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JSA Newsletter
Indirect Tax

September 2021 Edition

Recent Rulings by Courts and Authorities

Authority for Advance Ruling ('AAR')/Appellate Authority for Advance Ruling ('AAAR')

ITC[1] of GST[2] paid on canteen facility for employees disallowed

In the case of ***Tata Motors Limited [TS-437-AARGUJ-2021-GST]***, the applicant provided canteen facility to its employees, managed by a contractor, as mandated under the provisions of the Factories Act[3]. The cost of such services provided by the contractor was partly borne by the applicant and partly by the employees of the applicant. The advance ruling was sought on the following points:

- whether ITC of GST paid to the contractor could be availed by the applicant; and,
- whether GST was payable on the amount recovered from the employees for use of such services.

With respect to admissibility of ITC of GST charged by the contractor, the AAR observed that the proviso to sub-clause (iii) of Section 17(5)(b), which allowed ITC of GST paid in respect of goods and services so procured to be provided to employees to comply with requirements under any other law, was not applicable to food and beverages or outdoor catering services, notwithstanding the provision of the same to the employees might be mandatory under the Factories Act. Therefore, the AAR held that applicant was disallowed to avail ITC of GST charged by the contractor.

With respect to the applicability of GST on amount recovered from the employees for such services, the AAR held that no GST would be payable by the applicant.

JSA Comments:

The ruling is a deviation from the industry practice, wherein ITC for GST charged by outdoor caterers/ contractor for running canteen facilities is being claimed. In addition, industry has also been discharging tax liability on recovery made from employees for availing canteen facility. Further, the argument that running a canteen facility is a statutory obligation for units governed by the Factories Act and the expenses so incurred should be treated as expenses incurred in the course or furtherance of business.

Therefore, it is likely that ruling may be challenged before the higher forums.

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1 Input Tax Credit
2 Goods and Services Tax
3 Factories Act, 1948

Supply of vouchers taxable as supply of 'goods'

In the case of ***Premier Sales Promotion Private Limited [Advance Ruling No. KAR ADRG 37/2021 – AAR, Karnataka]***, the applicant was engaged in supply of marketing services and trading in e-vouchers. In this regard, the applicant approached the AAR to seek clarity on the taxability of supply of these e-vouchers.

The AAR held as below:

- The applicant was supplying the e-vouchers to various business clients, who were not settling any obligations treating this as a consideration. It was only at a later stage, that the end-user was using these e-vouchers to settle their obligation of payment of consideration, redeeming the said vouchers instead of cash. Hence the e-vouchers could not be covered under the definition of 'money' at the time of supplying them until these were used for payment of a consideration for the supply of goods or services procured by the end user.
- Actionable claims are unsecured debts (liability or obligation in respect of a claim which is due from any person) or a beneficial interest in a movable property which can be enforced by the civil courts. E-vouchers, however, could not be called as 'actionable claim' as these were not debt and had an expiry period.
- Given that trading of e-vouchers for a consideration in the course or furtherance of business were neither 'money' nor 'actionable claim', these were covered under the definition of the term 'supply' as defined under the CGST Act[4].
- Goods can be both tangible and intangible. The real test to determine whether property is 'goods' would be if the concerned item is capable of abstraction, consumption, use, transmission, transfer, delivery, stored, possessed, etc., i.e., is movable in nature. Considering that the e-vouchers were movable in nature, these were held to be intangible goods subject to GST at 18% under residuary entry number 453 of Third Schedule of the CGST Rate Notification[5]. The value of such supply was held to be the money value of the goods or services or both redeemable against such vouchers[6], i.e., face value of e-vouchers.
- Considering that the underlying supply of goods or services or both against which these e-vouchers would be redeemed by the end-user was not identifiable at the time of supply of these e-vouchers, the time of supply was held to be date of filing periodic return or payment of tax, as the case may be.

ITC of GST paid on construction material purchased by sub-contractor to provide works contract services to main contractor disallowed

The AAR of Andhra Pradesh has passed contradictory rulings in similar matters of ***Karthikeya Products [2021 (8) TMI 532 – AAR, Andhra Pradesh] ("Matter 1") and Building Roads Infrastructure & Construction Pvt. Limited. [2021 (8) TMI 526 – AAR, Andhra Pradesh] ("Matter 2").*** Brief facts of the matters are as below:

- Both the matters dealt with the issue regarding eligibility of ITC of GST paid by the sub-contractor to the supplier of goods or services, which were subsequently used by him in providing works contract services to the main contractor.

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4 Central Goods and Services Tax Act, 2017
5 Notification No. 1/2017 – Central Tax (Rate) dated June 28, 2017 ("**CGST Rate Notification**")
6 Rule 32(6) of the Central Goods and Services Tax Rules, 2017 ("**CGST Rules**")

- In Matter 1, the applicant was a sub-contractor providing works contract services, who entered into an agreement with the main contractor for the construction of a chemical lab, office building and a warehouse for the contractee. The sub-contractor purchased certain construction materials on his own account and used the same in provision of its works contract services.
- Similarly in Matter 2, the applicant was a sub-contractor engaged in providing services in relation to construction, erection, commissioning, widening of roads and completion of bridges for road transportation to the main contractor. The sub-contractor procured certain goods and services such as JCB, road roller, grader, hydra crane, transit mixer, generator, excavator, sensor paver, etc., and used the same to provide the services to the main contractor.

In Matter 1, the AAR observed that Section 17(5)(d) of the CGST Act specifically restricts ITC of goods and services used by a person for construction of an immovable property (except plant and machinery) on his own account and hence, held that if a person purchases construction material to provide construction services by using the said material, ITC would not be available.

Whereas, in Matter 2, the AAR observed that the goods procured by the sub-contractor were used for the construction of an immovable property, which was certainly not on his own account as per Section 17(5)(d) of the CGST Act. It was highlighted that as a matter of fact, the applicant carried out construction not on his own account, but as a sub-contractor to the main contractor and hence, allowed ITC to the sub-contractor.

JSA comments:

Contradictory rulings by the same bench are bound to create confusion and uncertainties among the assessee regarding the correct position of law on the matter.

Activity of agreeing to part with the leasehold rights held to be a taxable service and ITC of GST paid on such supply, disallowed

In ***India Pistons Limited [2021 (8) TMI 731 – AAR, Tamil Nadu]***, the applicant had obtained leasehold rights in a land from State Industrial Promotion Corporation of Tamil Nadu ("**SIPCOT**"). Inox Air Products Private Limited ("**INOX**") approached the applicant for transfer of an un-utilized portion of land to INOX for setting-up an air separation unit for manufacture and supply of industrial gases. The parties executed a Memorandum of Understanding ("**MOU**") for transfer of leasehold rights in the land in favor of INOX for a consideration and subject to approvals from SIPCOT. In this backdrop, the applicant approached the AAR for seeking clarification on whether transfer of leasehold rights by the applicant to INOX was a 'supply' subject to GST or not.

The applicant claimed that the said transaction was not a 'supply' as, the transfer was subject to approval from SIPCOT and hence, there was an 'obligation to do an act' on part of the applicant as, the definition of the term 'supply' under the GST laws does not contemplate agreeing to do an act between the supplier and receiver at the approval of third-party.

The AAR held as under:

- The MOU laid down the conditions of supply, to be fulfilled by both the parties respectively, which clearly exhibited relationship between the parties to be that of service provider and recipient;
- The compensation for parting with the interest was a 'consideration' for agreeing to part with the interest held by the applicant in the leasehold rights; and,

- The transaction was not a transfer of leasehold as the applicant was not permitted to sub-lease under the lease deed executed with SIPCOT, but it was an activity of agreeing to part with the leasehold rights in favor of INOX. The same was also established by the fact that apart from the MOU, no agreement was executed between the applicant and INOX regarding such transfer and a modified lease deed was executed between INOX and SIPCOT independently.

Accordingly, the AAR held that the activity of agreeing to part with the leasehold rights was an activity of 'agreeing to do an act' and hence a 'supply' subject to GST.

Simultaneously, INOX approached the AAR, to seek clarification on availability of ITC of tax paid to India Piston. The AAR in the matter of ***INOX Air Products Private Limited [2021 (8) TMI 730 – AAR, Tamil Nadu]*** held that Section 17(5)(d) of the CGST Act specifically restricts ITC on goods and services procured for construction of immovable property with specific exclusion for plant and machinery. The AAR noted that even if, the plant set-up by INOX qualified as plant and machinery, leased 'land' did not qualify as plant and machinery and therefore, disallowed ITC on GST paid to India Piston for obtaining interest in leasehold rights.

Value of assets to be included for computing ratio for apportionment of ITC in case of a demerger, to include all assets

In the matter of ***IBM India Private Limited [2021 (8) TMI 672 - AAR, Karnataka],*** the applicant proposed to de-merge its managed infrastructure services business into a new company. The applicant approached the AAR to seek clarity on computation of the ratio of assets to be considered for apportionment of ITC to the de-merged entity. Different types of assets proposed to be transferred as part of the de-merger scheme were:

1. Assets within the purview of GST; and,
2. Assets outside the purview of GST (such as trade receivables, cash/ bank balances, security deposits, etc.) and assets in accordance with accounting standards (such as building leases, deferred tax assets, etc.).

Assets such as advance tax, income tax paid under protest, investments, non-current trade receivables, etc. are not proposed to be transferred as part of the de-merger.

The AAR observed that the expression 'value of assets' explained under Rule 41(1) of the CGST Rules mean the entire assets of the business. Relying on the language used in the Circular[7], clarifying the issues pertaining to transfer of ITC in case of business transfers (including de-mergers), the AAR observed that the ratio of value of assets was computed basis the entire assets of the transferor without excluding any type of asset. Accordingly, the AAR emphasizing on the expression 'entire assets' held, that for computing the ratio in which ITC should be apportioned by the transferor to the transferee in case of a de-merger, the 'value of assets' will include not only the value of assets which are leviable to GST but also, of the assets, which are outside the purview of GST/ complying with accounting standards/ or do not form a part of the assets to be transferred to the de-merged entity. It was further, held that ITC will have to be apportioned in a ratio computed at state-level.

[7] Circular No. 133/03/2020-GST dated March 23, 2020

Lease agreement with an option but not obligation to purchase goods at a future date does not constitute hire-purchase of 'goods': taxable as supply of 'service'

In the case of ***Deccan Transco Leasing Private Limited [2021 (8) TMI 892]***, the applicant was a non-vessel owner container carriers/ operators engaged in transportation of bulk chemicals. The applicant used to enter into lease purchase agreements with suppliers located outside India to obtain the containers to be used in transportation of bulk chemicals. These containers never reached India throughout the lease term. During the lease term, the applicant used to pay monthly lease rentals to the suppliers for these containers and had an option to buy the containers upon payment of the agreed price at the end of the lease term. Considering that it was certain that the applicant would purchase the containers at the end of the lease term, the applicant believed that the transaction was that of supply of 'goods' under a hire-purchase arrangement covered under entry 1(c) of Schedule II of the CGST Act[8] and recorded these leased containers as 'assets' in its books of accounts throughout the lease term. Further, as these goods never reached India, the applicant contended that no GST should apply on the transaction till the time goods enter into India.

The AAR highlighted that for a transaction to be covered under the said entry of Schedule II of the CGST Act, the following conditions should be met:

- Transfer of title in goods happens under an agreement before the property in goods passes to the purchaser;
- The agreement must stipulate that the tile in goods will necessarily pass to the purchaser at the end of the lease term; and,
- The agreement should not provide for an option to purchase the goods at the end of the lease period but make it an obligation on part of the contracting parties to necessarily transfer such property and not leave any option for return of the goods.

Applying the above principles in the present case, the AAR observed that the lease purchase agreement executed between the applicant and the foreign suppliers were devoid of the aforementioned attributes. Therefore, it was held that the transaction constituted importation of leasing services into India subject to GST payable by the applicant under reverse charge mechanism.

Supply of air conditioning system along with installation and commissioning is a works contract, ITC disallowed

In the case of ***Wago Private Limited [TS-1174-AAR(GUJ)-2021-GST]***, the applicant was in the process of setting up its factory and awarded a contract for supply, installation and commissioning of air conditioning and cooling system for his factory building. The detailed scope of work under the contract covered operation, maintenance, warranty, and performance guarantee of the 'air conditioning and cooling system'. There was a single price for all the supplies made under the contract, however, the contractor issued separate invoices for the supply of materials and associated labor charges. The applicant sought an advance ruling on admissibility of ITC of GST paid to the contractor on the aforesaid supplies.

The AAR observed that the 'air conditioning and cooling system' was a unit comprising of different parts, which were assembled at the site of the applicant and installed into the factory building. Once these parts were

[8] Relevant extracts of the entry are reproduced below:
"1. Transfer
(c) any transfer of title in goods under an agreement which stipulates that property in goods shall pass at a future date upon payment of full consideration as agreed, is a supply of goods."

assembled together and installed into the building, these lost their identity as machines or parts of machines and became a system, called 'air conditioning and cooling system'.

The AAR further observed that the said system was in the nature of a 'system' and not a 'machine' when considered as a whole. It came into existence only by assembly and connection of various parts (having different HSN[9] and taxable at different rates of GST). The system was different from its constituent units.

With regard to whether the said system was a movable or immovable property, the AAR applied the 'permanency test' promulgated by the higher judicial forums and noted that the 'air conditioning and cooling system' could not be taken as such to the market for sale and could not be shifted from one place to another as such and hence, qualified it as an immovable property. In light of the same, the AAR held that the supply under the contract was that of works contract services used for construction of an immovable property and hence, disallowed ITC of GST paid to the contractor under section 17(5)(c) of the CGST Act.

Notifications

Haryana Enterprises & Employment Policy, 2020: Investment subsidy in lieu of Net State Goods and Services Tax ("Net SGST")

Notification No. 25/05/2020-4IB-I dated July 29, 2021

In order to reduce cost of doing business and enhancing industry competitiveness in the State of Haryana, the Government of Haryana has notified "Investment subsidy in lieu of Net SGST" ("**Scheme**")[10] with effect from January 1, 2021. With a vision to position Haryana as a pre-eminent investment destination and facilitate balanced regional and sustainable development, the Scheme is formulated giving significant impetus to start-ups, thrust sectors, data centers, co-location facilities, import substitution enterprises, cluster establishments/ relocation, and essential sector enterprises.

The Scheme is designed to grant fiscal incentive of investment subsidy by way of reimbursing Net SGST paid by the enterprise during a financial year, subject to fulfillment of different parameters prescribed therein.

Key features:

- The Scheme will be applicable to units, which have gone into 'commercial production' on or after January 1, 2021, or which have taken 'effective steps' for establishment of industrial unit before December 31, 2025, *where*,

  The expression 'commercial production' means the date of first sale bill issued by the industrial unit.

  The expression 'effective steps' means that the industrial unit which fulfils the below criteria:

  a) Arranged land or premises by way of purchase, allotment/ transfer, registered lease/ rent;

  b) Arranged sources of raising finance from a financial institution or made adequate arrangements for investments;

  c) Applied for clearance/ non-objection certificates from relevant authorities, as may be applicable; and,

  d) In case of mega projects, commercial production is commenced within two years, i.e., before December 31, 2027 (or before December 31, 2028).

[9] Harmonized System of Nomenclature Code
[10] Notification No. 25/05/2020-4IB-I dated July 29, 2021

- Benefit under the Scheme will be granted by way reimbursement of a specified percentage of Net SGST paid by the unit, i.e., the amount of Haryana Goods and Services Tax ("**HGST**") through cash ledger against output liability of HGST on sale of eligible products from the date of commencement of commercial production. The eligible unit will have to first utilize all its eligible ITC, including eligible ITC of IGST[11] against the output HGST liability, before adjusting the HGST amount through cash ledger.
- The industrial units are categorized into ultra-mega, mega, large, etc., based on the quantum of their new fixed capital investment ("**FCI**"), which will comprise the below:
  a) Land under use;
  b) New construction; and,
  c) New plant and machinery (including generating set), tools and equipment which have not been used in India before.
- Investment subsidy will also be granted to eligible industrial units undergoing expansion or diversification, as per prescribed norms.
- Special incentive provisions will be accorded in respect of below:
  a) Cluster establishment/ relocated enterprises, start-ups, data centres and co-location facilities, essential sector enterprises, and import substitution enterprises.
  b) Micro enterprises led by women/ SC[12]/ ST[13] and mega projects having inverted duty structure.
  c) 8 thrust sector enterprises enlisted below:
     - Auto, auto components & light engineering
     - Agro-based, food processing & allied industry
     - Textiles and apparels
     - Defence and aerospace manufacturing
     - Pharmaceutical & medical devices
     - Chemical and petrochemical
     - Large scale energy& data storage
     - Electronics system design & manufacturing

Eligibility Criteria:

An enterprise desirous of availing the benefits of the Scheme will have to fulfil eligibility criteria, which *inter-alia* includes the following:

- The unit will need to be registered under the GST laws of India.
- Only new investment in land, building, plant, and machinery will be considered in computing eligible FCI.

[11] Integrated Goods and Services Tax
[12] Scheduled Caste
[13] Scheduled Tribe

- The incentive granted under the Scheme will exclude refunds entitled to be obtained by the applicant on account of exports or deemed exports.
- Benefits under the Scheme will be restricted to manufacture of eligible products only. Further, the unit will not conduct any other business from the registration under which the Scheme is availed.
- Inter-state supplies shown by a unit as intra-state supplies through intermediary/ marketing network/ or any other middleman, either directly or indirectly controlled by the said unit, will be disallowed from subsidy under the Scheme, and if granted will be liable to be revoked along with interest at 18% per annum.
- The investment subsidy under the Scheme will not be granted to the unit in the following situations:
  a) Unit is in the 'restrictive list' of enterprises as notified by the State Government from time to time;
  b) Disposal or transfer by the unit or any of its fixed assets adversely affecting its manufacturing or production capacity; and,
  c) Closing down of its industrial activities or the unit remains out of production exceeding 6 months except beyond its control (such as strikes, fire, earthquakes, etc.).
- Application will be required to be filed within 3 months from the end of the financial year for which investment subsidy is to be claimed.

For more details, please contact km@jsalaw.com

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