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	Online gaming will be covered under the category of services and not goods	AAR
2	The applicant is a government entity.	AAR
3	The transfer of a business as a whole along with the capital assets as going concern for a monetary consideration is a supply of services.	AAR
4	No consideration was received by Appellant for providing safe vault service hence the same is not liable to tax	CESTAT
5	Appellant is not liable to pay service tax on interest earned by it by providing metal as loan.	CESTAT
6	The charges collected from customers for shifting of service lines are taxable under GST.	AAR
7	The amounts received by the applicant are not exigible to GST if the entire consideration related to such sale of flats is received after the issuance of the Completion Certificate.	AAR
8	GST cannot be levied on the estimated by-products value treating such by-products as part of the consideration for milling.	HC
9	Profit earned by the appellants on sale/purchase of used cars and incentives and discounts received by it not liable to service tax.	CESTAT
10	Amount received from incentives could not been levied to service tax.	CESTAT

Online gaming will be covered under the category of services and not goods

The applicant is a proprietor supplying digital goods, in the subject case 'online gaming'. Applicant contacts the suppliers of digital products requesting a list of digital products that are available with them. Digital Goods are then sent to the applicant by Email or Instant message service and the payout is issued. These received digital goods are assessed and stored on Cloud Servers for dispatching to customers of the applicant. Customers visit the Website of the applicant online and make payments to the applicant, after which Digital Goods are then delivered by the cloud server to the customer by Email. Their Suppliers are located abroad and are contacted by Email or instant message service. The Payments are received from customers using PayPal. The applicant sought advance ruling on whether "e goods", as commercially known in the market, are "goods" as defined in the GST Acts or are they services as per GST Act?

AAR observed that the applicant is supplying online content services'. The subject services i.e. online gaming falls under SAC 998439. All services covered under the heading 9984 attract a GST rate of 18%. Therefore, the supply is service and not goods.

Amogh Ramesh Bhatawadekar, *In re* - [2020] 122 taxmann.com 251 (AAR - MAHARASHTRA)

[1] *DISCLAIMER: The views expressed are strictly of the author. The contents of this article are solely for informational purpose. It does not constitute professional advice or recommendation of firm. Neither the author nor firm and its affiliates accepts any liabilities for any loss or damage of any kind arising out of any information in this article nor for any actions taken in reliance thereon.*

The applicant is a government entity.

The applicant is engaged in the generation and distribution of electricity. The Applicant is a subsidiary of Tamil Nadu Electricity Board Limited (TNEB Ltd), which is 100% owned by the Government of Tamil Nadu. TNEB Ltd is an investment Company only, no other business transactions are being carried out. The applicant is an Electricity Distribution utility under Electricity Act, 2003. TNEB was restructured on 1-11-2010 into TANGEDCO(the applicant); and TANTRANSCO. The applicant is in the service of Generating and Distributing (sale of) Electricity in the state of Tamil Nadu & TANTRANSCO Ltd is in the business of Transmission of Electricity. The applicant has its own stations for the purpose of generating electricity and has been distributing the generated electricity to various consumers throughout the State of Tamil Nadu, since the time it has been established. TANGEDCO and TANTRANSCO enter into transactions between them in the course of the generation, transmission, and distribution of electricity in Tamil Nadu. The applicant has sought an Advance ruling on the question of whether it can be considered a "Government Entity".

AAR observed that "Government Entity" means an authority or a board or any other body including a society, trust, corporation, set up by an Act of Parliament or State Legislature; or established by any Government, with 90 percent, or more participation by way of equity or control, to carry out a function entrusted by the Central Government, State Government, Union Territory or local authority. It was observed that the applicant is established by the Government of Tamil Nadu *vide* G.O. Ms. No. 94 Energy (B2) Department dated 16-11-2009 with the primary objective to function as generation and distribution utility in terms of the provisions of Electricity Act 2003. It is a public company wherein 99 percent of shares are held by TNEB, the Holding Company, which is established by the Government of Tamil Nadu with more than 90 percent equity shares and control. The appointments of the directors to the applicant are by the Government.

AAR held that the applicant is a Public Limited Company established by the Government of Tamil Nadu with more than 90 percent control for the purposes of generation and distribution of electricity and is a government Entity.

Tamil Nadu Generation and Distribution Corporation Ltd., *In re* - [2020] 117 taxmann.com 732 (AAR - TAMILNADU)

The transfer of a business as a whole along with the capital assets as going concern for a monetary consideration is a supply of services.

The applicant undertakes Research & Development work in Active Pharmaceutical Ingredient (API) & formulation molecules & manufacture of formulation products in small quantity for R & D purpose. Unit at Andhra Pradesh undertakes R&D work and the whole business was to be shifted to Bengaluru, Karnataka which is an ongoing concern. The applicant stated that they filed GST returns for the month of Jan-19 with an input Credit balance. It sought an advance ruling as to whether the transaction of the applicant would amount to the supply of goods or supply of services.

AAR observed that the business of the applicant, the Andhra Pradesh unit, as a whole along with the capital assets is being transferred as going concern to Karnataka Unit for a monetary consideration. The applicant had submitted no documentary evidence proving that the transaction is a going concern except for his categorical declaration in the application as such. It was observed that the activity of the 'transfer' is made for a consideration, but neither in the course of the business nor for the furtherance of the business. A going concern is a one-time affair made where the business is sold including assets in entirety or an independent part thereof. Even though this transaction does not amount to a 'supply' as per definition, but qualified to be one under the scope of supply as it is backed by the term 'includes' in Section 7(1) of the CGST Act, 2017. Thus, in the broadened interpretation of the term 'includes', this activity is brought under the scope of supply. AAR observed that the transfer of business assets is the 'supply of goods'. But applicant’s business in its entirety is transferred or sold

along with capital assets. Thus, it disqualifies the 'going concern' to be grouped under 'supply of goods' as per the above-mentioned clause 4(*c*). The definition of services qualifies 'anything other than goods' as service.

AAR held that the 'going concern', which was excluded from the list of 'supply of goods' would automatically fall under 'supply of services'.

Shilpa Medicare Limited, *In re* - [2020] 117 taxmann.com 806 (AAR - ANDHRA PRADESH)

No consideration was received by Appellant for providing safe vault service hence the same is not liable to tax

Appellant is a banking company and is involved in the sale and purchase of gold. The appellant imports gold from Union Bank of Switzerland and MKS Finance, Geneva and holds the same with them till such time they find a customer. After the customer is identified and the price of the gold is confirmed, they have their mark up, collect money from customer and send the money to the suppliers such as Union Bank of Switzerland or MKS Finance and at that point of time purchase the gold which is already in their physical custody. Immediately on purchase of gold, the same gold is delivered to their customers. It appeared to Revenue that after the import of gold and till such time the customer is identified, gold is being held by the appellant and during the said period the ownership of gold is with the Union Bank of Switzerland or MKS Finance, as the case may be, and therefore appellant is providing Safe Vault Service which is part of other financial services to Union Bank of Switzerland or MKS Finance as the case may be. Show cause notices were issued. On adjudication, the demand of service tax was confirmed and interest was also ordered to be recovered and penalties were imposed.

On appeal to Court:

The Court observed that Revenue does not have any figure of the consideration alleged to have been received by the appellant from the foreign suppliers of gold for providing safe vault service. Thus, revenue did not have any case for raising demand of service tax on providing safe vault service on the appellant. The onus was on Revenue to identify the consideration, if any, received by the appellant for providing service.

The Court held that without any consideration there is no service tax payable. Therefore, the Court *set aside* the impugned orders.

Indian Overseas Bank *v.* Commissioner of Central Excise & Service Tax - [2020] 118 taxmann.com 545 (Chennai - CESTAT)

Appellant is not liable to pay service tax on interest earned by it by providing metal as loan.

Appellant is a banking company and is involved in the sale and purchase of gold. The appellant is providing metal as a loan to the customers. Such metal is required to be returned to the appellant by their customers. Further, as consideration for use of such metal by their customers, customers were required to pay interest to the appellant. Revenue considered such interest as consideration for the demand of service tax. Therefore through various SCNs associated with the appeals. Revenue raised a demand of service tax on interest so earned by the appellants. Such demands were confirmed along with interest and imposition of penalties. The issue was whether service tax is payable on interest received by the appellant by providing metal as a loan?

The Court observed that 'interest' has been defined under clause (30) of Section 65B of Finance Act, 1994. Further, he has submitted that the contention of Revenue is that under clause (n) of section 66D interest is exempted from service tax and that interest is to be treated as interest earned on a cash loan. Further, he has submitted that contention of Revenue is that at sub-rule (2) clause (iv) of Rule 6 of Service Tax (Determination of Value) Rules, 2006 which provides that interest on the loan shall not be included in assessable value deals only with interest on cash loan given. He further submitted that the contention of Revenue in the present case is that since metal was given as a loan the said

provisions are not applicable and therefore, Revenue has demanded service tax on interest. He has submitted that there is no such distinction in the Act on interest.
The Court held that there is no provision in the law to hold that interest identified by Valuation Rules or Section 66 is interest only on a cash loan. Therefore, service tax confirmed on interest earned by the appellant by providing metal as the loan is not sustainable and no service tax would be levied.
Indian Overseas Bank *v.* Commissioner of Central Excise & Service Tax - [2020] 118 taxmann.com 545 (Chennai - CESTAT)

The charges collected from customers for shifting of service lines are taxable under GST.
The applicant is engaged in the generation and distribution of electricity. The Applicant is a subsidiary of Tamil Nadu Electricity Board Limited (TNEB Ltd), which is 100% owned by the Government of Tamil Nadu. TNEB Ltd is an investment Company only, no other business transactions are being carried out. The applicant is an Electricity Distribution utility under Electricity Act, 2003. TNEB was restructured on 1-11-2010 into TANGEDCO(the applicant); and TANTRANSCO. The applicant is in the service of Generating and Distributing (sale of) Electricity in the state of Tamil Nadu & TANTRANSCO Ltd is in the business of Transmission of Electricity. The applicant has its own stations for the purpose of generating electricity and has been distributing the generated electricity to various consumers throughout the State of Tamil Nadu, since the time it has been established. TANGEDCO and TANTRANSCO enter into transactions between them in the course of the generation, transmission, and distribution of electricity in Tamil Nadu. The applicant sought an Advance ruling on the applicability of GST on Deposit Contribution Works.
AAR observed that under Deposit Contribution Works, the consumer makes a request to the applicant for shifting of service line, Structure and equipment, the cost of which is to be borne by the consumer as per clause 5 of TNERC code. The charges for this are billed separately from the consumer. The works undertaken are Installation of transformers/lines and other accessories and are in the nature of installation of the structure and equipments classifiable under SAC 99873. And the applicable rate of tax is 9% as specified under Sl. No. 25 of Notification No. 11/2017-C.T. (Rate) dated 28-6-2017 and Sl. No. 25 of Notification No. II (2)/CTR/532(d-14)/2017 *vide* G.O. (Ms) No. 72 dated 29-6-2017 as amended. AAR further observed that CBIC *Vide* Circular No. 34-8-2018-GST dated 1-3-2018 issued in file F. No. 354/17/2018-TRU, has issued clarifications as approved by the Fitment Committee to the GST council in its meeting held on 9th, 10th and 13th January 2018, wherein under Sl. No.4 the issue at hand stands clarified as under:

Sl. No	Issue	Clarification
4	(1) Whether the activities carried by DISCOMS against - recovery of charges from consumers under State Electricity Act are exempt from GST?	(1) Service by way of transmission or distribution of electricity by an electricity transmission or distribution utility is exempt from GST under notification No. 12/2017- CT (R), Sl. No. 25. The other services such as, - *i.* Application fee for releasing connection of electricity; *ii.* Rental Charges against metering equipment; *iii.* Testing fee for meters/ transformers, capacitors etc.; *iv.* Labour charges from customers for shifting of meters or shifting of service lines; *v.* charges for duplicate bill; provided by DISCOMS to consumer are taxable

AAR thus held that the charges collected from customers for shifting of service lines are taxable under GST.

Tamil Nadu Generation and Distribution Corporation Ltd., *In re* - [2020] 117 taxmann.com 732 (AAR - TAMILNADU)

No levy of tax

The amounts received by the applicant are not exigible to GST if the entire consideration related to such sale of flats is received after the issuance of the Completion Certificate.

The Applicant, being the owner of an immovable property had entered into a Joint Development Agreement with M/s. Suprabhat Constructions, a partnership firm, authorizing them to construct residential flats by incurring the necessary cost together with certain common amenities and upon the development of the said property, the applicant gets 40% share of undivided right, title, and interest in the land proportionate to the super built-up area and 40% of car parking spaces. In view of this, the applicant sought advance as to whether amounts received by the Owner towards the advances or sale consideration of the flats fallen to his share of 40% in terms of the Joint Development Agreement dated 19-5-2016 and the subsequent Area Sharing Agreement dated 3-1-2018, are amenable for payment of GST.

AAR observed that the applicant had entered into JDA, along with irrevocable general power of attorney, on 19-5-2016 with the Developer M/s. Suprabhat Constructions; Developer obtained necessary plan approval dated 21-2-2017, Commencement Certificate dated 16-6-2017 and the Completion/Occupancy Certificate dated 26-8-2019, from the authority BBMP. AAR noted that the developer had the sole and exclusive right of marketing the entire project. The applicant was silent about the fact that whether the developer had executed any sale deeds on behalf of the applicant in respect of the applicant's share of units/flats. Thus if the applicant themselves or the developer on behalf of the applicant have sold the applicant's share of units/flats prior to issuance of the completion certificate, then the transactions amount to supply of "Works Contract Service" are liable to GST. The value of the aforesaid supply is to be ascertained from the open market and would be equal to the open market value as per rule 27 of the CGST/SGST rules 2017. Further, it is also clarified *vide* Notification No. 4/2019 Central Tax (Rate) dated 29-03-2019 at paragraph (*iii*) 1B, which states that "Value of portion of residential or commercial apartments remaining un-booked on the date of issuance of completion certificate or first occupation, as the case may be, shall be deemed to be equal to the value of similar apartments charged by the promoter nearest to the date of issuance of completion certificate or first occupation, as the case may be."

AAR held that the time of supply would be the time at which the constructed flats are handed over by the developer to the applicant. In the instant case, the applicant claims/contends that they have received their share of units/flats after the issuance of Completion Occupancy certificate by Bruhat Bengaluru Mahanagar Palike (BBMP) *Vide* number JDTR(S)/ADTP/OC/32/19-20 Dated 26-08-2019 for 74 units (11609 Square feet). Thus, the amounts received by the applicant, either by himself or through his agents, towards the sale of their share of flats are not exigible to GST, if and only if the entire consideration related to such sale of flats is received after the issuance of Completion Certificate dated 26-8-2019, as the said activities are treated neither supply of goods nor supply of service in terms of schedule III of the CGST Act 2017 subject to clause 5(*b*) of the Schedule-II.

B.R. Sridhar, *In re* -[2020] 121 taxmann.com 342 (AAR - KARNATAKA)

GST cannot be levied on the estimated by-products value treating such by-products as part of the consideration for milling.

HIGH COURT OF ANDHRA PRADESH Judgment dated 20-11-2020 – Shiridi Sainath Industries v. Deputy Commissioner of Services Tax (International Taxation) - [2020] 122 taxmann.com 25 (Andhra Pradesh)FACTS:

The petitioner is a Rice Miller. The State Government through the Andhra Pradesh Civil Supplies Corporation i.e., respondent No. 4 herein procures paddy from the ryots and gives to the rice mills for milling and handing over to respondent No. 4 for public distribution. As consideration for milling, respondent No. 4 pays charges at the rate of 15% per one quintal of paddy milled. As per the terms of the agreement, the Rice Millers have to supply rice equivalent to 67% of the paddy given for milling irrespective of the yield. In fact, the actual yield will be around 61% to 62% only. The balance of 5% to 6% has to be provided by the petitioner to respondent No. 4 out of his own stock. Therefore, as compensation/exchange for the same, respondent No. 4 allows the petitioner to retain the broken rice, bran and husk obtained in the course of milling of the paddy. The petitioner sells the said broken rice, bran and husk. The broken rice and husk are exempted from tax and hence, no GST need to be paid on the same. But, the petitioner pays tax on the bran at the rate of 5%. The 1st respondent conducted the inspection of the premises of the petitioner and issued a show-cause notice dated 22-5-2018, for which the petitioner submitted his objections/reply. Whereupon, the 1st respondent passed the impugned assessment order vide Ref. No. CGST/2017-18/05 dated 29-10-2018 imposing the GST not only on milling charges of Rs. 15/- per quintal, but also on the value of by-products which were allowed to be retained by the petitioner treating the by-products as part of the consideration. Hence the petition.

On filing writ petition:

Issue:

Whether the impugned assessment order levying GST on the estimated by-products value, treating such by-products as part of the consideration for milling, is legally sustainable under the provisions of CGST/APGST Act, 2017 or not?

High Court Judgment:

High Court observed that Custom Milling Rice is an arrangement where the Government through the Civil Supplies Corporation gets the paddy milled into rice through the millers. For this purpose, the 4th respondent enters into an agreement with the millers incorporating therein the method and manner of milling the paddy. In the above process, in the context of GST Act, the petitioner shall be regarded as a "supplier". Under Section 2(105), supplier in relation to any goods or services or both, shall mean the person supplying the said goods or services or both and shall include an agent as such on behalf of such supplier. The petitioner, in view of undertaking the exercise of milling the paddy, offers "services" to 4th respondent within the meaning of Section 2(102) of the GST Act. Similarly, the 4th respondent Corporation is called as "recipient" of services within the meaning of Section 2(93) of GST Act. What the petitioner undertakes is "job work" as per Section 2(68). The term "job work" means any treatment or process undertaken by a person on goods belonging to another registered person and the expression job work shall be construed accordingly. The returns, which the petitioner gets out of milling is known as "consideration" within the meaning of Section 2(31) of GST Act. As per this provision, the consideration may be either in the form of money or otherwise. Custom milling of paddy is not exempted and on the other hand, it is a taxable service and liable to GST @ 5% on the processing charges and not on the entire value of rice.

Whereas, clause No. 17 of the agreement says that milling charges will be paid as fixed by the GOI (admittedly @Rs.15/- per quintal), clause No. 22 states that the mill shall retain all the by-products such as broken, bran, husk etc., derived during the process of milling. There is no slightest insinuation in either clause that the by-products shall form part of the consideration. If the parties to the agreement had such intention, nothing prevented them to do so. As we observed, all the terms of CMR, both significant and trivial, are meticulously incorporated. For instance, it was mentioned that

the mill shall deliver raw rice - 67% and boiled rice - 68% as against the paddy delivered for CMR; the mill shall bear unloading charges, insurance, tarpaulin, ropes, dunnage material, prophylactic and curative treatment expenditure etc; the mill shall use SBT gunnies supplied with paddy stocks and shall return the leftover gunnies to the corporation, failing which, 60% of the cost of the gunny will be collected from the mill etc. Going by the way the aforesaid terms are meticulously incorporated, one can logically conclude that, if the parties wanted to covenant that by-products shall form part of the consideration, they would have mentioned in clear terms. Therefore, the absence of such mentioning is an indication that the by-products which are allowed to be retained by the petitioner are not part of the consideration.

High Court observed that treating the by-products as part of consideration and payment of tax on the sale of by-products are two different aspects. The petitioner has to pay tax on the sale of by-products (if they are taxable), whether he received the by-products from 4th respondent either towards part of the consideration or freely. Therefore, the later part of clause No. 22 is not a determinative factor for holding that the by-products are part of the consideration. As per clause No. 8 the petitioner has to handover 67% of raw rice and 68% of boiled rice as against the paddy delivered to him for milling.

High Court ~~It was~~ held that the by-products form part of compensation but not consideration. In the impugned order, the 1st respondent erroneously concluded that the miller was allowed to retain the by-products towards consideration, though such import is impermissible from the terms of the agreement. Therefore, the impugned order to the extent of including the value of by-products to the milling charges and assessing tax was legally unsustainable and no tax on such by-products would be charged.

Shiridi Sainath Industries *v.* Deputy Commissioner of Services Tax (International Taxation) - [2020] 122 taxmann.com 25 (High Court of Andhra Pradesh)

Profit earned by the appellants on sale/purchase of used cars and incentives and discounts received by it not liable to service tax.

Appellants are authorized dealers of Maruti Udyog Ltd. They are also engaged in the business of selling used or pre-owned vehicles through their True Value Division. Alleging that the profit earned by the appellant on purchase and sale of used cars, is a consideration towards the Business Auxiliary Service rendered by the appellants, Revenue issued three show-cause notices to the appellants. Department also alleged that the incentives and discounts received by the appellants from M/s. Maruti Suzuki India Ltd. also attracts levy of service tax under Business Auxiliary Service. On appeal:

The Court observed that the issue of taxability of profit earned by the appellants on sale/purchase of used cars has been settled in favor of the appellants in the case of *Sai Service Station,* wherein it was held that for considering a transaction as to whether it is a sale or not, what is required to be seen is not the aspect of registration but whether the price has been received and the property has been delivered or not. Once the property is delivered and the price has been received by the seller of the old car, the transaction is a sale. Once the first transaction is considered as a sale, it means that the vehicle has been purchased by the appellant who subsequently sold them. Therefore it becomes totally a transaction of purchase and sale of old vehicles. Activities of refurbishing of the vehicle, repair and other activities undertaken by the appellants are undertaken as value addition by them and it is neither for the seller nor the purchaser. There is no service element in this transaction either. With regard to the incentives and discounts received by the appellants from M/s. Maruti Suzuki India Ltd., AAR observed that the issue is settled in favour of the appellant's themselves by this Bench relying on *Sai Service Station Ltd.* wherein it was observed that these incentives are in the form of trade discount.

Therefore, on the basis of the above judgment', the issue was settled in the favor of the assessee.

Popular Vehicles and Service Ltd. *v.* Commissioner of Central Excise, Customs and Service Tax, Cochin [2020] 120 taxmann.com 305 (Bangalore - CESTAT)

Amount received from incentives could not been levied to service tax.

The appellant is a dealer of Maruti Udhyog Ltd. The appellant buys vehicles from MUL for further sale to the buyers by virtue of a dealership agreement. Under the said agreement, the appellant receives discount from MUL, which are referred to as "incentives" under the schemes. The Department has sought to levy service tax on the incentives received by the appellant under the category of "business auxiliary service". Show cause notice dated May 9, 2014, was issued for the period April 2012 to March 2013. The total demand confirmed under BAS was Rs. 24,91,202/-, while that under GTA was Rs. 35,117/-. Commissioner of Central Excise, Dehradun confirmed a portion of the demand of service tax with penalty and interest. The issue was whether Service tax is leviable on the amount received from incentives received the appellant?

The Court observed that the appellant works on a principal to principal basis and not as an agent of MUL. This is for the reason that the agreement itself provides that the appellant has to undertake certain sales promotion activities as well. The carrying out of such activities by the appellant is for the mutual benefit of the business of the appellant as well as the business of MUL. The amount of incentives received on such an account cannot, therefore, be treated as consideration for any service. The Court, therefore, held that the incentives received by the appellant cannot, be leviable to service tax.

Rohan Motors Ltd. *v.* Commissioner of Central Excise, Dehradun - [2020] 122 taxmann.com 24 (New Delhi - CESTAT)

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