

## **No advance ruling on eligibility of ITC w.r.t promotional schemes due to Member's divergent opinion**

The Hon'ble AAAR, Maharashtra in M/s. Sanofi India Ltd. (**Order No. MAH/AAAR/SS-RJ/10/2019-20 dated October 22, 2019**) has held that as per Section 101(3) of the Central Goods and Services Tax Act, 2017 ("**CGST Act**") no advance ruling can be issued w.r.t eligibility of input tax credit ("**ITC**") on the goods and services offered under various promotional schemes and as brand reminders since one member (SGST) has upheld the order of Authority of Advance Ruling ("**AAR**") and the other member (CGST) has set aside the order of the AAR in the favour of Appellant.

### **Facts:-**

The Sanofi India Ltd. ("**the Appellant**") is engaged in business of sale of pharmaceutical goods and services. The Appellant incurs various marketing and distribution expenses in regular course of business to promote their brand and enhance its sales. The Appellant offers various promotional schemes such as "Shubh Labh Trade Loyalty Program" ("**the Scheme**") in which distributors/wholesalers are rewarded on the basis of quantity sold by them. They are awarded with a trip to Singapore and watches under the Scheme.

The Appellant also distributed products like pens, notepad, key chains etc. as brand reminders to the distributors and dealers. The said products are embossed with Sanofi brand. The brand embossed on these product serves as an advertisement tool. Such goods act as reminder of the association with the brand Sanofi so as to promote sales.

In the light of the above business model, the Appellant applied for advance ruling in an application dated January 28, 2019 on the question of law as to whether the GST paid on expenses incurred towards the Scheme or goods given as brand reminders is available as ITC.

The Appellant submitted that:

- The ITC should be allowed on the procurement of promotional products and the credit is available as the goods are used for the furtherance of business.
- There was a contractual obligation was created between the Appellant and the distributor.
- Their case was not of barter exchange between the Appellant and the distributor as per Section 7 of the CGST Act and was a pure sale arrangement.
- The products given away as promotional items is not a gift as per provision of Section 17(5)(h) of CGST Act.
- To constitute a gift the property should be transferred voluntarily and not as a result of a contractual obligation.

**AAR** - Did not give its order in favour of the Appellant and ruled that ITC is not available on the GST paid on expenses incurred towards the Scheme and goods given as brand reminders as no consideration was charged by the Appellant while providing them under the Scheme or as brand reminders and therefore, amount to gift- blocked ITC under Section 17(5)(h) of the CGST Act.

**Issue:-**

Whether the ITC is available on the goods and services offered under the Scheme and as brand reminders by the Appellant?

**Held:-**

The Hon'ble AAAR, Maharashtra in **Order No. MAH/AAAR/SS-RJ/10/2019-20 dated October 22, 2019** held as under:

- The Appellant is in the business of the pharmaceutical products, wherein various pharmaceutical products are manufactured either by its own, or with the help of the third-party manufacturers. Therefore, it is clear that the Appellant is certainly not in the business of the supply of the subject goods or services as provided by them under the Scheme.
- The Appellant cited a judgement of **Sharyu Motors v. Commissioner of Service Tax, Mumbai [Appeal No. ST/213/09 dated on September 29, 2015] and Sai Services Station [2014 (35) STR 625]** wherein the Hon'ble CESTAT held that the amount received for achieving the target under the Target Incentive Scheme, which revenue sought to tax under Business Auxiliary Services ("BAS") cannot be treated as BAS as incentives are only trade discount for achieving targets and no separate supply has been rendered by the recipient.
- Noted that from the above judgement it can be safely assumed that the Appellant has not received any consideration against free supply of goods and services under the Scheme and if no consideration is received then goods are given away as gifts. Therefore, Appellant would not be eligible for ITC under Section 17(5)(h) of the CGST Act.
- It was ruled by the AAR that there was an inherent contradiction on part of the Appellant, where they have made two contradictory statements:
  - i. The promotional items are not gifts as they are supplied as a contractual obligation which serve as an advertisement tool and brand reminders to promote sales- not a gift as there is contractual obligation.
  - ii. Although the above is true, there is also a contractual obligation, at the same time it is not a supply in the nature of barter that is supply of promotional goods against supply of

services such as increased sales, advertisement of products and sales promotion- no consideration therefore, no barter.

- Analysed the second argument in detail to state that even though the goods and services provided under the Scheme are nothing but inputs or input services, as per the Appellant no consideration in monetary terms is received. In any business, all inward supplies are input goods or input services only and supply of which would definitely be output supply so it has to be decided whether it is supply in terms of Section 7 of the CGST Act.
- Observed that the Appellant has argued that the goods or services are supplied to increase the turnover. Therefore, can it be said that consideration is in the form of increased turnover received by the Appellant? But noted that the Appellant has relied on ***Sharyu Motors v. Commissioner of Service Tax, Mumbai (supra)*** to say that incentives are only trade discount for achieving targets and no separate service element is involved, there being only one transaction. Thus, goods and services supplied under the Scheme for free are not covered within the definition of supply under Section 7 of the CGST Act.
- The Authority went on to say that once it is established that subjected goods/services are being provided free of cost and there is no contractual obligation, then the only conclusion that can be drawn is that these are distributed as gifts as goodwill gesture. Thus, if the contention of the Appellant is accepted that there is no consideration, it will amount to gift as relied by the Appellant on the Hon'ble Supreme Court The judgement of ***Sonia Bhatia v. State of UP [Case No. C.A. 775 of 1981 order dated March 17, 1981]*** to say that 'gift' has been held to be a voluntary transfer of property by one to another, without any consideration or compensation therefor. A 'gift' is a gratuity and an act of generosity and does not require a consideration, if there is a consideration for the transaction, it is not a gift.
- Further, noted that the goods distributed free of cost has advertising potential and it is in the furtherance of the business but Section 17(5)(h) of CGST Act starts with a non obstante clause where it overrides section 16(1) of the CGST Act. The legislature has denied ITC on such goods. These goods are inputs but distributed as free gifts. Therefore, ITC is not available as per provisions of the Section 17(5)(h) *ibid*.
- One member (SGST) upheld the order of the AAR and the other member (CGST) set aside the order of the AAR in the favour of the Appellant.
- Therefore, as per Section 101(3) of the CGST Act, it shall be deemed that no advance ruling can be issued in respect of the question under the appeal.

#### **Our Comments:-**

It is be noted that the goods and services that are distributed by the organization under various promotional schemes to its distributors are done by them in order to increase their sales and promote their brand and their cost is already taken into account by the organizations while finalizing the pricing of the items manufactured by the Company. Therefore, these sales promotion goods or services cannot be regarded as gifts as per the provision of Section 17(5)(h) of the CGST Act which denies ITC on goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples.

Thus, distribution of bought out goods by the organizations to their distributors may not be treated as gifts within the meaning of Section 17(5)(h) of the CGST Act.

Further, the Government must provide for a mechanism wherever there is denial of advance ruling when learned members of AAAR differ with each-other.

#### **Relevant Provisions:-**

##### **Section 17(5)(h) of CGST Act:**

*(5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:-*

*(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples*

##### **Section 16(1) of CGST Act:**

*(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.*

##### **Section 101(3) of CGST Act:**

*(3) Where the members of the Appellate Authority differ on any point or points referred to in appeal or reference, it shall be deemed that no advance ruling can be issued in respect of the question under the appeal or reference.*

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Flat no. 34B, Ground Floor, Pocket -1, Mayur Vihar, Phase –I, Delhi - 110091  
Email: [bimaljain@a2ztaxcorp.com](mailto:bimaljain@a2ztaxcorp.com); Web: [www.a2ztaxcorp.com](http://www.a2ztaxcorp.com); Tel: +91 11 4242 5076

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