GST ADVANCE RULING

CA. C. B. Thakar, CA. Jinal Maru

CIRCULARS

1. The Commissioner of State Tax has issued Circular no. 33T of 2021 dated 31.12.2021 by which clarification given by CBIC vide circular 167/23/2021GST dated 17.12.2021 about applicability of GST on services supplied by restaurants through e-commerce operators is made applicable under MGST Act.

Case: M/s MOTHER EARTH ENVIRON TECH PVT LTD [2021-TIOL-35] (KARNATKA AAAR)

Facts of the Case:

1. The appellant is engaged in the business of solid waste managment. They provide services for treatment, storage and disposal of hazardous waste. They collect hazardous waste from various industries across Karnataka and dispose the same as per the guidelines of Central Pollution Control Board (CPCB) and Karnataka State Pollution Control Board (KSPCB).
2. For processing and disposal of the solid waste, they have taken land on lease from the Government and constructed a land filling pit into which the solid waste is filled and closed and sealed for 30 years. The land fill pit has been capitalised in their books of accounts as an asset and they have claimed depreciation under Income Tax.
3. The AAR held that "The land filling pit is not a plant and machinery but a civil structure". The appellant approached the High Court of Karnataka with a WP against this AAR on the grounds that the AAR had, before passing the order, referred the matter to the Principal Commissioner of Central Tax, Bangalore West Commissionerate who had given his opinion that the structure constructed by the Appellant is a civil structure. However, the Appellant was not given a copy of the report at any point of time and hence the order passed by the AAR on 11-09-2020 is violative of the principals of natural justice. The HC set aside the AAR order dated 11-09-2020 and remanded the matter back to the AAR for fresh consideration.
4. Following the directions of HC, the AAR passed the de novo advance ruling order and held as "The land filling pit is a civil structure, not a plant or machinery for the purpose of Chapter V and Chapter VI of the CGST Act".
5. Hence, the present appeal on the ground that AAR has verbatim reproduced, at several places, the same content from the earlier order dated 11-09-2020 which was set aside by the Hon'ble HC in W.P. That the impugned order does not provide any discussion and reasons on the judicial precedents submitted by the Appellant

Questions before AAR:

1. Whether the land filling pit can be considered as 'Plant and machinery' and therefore eligible for input tax credit or; whether the landfilling pit is to be considered as 'civil structure' and therefore become ineligible for ITC ?

Arguments by Applicant:

1. That on the land leased from the Government for purposes of solid waste management, the following structures are proposed to be constructed viz: Land filling pit, Temporary water Storage Tank, Utility / Parking, Green Belt Area, Office and laboratory area, Labour shed and Compound wall. That other than the land filling pit, all other structures involve the use of concrete, bricks or cement. The construction materials like steel, cement and bricks will be sourced from local manufacturers for the purpose of other structures only and not for land filing pit. That no cement, steel or bricks are used in the land filing pit at any time and hence the same cannot be termed as a civil structure.
2. Even assuming that the use of cement is a relevant factor, they submitted that it is an established principal of law that merely because steel, cement or bricks are used for construction of a structure, it does not cease to be plant or machinery. They relied on the following High Court decisions such as M/s J.K. Cement Works (KARANTAKA HC -2017-TIOL-640-HC-KAR-VAT), Ambuja Cements Ltd (KERALA HC - 2020 (1) KHC 884) to substantiate their stand that even if cement is used, the land filing pit will qualify to be a plant and not a civil structure.

3. The Appellant claimed that the land filling pit is an apparatus without which they cannot carry out his business and hence it qualifies to be a plant or machinery. They submitted that once they receive waste from industries, it is tested to decide the type of treatment required for it; that depending on the type of waste, the various processing action would be determined to avoid any emission from the hazardous waste. That in the course of processing of the hazardous waste, they use lime or fly ash or other neutralising agents for stabilizing it as per the protocols of the CPCB. That after the waste is deposited in the land filling pit, the further process of disposal takes place in the land filling pit continuously to avoid any explosion within the pit. Therefore, the land filling pit is plant or machinery under Section 17(5)(d) of the CGST Act. They relied on the Allahabad High Court decision in the case of S.K. Tulsi and Sons.

4. They also submitted Supreme Court in case of M/s Scientific Engineering House (P) Ltd vs CIT, Andhra Pradesh (2002-TIOL-665-SC-IT) have held that the term 'Plant' must be given a wide meaning. That the term plant need not be used for mechanical operations. They also submitted that the land filling pit satisfies the 'functionality test' which was explained by Lord Guest in IRC vs Barclay Curie and Co and referred to by the Karnataka High Court in the case of Santosh Enterprises. That the services provided by the Appellant include not only disposal of waste but also ensuring that during the period of disposal, any leachate from the waste does not escape; that all precipitation that falls onto an open landfill is absorbed into the waste; that as precipitation leaches through the waste, it picks up contaminants such as metals, nitrogen, silt, salts, volatile organic compounds and oxygen demanding wastes known as leachate; that if not managed and treated properly, the leachate can cause serious damage to the environment; for disposal of hazardous waste and to manage the leachate, the Appellant has constructed a land filling pit; that the two most important aspects of land filing pit design include Liner Installation and Leachate Management.

5. In view of the above decisions, they submitted that in their case, the land filling pit is a plant; that the entire process of disposal takes place in the land filling pit and it is not a mere storage mechanism. That the processing of content in the land filling pit and its monitoring is continuous as per the standards prescribed by the concerned statutory authorities to ensure that land and water are not contaminated.

6. They submitted that the land filling pit is a toll for the Appellant's trade and hence satisfied the functionality test in as much as without the land filling pit, neither the hazardous waste can be decomposed nor can the leachate be managed.

7. They also submitted that the fact that the land filling pit is embedded in the earth does not preclude it from being a plant; that the Supreme Court in the case of Scientific Engineering House (P) Ltd vs CIT, Andhra Pradesh has held that plant would include any article or object, fixed or movable, used by businessman for carrying on his business. Therefore, the fact that the land filling pit is embedded in the earth is not relevant to understand if it falls within the ambit of plant or machinery. That in several instances the Courts such as CIT vs Oil India Ltd - (1992) 105 CTR (Cal) 356, Tribeni Tissues Ltd vs CIT- (1991) 190 ITR 487 (Cal) have held that a structure is a 'plant' even though it was embedded in the earth.

8. They also contended that the AAR has concluded that the landfilling pit is a civil structure without attributing any reasons for arriving at such a conclusion; that the AAR has not provided any reasoning apart from stating that the land filling pit involves engineering work both above and below the ground; that the observation in the impugned order that the other structures are constructed using cement and steel and hence would qualify as civil structures, does not have any relevance to the issue at hand which is whether the land filling pit is eligible for ITC in terms of Section 17(5)(d).

9. That the case of the Appellant is covered under clause (d) of Section 17(5) whereas the definition of 'plant and machinery' as given in the 2" Explanation to Section 17(5) does not apply to clause (d) of Section 17(5); that the term 'plant' or 'machinery' has not been defined in the GST law but several judicial decisions have analyzed the terms and given a clear decision as to what constitutes a 'plant' and what is a 'machinery'; that the lower Authority has not appreciated any of those decisions.

Decision of AAAR

1. Before we analyze the provisions of law, let us understand what a land filling pit is and how it is constructed. Contrary to common understanding, a land fill for disposal of hazardous waste is not an open dump. It is an engineered pit in which layers of solid waste are filled, compacted and covered for final disposal. Land filling is the term used to describe the process by which solid waste is placed in the landfill. The purpose of land filling is to bury/alter the chemical composition of the waste so that they do not pose any threat to environment / public health. Landfills are built to concentrate the waste in compacted layers to reduce the volume and monitored for the control of liquid and gaseous effluent in order to protect the environment and human health. It is lined at the bottom to prevent groundwater pollution. Each layer of solid waste is covered with a layer of compacted soil until the capacity of

the landfill is reached. It is then covered and sealed. The life span of a landfill ranges from 12 to 40 years. the landfill in question is an engineered pit wherein the base of the landfill is lined with many layers of HDPE plastic.

2. From a reading of the clause (d) of Section 17(5), it emerges that goods and services received by a taxpayer for construction of immovable property on his own account are not eligible for input tax credit. The exception however, is when the immovable property is in the nature of plant or machinery, then the goods and services received for construction of plant or machinery will be eligible for credit and will not be hit by the restriction under clause (d).

3. The term immovable property has not been defined under GST Acts, therefore reference needs to be taken from General Clauses Act, 1897. There is no doubt that landfill pit is being embedded to the earth . It is also not in doubt that the construction of the landfill is done by the Appellant on his own account in order to render the service of disposal of hazardous waste.

4. The Appellant has vehemently argued that the explanation as given above cannot be applied to their case as the clause (d) to Section 17(5) (to which their case pertains) does not use the expression "plant and machinery" but uses the expression "plant or machinery". It is their contention that the Second explanation given in Section 17 is applicable only to clause (c) of Section 17(5), which clause they are not covered under. We find this argument to be unacceptable and devoid of merit. No doubt the words 'plant' and 'machinery' have not been individually defined in GST law. However, by defining the expression 'plant and machinery', the legislature has intended to define a particular genus or class or category.

5. We observe that the definition of the expression "plant and machinery" as given in the Second Explanation to Section 17(5) uses the term 'means'. As per the principles of interpretation of law laid down by higher judicial forums, a definition which uses the term 'means' has to be strictly construed to mean only what is stated therein and nothing more, nothing less. For the land filling pit to be considered a 'plant', it has to be either an 'apparatus', 'equipment' or 'machinery' which is fixed to the earth . Foundations and structural supports used to fix such apparatus, equipment and machinery to the earth are also covered within the ambit of the definition of 'plant and machinery'.

6. The use of the word 'means' indicates that the definition is hard and fast and no other meaning can be assigned to the expression than what is put down in the definition. The Appellant however, has contended that the term 'plant' should be given a wide meaning and has placed great emphasis on the SC ruling in the case of Scientific Engineering House (P) Ltd Vs. CIT the question before the Supreme Court was whether technical know-how in the shape of drawings, designs, charts, plans, processing data and other literature falls within the definition of 'plant'. That the Hon'ble SC, after having taken into consideration the definition of 'plant' as given in the Income Tax Act, held that the capital asset acquired by the assessee, namely, the technical know-how in the shape of drawings, designs charts, plans, processing data and other literature falls within the definition of 'plant' and therefore a depreciable asset.

7. We are unable to appreciate the precedential value of this case to the facts of the case before us. The context in which the term 'plant' has been defined in the Income Tax Act is not relevant for interpreting the said term under the CGST Act.

8. We hold that when the CGST Act has a clear definition of 'plant and machinery', there is no necessity of relying on the definition of the word 'plant' as given in the Income Tax Act. Further, the Income Tax Act and the CGST Act are not pari materia and hence the Doctrine of Pari materia in interpretation of statutes will not apply here. Moreover, the explanation which defines plant and machinery in the CGST Act is exhaustive as illustrated by the term 'means' used after plant and machinery vis-a-vis the use of the term 'includes' occurring in the definition under the Income Tax Act.

9. It is the Appellant's alternate claim that the land filling pit is an apparatus without which they cannot carry out their business. The Hon'ble Supreme Court in the case of CIC, New Delhi vs. C - Net Communications (I) (P) Ltd [2007 (216) E.L.T. 337] held that the word 'apparatus' would certainly mean the compound instrument or chain of series of instrument designed to carry out specific function or for a particular use. It follows that "apparatus" are normally instruments or equipment enhancing, reducing or controlling certain function of a principal system and does specific function or serve specific purpose.

10. In this case, although the land filling pit is designed to serve a particular purpose, it is not designed as a chain of instruments which is fixed to the earth for carrying out the activity of hazardous waste disposal. The pit is constructed by excavating the land area to form a pit and the excavated area is lined with liners to prevent leakage of the leachate in the soil and groundwater. The pit is more in the nature of a structure which is constructed for a specific purpose. The construction of the pit is carried out by applying the scientific principles of geotechnical engineering where the environmental factors relating to the soil and water is taken into

consideration for excavating the pit and designing the landfill. Such a structure, in our opinion cannot be termed as an apparatus or equipment or machinery. Rather, it is more appropriate to refer to this landfill as a civil structure.

11. The Appellant has been very vehement in their submission that the land filling pit is not a civil structure in as much as they have not used any cement or steel in the construction of the land filling pit. The term 'civil structure' has also not been defined in the GST law. general understanding of the term is "The profession of designing and executing structural works that serve the general public, such as dams, bridges, aqueducts, canals, highways, power plants, sewerage systems and other infrastructure". Further, a 'structure' in the context of civil engineering refers to anything that is constructed or built from different inter-related parts with a fixed location on the ground. Accordingly, a civil structure would be any man-made structure which is built by applying the science of civil engineering. The materials used for construction of structures is irrelevant.

12. We are therefore of the opinion that the lower Authority was right in construing that the land filling pit is a civil structure. The definition of 'plant and machinery' as given in the Second Explanation to Section 17 clearly excludes a civil structure from being considered as a plant. By virtue of this exclusion, we hold that the Appellants are not eligible for input tax credit on the goods and services used for construction of the land filling pit.

Case: M/s PORTESCAP INDIA PVT LTD [2021-TIOL-293-AAR] (MAHARASHTRA AAR)

Facts of the Case:

1. The Applicant, a SEZ Unit engaged in the manufacture of customized motors in India and exports the said goods. Applicant procures Rental Services from Seepz, SEZ Authority, Mumbai which is a Local authority.
2. Notification No. 18/2017- I.T.(Rate) dated 05.07.2017 exempts services imported by a unit or a developer in the SEZ for authorized operations, from the whole of the IGST leviable thereon under Section 5 of the IGST Act.
3. Section 7 of SEZ Act, 2005 provides for exemption to all goods or services procured from a DTA (Domestic Tariff Area) or foreign suppliers specified in first schedule. According to Section 51 of the SEZ Act 2005, the provisions of SEZ Act would have overriding effect on provisions of any other act including taxation law.
4. As per Notification No. 12/2017 – CTR dated 28.06.2017, CG has exempted Services provided by CG, SG, UT or a local authority where the consideration for such services does not exceed Rs.5,000/- subject to the proviso.
5. Hence, there is a need to determine whether a SEZ unit is required to comply with the provisions of RCM as a service recipient for local/domestic services procured by the unit, in view of entry 5A of Notification 13/2017-CTR amended by notification 3/2018-CTR. The said entry provides that any registered person is liable to pay tax under reverse charge basis on procurement of services of renting of immovable property from CG, SG , UT or local authority.
6. Originally, the application was rejected as being non-maintainable as per Section 95 of the CGST Act, 2017 because the applicant had raised questions as a recipient of services. However, The Appellate Authority for Advance Ruling, Maharashtra State, vide their Order has directed advance ruling authority to decide the application on merits, while setting aside the earlier order passed by this authority.

Questions before AAR:

1. Whether Portescap India Pvt. Ltd. is required to pay tax under RCM on procurement of renting of immovable property services from Seepz SEZ Authority (Local Authority) in accordance with Notification No. 13/2017 dated 28th June, 2017 read with Notification No. 03/2018 - CTR dated 25th January 2018 ?
2. Whether applicant is required to pay tax under RCM on any other services in accordance with above notifications?
3. If, answer to the above point is in the affirmative, then the tax under reverse charge mechanism is required to be paid under which tax head i.e., IGST or CGST and SGST?

Arguments by Applicant:

1. That a supply to SEZ will be considered as an inter-state supply and as long as the same supply is used for authorized operations of the SEZ, the same will be zero rated in view of section 16 of IGST Act.
2. The Default List of Services approved by the Department of Commerce (F. No. D.12/19/2013-SEZ dated 02.01.2018 for authorized operations specifically includes Renting of Immovable Property within its ambit. Therefore, there can be no liability under the notification 13/2017-CTR on the SEZ unit, since the service received by the SEZ would be considered as a zero-rated service.

3. Also, Notification No. 18/2017- I.T. (Rate) exempts services imported by a unit or a developer in a SEZ for authorized operations, from the whole of the IGST leviable thereon under Section 5 of the IGST Act, 2017.
4. That aforementioned notification is applicable not only for services procured from overseas service providers but from services procured within India as well, since the transaction with an SEZ is considered an inter-state supply and aforementioned notification exempts an SEZ unit from IGST on import of service.
5. Applicant is relying on the judgment of the Hon'ble Telangana and Andhra Pradesh High Court in GMR Aerospace Engineering Ltd. (2019 (8) TMI 748) which states that so long as services are used for authorized operations of a SEZ unit, the same should be exempted from the levy of tax.
6. Hence, Applicant is not required to comply with the requirements of Notification No. 13/2017 for any or all services mentioned therein.

Arguments by Revenue:

1. That instant case satisfies all the conditions of notification 13/2017-CTR & its corresponding notification 10/2017-ITR, which provides for payment of tax under RCM on renting services received from CG, SG etc. Hence as per section 9(3) of CGST Act, 2017 (or section 5(3) of IGST Act, 2017 as the case may be), the applicant is liable to pay tax under RCM.
2. FAQ's dated 15-12-2018 issued by CBIC clearly state that the SEZ unit is liable to GST under reverse charge mechanism.
3. Applicant has stated that Notification No. 18/2017- I.T.(R) will prevail over Notification No.13/2017-CTR . However, a combined reading of sections 2 (11) and 2 (56) of the IGST Act, 2017, makes it clear that, when recipient and supplier both are situated in SEZ, India , there is no question of import of services. Hence, Notification No. 18/2017 is not applicable in this case.
4. Further, in respect of Zero Rated supplies, section 16(2) of the IGST Act, 2017, says that "credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply" which means even in Zero Rated supplies, tax may be paid by using ITC available. And further sub-section 16 (3) is only applicable to "registered person making zero rated supply" i.e. suppliers of Zero Rated Supplies, but here, the applicant is recipient and thus it is not covered u/s section 16(3).
5. Further applicant argues that section 7 of SEZ Act, 2005 provides for exemption in respect of all goods or services procured from a DTA (Domestic Tariff Area) or foreign suppliers as specified in first schedule. The term "taxes, duties or cess under all enactments specified in the First Schedule" does not cover IGST tax (or CGST/SGST tax), hence this section is not applicable in the instant case.
6. Section 26 of SEZ Act, 2005 is yet to be aligned with the CGST Act, 2017 and/or IGST Act, 2017 and till now the list of taxes under Section 26 of SEZ Act, 2005 does not yet cover exemption from IGST tax (or CGST/SGST tax). In the absence of such explicit mention provided in the section 26, for exemption from IGST tax (or CGST/SGST tax), the applicant's argument is null and void.
7. That the 'Special Economic Zone (Amendment) Rules, 2018, vide Notification No. G.S.R. 909 (E), dated 19.09.2018, which came into effect, from 19.09.2018 provides Exemption to SGST. In the instant case, there is liability with respect to IGST, hence Rule 5 (5) (a) which deals with SGST, is not applicable in this case. Also, Rule 30(1) deals with procurement from DTA, which again is not applicable in the instant case, as the supplier is SEZ developer (and not DTA).
8. Furthermore, "the Default List of Services approved by the Department of Commerce for authorized operations specifically includes Renting of Immovable Property within its ambit", is not included within any notification/circular/orders etc. issued by GST Council, and hence, it cannot over-ride CGST Act, 2017/IGST Act, 2017 or notification/circulars etc. issued by the GST Council.
9. The judgement relied upon by applicant is in relation to Service Tax (Finance Act, 1994) which cannot be followed as a precedence for CGST Act or IGST Act, especially since the new concepts in GST such as Inter-state supplies and clearly defining conditions for Reverse Charge has made it in full alignment with SEZ Act.
10. Alternatively, the applicant states that "the SEZ unit in terms of Section 16 of the IGST could exercise the option to provide LUT as provided in respect of supplies made from DTA to an SEZ unit specifically under Sec 16(3) of the IGST Act and since all the provisions of the Act are applicable in terms of Sec 5(3) of the IGST with respect to the applicant, they will be the recipient and supplier at the same time. Therefore, as a supplier the Applicant is entitled to the option available under Sec 16 for zero-rated supplies and to provide a LUT for the supplies received from the SEEPZ, SEZ and in turn used for the authorized activities. Hence the Applicant is not required to make cash payment under reverse charge but effect supplies on the basis of an LUT at his option. In this regards, it may be noted that section 5(3) nowhere stipulates that under reverse charge the recipient will become supplier (or deemed supplier), it is just that the all the provisions of this Act shall apply to such recipient as if he is the person liable for paying

the tax. But still, the recipient would remain as recipient alone and supplier would remain as the supplier. Further, section 16(3) of IGST is applicable to the supplier alone. The applicant in the instant case is a recipient and thus, is not covered under the said section, thus there is no option for him to avail LUT.

Rebuttal filed by Applicants :

1. In response to the revenue's contention that when recipient and supplier both are situated in SEZ, there is no question of import of services in the present case as both are located within India and thereby Notification No. 18/2017- Integrated Tax (Rate) dated 05.07.2017 is not applicable, it may be noted that as per section 2(a) of SEZ Act,2005 receiving goods or services by a SEZ Unit from a SEZ Developer of same SEZ or different SEZ tantamounts to import of goods under the SEZ Act, 2005. In the instant case the SEEPZ SEZ is the Developer which is involved in the provision of service.
2. Based on the Lohani Committee report GST laws were aligned with the SEZ laws in 2018 and the amendment to Rule 30 of the SEZ Rules, 2006 conclusively establishes that the Applicant is entitled to receive the supplies from DTA either under LUT or on payment under RCM in terms of Sec 16 of the IGST Act 2017. Further with regard to the SEZ Developer this is clearly a case of import, as defined in SEZ Act and hence the benefit of tax free procurement in terms of Notfn No. 18/ 2017- Integrated Tax (Rate) dated 05.07.2017 is conclusively available to the SEZ unit.
3. Thus, Notification No. 18/2017 (Rate) will prevail over Notification No. 13/2017 dated 28.06.2017 as amended in so far as supplies from DTA are concerned and with respect to other DTA procurement Rule 30 of the SEZ Rules 2006 which refers to Sec 16 of the IGST Act will apply and therefore SEZ Unit is exempted from payment of tax.
4. That Ministry of Finance vide F. No 334/335/2017-TRU dated December 18, 2017 has issued letter in the context of reverse charge mechanism liability on procurement of service by International Financial Services Centre, SEZ which clarifies that - "a Unit in SEZ or SEZ developer can procure such services, where they are required to pay GST under reverse charge, without payment of integrated tax provided the actual recipient i.e., unit in SEZ or SEZ developer, furnishes a Letter of Undertaking in place". "The above provisions shall apply mutatis mutandis in respect of supply of services covered under Notification No. 13/2017-CT (Rate) to a unit". The applicant inquired about the said letter through an RTI application, on which the RTI responded that "The said communication F. No. 334/335/2017-TRU dated December 18, 2017 is not circular per se, it was issued to the recipient on request for clarification of certain issue. The said communication is self-explanatory". Therefore, we submit that the authorities should take into consideration the clarification issued by Ministry of Finance vide F. No 334/335/2017-TRU dated December 18, 2017.

Decision of AAR

1. Notification No. 10/2017- I.T. (Rate) dated 28.06.2017, as amended by Notification No. 3/2018-I.T. (Rate)-dated 25.01.2018 clearly states that in case of supply of services by any local authority, by way of renting of immovable property, to a person registered under the CGST Act, 2017 (12 of 2017), the person receiving the said service and registered under the CGST Act, 2017 read with clause (v) of section 20 of IGST Act, 2017, has to discharge GST on the transaction.
2. The applicants are receiving renting of immovable property services from a local authority i.e. SEEPZ SEZ and the applicant is registered under the CGST Act, 2017. Hence the applicant must discharge service tax liability under reverse charge mechanism as per the provisions of the amended Notification No. 10/2017- I.T. (Rate). The RCM provisions provide that all provisions of the IGST Act shall apply as if the recipient person is liable to pay tax. The subject case satisfies all the conditions of Notification No. 10/2017- I.T. (Rate) dated 28.06.2017 as amended, and therefore as per section 5(3) of IGST Act, 2017, we are of the opinion that, the applicant is liable to pay tax under RCM.
3. Further, FAQ No. 41 issued by CBIC dated 15-12-2018 clearly states that under reverse charge mechanism notified services, a SEZ has to pay GST as a recipient of service.
4. The applicant, a SEZ Unit, is situated in an Exclusive Economic Zone and as per the definition u/s 2(56) of CGST Act. the term 'India' includes an exclusive economic zone. Therefore in the subject case both, the recipient and supplier of services are situated in India. Hence, Notification No. 18/2017 is not applicable in this case. We agree with the submissions of the jurisdictional officer on this issue.
5. Applicant submitted that "reverse charge" notification is a general notification and will have to yield to the specific provision made in Sec 16 of IGST Act." In this regard, it is to be noted that Notification No. 10/2017- I.T. (Rate) dated 28.06.2017, as amended specifically define the conditions, detailing each and every service specifically and further putting on conditions on recipient and

suppliers specifically. In fact, the said notification specifically covers "Renting of Immovable property", hence the notification cannot be treated as a general notification.

6. Further sub-section 16 (3) is only applicable to "registered person making zero rated supply" i.e. suppliers of Zero Rated Supplies, but here, the applicant is recipient and thus it is not covered under section 16(3). Overall, a harmonious construction of section 5 (3) of IGST Act, 2017 read with relevant notifications and section 16 of IGST Act, 2017 clearly stipulates that applicant is liable to pay tax under RCM. The fact of the matter is that in the subject transaction, the applicant is not a supplier of the impugned services and has no option to avail the procedure under LUT/Bond.
7. With reference to Applicant's submissions that Section 26 of SEZ Act, 2005 deals with exemption of taxes in respect of services provided to a developer or unit to carry out the authorized operations in SEZ, we find that Section 26 of SEZ Act, 2005 has not yet been aligned with the CGST Act, 2017 and/or IGST Act, 2017 and the list of taxes under Section 26 of SEZ Act, 2005 for exemption, does not cover IGST/CGST/SGST. There is absence of any mention in the said section 26, to provide for IGST/CGST/SGAT/ exemptions.
8. This communication vide F. No. 334/335/2017-TRU dated December 18, 2017 not being a Circular and only a clarification on some particular matter of a particular person cannot be made applicable in the present case and the said communication cannot be treated as a binding clarification / judgement issued by board /competent authorities to be made applicable to all cases.

Case: M/s INTEGRATED DECISIONS AND SYSTEMS INDIA PVT LTD [2022-TIOL-06] (MAHARASHTRA AAR)

Facts of the Case:

1. The Applicant primarily engaged in providing software development and support services to its holding company located outside India.
2. It provides transportation facility to its employees. Services are being provided for security of staffs which have female employees also. In order to carry out the said function, the applicant is availing 'renting of motor vehicles service', 'cab services'. In such cases, the applicant initially pays the entire amount and subsequently as per policy of the company, partial amount is recovered from the respective employee.

Questions before AAR:

1. Whether part recovery of 'renting of motor vehicles services'/'cab services' from employees in respect of the transport facility provided to them would be treated as 'supply' as per provision of GST and whether GST is leviable on the same?
2. If answer to question no. 1 is yes, then how the value of said supply will be determined as employee and the applicant are related party as per provisions of GST law?
3. Further also if the answer to question no 1 is yes, then whether Input Tax Credit is admissible in respect of GST paid on inward supply of 'renting of motor vehicles service' which are used for the employee?

Arguments by Applicant:

1. The applicant is providing support services for software and not providing cab services to employees. It is a mere welfare and safety measure.
2. As required by Section 7 of CGST and MGST Act, in order to constitute a supply, the same should be in furtherance of business and for consideration. In the present case, there is no furtherance of business and in fact no consideration but recovery of partial amount only, which is reimbursement of expense. Thus, transaction between the company and their employee are not supply of service & not liable to GST.
3. Reliance is placed in the case of Posco India Pune Processing Center (P.) Ltd, wherein Maharashtra AAR held that they are not rendering any services of health insurance to their employees and hence there is no supply of services in the instant case. Hence, GST would not be applicable on part recovery transaction between applicant and its employee.
4. Alternatively, If GST would be payable on the said partial recovery, the value on which GST is to be paid, needs to be determined in terms of Section 15 of the CGST Act. Since, employee and employer are treated as "related persons" and hence, valuation of the supply needs to be determined as per Rule 28 of the CGST Rules, 2017. Presently, while the company is charging part of cab charges from employee, it is paying GST on full value of services. In view of Section 15 CGST Act read with Rule 28 of CGST Rules, open market value will be same which the company has paid to cab renting company.

5. Further, As per Section 16 of the GST Act, every registered person shall be eligible to take ITC of GST paid on goods or services used or intended to be used in the course or furtherance of business As per the relevant provisions of Section 17 (5) of the CGST Act in the case of renting or hiring of motor vehicles, referred to in clause (a) or clause (aa) except when used for the purposes specified therein, the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply. Hence ITC should be allowed to applicant.

Arguments by Revenue:

1. The taxable event, under GST Laws, is supply of goods or service. Therefore, it is necessary to examine whether any activity or transaction carried out by supplier is "supply" before levy of tax. The applicant and employees two persons are present as supplier and recipient of service respectively. Hence first condition is satisfied. Further, the impugned activity is in the form of sale which prescribed in section 7 (1) of the act. Thus, second condition is also satisfied. Finally, the applicant has supplied transport facility to the employees and recovered partial amount from the employees. Thus, it is clear that element of consideration is present.
2. The applicant is engaged in software development which squarely covered under sub clause (a) of section 2 (17) of the act. And activity of providing transport facility to the employees in connection with main business software development can also termed as incidental or ancillary to main business. Thus, said activity is carried out in course or furtherance of business
3. The applicant has received inward supply of renting of motor vehicle/ cab service from the supplier (for which consideration has been paid as per Tax invoice) which subsequently provided to the employees (for which partial amount recovered). In view of facts and circumstances of the case and provisions of Section 15 and Rule 28, value of supply providing transport facility to the employees shall be equal to the amount paid on inward supply of renting of motor vehicle service to the suppliers which are used for transportation of employees and not amount of partial recovery made from the employees.
4. However, Section 17(5)(b)(i) states that notwithstanding anything contained in section 16(1) and section 18 input tax credit shall not be available in respect of leasing, renting or hiring of motor vehicles. In view of the above, it is clear that the applicant is not entitled to claim input tax credit of GST paid on inward supply of "renting of motor vehicle service "which are used for transportation of employees. Applicant is engaged in development and supply of software services and not engaged in "renting of motor vehicles service" and therefore benefit of provision to section 17 (5) (b) (i) cannot be allowed to the applicant

Decision of AAR

1. We find that, the applicant is engaged in providing software development and support services to its holding company located outside India. The provision of transport facility to the employees is a welfare, security and safety measure and is not at all connected to the functioning of their business. Further, the said activity is not a factor which will take the applicant's business activity forward.
2. We also find that the applicant is not supplying any transport or lease/rental of vehicle service to its employees in the instant case.
3. We also observe that the partial amounts recovered by the applicant from its employees in respect of use of such transport facility are a part of the amount paid to the third party vendors which has already suffered GST.
4. In the case of an application filed by M/s Tata Motors Limited, a similar question was raised as to whether GST was applicable on nominal amounts recovered by Applicants from employees for usage of employee bus transportation facility. This authority vide Order No. GST-ARA-23/2019-20/B-46 dated 25 August, 2020 has held that, GST is not applicable on such nominal amounts recovered from its employees.
5. Further reference is also made to the decision of the Uttar Pradesh AAR in case of M/s North Shore Technologies Private Limited. It was held therein the applicant was in the business of software development and staff augmentation services and not in the business of providing transport service. The facility provided to their employees was not integrally connected to the functioning of their business and therefore, providing transport facility to its employees cannot said to be in furtherance of business.
6. Further, coming to the subsequent questions, we observe that the subsequent questions in the application would apply only when the answer of first question is in affirmative. As we are of the view that arranging transport facility to its employee is not a supply of service, accordingly the remaining questions become redundant and merit no discussion.