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	GST tax rates must be notified in consonance with recommendations of the GST Council	HC
2	Supply of liquor by a restaurant not taxable under GST	AAR
3	Tax is to be paid when the condition of exemption not fulfilled	SC
4	No exemption available of health service available when it is bundled in composite supply and principal supply is of accommodation	AAR
5	Uncompleted flats will be chargeable to GST irrespective of Partial Completion Certificate issued for other flats.	AAR
6	Amount recovered as reimbursement included in the value of services	AAR
7	Any additional payment over and above invoice value would be included in the transaction value	SC
8	ITC available when outward supply is a sale of medicines from its pharmacy counter to outpatients	AAR
9	Applicant is eligible to take ITC in case of a supply of medicines to the customers	AAR
10	ITC is to be restricted to the supply of food & beverages to inpatients since it is part of the health care services.	AAR

GST tax rates must be notified in consonance with recommendations of the GST Council

Petitioner, a society comprising of members engaged in the manufacture of fabrics, has invoked the extraordinary writ jurisdiction of this Court under Article 226 of the Constitution of India, 1950 seeking *inter alia* a writ in the nature of mandamus directing the Central Government as well as the Government of NCT of Delhi to notify the GST rate of 5% for all varieties of fabrics falling under Chapters 50 to 63 of the Customs Tariff in furtherance of the recommendations made by the Goods and Service Tax Council.

The issue was whether the petitioner can seek direction to the Central Government as well as the Government of NCT of Delhi to notify the GST rate of 5% for all varieties of fabrics falling under Chapters 50 to 63 of the Customs Tariff in furtherance of the recommendations made by the Goods and Service Tax Council where the GST Council in its 38th Meeting had reiterated that recommendation for the rate of tax was indeed 12 percent?

High Court observed that the GST Council in its 38th meeting on 18-12-2019 has deliberated on the matter and has unequivocally confirmed that it had indeed recommended the GST rate of 12% for the fabrics falling under Chapters 56 to 59 of the Customs Tariff.

It was further observed that the Council has the power and prerogative to issue recommendations on issues in terms of Article 279A (4) of the Constitution.

[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.*

High Court, therefore, held that the constitutional scheme of taxation is a clear indication that the functioning of the GST Council is based on collaborative efforts that embody the spirit of cooperative federalism. The coming together of the stakeholders has given rise to a unified system of taxation for the entire country. The GST tax rates must be notified in consonance with the recommendations of GST Council. High Court cannot sit in appeal and postulate that the decision of the Council is not what they have unwaveringly held it to be. Therefore, the petition was dismissed.

Manufacturers Traders Association *v.* Union of India - [2020] 120 taxmann.com 34 (High Court of Delhi)

Supply of liquor by a restaurant not taxable under GST

The Applicant owns and manages hotels and resorts. They offer a variety of services to their customers such as rooms and suites, banquet, dining, spa, etc. They sell Tobacco (Cigarettes), soft beverages to the guest. They supply Non-GST item of liquor to the guest and provide free supply of food to their employees. The applicant has sought the authority of Advance Ruling on the taxability of alcoholic liquor for human consumption under GST when supplied in the restaurant. It is stated that they serve liquor in restaurants and room service.

AAR observed that the applicant is charging only VAT when the supply of liquor is made in the Restaurant. As per Section 9(1) of the GST Act, the supply of alcoholic liquor for human consumption, is a non-taxable supply.

AAR, therefore, held that the supply of alcoholic liquor for human consumption by a restaurant will not be taxable under GST.

Mfar Hotels & Resorts (P.) Ltd., *In re* - [2020] 120 taxmann.com 442 (AAR - TAMILNADU)

Tax is to be paid when the condition of exemption not fulfilled

Assessee, a 100% Export Oriented Unit (EOU), is engaged in the production of cut flowers and flower buds of all kinds, suitable for bouquets and for ornamental purposes. It is required to export all articles produced by it therefore, it is exempted from payment of customs duty on the imported inputs used during the production of the exported articles *vide* Notification No. 126/94-Cus dated 3-6-1994 ("Exemption Notification").

The EXIM Policy 1997-2002 provided that a 100% EOU in the floriculture sector was permitted to sell 50% of its produce in DTA, subject to achieving positive net foreign exchange earnings of 20% and upon approval of the Development Commissioner. The appellant, without obtaining the approval of the Development Commissioner and without maintaining the requisite net foreign exchange earnings, made DTA sales.

Meanwhile, the Additional Commissioner, Central Excise issued a show-cause notice to the appellant to show cause as to why customs duty, interest, and penalty should not be imposed for the DTA sales made by the appellant in contravention of the EXIM Policy.

The court observed that irrespective of the goods produced being excisable or non-excisable, the benefit under the exemption notification is unavailable. In such a situation, the very goods would become liable to imposition of customs duty as if being imported goods.

It was noted that the notification provides for exemption on import of inputs and at the same time prescribes for adherence of certain conditions for availing the exemption. The notification further prescribes the rate at which the customs duty on the inputs used in the production of non-excisable goods sold in DTA is to be charged. Resultantly, the appellant, having availed exemption under the notification, cannot evade customs duty on the imported inputs.

Thus, it was held that the demand pertaining to the non-excisable goods has rightly been made under the 1962 Act upon the imported inputs used in the production of goods sold in DTA in violation of condition(*s*) in the EXIM Policy.

L.R. Brothers Indo Flora Ltd. *v.* Commissioner of Central Excise - [2020] 119 taxmann.com 174 (Supreme Court of India)

No exemption available of health service available when it is bundled in composite supply and principal supply is of accommodation

Nimba Nature Cure Village is a unit of M/s. Oswal Industries ltd. and is one of the largest Naturopathy Centers in India and offers physical, psychological, and spiritual health overhaul with the help of the power of nature.

Applicants provide different types of wellness facilities at Nimba such as Naturopathy, Ayurveda, Yoga and meditation, Physiotherapy, and Special therapy.

The applicant has stated that the classification of services provided by them as per the Notification No. 11/2017-Central Tax (Rate) dated 28-6-2017 is Heading 9993 (human health and social care services). The applicant stated that as per Entry No. 74 of Exemption Notification No. 12/2017-Central Tax (Rate) dated 28-6-2017, the service of clinical health provided by them under Heading No. 9993 is eligible for exemption.

The applicant sought advance ruling on whether the applicant is eligible to get the benefit of entry No. 74 of exemption Notification No. 12/2017-Central Tax (Rate) dated 28-6-2017?

AAR observed that a composite supply comprising of two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply. Therefore, the composite supply of services would be treated as a supply of accommodation service.

AAR held that since the supply of services provided by the applicant, which is a composite supply, has been classified under 'Room or unit accommodation services provided by Hotels, Inn, Guest House, Club and the like', the exemption does not apply to the applicant.

Oswal Industries Ltd., In re - [2020] 119 taxmann.com 269 (AAR - GUJARAT)

Uncompleted flats will be chargeable to GST irrespective of Partial Completion Certificate issued for other flats.

The applicant is engaged in the construction business. Ground and First Floor in all wings of the project are commercial shops. The remaining floors are residential flats. It has received BUP (Completion Certificate) for commercial shops.

The applicant submitted that it is not liable to pay GST from 26-9-2017 on new commercial bookings. It sought advance ruling on the issue of whether the selling of residential flats after the date of completion certificate of commercial shops or after the first occupancy in building is exempt supply?

AAR observed that the main condition in Para 5(*b*) of Schedule-II is that a complex, building, civil structure or a part there of including a complex or building intended for sale to a buyer, wholly or partly where entire consideration is received after the issuance of Completion certificate by the competent authority or after its occupation, whichever is earlier shall not be treated as supply under said Para 5(*b*) of Schedule-II to CGST Act, 2017.

The applicant has received the BU Permission for the Ground and First Floor *i.e.* only for commercial shops of building. The applicant has not submitted any documents, by which it can be established that they have received the Building Used Permission in respect of Residential Flats. The applicant has received part Building Used Permission for the commercial Shops of Ground and First Floor and not for the Residential Flat.

AAR, therefore, held that since no Building used permission has been issued by the competent authority in respect of residential flat and since no residential unit has been occupied by a prospective buyer, supply of residential flats shall be treated as supply of service. Hence, selling of residential flats after the date of completion certificate of commercial shops or after the first occupancy in the building is not an exempt supply.

V2Realty, In re - [2020] 119 taxmann.com 321 (AAR - GUJARAT)

Amount recovered as reimbursement included in the value of services

The applicant is engaged in providing Charter Hire Services. The applicant is responsible for operating and maintaining the aircraft. Aviation Turbine Fuel (ATF) is required for flying the Aircrafts. In terms of the contracts, in respect of the ATF, it is the responsibility of the Customers. However, at locations where the customer is unable to provide the fuel, the applicant procures the fuel on behalf of the Customer and the cost is reimbursed by the Customer at actual.

The applicant stated that ONGC is responsible for the supply of fuel in case of Mumbai and offshore locations whereas for other locations, the fuel supply charges are required to be reimbursed by ONGC to the applicant on an agreed basis and the cost of the fuel is not included in the Flying Hour Charges. It submitted that GST is not applicable on fuel debit notes raised by the applicant on customers as the same are in the nature of reimbursements and not a consideration towards any taxable supplies/services provided.

The applicant sought an advance ruling as to whether in terms of the valuation provisions under GST legislation, the amount recovered as reimbursement (at actual) by the applicant from the customer, for the fuel procured on behalf of the Customer is required to be included in the value of services provided by the Applicant.

AAR observed that the definition of 'consideration' includes any payment made or to be made, in respect of the supply of goods or services or both by the recipient or by any other person. It also includes the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person.

Also, examining the applicant's contention that it is acting as a pure agent of the customer, AAR observed that the applicant failed to satisfy all the conditions which would entitle it to be a pure agent. The applicant did not provide the relevant documentary evidence to prove that the reimbursement received from their customer is as per actual and without mark up. Neither did the applicant indicate that the payment of fuel made by it on behalf of the recipient of the supply was separate on the invoice issued by it to the recipient of service.

ATF fuel procured by the applicant for the aircraft is not in addition to the services he supplies on his own account but a part of the rental services provided by it. It cannot be said that the applicant did not intend to hold any title to the goods or services as a pure agent of the recipient of the supply.

AAR further observed that only the ATF fuel filled in the fuel tank of the aircraft would enable the aircraft to fly and thus enable the applicant to provide the aforementioned service to their customers. The applicant did not submit relevant documents to prove that it has received only the actual amount incurred to procure the ATF fuel for the aircrafts.

Therefore, AAR held that the amount of ATF fuel, which is received as reimbursement by the applicant will undoubtedly form a part of the 'consideration' *i.e.* the value of the services provided by the applicant and GST is liable on the same. Where the applicant and the customer are unrelated parties, the price actually paid or payable for the supply of services includes the value of services as well as the amount for the fuel filled in the aircraft by the applicant, which would be the sole consideration for the supply as per the said section.

Global Vectra Helicorp Ltd., *In re* - [2020] 119 taxmann.com 268 (AAR - GUJARAT)

Any additional payment over and above invoice value would be included in the transaction value

[Note: This case law was given in relation to Excise still it will have good use in GST law also.]

Searches were conducted by the Directorate General of Central Excise Intelligence (DGCEI) at their factory premises, depot, and residences of the partners of the assessee firm, the residences of some of their employees, and the premises of some of their dealers.
During the investigation, it was found that the assessee had undervalued the goods manufactured by them and cleared the goods from their factory, resulting in the evasion of Central Excise duty.
SC observed that the Adjudicating Authority may treat any amount received either in cash or otherwise, over and above the invoice value, as the value of excisable goods as the definition of "transaction value" means the price actually paid or payable. The Adjudicating Authority shall keep in mind the fact that while the expression "transaction value" is defined very exhaustively.
Wherever there is a finding that a particular dealer/customer has paid a consideration over and above what is reflected in the invoice, the additional payment made by him together with the invoice value shall be taken to be the transaction value, for all the transactions that the particular dealer/customer had with the assessee.
Commissioner of Central Excise, Customs & Service Tax v. Cera Boards & Doors - [2020] 118 taxmann.com 418 (Supreme Court of India)

ITC available when outward supply is a sale of medicines from its pharmacy counter to outpatients
The applicant is running a hospital providing health care services, to both in-patients as well as out-patients. The applicant, in addition to health care services also provides food & beverages, medicines to the in-patients.
The applicant has been making item-wise billing to the in-patients & the out-patients. Thus the applicant supplies medicines to three types of persons, (a) inpatients, (b) out-patients, and (c) customers.
The applicant sought an advance ruling in respect of the availability of ITC, on the inputs when they supply the medicines to out-patients.
AAR observed that in respect of the Supply of medicines to the out-patients are taxable goods. Thereby the applicant is eligible to claim input tax credit relating to the taxable supply of medicines.
Ambara, *In re* - [2020] 120 taxmann.com 369 (AAR - KARNATAKA)

Applicant is eligible to take ITC in case of a supply of medicines to the customers
The applicant is running a hospital providing health care services, to both in-patients as well as out-patients.
Applicant supplies medicines to three types of persons, (a) inpatients, (b) out-patients, and (c) customers.
The applicant sought an advance ruling in respect of the availability of ITC, on the inputs when they supply the medicines to the customers
AAR held that the applicant, with regard to the supply of medicines & other goods to the customers, is selling the medicines as a trader and hence they are liable to collect and pay the applicable tax on the goods sold and also is eligible to claim input tax credit like any supplier of taxable goods.
Ambara, *In re* - [2020] 120 taxmann.com 369 (AAR - KARNATAKA)

ITC is to be restricted to the supply of food & beverages to inpatients since it is part of the health care services.
The applicant is running a hospital providing health care services, to both in-patients as well as out-patients.
The applicant supplies medicines to three types of persons, (a) inpatients, (b) out-patients, and (c) customers.

The applicant sought an advance ruling in respect of the availability of ITC, on the inputs when they supply food & beverages to the in-patients in the hospital.

AAR observed that if the supply of food & beverages is under the prescribed diet as part of the treatment process, and if it is an integral part of the treatment, then the food and beverages loses their identity as a separate supply and merges with the supply of treatment service similar to supply of medicines. Thus the impugned supply of food & beverages is ancillary to the supply of treatment service i.e. health care service, which is an exempted supply, under entry No.74 of Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017.

AAR, therefore, held that the applicant can't claim the input tax credit.

Ambara, *In re* - [2020] 120 taxmann.com 369 (AAR - KARNATAKA)

About the author

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For any areas of improvement do let us know.

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