We are glad to share our GST litigation support communique and get you everything that you need to know from the world of litigation, along with incisive analysis from the CA. Rajat Mohan. This Newsletter brings you key judicial pronouncements from the Supreme Court, various High Courts, AARs, and Appellate Authorities emerging in the GST era and the erstwhile VAT, Service tax, and Excise regime.[1]

Synopsis of all changes in GST is given below for your quick reference:

| S.No. | Subject | Authority |
|---|---|---|
| 1 | **Respondent has denied the benefit of GST rate reduction to the customers of his products** | |
| 2 | **Penalty cannot be applied retrospectively** | **NAA** |
| 3 | **Repeal of the KVAT Act would not affect the proceedings initiated by the Authorities** | **HC** |
| 4 | **Repeal of the KVAT Act would not affect the proceedings initiated by the Authorities in view of section 174(1)(f) and (3) of KGST Act** | **HC** |
| 5 | **Compensation paid by GIDC would qualify as 'Supply' under clause 5(e) of Schedule II of the GST Act** | **AAR** |
| 6 | **GST leviable on the amount forfeited** | **AAR** |
| 7 | **GST is applicable on the notice pay amount** | **AAR** |
| 8 | **CGS-SGST applicable on service provided as an intermediary** | **AAR** |
| 9 | **The import of drill bits for supply to ONGC at its location in India on a consumption basis involves two supplies - Import into India of drill bits; and Indigenous movement from the port of import to ONGC's location** | **AAR** |
| 10 | **In the absence of a legal provision that puts an obligation on the tax department, petitioner has no legal right to get directions issued to department to provide him information as to whether the tenant has taken credit of Service Tax/GST amount charged by the Petitioner in the monthly rent invoices** | **HC** |

**Respondent has denied the benefit of GST rate reduction to the customers of his products**

The Applicant had stated in their complaint that Respondent despite the reduction in the rate of GST from 18% to 5% from November 15, 2017 vide Notification No. 46/2017-Central Tax (Rate) dated November 14, 2017 by way of not making a commensurate reduction in price, in terms of Section 171 of the CGST Act, 2017.

NAA observed that The DGAP has reported that the Menu Price List and the invoice-wise sale register for the part period that the Respondent had been dealing with a total of 137 items while supplying restaurant services before and after November 15, 2017. As per the detail submitted by Respondent for the period before November 14, 2017, the increase in base prices after the reduction in GST rate w.e.f. November 15, 2017 was evident in respect of 133 items supplied by him. The lower GST rate of 5% had been charged on the increased base price of these 133 items, which confirmed that the tax amount was computed @ 18% before November 15, 2017 and @ 5% w.e.f. November 15, 2017. However, the fact was that because of the increase in base prices the cum-tax price paid by the consumers was not reduced commensurately for all the items supplied by the Respondent. The DGAP has reported that the ratio of ITC to the net taxable turnover had been taken for determining the

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impact of denial of ITC, which was available to the Respondent till November 14, 2017 but not thereafter. On this basis, the findings of the DGAP were that ITC amounting to INR 4,54,734/- was available to the Respondent during the period from July, 2017 to October, 2017 which was approximately 9.64% of the net taxable turnover of restaurant service amounting to INR 47,18,983/- supplied during the same period. With effect from November 15, 2017, when the GST rate on restaurant service was reduced from 18% to 5%, the said ITC was not available to the Respondent. A summary of the computation of the ratio of ITC to the taxable turnover of the Respondent was furnished by the DGAP as is given in Table "A" below.

**Table A**

| **Particulars** | **July 2017** | **August 2017** | **September 2017** | **October 2017** | **Total** |
|---|---|---|---|---|---|
| ITC Availed as per GSTR-3B (A)* | 1,18,312 | 1,27,319 | 1,07,139 | 1,01,964 | 4,54,734 |
| Total Outward Taxable Turnover as per GSTR-3B (B) | 11,45,395 | 11,43,249 | 12,90,075 | 11,40,264 | 47,18,983 |
| **The ratio of ITC to Net Outward Taxable Turnover (C)= (A/B)** | | | | | **9.64%** |

The DGAP has further reported that the analysis of the details of item-wise outward taxable supplies during the period from November 15, 2017 to June 30, 2019 revealed that the Respondent had increased the base prices of different items supplied as a part of restaurant service to make up for the denial of ITC post GST rate reduction. The pre and post GST rate reduction prices of the items sold as a part of restaurant service during the period November 15, 2017 to June 30, 2019 were compared and it was established that the Respondent had increased the base prices by more than 9.64% in respect of 115 items (out of a total of 137 items) sold during the same period. Thus, the conclusion was that in respect of these items the commensurate benefit of reduction in the rate of tax from 18% to 5% had not been passed on. It was also clear that there was no profiteering regarding the remaining items on which there was either no increase in the base prices or the increase in base prices was less than or equal to the denial of the input tax credit.

The DGAP has also reported that the methodology adopted in this case could be explained by illustrating calculation in respect of a specific item i.e., "6 Inch Western Egg and Cheese" sold by the Respondent. In this regard, the denial of ITC @9.64% was added to the pre-GST rate reduction base price obtained from the Menu Price List and then the commensurate cum-tax selling price was arrived at by adding the reduced GST rate of 5% on this base price. The commensurate cum-tax selling price of this item was compared with the actual cum-tax selling price of this item as per Menu Price List during post- GST rate reduction i.e. on or after November 15, 2017 as has been illustrated by the DGAP in the Table "B" below:

**TABLE - B**

| **Sl No.** | **Description** | **Factors** | **Pre Rate Reduction (** | **Post – tax rate reduction (From** |
|---|---|---|---|---|

| | | | | |
|---|---|---|---|---|
| | | | **upto to November 14, 2017)** | **November 15, 2017)** |
| 1 | Item description and Category | A | Western egg and cheese (6 inch) | |
| 2 | Base price as per Menu Price List | B | 110/- | |
| 3 | GST@18% | C = B*18% | 19.80/- | |
| 4 | Selling price ( Including GST) | D = B+C | 129.80 | |
| 5 | GST Rate | E | 18% | 5% |
| 6 | Denial of ITC of 9.64% as per table – B | F = B*9.64% | | 10.60/- |
| 7 | Commensurate Base price ( post Rate reduction) ( Excluding GST) | G = B+F | | 120.60/- |
| 8 | Commensurate Selling price ( post Rate reduction) ( including GST) | H = 105% of G | | 126.63/- |
| 9 | Selling price (including GST) as per Menu Price List | I | | 130.23/- |
| 10 | The excess amount charged or Profiteering per unit | J = I-G | | 3.57/- |
| 11 | Total quantity Sold in Post reduction illustrative month of Feb - 2018 | K | | 26 |
| **12** | **Total Profiteering** | **L= J*K** | **92.82/-** | |

The DGAP has reported that while computing the total profiteering, only those items where the increase in the base prices was more than what was required to offset the impact of denial of the ITC, were considered. Based on the aforesaid pre and post-reduction in GST rates, the impact of denial of ITC and the details of outward supplies based on Menu Price List along with quantity sold during the period November 15, 2017 to June 30, 2019, the amount of net higher sale realization due to increase in the base price of the service, despite the reduction in GST rate from 18% to 5% (with denial of the input tax credit) or in other words, the profiteered amount came to 6,85,531/- (including GST on the base profiteered amount).

**Contentions of respondent**

The Respondent has argued that the DGAP has wrongly computed ITC/Turnover ratio as 9.64% instead of 9.86%. NAA held that that the total ITC availed by the Respondent during the period from July 2017 to October 2017, as per GSTR-3B Returns filed by him, was INR 4,54,734/- and the total outward taxable turnover for the same period, as per GSTR-3B Returns, was INR 47,18,983/-. Therefore, the ITC to taxable turnover ratio for the pre rate reduction period comes out to 9.64% which has been

correctly computed by the DGAP as mentioned in Table – A above. Hence, the claim of the Respondent that the DGAP has wrongly computed the ITC to taxable turnover ratio for the pre-tax rate reduction period is not tenable and cannot be accept.

The Respondent has also contended that the DGAP has not considered the ITC and Turnover for the period from November 01, 2017 to November 14, 2017 while computing the ratio of ITC to taxable turnover for the pre rate reduction period. NAA held that as required according to the provisions of Section 171 of the CGST Act, 2017 read with Rules 42 and 43 of the CGST Rules, 2017, the Respondent had not reversed the ITC on the closing stock of inputs and capital goods as of November 14, 2017. Further, the case records have revealed that the Respondent had incorrectly availed ITC on the strength of certain invoices relating to the whole month of November 2017 (as in the case of ITC on rent paid by him for the whole month of November 2017) and had not limited the availment of ITC only till November 14, 2017. Since the ITC was no longer available to him with effect from November 14, 2017, he could not have claimed it after the above date.

The respondent also contended that the invoices for the period from November 01, 2017 to November 14, 2017 during the currency of present proceedings before this Authority in `pdf format which ran into thousands of pages, from which relevant information could not be extracted for determination of profiteered amount. NAA held that Respondent had desisted from furnishing the said invoices during the investigation on one pretext or the other despite numerous reminders issued by the DGAP. NAA also find that the failure of the Respondent to provide the relevant information in the prescribed format to the DGAP that allowed computation of product-wise base prices for the period from November 01, 2017 to November 14, 2017 was also a reason for the exclusion of the month of November 2017. The Respondent had also not reversed the balance ITC that he ought to have done in line with the existing statutory provisions.

The Respondent also contended that the DGAP ought to have considered 'utilized' ITC instead of 'availed' ITC while computing the ratio of ITC to turnover for the pre-tax rate reduction period. NAA held that as per the provisions of Section 16 of the CGST Act, 2017, every registered person is legally bound to keep record of the ITC availed by him on inputs and input services which are used in the furtherance of his outward supplies. Therefore, the quantum of ITC availed is directly proportional to the quantum of inputs/ input services utilized and thus to the outward supplies of a registered person. On the other hand, utilization of ITC depends upon the will of the registered person since every registered person has an option to pay his tax liability either in the form of cash or by utilizing the available ITC/ credit as per his convenience. Therefore, it is clear to us that the utilization of ITC has no direct relationship with the outward supplies of the registered person. Given the above facts, the factoring of the ITC 'availed' instead of the ITC `Utilized' in the computation is the more reasonable, accurate and appropriate approach. Therefore, we take the view that the DGAP has rightly considered the ITC 'availed' while computing ITC to taxable turnover ratio for the pre-tax rate reduction period. Therefore the said contention of the Respondent cannot be accepted.

NAA held that from the above fact, it is evident that the Respondent has denied the benefit of GST rate reduction to the customers of his products w.e.f. November 15, 2017 to June 30, 2019, in contravention of the provisions of Section 171 (1) of the CGST Act, 2017 and he has thus resorted to profiteering. Hence, he has committed an offence under Section 171 (3A) of the CGST Act, 2017.

Therefore, he is liable for imposition of penalty under the provisions of the above Section. However, a perusal of the provisions of Section 171 (3A) under which penalty has been prescribed for the above violation shows that it has been inserted in the CGST Act, 2017 w.e.f. January 01, 2020 vide Section 112 of the Finance Act, 2019 and it was not in operation during the period from November 15, 2017 to June 30, 2019 when the Respondent had committed the above violation and hence, the penalty prescribed under Section 171 (3A) cannot be imposed on the Respondent retrospectively. Accordingly, notice for the imposition of penalty is not required to be issued to the Respondent.

**Order No. 99/2020 dated December 11, 2020 in case of M/s Subwest Restaurant Pvt. Ltd.**

**Penalty cannot be applied retrospectively**

The Applicant had stated in their complaint that respondent had not passed on the benefit of Input Tax Credit in respect of the flat purchased by him in the "Laurel Heights" project of the Respondent on introduction of the GST w.e.f. July 1, 2017, as per the provisions of section 171 (1) of the CGST Act, 2017.

DGAP had also that the Respondent had denied the benefit of input tax credit to the above Applicant and other buyers amounting to INR 99,20,246/-pertaining to the period from July 1, 2017 to August 31, 2018 and had thus indulged in profiteering and violation of the provisions of section 171 (1) of the above Act.

NAA observed that Authority after careful consideration of the Report dated February 25, 2019 had issued notice dated March 5, 2019 to the Respondent to show cause why the Report furnished by the DGAP should not be accepted and his liability for violation of the provisions of section 171 (1) should not be fixed.

NAA Held from the above fact, it is evident that the Respondent has not passed on the benefit of input tax credit to his buyers who had purchased flats in his project 'Laurel Heights' w.e.f July 1, 2017 to August 31, 2018 and hence, the Respondent has violated the provisions of section 171 (1) of the CGST Act, 2017.

It is also revealed from the perusal of the CGST Act and the Rules framed under it that no penalty had been prescribed for violation of the provisions of section 171 (1) of the above Act, therefore, the Respondent was issued show cause notice to state why penalty should not be imposed on him for violation of the above provisions as per section 122 (1) (i) of the above Act as he had apparently issued incorrect or false invoice while charging excess consideration and GST from the buyers. However, from the perusal of section 122 (1) (i) it is clear that the violation of the provisions of section 171 (1) is not covered under it as it does not provide penalty for not passing on the benefits of tax reduction and ITC and hence the above penalty cannot be imposed for violation of the anti-profiteering provisions made under section 171 of the above Act. It is further revealed that vide section 112 of the Finance Act, 2019 specific penalty provisions have been added for violation of the provisions of section 171 (1) which have come in to force w.e.f. 1-1-2020, by inserting section 171 (3A). Since no penalty provisions were in existence between the period w.e.f. 1-7-2017 to 31-8-2018 when the Respondent had violated the provisions of section 171 (1), the penalty prescribed under section 171 (3A) cannot be imposed on the Respondent retrospectively. Accordingly, the notice dated 18-6-2019 issued to the Respondent for imposition of penalty under section 122 (1) (i) is hereby withdrawn and the present penalty proceedings launched against him are accordingly dropped.

**Deepak Kumar Khurana v. Sattva Developers (P.) Ltd [2021] 123 taxmann.com 370 (NAA)**

**Repeal of the KVAT Act would not affect the proceedings initiated by the Authorities**

The petitioner is a company engaged in the business of manufacturing of refined rice bran oil. The petitioner while in the process of manufacturing the refined rice bran oil obtained de-oiled rice bran as a by-product. While the rice bran oil was a taxable commodity under the Karnataka Value Added Tax Act, 2003 ['KVAT Act'], the de-oiled rice bran was an exempted product. The petitioner applied for partial rebate under section 17 of the KVAT Act and accordingly restricted its claim of input tax credit to the extent of the inputs utilized towards the de-oiled rice bran. Petitioner filed writ seeking for a direction to the concerned Authority to refund the input tax credit in respect of the tax period, March 2014 to July 2015 which was allowed and a direction was issued to Authority No. 1 to process the application filed by the petitioner for refund of input tax paid in excess, refund the same, if not otherwise found disentitled. It was observed that refund shall be subject to result of special leave

petitions pending in SLP [Civil] Nos.576-596/2014. Authority refunded the excess input tax credit in respect of tax period April 2015 to January 2017. Apex Court in its order dated 22-9-2017, in *State of Karnataka* v. *M.K. Agro Tech (P.) Ltd.* set aside the decision of this Court in STRP Nos.774-794/2013 and held that the assessee was not entitled to claim full input tax credit and provisions of section 17 of the KVAT Act, partial rebate was applicable. Subsequently, the authority issued notice and sought to recover the refunded amount on the premise that the refund was subject to the result of the Hon'ble Supreme Court Judgment and sought for recovery on the basis of a circular issued by the Commissioner of Commercial Taxes ['CCT'] dated 9-10-2017. Being aggrieved, petitioner filed present petition.

Court observed that the contention of the petitioner that KGST Act having come into force on 1-7-2017 and the KVAT Act being repealed on the same day, respondent-authorities have no power to recover the refunded amount cannot be accepted for the reason that the refund order was directed to be passed by this Court in W.P. Nos. 110509-525/2015 subject to the result of the Special Leave Petition pending before the Apex Court. It was further ordered that respondents are at liberty to obtain indemnity bonds from the petitioner to the extent of amount refunded. The refund orders are passed after obtaining the indemnity bonds from the petitioner to the extent of the amount refunded. Though the subject matter of W.P. Nos. 110509-525/2015 was relating to the tax period from March 2014 to July 2015, refund orders are issued for 22 months based on the said order of this court subject to the indemnity bonds executed by the petitioner.

Court held that repeal of the KVAT Act on 1-7-2017 would not affect the proceedings initiated by the Authorities in view of section 174(1)(f) and (3) of KGST Act.

**Abhay Solvents (P.) Ltd. *v.* Assistant Commissioner of Commercial Taxes - [2020] 119 taxmann.com 261 (High court of Karnataka)**

**Repeal of the KVAT Act would not affect the proceedings initiated by the Authorities in view of section 174(1)(f) and (3) of KGST Act.**

The petitioner is a company engaged in the business of manufacturing of refined rice bran oil. The petitioner while in the process of manufacturing the refined rice bran oil obtained de-oiled rice bran as a by-product. While the rice bran oil was a taxable commodity under the Karnataka Value Added Tax Act, 2003 ['KVAT Act'], the de-oiled rice bran was an exempted product. The petitioner applied for partial rebate under section 17 of the KVAT Act and accordingly restricted its claim of input tax credit to the extent of the inputs utilized towards the de-oiled rice bran. Petitioner filed writ seeking for a direction to the concerned Authority to refund the input tax credit in respect of the tax period, March 2014 to July 2015 which was allowed and a direction was issued to Authority No. 1 to process the application filed by the petitioner for refund of input tax paid in excess, refund the same, if not otherwise found disentitled. It was observed that refund shall be subject to result of special leave petitions pending in SLP [Civil] Nos.576-596/2014. Authority refunded the excess input tax credit in respect of tax period April 2015 to January 2017. Apex Court in its order dated 22-9-2017, in *State of Karnataka* v. *M.K. Agro Tech (P.) Ltd.* set aside the decision of this Court in STRP Nos.774-794/2013 and held that the assessee was not entitled to claim full input tax credit and provisions of section 17 of the KVAT Act, partial rebate was applicable. Subsequently, the authority issued notice and sought to recover the refunded amount on the premise that the refund was subject to the result of the Hon'ble Supreme Court Judgment and sought for recovery on the basis of a circular issued by the Commissioner of Commercial Taxes ['CCT'] dated 9-10-2017. Being aggrieved, petitioner filed present petition.

Court observed that in terms of section 174(1)(*f*), the repeal of the Act specified in section 173 shall not affect any proceedings including that relating to an appeal, revision, review or reference, instituted before, on or after the appointed date, under the said repeals Acts and such proceedings

shall be continued under the said repealed Acts as if KGST Act had not come into force and KVAT Act had not been repealed.

It was observed that the contention of the petitioner that KGST Act having come into force on 1-7-2017 and the KVAT Act being repealed on the same day, respondent-authorities have no power to recover the refunded amount cannot be accepted for the reason that the refund order was directed to be passed by this Court in W.P. Nos. 110509-525/2015 subject to the result of the Special Leave Petition pending before the Apex Court. It was further ordered that respondents are at liberty to obtain indemnity bonds from the petitioner to the extent of amount refunded. The refund orders are passed after obtaining the indemnity bonds from the petitioner to the extent of the amount refunded. Though the subject matter of W.P. Nos. 110509-525/2015 was relating to the tax period from March 2014 to July 2015, refund orders are issued for 22 months based on the said order of this court subject to the indemnity bonds executed by the petitioner. Hence repeal of the KVAT Act on 1-7-2017 would not affect the proceedings initiated by the Authorities in view of section 174(1)(f) and (3) of KGST Act. It was observed that no enhancement of an assessment or otherwise increasing of the liability of the dealer was made by the Prescribed authority in rectifying the refund orders passed under section 10(5) of the Act. The impugned orders were passed under section 10(5) r/w Section 69(1) of KVAT Act. Assessee had no objections at the time of passing of the refund orders under Section 10(5) of the Act. An order of recovery/demand of refunded amount has to be passed pursuant to the disposal of the appeal before the Apex Court as ordered by this court while directing the respondent-authorities to refund the amount. Hence, respondent-authorities demanding the refund amount cannot be found fault with or it cannot be held that proceedings initiated by the prescribed authority under section 10(5) r/w Section 69(1) is not valid.

It was observed that the levy of penalty and interest shall be subject to providing reasonable opportunity of hearing to the assessee in the circumstances of the case though ordinarily interest is automatic. Once indemnity bond is furnished, the payment of tax refunded is mandatory and the same cannot be assailed by the petitioner. Hence, confirming the demand of tax refunded, the matters were remanded to the prescribed authority to examine the levy of interest applicable to the tax demanded. The refund orders were passed for 22 months, on furnishing of the indemnity bonds by the assessee in terms of the order of this court in W.P. Nos. 110509-525/2015. Hence, the petitioner cannot turn back and dispute the demand of tax made by the prescribed authority. Thus, the court confirmed the demand of refunded tax amount. Matters were remanded to the prescribed authority to provide an opportunity of hearing inasmuch as the levy of interest and prescribed authority shall proceed to pass appropriate orders in accordance with law in quantifying the interest amount.

**Abhay Solvents (P.) Ltd. *v.* Assistant Commissioner of Commercial Taxes - [2020] 119 taxmann.com 261 (High court of Karnataka)**

**Compensation paid by GIDC would qualify as 'Supply' under clause 5(*e*) of Schedule II of the GST Act**

The applicant is a Government of Goa Undertaking. The applicant *vide* Deed of Lease had allotted land for setting up Special Economic Zone (SEZ). However, this could not materialize due to protests from the people. As a result, the deposit taken from the parties had to be refunded. However, GIDC refused to pay compensation on this deposit, as the original Deed of Lease never mentioned such clause. The parties approached the Supreme Court, who intervened and directed GIDC to compensate parties with interest at the rate of 8.25%. The Government of Goa through the Council of Ministers in its XXXIIIrd Cabinet Meeting held on 27/07/2018, resolved to approve the proposal of Goa Industrial Development Corporation (GIDC) to take back all the land allotted to 7 parties for setting up Special Economic Zone and refund the amount paid by SEZ parties along with interest, earned on such amounts paid by the parties amounting to Rs. 256,56,90,593/-. The applicant sought an advance ruling

on the question of whether an obligation to refrain from an Act, or to tolerate an Act or a situation treated as supply of Goods/Services (Schedule II u/s 7 Scope of Supply).

It was observed that the applicant is a Government of Goa Undertaking and had entered into an agreement leasing land to parties for setting up Special Economic Zone (SEZ). However, this could not materialize due to protest from the people. As a result, deposit taken from the parties had to be refunded. However, GIDC refused to pay compensation on this deposit. As the original Deed of Lease never mentioned such clause, the parties approached the Supreme Court, who intervened and directed GIDC to compensate them @ 8.25%. In the process, the applicant had agreed to do an act of vacating the claim by parties of setting up SEZ units for which GSIDC has paid consideration. Thus the original amount which was paid back along with compensation would clearly qualify as 'Supply of Services'.

AAR held that the compensation paid by GIDC would qualify as 'Supply' under clause 5(*e*) of Schedule II of the GST Act, and therefore the amount would attract tax liability.

**Goa Industrial Development Corporation, *In re* - [2020] 115 taxmann.com 171 (AAR - GOA)**

**GST leviable on the amount forfeited**

The applicant want to sell factory land to Mr. B for INR 1 crore. Mr. B showing acceptance to the sale agreement gives advance money amounting to INR 20 lakhs which is 20% of the total sale amount. Now for some reason Mr. B could not complete the transaction upon which Fastrack forfeits amount of Rs. 20 lakhs. The applicant contended that as per Schedule II and Schedule III of CGST Act, 2017 sale of land will be a non- GST supply as it is clearly stated in the Schedule III of CGST Act, 2017. Since sale of land is not treated as supply the amount of advance forfeited for sale of land will also not be considered as supply, leading to no liability to pay GST. Accordingly, an applicant sought advance ruling on when sale of land is not treated as supply as per Schedule III of GST Act, 2017, whether forfeiture of advance pertaining to sale of land will be treated as supply and accordingly attract GST?

AAR observed that the applicant's contention is not tenable because he is of the view that the forfeited amount received by him is on account of the sale of land. However, it is clear from his own submissions that he has not received the said amount on account of sale of land but received the same on account of non-fulfillment of conditions of the agreement of purchase of factory land by the customer. AAR further observed from the terms and condition of the contract, that Mr. B i.e. customer has agreed that in case he fails to give full payment as per the dates mentioned in the contract, the amount paid to the applicant would be forfeited by him. Now, it is clearly seen that aforesaid transaction/activity of forfeiture nowhere involves the sale of land. The applicant has received money not on account of sale of land but on account of non-fulfillment of conditions as stipulated in the agreement by the prospective customer. Hence the said income of INR 20 lacs of the applicant is not due to sale of factory land but it is due to breach of condition of contract by Mr. B. It can be termed as a consideration to the applicant for "refraining or tolerating or doing an act" of Mr. B to not complete the transaction, which Mr. B had agreed in terms of contractual obligations.

Therefore, AAR held that the impugned transaction is a 'supply' under the provisions of the CGST Act and therefore taxable and therefore, this transaction of the applicant agreeing to the obligation of refrain or tolerate or to do an act on the part of Mr. B, for payment of a sum, will be covered under clause 5(e) to Schedule II to CGST Act 2017, as a declared service.

**Fastrack Deal Comm (P.) Ltd. [2021] 124 taxmann.com 399 (AAR - GUJARAT)**

**GST is applicable on the notice pay amount**

The applicant is a 100% Export Oriented Unit (EOU) engaged in the manufacturing of pharmaceuticals products. They, at the time of appointing any employee at their factory, enter into a contract with employees by issuing an "Appointment Letter". Under the appointment letter, it has been clearly

mentioned that, either parties shall serve a three months mandatory notice to terminate this contract. Thus, three months' notice is mandatory for all employees/employers. In case, if any employee doesn't serve the notice period after tendering the resignation, then as per the contract (Appointment Letter) condition, company is entitled to recover the notice pay from the agreed portion of salary to compensate the loss to the company. The applicant sought for advance ruling on whether the applicant is liable to pay GST on the recovery of Notice Pay from the employees who are leaving the company without completing the notice period as specified in the Appointment Letter issued as per the contract entered between Employer and the Employee?

AAR observed that the said Notice Pay is nothing but the amount stipulated in the employment contract for breach in serving (not serving) the stipulated notice period. In other words, notice pay is a sum mutually agreed between the employer and the employee for breach of contract. It can be regarded as a consideration to the employer for "tolerating the act" of the employee to not serve the notice period, which was the employee's agreed contractual obligation. It also observed that the GST is applicable on supply of taxable goods or services. Section 7(1) of the CGST Act, 2017, includes activities referred to in Schedule II in the scope of supply. Clause 5(e) to Schedule II to CGST Act 2017, declares that 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' shall be treated as supply of service. The condition to pay an amount as notice pay in lieu of notice period, for the employer to agree to let go an employee, normally forms part of the terms and conditions of employment. This would mean that the employee while accepting the offer of employment, has not only understood the intent on the part of the employer in prescribing this exit condition but has also accepted it.

Therefore, the transaction of the employer agreeing to the obligation of tolerating an act on the part of the employee, for payment of a sum, will be covered under clause 5(e) to Schedule II to CGST Act 2017, as a declared service. In view of the above, AAR held that the applicant is liable to pay GST @ 18% under the entry of "services not elsewhere classified, on the recovery of Notice Pay from the employees who are leaving the company without completing the notice period as specified in the Appointment Letter issued as per the contract entered between them.

**Amneal Pharmaceuticals (P.) Ltd. [2021] 123 taxmann.com 191 (AAR - GUJARAT)**

**CGS-SGST applicable on service provided as an intermediary**

The applicant is engaged in the agency business of weaving machinery wherein it is acting as an agent of foreign entities who are supplying such machinery directly to the end customer and the company is getting a commission for being an intermediary, thereby creating Principal-Agent relationship. For the same, the applicant has entered into an agency agreement with the parties situated outside India wherein it is getting certain amount as commission in the capacity of Agent/intermediary from the foreign entities for the Supply of their machinery. The applicant sought the Advance Ruling on whether the 9ssesse was liable to payment of CGST and SGST for services provided as an “intermediary”?

AAR observed that the term ‘Intermediary’ is defined in Section 2(13) of IGST Act, 2017 as:-

*‘intermediary’ means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account.”*

AAR observed that the applicant is covered by the said definition of an intermediary because they are definitely acting as an agent and facilitating the process for the sale of machinery by their foreign principals to the Indian parties and for providing such service to the foreign principal the applicant is receiving the commission. The applicant in his applicant has submitted that, “they are acting as an agent of foreign entities who are supplying such machineries directly to the end customer and the company is getting commission for being an intermediary, thereby creating Principal-Agent relationship.” AAR after gone through the relevant provisions of Section 13 it is found that sub-section

(2) of Section 13 specifically provides that the place of supply of services except the services provided in sub-sections (3) to (13) shall be the location of the recipient of services provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services AAR further observed that the supplier of services here is the applicant and the service recipient is M/s. UKIL Machinery Co. Ltd, Republic of Korea and further, AAR observed that the services provided by the applicant i.e. 'intermediary services' appears at Sub-Section (8)(b) of Section 13. Also, sub-section (8) clearly mentions that the place of supply in respect of the services described under the said sub-section shall be the location of the supplier of services.

Now, AAR held since the location of the applicant, who is supplier of services, is in Gujarat and both the supplier of service as well as the place of supply of service is in Gujarat, the supply of services would be considered akin to intra-state supply of services and would be liable to CGST and SGST as per the provisions of Section 9(1) of the CGST Act, 2017. AAR further held that the applicant is liable to payment of CGST and SGST on the services provided by them as an 'intermediary".

**Sagar Powertex (P.) Ltd, [2021] 124 taxmann.com 227 (AAR – GUJARAT)**

**The import of drill bits for supply to ONGC at its location in India on a consumption basis involves two supplies - Import into India of drill bits; and Indigenous movement from the port of import to ONGC's location.**

Halliburton Offshore Services Inc. is a global service provider, engaged in providing various oilfield services to Exploration and Production companies across the globe. The applicant has contracted to provide drill bits for drilling to ONGC at 12 different locations. The applicant sought advance ruling on the issue as to whether the import of drill bits for supply to ONGC at its location in India on a consumption basis involves two supplies?

AAR observed that the Applicant, under a contractual obligation, is required to import drill bits by themselves as an importer and undertake to supply drill bits to the delivery location of ONGC on a consignment basis i.e. sale on approval basis. Thus, the activity of import and subsequent supply of drill bits by the Applicant to ONGC does not qualify as one single supply. It was observed that in terms of Section 7(2) of the Integrated Goods and Services Tax Act, 2017, the supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-state trade or commerce. As per Section 2(4) of the Integrated Goods and Services Tax (IGST) Act, 2017, read with Section 2(11) of the Customs Act, 1962, "customs frontiers of India" means the limits of a customs area viz. the area of a customs station or a warehouse and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities. Till clearance by the Customs Authorities i.e. issuance of Out of Charge, the supply of goods imported shall be treated to be 'Inter-state supplies' and in terms of proviso to Section 5 of the IGST Act, 2017, the integrated tax on goods imported shall be levied and collected in accordance with the provisions of Section-3 of the Customs Tariff Act, 1975- The levy and collection of Customs duties including the concessions/exemptions etc are as per the Customs Law, the Customs Tariff Act and the Notifications issued there under. Once the goods imported are cleared by the Customs authorities, all the provisions of the Customs Law (relates to imported goods) ceases to be applicable or extendable to such goods. It is therefore, clear that the activity of import of drill bits by the Applicant is a distinct activity of supply of goods in the course of inter-state trade or commerce.

**Halliburton Offshore Services Inc.(Drill Bits), *In re* - [2020] 122 taxmann.com 153 (AAR - ANDHRA PRADESH)**

**In the absence of a legal provision that puts an obligation on the tax department, petitioner has no legal right to get directions issued to department to provide him information as to whether the**

**tenant has taken credit of Service Tax/GST amount charged by the Petitioner in the monthly rent invoices.**

The Petitioner is the sole/absolute owner/lease rights holder and in possession of shop/office premises situated in Delhi. The afore-noted property has been leased in favour of Respondent *vide* lease agreement dated 27th June 2011, on a monthly rent of Rs. 81,000/-, for a term of 15 years. It is asserted that earlier when the total turnover of the Petitioner was below the threshold limit required for service tax registration, the invoices for the monthly rent were issued without levying service tax. Later, when the turnover crossed threshold limit, it got registered with the service tax department and started levying service tax on the rent amount. Presently, Petitioner is raising invoices with GST at the prevailing rate. It was argued that Petitioner has been charging Service Tax/GST at the rate of 18% on the monthly rent, but Respondent was not paying the said taxes. It was urged that Respondent in all likelihood would have taken credit of the Service Tax/GST deposited by the Petitioner with the tax department. However, despite taking credit, Respondent had not reimbursed the taxes and therefore the availment was unauthorised. Petitioner has filed petition for issuing a direction to the authorities to disclose and confirm as to whether Respondent has taken credit of Service Tax/GST amount charged by the Petitioner in the monthly rent invoices.

It was observed that the Petitioner has not received the entire amount against the monthly rent invoices for the period commencing from November 2012 to June 2020. Concededly, as the owner/landlord of the property in question, Petitioner was required to register itself, and discharge the service tax liability from the date it was covered under the threshold limit applicable to service tax. Likewise, under the CGST Act, 2017, renting of certain immovable properties is treated as taxable services. Here also it is the Petitioner who has the obligation to discharge the GST liability. The service tax/GST paid on the rent can be availed as Input Tax Credit for utilisation against outgoing payments, provided, however, the criteria for availing Input Tax Credit is met. However, the availment of credit of the taxes paid by the Lessee does not affect the liability of the registered taxpayer to pay the taxes. In so far as the tax department is concerned, it is the Petitioner who is registered with them and is liable to pay taxes. Under GST, the point of taxation, that is the liability to pay GST will arise at the time of supply, as determined for goods and services. This obligation to pay Service Tax/GST is irrespective of Respondent taking credit of the taxes paid. Thus, in our view whether Respondent has availed the credit of Service Tax/GST or not is immaterial and will not affect Petitioner's right, if any, to recover the same. The right of recovery would have to be determined in the context of the clauses contained in the lease agreement, in appropriate proceedings. Petitioner was unable to show any provision of law that puts an obligation on the tax department to furnish the information for which the mandamus was being sought. In case the petitioner has no such legal right, the prayer cannot be granted. Petition was dismissed.

**Allied Engineers & Builders (P.) Ltd. *v.* Muthoot Finance Ltd. - [2020] 122 taxmann.com 142 (High court of Delhi)**

**About the author**

CA. Rajat Mohan is Fellow Member of Institute of Chartered Accountants of India (F.C.A.) and Fellow of Institute of Company Secretaries of India (F.C.S.). Furthermore, he also has qualified post qualification course of Institute of Chartered Accountants of India on 'Information Systems Audit' (D.I.S.A.).

He has authored more than half a dozen books on indirect taxes, GST being his forte with publishers like Taxsutra, Wolters Kluwer and Bharat Law House. He has been authoring books on GST since 2010 every year, which has gained wide popularity in India and internationally also. He is a regular contributor of articles on GST, which are published on several online portals and in the columns of reputed tax journals and magazines. His views are well respected by media which is the reason that his name is placed regularly in national dailies and top-notch online news portals including Times of India, Economic Times, Hindustan Times, Indian Express, The Hindu, LiveMint, Hindu Business Line, Business Standard, Bloomberg, Business Today, Financial Express, Firstpost, NDTV, ETRetail, Monday News Alerts and various others.

For any areas of improvement do let us know.

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