Dimensions – 15th Edition

Advance ruling:

1. Senco Gold Limited – West Bengal[1]	
Issue for Consideration	Whether the input tax credit ('ITC') is admissible in case of settlement through book adjustment of the debt created on inward supplies?
Discussion & Ruling	**Discussion:** • The Applicant maintains a network of franchisee operated stores. Also, it periodically raises tax invoices on such franchisee for supplies made and for franchise support services in terms of the Franchisee Agreement. The Franchisee also raises tax invoices on the Applicant for supply of old gold, silver, etc. • The Applicant intended to settle mutual debts through book adjustments. • Proviso to Section 16(2) of the CGST Act ('the said proviso'), restricts ITC in case the amount towards the value of supply along with tax payable thereon is not paid to the supplier within a period of 180 days. • The Applicant contended that apart from the said proviso, the CGST Act nowhere makes availing of ITC dependent upon the payment to be made for the inward supply. Also, the said proviso does not prescribe or restrict the mode in which the payment must be made. • The Applicant submitted that payment through an adjustment entry in the books of account is a prevalent commercial practice. Reliance was placed on para. 42 of the Indian Accounting Standard 32, which confers recognition to the offset of a financial asset and a financial liability in certain scenarios. • It was submitted that Rule 19(8) of the West Bengal Value Added Tax Rules, 2005 ('WBVAT Rules'), restricts credit to transactions where the payment had been made by account payee cheque or account payee draft or through electronic banking clearance

[1] Order No. 02/WBAAR/2019-20 dated May 8, 2019

	when such payment exceeded rupees twenty thousand in a day, however, such restrictions are not stipulated under the CGST Act. • The Revenue Department referred to Section 16(1) of the CGST Act whereby the entitlement to ITC is inter alia subject to the provisions of Section 49 of the CGST Act. • Section 49(1) of the CGST Act provides that every deposit made towards tax, interest, penalty, fee and any other amount shall be made through internet banking. • Accordingly, the Revenue Department contended that transactions between the supplier and the recipient should also be made through the online banking system. • The Authority ruled that Section 49 of the CGST Act, does not deal with the mode of the transaction between the supplier and the recipient and pertains only to the payment of tax. • It was observed that the definition of 'consideration' under the CGST Act, is wide enough to prevent exclusion of any form of payment. Hence, reduction in book debt (an asset in the payer's books of accounts) is a valid 'consideration'. In absence of specific restriction, ITC in such a scenario cannot be denied. • Accordingly, the submission of Applicant was accepted, to the effect that the CGST Act did not contain a restriction as stipulated in the Rule 19(8) of the WBVAT Rules. **Ruling:** The Applicant can avail ITC when it pays consideration for corresponding inward supplies by way of setting off book debt, subject to applicable restrictions.
Dhruva Comments / Observations	• Upon a literal and purposive interpretation of the provisions, this advance ruling recognising the commercial realities allows for ITC when payment of consideration for inward supplies is through a book adjustment / set off. • Even under the erstwhile Service tax regime, the definition of 'gross amount charged' included payment by deduction from account / book adjustment.

Judgements under Indirect tax:

2. Selvel Media Services Private Limited & Others[2]	
Issue for Consideration	Whether the demand of advertisement tax levied by Nagar Nigam, Kanpur is tenable after July 1, 2017, i.e. post the introduction of Goods and Services Tax ('GST') regime?
Discussion & Judgement	**Discussion:** • The petitioner is a group of advertising companies that are aggrieved by the demand of advertisement tax imposed by the Nagar Nigam, Kanpur, on displays of advertisements (via hoardings within their jurisdiction), post July 1, 2017, i.e. after the introduction of GST regime in India. • The Hon'ble High Court ('HC') first observed that the demand for advertisement tax was made despite the relevant and underlying rules and bye laws having been struck down on two occasions.

[2] 2019 (5) TMI 728 - Allahabad High Court

	• The HC observed that the power to levy advertisement tax under Section 172(2)(h) of the Municipal Corporation Act, 1916 was deleted with effect from July 1, 2017, by virtue of introduction of the GST law and specifically Section 173 of the U.P. GST Act, 2017. Furthermore, the power of the State Government to legislate regarding advertisement tax, provided for under Entry 55 of List II of the VII Schedule of the Constitution of India was deleted with effect from September 12, 2016 by the Constitution (101 Amendment) Act, 2016. • The HC relied on Article 265 of the Constitution of India, which mandates that no tax shall be levied or collected except by the authority of law and then observed that the Nagar Nigam (as also the State Government) ceased to have any jurisdiction to impose and realise advertisement tax after introduction of the GST regime and law. It was concluded that these authorities were denuded of their powers in respect of advertisement tax. **Judgement:** • The HC held that the demand of tax on advertisements after July 1, 2017 is illegal and directed the Nagar Nigam to refund such tax, if any, collected for the period after July 1, 2017.
Dhruva Comments / Observations	• The introduction of GST subsumed several central, state and municipal levies and accordingly Nagar Nigam, Kanpur ceased to have jurisdiction to levy advertisement tax on the displays of hoardings. • This judgement is in line with the order pronounced by the Hon'ble Allahabad High Court recently in the case of ***DM Advertisers Agency*** [***TS-169-HC-2019(ALL)-VAT]***.

3. Sanjose Parish Hospital vs The Commercial Tax Officer[3]	
Issue for Consideration	Whether the price recovered from the patients for medicines supplied, implants carried out, the consumables used, and surgical tools exclusively used as part of treatment in a hospital can be treated against 'sale of goods' and as such is leviable to tax under Kerala Value Added Tax, 2003?
Discussion & Judgement	**Discussion:** • The State, primarily relying on Article 366(29A)(f) of the Constitution of India, contended that the sale of drugs, implants, consumables, etc. in the course of medical treatment is to be treated as a sale of goods as provided in the Sales tax enactment and should be exigible to Sales tax / VAT. • Hon'ble High Court noticed the following in respect of the 46th Constitutional Amendment: – The Hon'ble Supreme Court in ***Gannon Dunkerley [1958 (9) STC 353]*** held that a contract which is indivisible**,** with no agreement for sale of goods**,** would not attract the levy of sales tax.

[3] WA. No. 1896/2012 – Kerala High Court

- The Hon'ble Supreme Court in ***BSNL vs UOI [(2006) 3 SCC 1]*** observed that the judgment in Gannon Dunkerley survived even after the 46th Constitutional Amendment with respect to the dominant nature test to be applied to a composite transaction not covered by Article 366(29A). It was held that "*Transactions which are mutant sales are limited to the clauses of Article 366(29A). All other transactions would have to qualify as sales within the meaning of Sale of Goods Act, 1930 for the purpose of levy of sales tax.*"
- When the Constitution by a deeming fiction has permitted only certain transactions to be treated as sale of goods, the State legislature cannot enlarge the scope of the definition in excess of that available in the deeming fiction to those transactions not strictly answering the definition of sale of goods**,** or extend the fiction to those other transactions.

- The following points were also noted in respect of the services rendered by hospitals to 'in-patients':
  - The medicines or consumables or implants used do not have identities, as it does not lie in the mind or mouth of the patient to identify the drugs to be administered in the course of treatment.
  - A patient of his own volition could refuse to take a particular drug, but he cannot demand as a matter of right that a drug be administered to him in the course of medical treatment.
  - The patient places himself at the disposal of the physician or surgeon who decides on the course of treatment to be taken**,** which may or may not involve the administration of drugs, or medical implants.
  - The dominant nature of the transaction is 'therapeutic treatment' rendered (i.e. provision of medical care and treatment) and not sale of medicines, implants or consumables.
  - The administration of drugs or implants carried out in the course of surgical procedures and the consumables used in the course of any medical procedures would be an inseparable, indivisible part of the treatment rendered.
  - Article 366(29A)(f) of the Constitution covers specific supply of food or drink in a hotel or restaurant, which is part of the service rendered by a hotelier or restauranteur and such deeming fiction cannot be extended to bring hospital services within its ambit.

Judgement:

- Based on the above observations, Hon'ble High Court held that the hospital services provided to in-patients cannot be differentiated as sales and services**,** and the sales, if any**,** made are with the sole intention of curing the patient in a hospital**,** which is an inseparable part of the service offered in a hospital. Such activity does not create any separate rights on such drugs, implants or consumables used in the course of treatment and hence cannot be treated as sale of goods and therefore are not exigible to Sales Tax / VAT.

Dhruva Comments / Observations	• The Hon'ble High Court has rightly concluded that the dominant nature of the transaction between the hospital and in-patients is to provide a service in the nature of medical care**,** and the supply of goods – being drugs, implants, consumables **–** is only incidental. • Under the GST law also, Hon'ble Karnataka AAR in ***Columbia Asia Hospitals Private Limited [2019 (20) GSTL 154]*** held that where supply of medicines forms part of the supply of healthcare services and there is no choice for the patients to choose them separately, then they would form a composite supply with healthcare services being the principal supply. • Recently, Hon'ble Kerala AAR in ***Kindorama Healthcare Private Limited [AR No. KER/47/2019 dated April 12, 2019]*** held that supply of medicines, consumables, surgical items, items such as needles, reagents etc. used in laboratory, room rent used in the course of providing health care services to inpatients would be considered as 'composite supply of health care service'.

4. Steel Authority of India Limited vs. CCE[4]	
Issues for Consideration	• Whether interest under Section 11AB of the Central Excise Act,1944 ('the Act') is payable on differential excise duty with retrospective effect**,** becoming payable due to the escalation clause? • Whether the decision in SKF case and in International Auto case laid down the correct law considering the decision of Hon'ble Supreme Court in the MRF case?
Discussion & Judgement	**Discussion:** • The Appellate Company had sold various products including rail to the Indian railways. The products were cleared on sale from January 2005 to July 2006 with the price fixed as per the circular dated April 24, 2005. Subsequently, the prices were increased retrospectively by way of the price circular dated July 20, 2006. Owing to this revision in price, SAIL deposited a sum of ₹142 crores as excise duty (on differential value) in August 2006. • Upon perusal of the documents, the Department insisted SAIL to remit interest under Section 11AB of the Act due to a delay in payment of excise duty on clearances made from January 2005 to July 2006. An appeal was filed before the Tribunal challenging said demand for interest. The Hon'ble Tribunal dismissed the appeal, relying on the decision of the Hon'ble Supreme Court in ***SKF Limited [2009 (239) ELT 385 (SC)]*** where demand of interest on payment of differential duty liability due to price revision (with retrospective effect) were upheld. • Upon appeal by the Appellant before the Hon'ble Supreme Court (two-member bench), the Hon'ble Bench noted that the additional duty to be paid in future (on account of such retrospective revision) cannot be treated as attracting the concept of 'short payment'. It was observed by the Hon'ble Bench that although the differential duty may be payable, the interest should *not* be payable. The Hon'ble Bench doubted the correctness of the

[4] 2019 (5) TMI – Supreme Court

	decision made in both the SKF case and the International Auto case, hence reference was made to a larger bench in ***[2015 (326) ELT 450 (SC)].*** **Observations of the Hon'ble Larger Bench:** • Excise duty is levied on the manufacture or production of goods and is collected at the point of removal of goods. • Transaction value for the purpose of payment of excise duty not only includes the amount paid or payable, but also any amount which the buyer is liable to pay to the assessee by reason of, or in connection with the sale (whether at the time of sale, or at any other time). • In cases where the assessee is unable to determine the correct value for the purpose of excise duty payment, reference may be made to Rule 7 of the Central Excise Rules which provides a mechanism for provisional assessment. Furthermore, upon determination of the final amount payable, the assessee is liable to pay interest under Section 11AB of the Act, from the first date of the month succeeding the month for which the amount is determined, until the date of payment thereof. • In this particular case, the price on which duty was initially discharged was amenable to upward revision, and therefore the circumstances were appropriate for the assessee to apply for provisional assessment. • Where the assessee is aware of the fact that the price on which duty is being paid is variable under the escalation clause (and therefore the original value is provisional), then the demand for interest is sustainable. • The expression "ought to have been paid" used in Section 11AB of the Act would mean the value of the goods which is finally determined, and it is on said final value that duty is liable to be paid in totality. **Judgement:** • The Hon'ble Supreme Court in ***Steel Authority of India Limited vs CCE [2019 (5) TMI – Supreme Court)]*** concurred with the views expressed in both the SKF case and the International Auto case and upheld the demand of interest on payment of differential duty owing to a revision in price (which was subject to the escalation clause).
Dhruva Comments / Observations	The decision of the Hon'ble Supreme Court in ***Steel Authority of India Limited [2019 (5) TMI – SC]*** may be found applicable while interpreting Section 50 of CGST Act 2017, which provides for provisional assessment and seeks to recover interest from the first date after the due date of payment of tax in respect of the supply of goods or services or both. Prima facie, it appears that the assessee may also be liable to pay interest in case of an upward revision in prices where the original price is subject to escalation / revision. Alternatively, upon reading Explanation 1 to Section 12(2) of the CGST Act, which states that "*supply shall be deemed to have been made to the extent it is covered by the invoice..*", one may argue that the time of supply provision provided under Section 12(2) of the CGST Act is applicable only to the extent of the amount covered by the invoice. Thus, the differential

	taxable amount arising due to price variation will not be governed by said provisions. Furthermore, Section 12(5) provides that in cases where the time of supply cannot be determined as per the specific provisions, the time of supply shall be the date on which the periodical return is to be filed or when tax is paid. Thus, the time of supply will arise in the month when the debit note is raised and reported. However, in light of the principles upon which the Supreme Court has upheld the imposition, persisting with a position on non-imposition of interest in such instances would be a highly litigious proposition.

5. United Telecoms Limited vs CCE[5]	
Issue for Consideration	Whether the transaction value for determination of excise duty liability (for the supply of hardware) should include the value of pre-loaded software supplied with the hardware?
Discussion & Ruling	**Discussion:** • The Appellant imported certain equipment (MSC based WLL CDMA equipment) which was of usage technology of China. This equipment was imported from China, upon which, software had been pre-loaded (as opposed to being imported separately in the form of a CD or other media format). • Post-import, the Appellant carried out activities such as assembly, inspection, integration, software porting, and customization etc. before clearing the goods to BSNL (after a quality inspection conducted by the customer). The Appellant paid excise duty on the value of the equipment (excluding the value of software)**.** • The Department contended that software shown to have been manufactured and removed separately is simply classified as firmware etched/embedded/burnt onto the flash memory chip of the hardware's mother board at the point of import. The software has therefore become an integral part of the hardware at the point of removal for home consumption, and so splitting the value and classifying the software as a different commodity, or preparing separate documentation at the time of the equipment's removal would represent an attempt to evade appropriate payment of duty. • The Hon'ble CESTAT noted that a system with pre-loaded software has a higher intrinsic value than a system without pre-loaded software. It was further noted that the essentiality test is to identify the condition in which the system or equipment was cleared from the factory. • In this instant case, it was held that the equipment was pre-loaded with software, and that the customs duty was also paid on the value (including the value of software). Hence, such software, irrespective of its nomenclature, has become an integral part of the system or equipment, and has therefore enhanced the intrinsic value of the system or equipment. **Judgement:** • It is therefore to be construed that the value paid or payable for the equipment will include the value of the software, since it was inseparable from the hardware at the time of clearance from the factory.

[5] 2019-TIOL-1154-CESTAT-Bang.

	• The demand raised by the department was upheld. This is despite the fact that in the invoices, the price had been split between hardware and software.
Dhruva Comments / Observations	• The Hon'ble Supreme Court in ***CCE vs Acer India Limited [2004 (172) ELT 0289 (SC)]*** held that the value of the firmware (software kept in semi-permanent memory) etched onto the EEPROM is always included in the assessable value of the computers. A similar view was held by the Hon'ble Supreme Court in ***Anjaleem Enterprises Private Limited vs CCE [2006 (194) ELT 129 (SC)]*** in respect of computer based embedded systems. • In this case, it would appear that the software which was pre-loaded at the time of import was etched onto the hardware and has therefore become an intrinsic part of the equipment itself. Thus, the value of such software should form part of the removed equipment's value, and duty should be payable on said value (inclusive of the value of software).

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