these steel and civil structures are foundation or support structures that are used to fasten the machinery. Hence, ITC of goods or

² Reference was made to dictionary meanings and to SB Sarkar's Words and Phrases of Excise, Customs & Service Tax



services used in the construction of such support is admissible.

- ITC shall be eligible on the wave pool machines and on goods and services used for the foundation of these machines. However, the machine room, which is a civil structure constructed for the protection of the machine, is neither a foundation nor civil structure for the machine, and accordingly, the ITC in respect of construction of the room should not be eligible.
- ITC on goods or services used for area development and preparation of land site shall not be available as these expenses are part of cost of land and are interminably bound with land. These are liable to be capitalized under land. Therefore, due to the specific exclusion of 'land' from 'plant and machinery', ITC shall not be available.
- Swimming pools and water pools are not support structure or foundation for plant but are independent items, *per se*. Since they are not foundation or support structure and they are civil structures, they are excluded from 'plant and machinery', and accordingly, the ITC shall not be available.
- Provision of facilities like transformers, sewage treatment plant, D.G. sets, lifts, etc. which are *sine qua non* for a commercial mall, and hence cannot be considered separate from the building or civil structure. The provision of these are either statutory for a building or defines the nature of the building as a commercial mall. Hence, ITC on such inward supplies involved in the construction of an immovable property that is a civil structure should not be available.

Dhruva Comments:

The Authority has analysed in depth as to what constitutes 'plant and machinery' and the reason for exclusion of civil structures from this. However, in recent times, as to what constitutes 'plant and machinery' has been a subject matter of dispute under GST.

The Authorities have been consistently denying the credits on D. G. sets, lifts, etc. by treating it as a part of the building itself, and thereby regarding it as an immovable property. It needs to be analysed as to whether such items qualify as plant and machinery *per se*.

M/s Shilpa Medicare Limited - Authority for Advance Ruling, Andhra Pradesh³

Issues for Consideration

- Would the transfer of the whole business (along with capital assets) from one registered unit to another amount to supply of 'goods' or 'service'?
- Would the transfer be covered under sl. no. 2 of the notification no. 12/2017 - Central Tax (Rate) dated June 28, 2017 ("the exemption notification")⁴?
- Can the unutilised input tax credit ("ITC") be transferred to the transferee unit by filing Form ITC-02?

Discussion

- M/s Shilpa Medicare Ltd. ("the Company") is engaged in Research and Development ("R&D") work in Active Pharmaceutical Ingredient ("API") and formulation molecules and manufacture of formulation products in small quantities for R&D purposes. The R&D unit of the company ("the Applicant") is located in the state of Andhra Pradesh and is registered under the GST law.
- The Applicant is proposing to transfer its entire business to another unit of the Company, registered under GST in the state of Karnataka, for a monetary consideration.
- The Applicant has accumulated ITC balance which would also be transferred via Form ITC-02.
- The Applicant approached the Authority for Advance Ruling ("the Authority") in respect of the above mentioned issues and contended that as per sl. no. 2 of the exemption notification, activity of

³ Ruling no. AAR 05/AP/GST/2020 dated February 24, 2020

⁴ Sl. no. 2 of the exemption notification exempts services by way of transfer of a going concern, as a whole or independent part thereof



transfer of a going concern constitutes a supply of service and is taxable at Nil rate.

- The Authority observed as follows:
 - As per section 7(1)(a) of the CGST Act, 2017, the expression 'supply' includes all forms of supply such as sale, **transfer**, barter, etc. made for a consideration and in the course or furtherance of business.
 - In the present case, the activity of 'transfer' is made for a consideration, but it is neither in the course of business nor for furtherance of business.
 - A going concern is a one-time affair where business is sold including assets in entirety or an independent part thereof. Even though the transaction does not amount to a 'supply' under section 7 of CGST Act, 2017, but qualifies to be one under the scope of 'supply' as it is backed by the term 'includes' used in the expression of 'supply'. Thus, by broadly interpreting the term 'includes', this activity is brought under the scope of supply.
 - The transfer of business assets constitutes 'supply of goods' as per clause 4 of Schedule II to CGST Act, 2017. However, in the present case, since the Applicant transfers / sells the whole business along with capital assets, it disqualifies the 'going concern' to be grouped under 'supply of goods' as per clause 4(c) of Schedule II to CGST Act, 2017.
 - 'Service' as defined under section 2(102) of the CGST Act, 2017, includes anything 'other than goods'. Thus, it is obvious that 'going concern' which is excluded from the list of 'supply of goods' would automatically fall under 'supply of services'. Accordingly, it would attract Nil rate of tax as per sl. no. 2 of the exemption notification.
 - Section 18(3) of CGST Act, 2017 read with rule 41 of CGST Rules, 2017 allows the transferor to transfer the unutilised ITC to the transferee, lying in his electronic credit ledger, by filing Form GST ITC-02.

Ruling

- Transfer of business along with 'capital assets' on a going concern basis amounts to supply of 'services'
- The transfer is covered under sl. no. 2 of the exemption notification.
- The Applicant can file Form ITC-02 to transfer unutilised ITC to the Karnataka unit.

Dhruva Comments:

This is a very unique ruling where the transfer of going concern concept has been applied within the same legal entity. There is no discussion on whether this is on account of the fact that under the GST provisions, two separate registrations are deemed to be separate persons. Assuming it to be so, whether the deeming fiction can be extended to this is a debatable point. Further, the two separate registrations are in different States. The consequence of such transfer is not very clear because it does not seem to be a case where there were two separate registrations for different business verticals and one merged into another within the same State. It also needs to be seen how ITC would get transferred from one State to another. Interestingly, there is no mention in the ruling as to whether any ITC would be required to be reversed by the Applicant as the transaction amounts to be an exempt supply.

Halliburton Offshore Services INC. (LIH) - Authority for Advance Ruling, Andhra Pradesh⁵

Issues for Consideration

- Can reimbursements received under a contract towards lost / damaged equipment be regarded as supply under GST?
- If yes, what would be the classification and rate of GST applicable on such supply?

Discussion

- M/s Halliburton Offshore Services INC. ("the Company") is registered under the laws of Cayman Islands and is globally engaged in the business of

⁵ 2020-VIL-202-AAR



providing various oilfield services to exploration and production companies. The Company has a unit set up in the state of Andhra Pradesh (“the Applicant”) which is registered under the GST law.

- The Applicant was awarded a contract by M/s Oil and Natural Gas Company Ltd., New Delhi (“ONGC”) in the year 2016 for supply of bundled services pertaining to oilfield services to support operations of DP rigs in KG Offshore, East Coast of Indian offshore waters.
- The contract had a clause whereby if any equipment of the contractor (i.e. the Applicant) used for providing the oilfield services is lost / damaged due to uncontrollable or unforeseen down hole environmental situations in the oil and gas well, then ONGC was required to reimburse the cost of such equipment as per the formula prescribed in the contract.
- The Applicant approached the Authority for Advance Ruling (“the Authority”) in respect of the above issues and contended as follows:

Supply under GST

- The reimbursement is paid by ONGC, as per the contract, only if the equipments lost in hole (“LIH”) of the oil and gas well did not occur due to gross negligence / mistake of the Applicant.
- LIH event is entirely contingent and outside the normal stream of supplies under the contract. The reimbursement is made as a part of the compensatory mechanism. There is no transfer of title in LIH equipment to ONGC. Accordingly, there is no supply of ‘goods’ (as defined under section of 2(52) of the CGST Act, 2017).
- However, as the definition of ‘services’ under section 2(102) of the CGST Act, 2017 is wide enough to cover anything other than goods, the reimbursements would be covered under the broad definition of supply of service under section 7 of the CGST Act, 2017.

Classification and rate of tax

- It needs to be determined whether the reimbursements are to be treated as a part of

the overall bundle of services under the contract and chargeable to tax at the rate of 12% as a ‘works contract’ or to be treated as a service of ‘agreeing to the obligation of tolerating a situation’ as per clause 5(e) of the Schedule II to the CGST Act, 2017 and taxable at the rate of 18%.

- The contract comprises of an agreed scope of work for which there is an agreed charge. In case of breach of contract, there is liquidation damage / compensation agreed between the parties. Further, the contract also has a clause for compensating the Applicant, in case any equipment is irretrievably lost during the performance of operations.
- The loss of equipment is a distinct transaction under the contract. This is not agreed as a routine or inevitable part of the scope of supply and it is entirely possible that no such accident may take place at all. A separate invoice is raised for such reimbursements.
- Reimbursements can be regarded as a ‘composite supply’ and ‘mixed supply’ under the GST law subject to the supplies being made in conjunction with each other (i.e. made together or in combination). The loss of equipment is entirely contingent and accidental, and it cannot be said that ONGC has contracted for reimbursement of loss of equipment in conjunction with drilling services. Similarly, the equipment would not form part of the services of building / construction of any immovable property so as to qualify as a composite supply of ‘works contract’, as the true nature of reimbursement is accidental and may not even occur during the execution of works contract.
- A liquidation damage / penalty clause is outside the stream of routine supplies under a contract and is to be treated as a distinct supply of service under GST. In this regard reliance was placed upon the ruling of *Maharashtra State Power Generation Company Ltd.*⁶ and the FAQs issued on ‘Government Services’.

⁶ 2018-VIL-12-AAAR



- The Applicant cannot be said to be tolerating any act of ONGC. At the best, the Applicant is tolerating a situation i.e. irretrievable loss of equipment. In such case GST is to be paid at the rate of 18% under HSN 999794 (i.e. agreeing to tolerate an act).
- The Authority after taking into account the submissions of the Applicant and the relevant clauses of the contract observed as follows:
 - On the basis of the very distinctive nature of each of the individual services (referred under scope of work as ‘bundled services’), the same can be performed independently and does not affect or alter the performance of other services. Thus, the services cannot be regarded as naturally bundled and are not composite supply as per section 2(30) of the CGST Act, 2017.
 - The Applicant has himself submitted that there is no transfer of property to ONGC. Accordingly, the activity of reimbursement cannot be a ‘works contract’ as there is no transfer of goods involved.
 - The Applicant has himself stated that contingency of reimbursement for loss of equipment is entirely different from liquidated damages for any breach in the contract. Accordingly, the reimbursement for loss of equipment does not merit classification as an act of toleration under clause 5(e) of the Schedule II to the CGST Act, 2017. Thus, the event of reimbursement cannot be regarded as a supply of service as contended by the Applicant.
 - As per section 7(3) read with Schedule III to the CGST Act, 2017, states the supplies which are neither to be treated as supply of goods or services. The activity of the Applicant (i.e. reimbursement for loss of equipment) does not fall in any of such supplies and accordingly, the impugned transaction should constitute as a supply under section 7 of the CGST Act, 2017, as there is a consideration and it is the course or furtherance of business.

- The amount of reimbursement of equipment is at an agreed depreciated value of the original FOB price of such equipment. As per the methodology and nature of equipment the activity of reimbursement is rightly classifiable as supply of goods. The classification (i.e. HSN code) and rate would depend upon the nature of the goods lost.

Ruling

- Reimbursements received are to be regarded as a supply under GST.
- Reimbursement would be classified as supply of goods and the HSN code and rate would depend upon the nature of the goods and the classification rules made in this regard.

Dhruva Comments:

The instant ruling after an elaborate discussion arrives at a conclusion characterising the reimbursement as consideration towards supply of goods. Interestingly, while negating the transaction to be works contract, the ruling notes that there is no transfer of property in goods involved.

Accordingly, in the absence of transfer of goods (which are lost) to ONGC, treating the reimbursements as supply of ‘goods’ seems to be erroneous.

Judgments under GST era

Zones Corporate Solutions Pvt Ltd v. Commissioner of Central Goods & Services Tax Delhi East & Anr.⁷

Issue for Consideration

Can the department withhold refunds even after a favourable order from the Commissioner (Appeals) on the grounds of an inability to file an appeal before the GST Appellate Tribunal?

⁷ 2020-VIL-302-DEL



Discussion

- The Petitioner had applied for a refund of GST along with interest on account of exports and supplies of computer hardware goods to Special Economic Zone (SEZ) units.
- The said refund claims were allowed by the Commissioner (Appeals) vide its orders dated July 23, 2019. However, the Respondents failed to release the refunds despite the favourable orders.
- Aggrieved, the Petitioner filed a Writ Petition before the Hon'ble High Court of Delhi seeking a direction for the release of the refunds along with applicable interest.
- The Petitioner submitted that the withholding of any refund violates section 16 of the IGST Act, 2017 as well as sections 54 and 56 of the CGST Act, 2017.
- The Respondents submitted the following reasons for not releasing the refunds owed to the Petitioner:
 - The Petitioner was unable to file an appeal against the order of the Commissioner (Appeals) due to the non-functioning of the GST Appellate Tribunal;
 - The Petitioner failed to provide a clear description and nature of the service exported; and
 - The Petitioner failed to submit the declaration mandated under rule 89(2) of the CGST Rules, 2017, for supplies to SEZ units. The Commissioner (Appeals) also remained silent on this aspect and allowed the appeal filed by the Petitioner.
- After perusing the facts of the case, the Hon'ble High Court observed the following:
 - The Petitioner had succeeded in its appeal filed before the Commissioner (Appeals). No proceedings have been initiated against the order by the Respondents till date.
 - The Petitioner cannot be asked to wait endlessly for the Respondents to challenge

the order passed by the Commissioner (Appeals).

Judgment

The Hon'ble High Court disposed of the Writ Petition with a direction to refund the amount within four weeks. Furthermore, the Respondents can initiate appropriate proceedings against the order of the refund in accordance with the law.

Dhruva Comments:

The constitution of the GST Appellate Tribunal as per section 109 of the CGST Act, 2017 has been struck down by the Hon'ble Madras High Court in the case of *Revenue Bar Association v. Union of India*⁸. The Court observed that the number of technical members of the Appellate Tribunal cannot exceed the number of judicial members.

Accordingly, the Department has issued an order⁹ and a circular¹⁰ clarifying that the time limit for filing an appeal to the Appellate Tribunal will be counted from the date of the constitution of the said Appellate Tribunal. It also directed the Appellate Authorities to dispose of all the pending appeals without waiting for the constitution of the Appellate Tribunal.

However, the said order and circular were silent on the issue of the disbursement of pending refunds that arise from an inability to file appeals due to the non-constitution of the Appellate Tribunal. Accordingly, the above judgment provides much needed clarity in the matter.

***M/s Sukhdev Singh v. Union of India and Others*¹¹**

Issue for Consideration

Is a Writ Petition maintainable if the Petitioner fails to challenge any order before the first Appellate Authority during the time limit prescribed under law?

⁸ 2019-VIL-466-MAD

⁹ Order no. 9/2019-Central Tax dated December 3, 2019

¹⁰ Circular no. 132/2/2020-GST dated March 18, 2020

¹¹ 2020-VIL-305-P&H



Discussion

- Registration under the CGST Act, 2017 of the Petitioner was cancelled by an order dated September 2, 2019. To revoke the cancellation order, the Petitioner was required to challenge the said order before the first Appellate Authority.
- However, the Petitioner could not challenge the order before the first Appellate Authority within the permissible time limit (including delay period which could have been condoned).
- Instead, the Petitioner filed the present Writ Petition before the Hon'ble High Court of Punjab and Haryana seeking directions for the revocation of the registration cancellation order.
- The Hon'ble High Court dismissed the Writ Petition observing that the Court cannot exercise its jurisdiction under Article 226 of the Constitution of India to alter the statutory scheme and permit the Petitioner to bypass the statutory remedy.

Judgment

The Hon'ble High Court dismissed the Writ Petition.

Dhruva Comments:

While the powers conferred upon the High Court under Article 226 of the Constitution of India are very wide, they cannot act beyond the statutory provisions under law.

The said principle has been upheld by the Courts in various judgments such as *Assistant Commissioner (CT) LTU, Kakinada & Ors. v. M/s. Glaxo Smith Kline Consumer Health Care Limited*¹², *M/s. L & T Hydrocarbon Engineering Limited v. The State of Karnataka and Ors.*¹³, *M/s A. B. Enterprises v. State of U.P. and two others*¹⁴.

¹² 2020-VIL-18-SC

¹³ 2020-VIL-275-KAR

¹⁴ 2020 (6) TMI 215





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