



Dimensions – 135th Edition

Rulings under GST era

Aristo Bullion Pvt. Ltd. – Gujarat Appellate Authority for Advance Ruling¹

Issue for Consideration

Whether input tax credit ('ITC') availed on inward supplies, lying as balance in Electronic Credit Ledger ('ECL'), can be utilised towards payment of GST on an outward supply, which has no nexus with the inputs on which ITC has been taken?

Discussion

- The Appellant intends to engage in manufacturing as well as trading of gold and silver bullion including coins etc. which may be procured domestically or imported as raw materials, on payment of appropriate GST. The Appellant also intends to engage in the business of trading of castor oil seeds by purchasing them directly from unregistered agriculturist without payment of GST. The GST as applicable on the sale of bullion and castor oil seeds would be paid by utilising the ITC or cash.
- The Appellant had approached the Gujarat Authority for Advance Ruling ('the Authority') to contend that ITC balance lying in the ECL could be

utilised towards payment of GST on the outward supply of castor oil seeds. However, the Authority vide its order² denied utilisation of such ITC towards supply of castor oil seeds.

- Aggrieved by the said order, the Appellant filed the present appeal before the Gujarat Appellate Authority for Advance Ruling ('the Appellate Authority') and contended as follows:
 - Section 16(1) of the CGST Act, only provides for eligibility and conditions for taking ITC. It does not impose any restriction on utilisation of the ITC for the specific outward supply on whose inputs such ITC was availed.
 - There is no requirement under the law to prove the nexus between the ITC availed and the output tax payable for the purpose of utilisation of ITC towards output tax liability.
 - As per section 49(4) of the CGST Act, there is no restriction to utilise the accumulated ITC lying in the ECL towards payment of any output tax liability.
 - Reliance was placed on various judgments pronounced in the pre-GST regime where it has been held that Cenvat credit is available as common pool which can be either utilized for

¹ TS-759-AAAR(GUJ)-2021-GST

² TS-158-AAAR(GUJ)-2021-GST



payment of central excise duty or service tax and there is no need to prove nexus of credit with the final liability discharged by the assessee.

- After observing the facts of the case, the Authority agreed with the submission made by the Appellant.

Ruling

The Appellate Authority held that payment of output tax on castor oil seeds can be made through utilization of ITC taken on gold and silver bars.

Dhruva Comments:

The GST law nowhere restricts the utilisation of ITC taken on a particular supply to be utilised only against the output made against such input. There is no requirement of one-to-one correlation of inward supply with outward supply. ITC lying in the ECL can be utilised for payment of any output tax liability. The ratio of the judgments issued under the pre-GST regime on the subject issue (though not discussed in the instant ruling) should equally hold good under the GST regime.

M/s. Shantilal Real Estate Services, Goa Authority for Advance Ruling³

Issue for Consideration

Whether sale of a sub-divided plot of land after development of roads, drainage, electricity poles etc. on the land is exigible to GST?

Discussion

- The Applicant is a real estate developer and the owner of a plot of land situated in Goa.
- The Applicant intends to divide the land at Goa into two projects namely the “Waddo” project and the “Valley and hills” project.
- In both projects, the total land will be sub-divided into smaller plots for sale to the buyers.

- In case of the ‘Waddo’ project, there are pre-existing roads, drainage and electricity poles (these may be marginally improved by the Applicant) whereas in case of the “Valley and hills” project, the Applicant will undertake construction of roads, drains and electricity poles, if necessary.
- However, in both projects, the Applicant will not undertake construction of building or structures.
- The development of both projects is governed by Mormugao Planning and Development Authority (MPDA) and the roads so developed would be gifted to MPDA and the same are in nature of public utility.
- The sale price for the sub-divided plot of land to be sold by the Applicant to the buyer would be based on the actual area of the plot and would not include built-up area, super built-up area or any constructed structure.
- The Applicant being of the view that the sale of plot of land to the buyers is not exigible to GST, approached the Goa Authority for Advance Ruling (‘the Authority’) and raised the following contentions:
 - The sale is merely of a plot of land based on actual measurement, not on basis of built up / super built-up / carpet area, and without construction of any building or structure. Hence, sale of plot of land is not liable to GST as per paragraph 5 of Schedule III of the CGST Act, 2017⁴.
 - If the development of plots is considered as a supply, then land being the principal element in the supply should be considered as the principal supply as per the concept of composite supply and should not be liable to GST, by virtue of Schedule III.
 - Without prejudice, if it was argued that sale of plots of land is exigible to GST, then the value to be adopted for the purpose of payment of GST should be the “total cost incurred in

³ TS-748-AAR(GOA)-2021-GST

⁴ Paragraph 5 of Schedule III of the CGST Act, 2017: “ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES.... 5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.”



development works + reasonable margin (say 20% of consideration)" and liable to tax at 18% with eligibility of input tax credit. The remaining consideration would be towards land and hence, should not be taxable.

• After perusing the facts of the case and the contentions raised, the Authority observed as follows:

- Roads, drainages and poles which are proposed to be constructed are as per conditions mandated by the local authorities as a precondition for giving NOC for plot development.
- The contract between the buyer and the Applicant is for the sale of the sub-divided plots. Hence, the consideration is received for sale of subdivided plot of land.
- The roads, poles and drainage constructed by the Applicant are not transferred to the buyer of the plot and are available for use by every plot holder without any title to it.
- Furthermore, these amenities are gifted by the Applicant to the local authorities and hence, the local authorities would be the owner of the road / electricity poles.
- No plot owner will be able to sell the road / poles / drainage, nor will they be able to sell the plot of land without the road / poles / drainage.
- The buyer will also not be able to buy the plot without the amenities of road / poles / drainage.
- Furthermore, the buyer will be able to sell only the actual land area of the plot and not the built-up area / super built-up area.
- No construction of any structure for facilities such as a gym, clubhouse etc. in the nature of complex, building has been undertaken.
- Hence, the sale of plots by the Applicant is a sale of land.
- Paragraph 5(b) of Schedule II of the CGST Act, 2017 pertaining to sale of a complex, building etc. before OC is not applicable, as neither the

ownership nor the exclusive possession of roads, poles, drainage etc. passes to the buyer and these amenities are intended to be vested with local authorities.

- The principal transaction is sale of land; the amenities are a natural part of the land and do not change the nature of transaction of sale of the land.
- The ownership of the sub-divided plot of land is being passed on from the Applicant to the buyer. The buyer becomes the owner of the subdivided plot only.
- Sale of land is excluded from the scope of supply in its entirety as per Paragraph 5 of Schedule III of the CGST Act, 2017.

Ruling

The Authority held that sale of sub-divided plots of land by the Applicant to the buyers is a sale of land and is not exigible to GST.

Dhruva Comments:

There have been contrary advance rulings on the instant subject matter. While on one hand the advance ruling in the case of *M/s Bhopal Smart City Development Corporation Ltd.*⁵ has held that GST is not applicable on sale of developed plots where the development work is limited to providing common amenities by the seller, on the other hand the advance ruling in the case of *Shree Dipesh Anilkumar Naik*⁶ has held that GST is applicable.

Judgment under GST era

Aathi Hotel v. Assistant Commissioner (ST) (FAC)⁷

Issue for Consideration

Whether interest and penalty are applicable on transitional credits wrongly availed but not utilised under

⁵ 2021 (12) TMI 39

⁶ 2022 (1) TMI 1055

⁷ 2022-VIL-72-MAD



the Central Goods and Services Tax Act, 2017 ('the Act').

Discussion

- The Petitioner is a hotelier and has availed transitional credit of ₹ 3,86,271/- from the erstwhile Tamil Nadu VAT regime. This credit has not been utilised by the Petitioner.
- On scrutiny of the VAT returns and invoice copies, it was found that the Petitioner was not eligible to the input tax credit (ITC) under GST and VAT. A show cause notice ('SCN') was issued to recover the tax dues along with interest and penalty under section 74 of the Act.
- The GST officer issued an order under section 74 levying interest at 24% along with a penalty at the rate of 100% of the ITC wrongly claimed. The Petitioner reversed the entire ITC, which was availed but not utilised, in form GSTR-3B of January 2020, but has filed the present writ petition before the Hon'ble Madras High Court challenging the GST department's levy of interest and penalty ('the impugned order').
- The Petitioner made the following submissions:
 - Section 74 of the Act will be attracted only on wrong utilisation of ITC and not merely on its wrong availment.
 - Interest under section 50(3) shall be payable only in the case of mismatch / excess ITC claimed as per section 42 of the Act. In the present facts, section 42 is not attracted and thus, interest should not be levied.
 - Reliance has been placed on the Hon'ble Patna High Court judgment in the case of *Commercial Steel Engineering Corporation v. State of Bihar*⁸ to submit that availment and utilisation of ITC are two separate events and must be satisfied cumulatively to recover interest. The legislative intent suggests that mere wrong availment of ITC is not enough to recover interest; it should also have been utilised.

- The Respondent contended as follows:
 - The Petitioner has an alternate remedy available to them under section 107 of the Act i.e., appeal to appellate commissioner, and hence, the present writ petition should be dismissed.
 - The Petitioner was not liable to claim the ITC under the erstwhile Tamil Nadu VAT Act as well as under GST. Hence, the petitioner is liable to pay the interest and penalty on merits of the case for wrongly availing the transitional ITC.
 - The levy of interest and penalty under the Act is consequential under section 74 of the Act.
- The Hon'ble Madras High Court considered the submission of both the parties and held as follows:
 - The Petitioner is not eligible to claim the transitioned ITC and has thus attempted to wrongly avail the said credit. The Petitioner's claim that the ITC was pertaining to his furniture business is not tenable, as no relevant documents pertaining to such business has been furnished by him. Thus, the intention of the Petitioner was not *bona fide*.
 - The SCN issued by the GST officer merely states that proceedings under section 74 of the Act are being initiated due to lack of documents in support of the claim of ITC. Therefore, it does not justify invoking section 74 of the Act.
 - The GST officer was under an obligation to check whether the transitional ITC availed has been availed and utilised by the Petitioner before issuing the order levying interest and penalty.
 - Sections 73 and 74 of the Act can be initiated only in cases where the ITC has been utilised to discharge the output tax liability. Instead, the penalty under section 122 of the Act should have been levied.

⁸ 2019 (7) TMI 1452



Judgment

The Hon'ble Madras High Court allowed the writ petition and held as follows:

- The impugned order is partially set aside to the extent that the Petitioner is not liable to pay the interest and penalty levied under section 74 of the Act.
- However, a token penalty of ₹ 10,000/- shall be levied under section 122 considering that the ITC has been wrongly availed.

Dhruva Comments:

The Finance Bill, 2022 has proposed amendment in section 50(3), with retrospective effect from July 1,2017, to levy interest at 18% only on the ITC which has been wrongfully / excessively availed as well as utilised. Thus, 24% interest has been done away with retrospectively.





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,
Prahlanagar, 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
Emaar Square Building, 4
2nd Floor, Office 207,
Downtown, 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, 2020 and 2021.

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

