

**Valuation as per Rule 28 applies only where the value for GST is not ascertainable**

The Hon'ble AAR Tamil Nadu in the matter of ***M/s Thirumalai Chemicals Ltd. [Order No. 41/AAR/2020 dated December 18, 2020]*** has held that in case of valuation of supply between distinct persons, any of the following three methods can be adopted as per Rule 28 of the CGST Rules, 2017 ("**CGST Rules**"):

- Open Market Value ("**OMV**") of such supply
- 90% of ultimate sale value as raised by distinct person to unrelated ultimate customers based on the purchase orders in cases of 'as such' supplies
- Invoice value as OMV where the distinct person is eligible for full input tax credit ("**ITC**") of the taxes paid by the Applicant.

**Facts:-**

Thirumalai Chemicals Ltd. ("**the Applicant**") is having its principal place of business in Tamil Nadu and is engaged in business of manufacturing and trading of chemicals. They have units and branches in Gujarat, Maharashtra and Dadra and Nagar Haveli. They are also engaged in stock transfer of the finished products to their depots located in other states, which are distinct units as per Section 25(2) of the CGST Act, 2017 ("**CGST Act**"). The valuation adopted for stock transfer is made in accordance with the provisions of Rule 28(a) of CGST Rules, which states that the value of supply of goods or services or both between distinct person to be the OMV of such supply i.e., they are adopting the OMV for the stock transfer to the depots.

The distinct units are eligible to full ITC as per second proviso of Rule 28 of the CGST Rules and availing ITC of the stock transfers received from the distinct units at Tamil Nadu. The said stock transfers are then sold by the distinct person from their depots.

**Issue:-**

Whether the Applicant can adopt and determine the value of supply of goods made to distinct units as per the second proviso to Rule 28 of the CGST Rules?

**Held:-**

The Hon'ble AAR Tamil Nadu in ***Order No. 41/AAR/2020 dated December 18, 2020*** has held as under:

- Observed that the Applicant and the distinct person outside the state of Tamil Nadu are different legal persons, hence both are said to be related as per the explanation to Section 15 of the CGST Act. Therefore, the value to be adopted is governed by rules prescribed as per Section 15(4) of the CGST Act.

- Stated that as per Rule 28 of the CGST Rules, the valuation to be adopted is OMV i.e., the price of sale charged to an independent buyer; if such OMV is not available then value charge of like goods and quantity is adopted and if value cannot be ascertained by both the above means, then value is to be determined by cost construction or best judgement method. However, there are 2 provisos to Rule 28 ibid:
  - When goods are intended to be supplied as such, then supply to the related person can be valued at 90% of the ultimate sale value and this is at the option of supplier;
  - When recipient is eligible for full ITC, then value declared in the invoice is deemed to be OMV.
- Relied on AAAR, Tamil Nadu in ***Re: Specmakers Opticians Private Limited [Order No. 9/2019 dated November 13, 2019]*** to say that the value in respect of supply between distinct persons can be any of the following:
  - The available OMV;
  - In cases of 'as such' supply by the recipient, the supplier has an option to value the supply at 90% of the ultimate sales value;
  - When the recipient is eligible for full ITC, the invoice value is deemed to be the OMV.
- Observed that the Applicant supplies to their distinct persons. The distinct person supplies to their ultimate-unrelated consumer 'as such' and the value adopted is that on the purchase order issued to such distinct person by the ultimate consumer. Further, the distinct units are eligible to avail full ITC of the tax paid by the Applicant. Therefore, following the Specmakers ruling (supra) held that the Applicant can adopt either of the above three methodology.

#### **Our Comments:**

It may be noted that AAR Tamil Nadu in *Re: Specmakers Opticians (P.) Ltd. [2019 (27) G.S.T.L. 596]* while dealing with the aspect that Valuation rules have to be applied in sequential manner only, held that if a taxpayer can skip all the provisions under Rule 28(a) to (c), in spite of them being specifically mentioned as the value which "shall" be adopted, then any taxpayer will not ever use Rule 28(a) to (c) of the CGST Rules, in any scenario. Both provisos are to be read together and not independently, i.e., the applicant cannot choose whichever proviso is favourable to them.

However, the above ruling was overruled by AAAR Tamil Nadu (supra) to state that looking at the construction of the said rule, it is evident that when an 'Open Market Value' is available, sub-rule (b) and (c) may not be applicable but the **same is not the case in respect of the proviso. There is nothing to show that the second proviso is subordinate to the first. It independently deals with a scenario where the recipient is eligible for full input tax credit.**

## **Relevant Provisions:-**

### **Rule 28 of the CGST Rules:**

*“Value of supply of goods or services or both between distinct or related persons, other than through an agent. -*

*The value of the supply of goods or services or both between distinct persons as specified in sub-section (4) and (5) of section 25 or where the supplier and recipient are related, other than where the supply is made through an agent, shall-*

*(a) be the open market value of such supply;*

*(b) if the open market value is not available, be the value of supply of goods or services of like kind and quality;*

*(c) if the value is not determinable under clause (a) or (b), be the value as determined by the application of rule 30 or rule 31, in that order:*

*Provided that where the goods are intended for further supply as such by the recipient, the value shall, at the option of the supplier, be an amount equivalent to ninety percent of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person:*

*Provided further that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services.*

### **Section 15(4) of the CGST Act along with explanation:**

*“Value of taxable supply*

*(4) Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.*

*Explanation.- For the purposes of this Act,—*

*(a) persons shall be deemed to be “related persons” if—*

*(i) such persons are officers or directors of one another’s businesses;*

*(ii) such persons are legally recognised partners in business;*

*(iii) such persons are employer and employee;*

*(iv) any person directly or indirectly owns, controls or holds twenty-five per cent. or more of the outstanding voting stock or shares of both of them;*

*(v) one of them directly or indirectly controls the other;*

*(vi) both of them are directly or indirectly controlled by a third person;*

*(vii) together they directly or indirectly control a third person; or*

*(viii) they are members of the same family;*

*(b) the term “person” also includes legal persons;*

*(c) persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other, shall be deemed to be related.”*

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