Dhruva Alert for ADVANCE RULINGS - GST

Sr No	Applicant	State	Issue for consideration	Final Order	Dhruva Comments / Observations
1	Reliance Infrastructure Limited (21st March 2018)	Maharashtra	Determination of liability to pay GST on charges paid to Municipal Authorities towards the restoration of roads	The service provided by the Municipality in relation to any function entrusted to it under Article 243W of the Constitution, is exempt under Entry No. 4 of the Notification No 12/2017 dated 28.06.2017. This function *inter alia* contains construction and maintenance of roads. However, charges paid by a business entity for restoration of the road which is required to be dug for business purposes, cannot be equated with road construction or maintenance work undertaken for general public. The restoration of the road undertaken	The Authority has restricted the use of the term 'roads and bridges' in the Twelfth Schedule to extend to activities only in relation to *suo motu* construction or maintenance of roads. However, they have failed to comment as to why the function will be limited only to construction or maintenance of roads and the reasons for exclusion of charges paid by telecom / electricity companies [post laying of underground pipes / cables] to maintain and restore public property

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				in this instance is only to enable certain private companies to undertake laying pipes, cables, etc. for commercial purpose. In fact, the Municipal authority suo moto does not undertake any construction / restoration activity and merely recovers certain sums from the companies who undertake the works. Therefore, the road restoration for a charge collected by the Municipality cannot be equated with sovereign functions as prescribed in Article 243W read with Schedule 12 of the Constitution of India and thus, GST is payable on reverse charge basis by the Applicant at the rate of 18%.	from the ambit of 'roads and bridges'. The Authorities have observed that, in the present case, the Municipalities do not undertake any activity of construction [or for that matter any activity at all]. The amounts recovered are more in the nature of compensation that is being paid by the companies [under Rule 13 of the Electricity Work Rules]. However, these facts in itself do not disengage the current activities of the Municipalities from their primary function of maintaining roads or ensuring that the roads are maintained in the proper conditions for the general public use, which is a function covered under Article 243W.
2	M/s Kanam Industries (14th March 2018) And	Uttarakhand And Maharashtra	• Classification and meaning of "three wheeled powered cycle rickshaws" and if e-rickshaws are *pari materia* to these rickshaws.	The Uttarakhand Authority stated that an e-rickshaw could not be equated with a 'powered cycle rickshaw' citing the following reasons: 1. An e-rickshaw could not be pedalled;	The Tribunal in **Kinetic Engineering Ltd. vs. CCE, Bombay**[1], had held that powered cycle rickshaws would not cover auto rickshaws but only ordinary cycle

[1] [1985 (22) E.L.T. 132 (Tribunal)]

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	CEAT Limited (9th March 2018)		• Classification and rate on tyres manufactured for e-rickshaws	2. It was a motor vehicle under the definition provided in the Motor Vehicles Act; 3. An e-rickshaw has to be registered with the local transport authority; 4. An e-rickshaw is powered solely by an electric motor which is not auxiliary in nature. The Authority for Advance Rulings, Maharashtra, based on a similar finding on the classification of an e-rickshaw whether as a 'cycle powered rickshaw' or not, held that where entries relating to tyres does not specifically mention an e-rickshaw but mentions a 'powered cycle rickshaw' (taxable at 5%) and other tyres (taxable at 28%), the tyres manufactured and used in e-rickshaws cannot be equated with that used in a 'powered' cycle rickshaw since both the vehicles were inherently different. Therefore, the tyres relating to an e-rickshaw	rickshaws to which a motor or petrol engine has been fitted. The decision was maintained by the Supreme Court[2]. Electric rickshaws are a variation of auto rickshaws, with only distinction that electric rickshaws, as the name suggests, run on electricity and thus, cannot be equated to a cycle rickshaw.

[2] 1997 (94) E.L.T. A157

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				could not be included in the entry relating to tyres of 'powered cycle rickshaw' and thus was taxable at 28%.	
3	M/s Rod Retail Private Limited (27th March 2018)	New Delhi	Whether Duty Free shops in the international airport are "beyond airspace or territorial waters of India" or are located in India?	Taking into consideration the definition of 'export of goods' under Section 2(5) of the Integrated Goods and Services Tax Act, 2017, which states that an export of goods would mean the 'taking goods out of India to a place outside India" and reading it in conjunction with the definition of "India" under the Central Goods and Services Tax Act, 2017, where India extends to the territory of India and includes the territorial waters, seabed, sub-soil underlying such waters, continental shelf, exclusive economic zone and air space above – the Authority for Advance Ruling, relying on **Collector of Customs, Calcutta v Sun Industries**[3], concluded that only when the goods cross the airspace limits or the limits of the territorial	Duty Free Shops are established as Customs bonded warehouses under section 58 of the Customs Act, 1962. Owing to the said set-up, under Section 5 of the erstwhile Central Sales Tax Act, 1956, a supply of goods undertaken beyond the customs frontiers was stated to have taken place outside India. Also, the erstwhile law provided exemption from VAT on any transaction which was a sale *in the course of* export or import. There have been decisions of the higher Courts in the earlier regime which have discussed what would the concept of taking goods out of India to a place outside India. Given the above, although globally 'Duty Free' is understood to

[3] 1988 SCR (3) 50

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				waters, will there be an export. Whereas in this case, the goods are sold at a location very much within the territory of India, GST would be applicable on such supplies.	be a 'tax free zone', because of the construct of the present law, unless a specific exemption is provided, arguing non-taxability of such transactions would be difficult. Also, in so far as sales to inbound passengers is concerned, the corollary argument of import for non-taxability of sale transaction would not be available.
4	Sanjeev Sharma (28th March 2018)	New Delhi	Where there are two separate agreements (i) for sale of undivided and impartial sale of land; and (ii) for sale of superstructure, whether: 1. GST is applicable on sale of an undivided, impartible share of land? 2. GST is applicable on sale of superstructure; if yes what will be the value of land included in the amount charged for the sale of superstructure?	As per section 7 read with Entry 5 of Schedule III of the CGST Act, an activity/transaction which is in the nature of "sale of land", is neither a supply of goods nor a supply of services and hence outside the purview of GST. Similarly, the sale of an undivided portion of land is also an outright sale of immovable property and hence outside the scope of GST. However, the construction activity undertaken by the builder on behalf of the buyer is a 'supply' and is liable to GST. Also, since during the	The issue of taxability of under construction property has been subject matter of various litigations. Though provisions have been enacted to bring such transactions within the ambit of tax, considering the multiple issues, especially since land is outside the ambit of GST, till such time the entire real estate i.e. including land is brought within the ambit of GST, litigations would continue.

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				construction of a complex, the land and superstructure are inseparable, there can be no separate sale of land and superstructure. In fact, the transaction would be a composite supply of (i) land; (ii) goods used for construction; and (iii) services. Since the value of land is not exigible to GST, the said value as determined under Notification No. 11/2017 – Central Tax (Rate) dated 28th June 2017 – Sr. No. 3 read with paragraph 2, [i.e. one third of the total amount charged for supply] shall be excluded from value liable to GST. The Authority rejected the argument of the Applicant that there was no provision for determination of value of land and hence Rule 30 of the CGST Rules would become applicable. The Authority held that Notification No. 11/2017 has been issued under Section 15(5) of the CGST Act, which would operate as the	

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				machinery provisions and no separate Rules were required to be introduced for such valuation.	
5	M/s JSW Energy Limited (5th March 2018)	Maharashtra	Applicability of GST on supply of electricity as a 'Job Worker'	JSW Energy Limited (JEL) supplies coal etc. to its related party i.e. JSW Steel Limited (JSL), on free of cost basis. Further, JSL uses the inputs received from JEL to generate power and supply it to JEL. JSL would charge 'Job work' charges for such conversion activity. Based on the definitions of 'Job work' and 'Manufacture' under GST Law, the Authority concluded that the intent of legislature is to restrict the scope of 'job work' to 'treatment' or 'process' which would not result into a distinct commodity and to not extend its meaning to include 'manufacture'. Further, the end product i.e. "electricity" has a distinct name, character and use than the inputs i.e. 'coal'. Accordingly, the Authority ruled that the activity of generation of power undertaken by	The law as it stands today, no-where qualifies the terms 'treatment' and 'process' to mean or be limited to processes that do not change the essential character of the goods provided by the principal. The Supreme Court in **UOI vs. Ahmedabad Electricity Co. Ltd.**[4], held as under: *"The word 'process' has not been defined in the Act. In its ordinary meaning 'process' is a mode of treatment of certain material in order to give a desired shape to the material. It is an activity performed on a given material in order to transform it into something."* Further, the Authority has concluded that the supply of electricity would tantamount to supply of goods exigible to GST. But,

[4] [2003 (158) E.L.T. 3 (S.C.)]

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				JEL amounts to 'manufacture' and would be a transaction of supply of goods under GST and not a 'Job work' transaction.	given that electricity is exempt, the principal will have to reverse proportionate ITC of tax paid on common input services, which will lead to a huge cash flow and tax impact, where credit is not available on all such related party agreements.
6	CMS Info Systems Limited (19th March 2018)	Maharashtra	Whether the sale of used cash carry vans is a supply in the course or in furtherance of business and liable to GST? If the transaction is treated as taxable, whether input tax credit is available to the applicant?	The transaction of disposal of old vehicles for consideration is a sale and the same is covered under the ambit of supply as per Section 7 of the GST Act. Also, purchase of new assets and disposal of old and unusable assets is an activity in the course or furtherance of business. Basis the above, AAR has concluded that the transaction is subject to GST. Members of the AAR bench differ on the position of the availability of ITC on vehicles purchased for use in the cash management business. Thus, the matter has been referred to Appellate Authority for Advance Ruling for hearing and	The said issue would be relevant for many such transactions which under the earlier law may not be subject to tax and hence no set-off were availed during the impugned period. Now with the introduction of GST, levying tax on such transactions, the question of availing set-off on taxes paid on purchase would arise. However, no GST should arise in case of sale of used vehicles (on which no CENVAT / state-VAT credit has been claimed) where the *margin* of such supply becomes negative (value of supply *less*

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				pronouncing a decision on the said issue.	depreciated value of such vehicles)
7	Kansai Nerolac Paints Limited (5th April 2018)	Maharashtra	Whether the accumulated credit of Krishi Kalyan Cess ('KKC') carried forward to the GST regime would be considered as admissible input tax credit?	AAR on perusal of the transitional provisions for transfer of credit under the GST Act and Cenvat Credit Rules ('CCR') observed that credit of KKC would be available for utilization only against payment of KKC. Further, the list of tax, duties etc under Rule 3(1) of the CCR in respect of which Cenvat Credit may be availed, would not be utilized for payment of KKC. AAR also placed reliance on judgement in the case of **Cellular Operators Association of India and Ors. V Telecom Regulatory Authority of India and Ors**[5] wherein the Hon. Delhi HC observed that Education Cess and Secondary and Higher Education Cess cannot be treated as excise duty or service tax and cannot be allowed for cross utilization against excise duty or service tax. Reliance was also placed on FAQs issued in relation to Swachh	The ruling equates SBC and KKC, disregarding the inherent distinction of one being creditable in nature and other being non-creditable. Additionally, there has been no detailed discussion on Rule 3(1a) of CCR pursuant to which the Cenvat Credit of KKC was available for utilization. Further, it needs to be examined whether the denial of credit of KKC could be a violation of the legal principle of Promissory Estoppel.

[5] Writ Petition (Civil) No. 7837/2016 dt. 15.02.2018

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				Bharat Cess (SBC) clarifying the non-availability of credit of SBC. AAR concluded that KKC would not be considered as admissible input tax credit.	
8	Giriraj Renewable Private Limited (17th February 2018)	Maharashtra	Whether EPC contract for construction of solar power plant would be construed as composite supply of goods with solar power generating system being the principal supply or works contract services?	The AAR concludes that setting up of solar power generating system qualifies as "works contract" (i.e. works carried on an immovable property) and not as "composite supply of goods". The crux of matter was whether setting up of solar power plant results in an immovable property or not. The authorities while delivering the ruling focused on two factors i.e. intention of setting the solar power plant and whether such plant is immovable or movable property. Relying on the Apex Court decision of **T.T.G Industries Ltd. vs. CCE**[6] the authority concluded that solar power plant is an immovable property. The decision *supra* had	The AAR would have huge ramifications on the solar power generating companies leading to a substantial increase in their tax costs as input tax credit benefit is not available to them due to their output being outside the purview of GST. It is also interesting to note that the AAR while stating the impugned transaction as a "works contract service", has simply ruled out the transaction to be a "composite supply" and hence principal supply has no relevance. However, as per Clause 6(a) of Schedule II, **composite supply of works contract** is regarded as a service transaction.

[6] [(2004) 4 SCC 751]

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				laid down the following principles to determine whether a plant /machinery is immovable property: • Whether the intention is to fix machinery permanently on structure embedded in earth? • Whether structure is custom-made to fix machinery on it without which machinery cannot be functional? • Whether movable character of machinery becomes extinct once it is fixed on such structure? The ruling also relies upon **Solid and Correct Engineering Works & Ors.**[7] and has discussed the concept of permanent beneficial enjoyment. Basis the above analysis, the authorities concluded that the plant has an inherent element of permanency and it would not be possible and prudent to shift base or locate the plant elsewhere at frequent intervals.	Therefore, the question that would arise is if it is not a composite supply, can it be covered by the entry in Schedule II even if it is a works contract, and the ramifications thereof? It is also relevant to note that pursuant to the said ruling, Ministry of New and Renewable Energy (MNRE) has issued a Circular no. **283/11/2017-GRID SOLAR dated 03 April 2018,** wherein it is stated that structurals as such do not qualify as immovable property and thus are not works contract service. It further states that whether EPC contract qualifies as composite supply of goods or service would need to evaluated on case to case basis. Since divergent views are being adopted, it could institute fresh round of litigations. Thus, it is extremely critical that the scope of work and other contractual clauses are clearly defined in the contract

[7] [2010 (175) ECR 8(SC)]

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				In light of the above, the EPC contract of setting up of solar plant was classified as works contract services, the contention of alternatively classifying it as "composite supply" did not arise.	/ bid documents so as to avoid disputes with the tax department.
9	Deepak & Co (28th March 2018)	Delhi	The rate of tax applicable on supply of food/ beverages supplied to passengers in either Rajdhani / Duronto trains or in Mail / express trains or at food stalls at railway platforms	Train is a mode of transport and cannot be classified as eating joint, restaurant, mess or canteen. Mere consumption of food on train would not mean that train is a restaurant or an eating joint. The contract for supply of food on board a train is not a composite supply since there are separate values available for supply of goods and services Heating of food / beverages at food stalls is incidental to the supply of food. Supply of food / beverages in Rajdhani/ Duronto/ Mail Train/ food stalls amounts to pure supply of goods as there is no element of service. GST shall be charged on individual	Subsequent to the issuance of the AAR, the Government has issued Circular No. F. No. 354/03/2018-TRU dated **31.03.2018** whereby it has been clarified that the GST rate on supply of food/drinks by the Indian Railways / IRCTC / or their licencees, whether in trains or platforms would be charged at 5% without ITC. The Government in its circular has considered supply of food in train/platform as catering service whereas the AAR has considered it as supply of food. However, as the circulars issued are binding on the department, the said

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				items at their respective applicable rates. The service charges for providing services on board a train would be covered under HSN 996335 “catering services in train” and taxed 18%.	AAR may be appealed before the appellate authority in light of the said circular.

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