Dhruva Alert for GST ADVANCE RULINGS – 9th Edition

1. BASF India Limited – Maharashtra	
Issue for Consideration	• Whether IGST is leviable on High Sea Sales made to customers who are known at the time of placing order on the overseas party? • If not, whether input tax credit needs to be reversed treating such High Sea Sales as an exempt supply?
Discussion & Ruling	**Discussion:** • The Applicant would be buying products from an overseas supplier (i.e. a related party) in terms of the purchase order received from its customer in India. The Applicant would also be entering into a High Sea Sales agreement with the Indian customer and sell these goods before they cross the customs frontiers of India. • Referring to Section 7(2) and proviso to Section 5(1) of IGST Act, 2017, the Authority held that the goods sold in a High Sea Sales transaction are in the nature of an inter-state supply, and there is no levy and collection except in terms of Section 12 of the Customs Act, 1962 and Section 3 of the Customs Tariff Act, 1975. • The Authority further ruled that the goods sold on High Sea Sale basis are non-taxable supply, since no tax is leviable on them till the time of their customs clearance and accordingly, be covered under the definition of 'exempt supply'. • While examining the second question, the Authority held that since the goods sold on the High Sea Sales basis are 'exempt supply', the input tax credit to this extent would be required to be reversed as per Section 17 of the CGST Act, 2017. **Ruling:** • The goods sold on High Sea Sales basis are not leviable to IGST and therefore would be treated as an exempt supply.

	• High Sea Sales, being an exempt supply, would require reversal of input tax credit in terms of Section 17 of the CGST Act, 2017.
Dhruva Comments / Observations	• Interestingly, one may refer to the provisions of Section 7(5)(a) of the IGST Act, 2017, which indicates a specific intent of the law to levy IGST on supply of goods where the supplier is located in India and place of supply is outside India. There is no reference to the said provision under the AAR and Circular No. 33/2017-Cus dated August 1, 2017. • In such case, whether arguably GST implications could still arise in the hands of High Sea Seller in the absence of a specific exemption notification. • It is also relevant to note that in order to address the double taxation issue, GST Council has recently recommended declaring High Sea Sales and transactions executed in Customs Bonded Warehouse as "no supply" transactions in terms of Schedule III of CGST Act. Such an amendment would put to rest the long-standing debate on taxability of such transactions. Also, in such event, question of reversal may not arise as the transactions are outside the ambit of "supply". • Separately, in a similar case of **M/s. Pon Pure Chemical India Private Limited**[1], the Gujarat AAR had rejected the application, while examining GST implications on High Sea Sales, stating that it lacks jurisdiction as the determination of 'place of supply' is not covered under the scope of Section 97(2) of the CGST Act, 2017. The said Authority had further stated that the transaction falls in the domain of Customs and not GST. • Hence, a larger issue arises on admissibility or otherwise of matters pertaining to High Sea Sales under Section 97(2) of CGST Act and raises a doubt on applicability of the current ruling.

2. Zaver Shankarlal Bhanushali – Maharashtra	
Issue for Consideration	• Whether GST is applicable on the tenant for compensation received for alternate accommodation provided by the developer / owner and for delayed handover of possession of the premises by the developer / owner?
Discussion & Ruling	**Discussion:** • The owner of the premises had entered into an agreement with the developer for the redevelopment of the premises. The tenant had occupied the premises and was paying monthly rentals to the owner for use of the commercial premises. The tenant was required to vacant the premises due to the redevelopment. • The tenant was to receive monthly compensation for temporary accommodation for a certain period of time until the handover of the possession of the premises within a certain period. However, if the tenant was not given the possession of the premise within the specified period of time, the tenant would receive additional compensation / damages for the delay beyond 36 months. • Section 7 of the CGST Act, 2017 states that "supply" includes - "***(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II***."

[1] GUJ/GAAR/ADM/2017-18/1 dated October 30, 2017

	• Clause 5(e) of Schedule II to the CGST Act, 2017 states that "*agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act*" is a supply of service. • The Applicant relied upon the decision of Income Tax Appellate Tribunal, Mumbai in the case of **M/s Sahana Dwellers Private Limited vs. Income Tax Officer**, in support of their contention that the transaction in question was not recognized as a rental transaction. The Applicant stated that the amount they received from the owner was a compensation and not rental income. **Ruling:** • The Maharashtra AAR has stated that the said amounts are paid in the form of compensation to the Applicant to do an act i.e. vacating the premise to facilitate the redevelopment of the premise**,** as well as tolerating construction cum redevelopment work during the specified period of redevelopment**,** and also to tolerate an act of not having received the new premises back from the developer within the specified period of 36 months from the developer. • Accordingly, the Maharashtra AAR held that compensation received by the tenant for the alternate accommodation and damages for delayed handover of possession of premises by the developer / owner are classed as a supply of service under clause 5(e) of Schedule II to the GST Act, and are thus liable to GST.
Dhruva Comments / Observations	• Clause 5(e) of Schedule II is of a very wide amplitude and when read so, would cover within its fold any amount received as compensation, liquidated damages or any amounts of such nature etc. • It is important to distinguish between an amount which can be considered as being received towards an underlying supply from amounts that are purely compensatory in nature and that arise out of a breach of contract. A guidance note / clarification should be issued to clarify instances where GST ought not to be levied. There is an international jurisprudence which can be relied upon for formulating the guidance note.

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