



Dimensions – 88th Edition

Rulings under GST era

M/s. ICU Medical LLP – Authority for Advance Ruling, Tamil Nadu¹

Issues for Consideration

- Can GST be levied on the reimbursement of expenses paid by the subsidiary company to its holding company outside India?
- If yes, the rate of GST applicable on such reimbursement?

Discussion

- ICU Medical Inc. (“Holding Co.”) is registered in USA and has a subsidiary named ICU Medical LLP (“the Applicant”) in India which is registered under GST.
- The Holding Co. has entered into an agreement with a bank named Wells Fargo, USA (“the Bank”) to provide credit cards to the employees of the Holding Co. and its subsidiaries globally, including the Applicant.
- The Applicant does not have any agreement with the Bank and its employees use the credit card for

business purposes such as accommodation, travel, food, admin expenses, etc.

- On a monthly basis the Holding Co. settles the credit card liability with the Bank and thereafter shares a statement with the Applicant detailing the expense incurred by the Applicant’s employees. The Applicant reimburses the Holding Co. these expenses at actuals. Furthermore, there is no agreement between the Holding Co. and the Applicant towards such reimbursement of expenses.
- The Applicant approached the Authority for Advance Ruling (“the Authority”) to contend that no GST should be levied on such reimbursements on the basis of the following grounds:
 - The reimbursement of actual expense does not have an element of income embedded in it and is in the nature of recovery of expense and is a matter of logistical convenience. Hence, it is not a transaction at all.
 - There can be a ‘supply’ only if there is a ‘consideration’ as defined under section 2(93) of the CGST Act, 2017. There is no evidence of any other non-monetary consideration being

¹ 2020 (10) TMI 764



received. Reliance was placed upon various Pre-GST regime judgments.

- There is no contractual arrangement between the Holding Co. and the Applicant for rendering of any service and there is no consideration flowing from the Applicant to the Holding Co. in response or due to inducement of any supply of service.
- The Holding Co. can be regarded as an 'intermediary' as per section 2(13) of the IGST Act, 2017 since it only facilitates the provision of service by the Bank to the employees globally. Accordingly, as per section 13(8)(b) of the IGST Act, 2017, the place of supply of service would be outside India. Thus, GST should not be attracted under reverse charge mechanism. In this regard, reliance was placed upon various GST advance rulings².
- On the basis of the facts of the case, the Authority observed as follows:
 - As per the agreement entered into between the Holding Co. and the Bank, the Holding Co. is the customer of the Bank who would pay for all of the costs of purchases made from the card. As per the agreement, the financial and legal obligations linked to the cards are upon the Holding Co. and not the card holders.
 - The commercial invoice raised by the Holding Co. states the Applicant as the service recipient, with the description as credit card expenses.
 - There is a separate transaction between the Holding Co. and the Applicant for providing credit cards to the employees of the Applicant for business purposes. For this, a payment is made by the Applicant to the Holding Co. Therefore, the transaction falls within the definition of services and is for a consideration.
 - Further, the definition of 'person' under section 2(84)(h) of the CGST Act, 2017, includes any body corporate incorporated under the laws

outside India, which in the present case is the Holding Co.

- An 'intermediary' does not include anyone supplying goods / services on his own account. The Holding Co. has entered into an agreement with the Bank. The Applicant does not come into the picture for any transaction with the Bank and the Holding Co. is legally responsible for making payments to the Bank. The cards are the property of the Holding Co. and can be revoked at any time. This shows that the Holding Co. is making the supply of credit cards to the Applicant, for use of its employees, on its own account and not as an 'intermediary'.
- The said services are appropriately classifiable under HSN 997113 and taxable at the rate of 18% under reverse charge mechanism in terms of sl. no. 1 of notification no. 10/2017-Integrated Tax (Rate) dated June 28, 2017.

Ruling

The amount reimbursed by the Applicant to the Holding Co. would be leviable to GST under reverse charge mechanism at the rate of 18%.

Dhruva Comments:

The concept of reimbursements has been a subject matter of dispute under the Service tax regime as well as GST.

While the agreement is entered into between the Holding Co. and the Bank, it does make a reference to include its subsidiaries and affiliates etc. Accordingly, it needs to be evaluated as to whether the recipient of such credit card services are respective subsidiaries / affiliates, and payments made by the Holding Co. to the Bank are merely from a facilitation / administrative convenience perspective.

Generally, it is observed that Holding Companies (whether foreign or domestic) enter into contracts with vendors for various services for themselves and their

² *Vservglobal Pvt. Ltd.* [2019 (4) TMI 1543]; *Asahi Kasei India Pvt. Ltd.* [2019 (1) TMI 1091]



subsidiaries and thereafter get the cost reimbursed from the subsidiaries. It is critical that such inter-company agreements and related documentation clearly specifies and expressly spells out whether the purpose and arrangement merely represents reimbursement of expenditure.

MFAR Hotels & Resorts Private Limited – Authority for Advance Ruling, Tamil Nadu³

Issues for Consideration

- What would be the rate of GST applicable on the supply of soft beverages / aerated drinks and cigarettes / tobacco when supplied independently and not as composite supply i.e. not along with food in the restaurant located within the hotel premises?
- What is the taxability under GST on the supply of alcoholic liquor in a restaurant / as room service?
- What is the taxability under GST for the supply of free food to employees by the Applicant?

Discussion

- MFAR Hotels & Resorts Private Limited (“the Applicant”) owns and manages hotels, resorts and restaurants located within such hotels. The Applicant offers a variety of services such as rooms and suites, banquets, dining, spa, etc.
- In some cases, for walk-in guests not consuming food, the Applicant supplies soft beverages and cigarettes as a separate item and not as a part of the food in the buffet or composite supply with separate billing. The Applicant currently charges 28% GST plus cess on the same, whereas for other room and restaurant services it charges 18% GST.
- The Applicant also supplies alcoholic liquor for human consumption in the restaurant / as room service and charges VAT on the supply.
- Also, in terms of contracts with employees, the Applicant serves free food to employees in a separate canteen located within the hotel premises,

the food being separate from the food served in the restaurant. The canteen is run in-house, though with common procurements.

- After taking into consideration the current practice adopted by the Applicant as well as perusal of various documents, the Authority for Advance Ruling (the “Authority”) observed as follows:
 - The soft beverages are supplied as a separate supply by the restaurant to a casual guest who does not avail any other service offered by the Applicant other than buying soft beverages at the restaurant.
 - When a guest (residing in the hotel i.e. resident, or outsider guests i.e. non-resident) visits the restaurant and orders soft beverages / aerated water, it involves supply of goods (soft beverages / aerated water) and supply of services i.e. use of facilities / restaurant staff.
 - Such supplies of goods and services are naturally bundled and supplied in conjunction with each other, thus a composite supply under GST.
 - Also, the payment in case of supply of soft beverages / aerated water can be immediate or billed to the room for residents to pay later. Hence, the supply of soft beverages / aerated waters being drinks (other than alcoholic liquor for human consumption) and articles for human consumption as a part of any service is a composite supply of service as per para 6(b) of Schedule II of the CGST Act, 2017, classifiable under HSN 996331, for resident as well as non-resident guests.
 - Since the hotel is a 5-star hotel with a declared tariff of ₹ 7,500/- and above, the supply of soft beverages / aerated water, whether in person or as room service, by the restaurant located within hotel premises is taxable at 18% GST as per sl. no. 7 of notification no. 11/2017-Central Tax (rate) dated June 28, 2017 (as amended).
 - The supply of cigarettes as a separate supply in a restaurant to a guest (resident / non-resident)

³ 2020-VIL-296-AAR



who does not avail any other service involves supply of goods (cigarettes) and supply of service (use of facilities / staff of restaurant) by the restaurant, both of which are taxable.

- However, the sale of cigarettes is not naturally bundled with restaurant services, which involves serving of food and beverages alone in the normal course. Hence, the sale of cigarettes is not a composite supply, but shall be a mixed supply since a single price is charged for supply of cigarettes and for providing restaurant service.
- Accordingly, the mixed supply of cigarettes by the restaurant, in person or as room service, would attract 28% GST as per sl. no. 14 of Schedule IV of notification 1/2017-Central Tax (rate) dated June 28, 2017, plus applicable GST compensation cess as per notification no. 1/2017-Compensation Cess (Rate) dated June 28, 2017.
- As regards the second question concerning taxability under GST on the sale of alcoholic liquor for human consumption in restaurant and as room service, such supply is a non-taxable supply in terms of section 9(1) of the CGST Act, 2017 and, hence, is not taxable under GST.
- The supply of free food to employees without any charge is deemed to be supply of service in terms of para 2 of Schedule I of the CGST Act, 2017 (supply of goods and services between related persons in the course of furtherance of business is considered as a supply, even if made without consideration), since employer and employee are regarded as related persons under explanation (a)(iii) to section 15 of the CGST Act, 2017.
- Hence, the supply of food in a specified canteen to employees, without consideration, is a supply under GST taxable at the rate of 18% as per sl. no. 7 of notification no. 11/2017-Central Tax (Rate) (*supra*), on such value as determined by rule 28 of the CGST Rules, 2017.

Ruling

- Supply of soft beverages / aerated water, in person / as room service, by a restaurant located within the hotel premises is taxable at the rate of 18% GST.
- Supply of cigarettes by the restaurant, in person / as room service, is taxable at the rate of 28% GST along with the applicable GST compensation cess.
- Supply of alcoholic liquor for human consumption by a restaurant is not taxable under GST.
- Supply of free food to employees at a canteen located within the hotel premises is a supply under GST and taxable at the rate of 18% on the value, as determined by rule 28 of the CGST Rules, 2017.

Dhruva Comments:

Interestingly, restaurant service is defined under GST to mean supply of goods being food or any other article for human consumption or any drink. Accordingly, whether cigarettes being goods fall under '*any other article for human consumption*' and in such case whether the transaction can be construed as a composite supply along similar lines to the supply of aerated drinks?

As regards the applicability of GST on supply of free food to employees, it is interesting to note that the recent advance ruling pronounced in the case of *M/s Tata Motors Limited*⁴ held that amounts recovered by the Applicant from its employees towards providing bus transportation facility does not constitute a supply under GST. Further, the ruling under consideration has also not discussed the *Press Release*⁵ issued by CBIC which stated that supply by an employer to an employee in terms of a contractual agreement between them is not subject to GST and that all services provided free of charge to employees would not be subject to GST.

⁴ 2020-VIL-257-AAR

⁵ Press Release dated July 10, 2017



Judgment under GST era

*M/s. Meenakshi Trendz v. State of Gujarat*⁶

Issue for Consideration

Whether the presence of credible material is necessary for forming an opinion to initiate a provisional attachment under GST.

Discussion

- The Assessee is a partnership firm (“the firm”) engaged in the business of manufacturing of different types of textile fabrics. An inquiry was initiated against the firm by the authorities by issue of summons under section 70(1) of the CGST Act, 2017. During the course of the inquiry, the following actions were taken:
 - Issuance of order in Form DRC-01A; and
 - Issuance of order for provisional attachment of property.
- Aggrieved by the actions taken by the authorities, a Writ Application has been filed by the firm.
- The Hon’ble High Court declined to interfere with the order passed in Form DRC-01A and held that the provisional attachment order is not sustainable in law. The observations of the Court are as follows:
 - Section 83 of the CGST Act, 2017 requires formation of an opinion to protect the interests of the revenue. Although an opinion is not subject to an objective test but there must be material grounds on which the opinion has been formed. Furthermore, existence of relevant material is a precondition to formation of an opinion.
 - The Court has also explained meaning of the following terms to interpret the provisions and decide the issue:
 - May – The term not only indicates discretion but also an obligation and

consequently an opinion cannot be formed on imaginary grounds.

- Belief – The term is a mental expression of accepting a fact as true and therefore no belief can be formed in the absence of a fact. In the event of a challenge on reasons to believe, one must disclose the material based on which the belief was formed.
- Necessary – The term means requisite, indispensable, something that cannot be avoided etc. and must be construed in the connection in which it has been used. Furthermore, formation of the opinion should reflect the intense application of the mind along with material available on record to necessitate the issue of a provisional attachment order. The Court placed reliance on various judgments⁷ in this regard.
 - The Court also noted the absence of any reasons and relevant material in the original file to ascertain the genuineness of the belief formed by the authorities.
 - The Court placed reliance upon the judgment in the case of *Smt. S.R. Venkatraman v. Union of India*⁸ and stated that any subjective satisfaction arrived at by the authorities for passing a provisional attachment order amounts to malice in law in absence of any cogent or credible material. Furthermore, none of the conditions mentioned in the judgment of *Valerius Industries v. Union of India*⁹ have been fulfilled for issue of a provisional attachment order.

Judgment

The Hon’ble High Court allowed the Writ Application by quashing and setting aside the provisional attachment order.

⁶ 2020-VIL-504-GUJ

⁷ *Bhikhubhai Vithlabhai Patel and others v. State of Gujarat* [AIR 2008 SCC 1771], *J. Jayalalitha v. U.O.I.* [AIR 1999 SC 1912], *Barium Chemicals Ltd. v. Company Law Board* [AIR 1967 SC 295] and *Income-tax Officer, Calcutta and Ors. v. Lakhmani Mewal Das* [AIR 1976 SC 1753]

⁸ (1979) ILLJ 25(SC)

⁹ 2019-VIL-443-GUJ



Dhruva Comments:

The Hon'ble High Court has very intricately examined the provisions relating to the provisional attachment of property and the meaning of the terms "may", "belief" and "necessary". Although attachment of property on a provisional basis is permitted under section 83 of the CGST Act, 2017 to safeguard the interest of revenue, there must be credible and substantive reasons to necessitate such an action.

The judgment would certainly provide necessary assistance when such powers are summarily invoked by the GST authorities.





ADDRESSES

Mumbai

11th Floor, One World Centre,
Tower 2B, 841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad

B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahladnagar, Corporate Road,
Ahmedabad 380 015
Tel: +91-79-6134 3434

Bengaluru

Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560 001
Tel: +91-80-4660 2500

Delhi / NCR

101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana 122 002
Tel: +91-124-668 7000

Pune

305, Pride Gateway, Near D-Mart, Baner,
Pune 411 045
Tel: +91-20-6730 1000

Kolkata

4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal 700016
Tel: +91-33-66371000

Singapore

Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai

WTS Dhruva Consultants
U-Bora Tower 2, 11th Floor, Office 1101
Business Bay P.O. Box 127165
Dubai, UAE
Tel: + 971 56 900 5849

KEY CONTACTS

Dinesh Kanabar

Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia

ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri

niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani

ranjeet.mahtani@dhruvaadvisors.com

Dhruva Advisors has been consistently recognised as the **“India Tax Firm of the Year”** at the ITR Asia Tax Awards in 2017, 2018, 2019 and 2020.

Dhruva Advisors has also been recognised as the **“India Disputes and Litigation Firm of the Year”** at the ITR Asia Tax Awards 2018 and 2020.

WTS Dhruva Consultants has been recognised as the **“Best Newcomer Firm of the Year”** at the ITR European Tax Awards 2020.

Dhruva Advisors has been recognised as the **“Best Newcomer Firm of the Year”** at the ITR Asia Tax Awards 2016.

Dhruva Advisors has been consistently recognised as a Tier 1 firm in **India’s ‘General Corporate Tax’** and **‘Indirect Tax’** ranking tables as a part of ITR’s World Tax guide. The firm is also listed as a **Tier 1 firm** for India’s **‘Transfer Pricing’** ranking table in ITR’s World Transfer Pricing guide.

Disclaimer:

The information contained herein is in summary form and is therefore intended for general guidance only. This publication is not intended to address the circumstances of any particular individual or entity. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. This publication is not a substitute for detailed research and professional opinions. Before acting on any matters contained herein, reference should be made to subject matter experts, and professional judgment needs to be exercised. Dhruva Advisors LLP cannot accept any responsibility for loss occasioned to any person acting or refraining from acting as a result of any material contained in this publication

