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Indirect Tax Alert

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Rulings under the GST era

M/s. SCV Sky Vision – Authority for Advance Ruling, Andhra Pradesh[1]

Issue for Consideration

Whether the transfer of business undertaken by the Applicant is exempt from tax under serial no. 2 of notification no. 12/2017 – Central Tax (Rate), dated June 28, 2017?

Discussion

- The Applicant is a multi-system operator (MSO) and purchases digital signals from broadcasters. These signals are transmitted through satellite to receiving stations that are owned by the Applicant, then further transmitted to local cable operators (LCO), and then to end customers.
- The Applicant entered into a Business Transfer Agreement to sell its cable operation business.
- As per the agreement all the rights, titles to and interests in the assets, businesses, subscribers, and linked LCOs would be transferred on a going concern basis.
- However, employees and liabilities of any nature arising out of past business relations would not be transferred including but not limited to future payments, claims due and payable, tax liabilities, and statutory liabilities.
- The Applicant contended before the Authority that there are two supplies in the transfer of business:
  - The transfer of goods (assets), deemed as supply of goods under Clause 4(a) of Schedule II of the CGST Act, 2017;
  - The transfer of business (other than goods), qualifying as supply of service.
- Since both the supplies are naturally bundled, the supply undertaken by the Applicant is a composite supply, in which the supply of service is the principal supply, and the supply of goods is incidental.
- Furthermore, the term 'going concern' as per Accounting Standard, Service Tax Education Guide and legal lexicon means that at the point in time at which this description applies, the business is live or operating and has all the parts and features that are necessary to keep it operational. Thus, the transfer of business qualifies as the transfer of going concern. Accordingly, the said business transfer agreement falls under serial no. 2 of the

[1] Advance Ruling No. 04/AP/GST/2021 dated January 12, 2021

service exemption notification and is exempt from tax.

- The Authority after considering the facts of the case observed as follows:
  - The Applicant's business will be sold in functioning state. Further, the transaction consists of the sale of the business to the purchaser, excluding any of the employees or liabilities and the purchaser intends to continue the same business.
  - Since 'going concern' is nowhere defined under GST, reference shall be drawn from common parlance, which means a running business, when sold in its entirety, in lock, stock and barrel.
  - The transfer of a going concern means transfer of a running business that can be carried on by the purchaser as an independent business. Such transfer of business as a whole will comprise a comprehensive transfer of immovable property and goods, and a transfer of unexecuted orders, employees, goodwill, etc.
  - Reliance is placed upon judgment of the Hon'ble Delhi High Court[2] and the Hon'ble Supreme Court[3], wherein it was held that an entity is transferred as a going concern when the assets and liabilities that are being transferred constitute a business activity that is capable of being run independently in the foreseeable future.
  - Since, no liabilities are transferred in the said case, the transaction of the 'transfer of business' does not fit the definition of a going concern.
  - Hence, the exemption notification is not applicable in the said case.

Ruling

The Authority held that the entry at serial no. 2 of chapter 99 of notification no. 12/2017-Central Tax (Rate) prescribing the rate of tax for "the services by way of transfer of a going concern as a whole or an independent part there of", as "nil" rated, is not applicable to the present case.

Dhruva Comments:

Since the term "going concern" has not been defined under the GST law, there is lot of ambiguity as to what constitutes a going concern. As noted in several judgments, the transfer of a business on a going concern basis has been interpreted to mean the transfer of a running business, involving the transfer of all assets, liabilities, employees, unexecuted orders, etc. In the event, if a few elements such as employees / liabilities are retained, whether the transaction still satisfies the test of transfer of business needs to be deliberated. It is a subjective matter that needs to be evaluated on a case-by-case basis on whether the business can be carried on despite few elements are not transferred as part of the business.

M/s. IBM India Private Limited – Authority for Advance Rulings, Karnataka[4]

Issue for Consideration

- Whether the value of the following assets is required to be included in the value of assets for apportionment of input tax credit ("ITC") in case of de-merger as per section 18(3) of the CGST Act, 2017 ("the Act") read with Rule 41(1) of the CGST Rules, 2017 ("the Rules"):
  - Assets that are outside the purview of GST;
  - Assets that have been created only to comply with the requirements of accounting standards; and
  - Assets that are not transferred as part of demerger.
- If yes, whether the assets that are not attributable to any particular GSTIN can be considered in the

[2] *Inre Indo Rama Textile Ltd.* [(2013) 4 Comp LJ 141 (Del)]
[3] *Allahabad Bank* v. *ARC Holding* [AIR 2000 SC 3098]
[4] Advance Ruling No. KAR ADRG 47/2021 dated July 30, 2021

GSTIN of the head office for computation of asset ratio?

Discussion

- The Applicant is engaged in the business of providing information technology products and services.
- The Applicant intends to separate its managed infrastructure services ("MIS") unit into a new Company ("demerged Company").
- As per section 18(3) of the Act read with rule 41(1) of the Rules, the balance of unutilised ITC of the MIS division is allowed to be transferred in the ratio of value of assets of the demerged Company as per the demerger scheme. Furthermore, the term "value of assets" is defined to mean the value of the entire assets of the business, whether or not ITC has been availed thereon.
- The Applicant approached the Karnataka Authority for Advance Ruling ('the Authority') seeking clarifications with respect to the value of assets contending as follows:
  - The definition of "value of assets" uses the word "means". Hence, it is an exhaustive definition and only covers those assets that are within the purview of GST and where there exists a possibility either to avail ITC, whether or not taken by the company. Accordingly, the value of assets that are outside the purview of GST is not required to be considered for computing the asset ratio for apportionment of ITC.
  - The assets on which GST is not leviable such as trade receivables, cash / bank balances, security deposits etc. and which are outside the purview of GST should not be considered for the asset ratio as including the same may lead to an incorrect asset ratio and an incorrect transfer of ITC.
  - Assets that are created due to requirement of accounting standards such as building leases and deferred tax assets do not have any value in terms of meeting debts, commitment etc. and are treated as book adjustments rather than as an asset *per se*. Hence, such assets do not qualify under the definition of assets as per the Oxford Dictionary.
  - The word "assets" in common parlance include assets that are purchased, used, and set up in relation to business activity and hence would not include assets that are created merely to comply with accounting standards and that do not qualify as assets of the business.
  - As per rule 41(1) of the Rules, only the ITC those assets that are specifically mentioned in the demerger scheme as being transferred to the demerged Company is required to be considered for calculating the asset ratio. Hence, assets such as advance tax, investments etc. which are not transferred as part of the demerger scheme are not required to be considered as part of the value of assets.
  - Also, due to the nature of some of the assets such as investment in subsidiaries, cash and cash equivalent etc., they cannot be attributed to a different GSTIN and hence the entire value of such assets should be allocated to the head office of the Applicant for computing the asset ratio for the transfer of ITC.
- The Authority after considering the facts of the case and the Applicant's submissions observed as follows:
  - The definition of "value of assets" uses the words "entire assets" and hence all of the assets coming out of the demerger are to be considered for calculation of the apportionment of ITC towards the demerged company.
  - Furthermore, the use of the words "whether or not ITC has been availed thereon" in the definition of "value of assets" makes it immaterial whether or not ITC has been availed and does not limit the scope of the meaning of the words "entire assets" to assets where ITC is eligible to be taken.
  - The words "entire assets" should denote all of assets of the business that are allotted to the demerged Companies and the words "whether

or not ITC has been availed thereon" gives greater clarity to the words "entire assets". It only states that availment or not of ITC would not preclude the consideration of assets in the calculation of ITC to be apportioned to the de-merged Company.

- Hence the assets that are outside the scope of GST and the assets that have been created to comply with the accounting standards should fall within the scope of the "entire assets" and should be included in the value of assets for the apportionment of transfer of ITC in case of de-merger.
- With regard to assets that are not transferred as part of the de-merger scheme, the Authority observed that as per para 3(a) of the circular[5] issued by the Board, there would not be a situation in which some assets would not be transferred to the two entities coming into existence. Hence, the assets need to be transferred to either of the entities as per the de-merger scheme. Furthermore, the proviso to rule 41(1) of the Rules does not state any exclusions on the assets transferred or not transferred and would include all assets.
- With regards to the question of whether the asset cannot be attributed to a particular GSTIN, the Authority observed that the assets are a part of balance sheet, and that they have to be part of either one or another GSTIN. Furthermore, the Authority observed that as clarified by para 3(a) of the circular, for the purpose of computing the asset ratio, the assets that are transferred to the de-merged Company has to be considered to the total assets which the Company was maintaining in the particular state and accordingly the ITC apportionment is to be calculated.

Ruling

- The Authority held that the assets that are outside the purview of GST, assets that have been created only to comply with accounting standards and assets that are not to be transferred as part of the de-merger are to be included as part of value of assets for the transfer of ITC in case of a de-merger.
- Furthermore, the question of assets not being attributable to any particular GSTIN does not arise as the assets that are transferred to the de-merged Company has to be considered to the total assets which the Company was maintaining in the particular state and accordingly the ITC apportionment is to be calculated.

Dhruva Comments:

The Authority has given a very wide meaning to the term "value of assets" so as to include all types of assets whether or not the assets are in the nature of tangible or intangible goods. Furthermore, the Authority has held that all the assets of the Company are required to be bifurcated into assets held by the de-merged Companies pursuant to the de-merger, and that the value of all of the assets needs to be considered for the apportionment of ITC. This is one of the first rulings on this subject and should provide guidance on few aspects though some aspects like considering intangible assets also as part of the assets is likely to be debated in future.

[5] Circular no. 133/03/2020-GST dated March 23, 2020

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