Dimensions – 22nd Edition

Rulings / Judgments under GST era:

1. Sanofi India Ltd - Maharashtra[1]	
Issues for Consideration	• Whether Input Tax Credit (ITC) can be availed of GST paid on expenses incurred towards sales promotional scheme? • Whether ITC can be availed of GST paid on goods (viz. pens, note pads, keychains, etc.) given as brand reminders?
Discussion & Ruling	**Discussion:** • The Applicant is engaged in the manufacture of pharmaceutical goods and provides taxable services. The Applicant undertakes marketing and distribution expenses, with a view to promote their brand / products and to enhance their sales. The details of promotional schemes are as follows: - **Shubh Labh Loyalty Program (SLLP)** o The distributor gets reward points based on the quantity of goods sold by them. These reward points can then be redeemed at the end of the month/ quarter/ year, against foreign trips or Raymond Weil watches; o If the distributor opts for the watch, then the same is purchased by the Applicant and given to the distributor. The invoice for the watch is raised in the name of the Applicant and the ITC is claimed by the Applicant. - **Brand reminders** o Products like pens, keychains, note pads, etc are distributed to doctors or distributors with the name of the Applicant embossed on it. This is done to promote the brand;

[1] Order no. GST-ARA-115/2018-19/B-43 dated April 24, 2019

    - These goods are procured on payment of GST and the ITC is claimed.

- The Applicant has approached the Authority to know whether the ITC can be claimed by it on such promotional schemes. The Applicant has raised the following contentions:
    - Section 16(1) of the Central Goods and Services Tax Act, 2017 (CGST Act) states that the ITC is available of goods/ services, if the same have been used in the course of furtherance of business subject to certain other conditions. The term furtherance of business means advancement of business;
    - The use of the impugned goods help, to conduct the business in a better and effective way and accordingly, the credit of the same should be allowed;
    - Further, section 17(5)(h) of the CGST Act states that the ITC should not be eligible in respect of goods disposed off by way of gift or free samples. The term 'gift' has not been defined under the GST Law but in order to constitute as a 'gift' there should be the following elements:
        - Supply must be made given without any contractual obligation;
        - Supply must be made without any consideration in money or money's worth;
        - Supplies made out of love and affection can only be termed as gifts;
        - It is an act of generosity.
    - Accordingly, the reward points are earned by the distributor based on achievement of a target as per the scheme and is not in the nature of 'gift'. The watch is given under a contractual obligation as per the scheme. It is a consideration for achieving a target and accordingly, the ITC should be allowed;
    - If promotional items are considered as gifts and the ITC in respect of the same is disallowed, then this will have huge impact on businesses;
    - When a free supply is made, the cost of the same is always taken into account while fixing the price of the rest of the supplies. Indirectly, the exchequer will get the GST even of the value of free supplies and there is no loss to the Government;
    - In respect of SLLP there are certain terms and conditions which a distributor needs to accept before they get access to the website / application. This acceptance of terms and conditions creates a contractual obligation. Accordingly, it is in the course of furtherance of business and not a gift.
- The Authority observed as follows:
    - The Applicant has not submitted any contract / agreement in respect of the contractual arrangement but have provided only a SLLP scheme as available on the Applicant's website. Accordingly, the promotional products are given voluntarily on certain conditions achieved by the distributors;
    - Distribution of promotional products is an assurance of giving away gifts on conditions being achieved by the customers.
    - As per section 17(5)(h) of CGST Act, no ITC can be availed on any goods given as gifts even if it is in the course of furtherance of business except when given by an

	employer to an employee to the extent of rupees fifty thousand [Schedule I of CGST Act]; - Merely because the conditions of 16(1) of the CGST Act has been satisfied would not mean the ITC would be eligible since section 17(5) of the CGST Act starts with the words "*Notwithstanding anything contain in sub-section (1) of Section 16 ….*" - Circular no. 92/11/2019 GST dated March 7, 2019 is not applicable to the present case since the said circular clarifies about the discounts provided to the customers whereas the Applicant has not provided any discounts but given reward points against which promotional products can be purchased by the distributor; - If the contention is accepted that there is a contractual obligation under the scheme to increase the sale and for which the watch is being provided, then the same amounts to supply as per Section 7 of CGST Act as it is in the nature of barter. On the contrary, the Applicant has accepted that supply is without consideration. Thus, the transaction is nothing but 'gift'. **Ruling:** ITC should not be eligible on the GST paid on expenses incurred towards the SLLP and the goods distributed as brand reminders.
Dhruva Comments/ Observations	• The current pattern of awarding rewards is quite prevalent method adopted by companies for boosting sales. Further, distribution of promotional material creates a brand recall value. • While the ruling disallows input tax credit on rewards / promotional items, it could be debated as to whether such schemes should be equated with post sales target discounts? Also, whether promotional items distributed with an intent of creating brand recall value could be categorised as gifts? • It would be interesting to see how judicial interpretation evolves on the above aspects as the ruling would have far reaching implications.

2. Cliantha Research Ltd. (formerly known as B.A. Research India Ltd) - Maharashtra[2]	
Issue for Consideration	Whether the 'Clinical Research' services proposed to be provided by the Applicant to the entities (sponsors) located outside India is liable to be taxed under GST or is it eligible to be treated as an export of service under section 2(6) of the Integrated Goods and Services Tax Act, 2017 (IGST Act)?
Discussion & Ruling	**Discussion:** • The Applicant provides a comprehensive range of clinical research and support services by performing technical testing and analysis on the Drug / Investigational Product provided by the sponsors located outside India and submits a final report to such foreign

[2] Order no. GST-ARA-119/2018-19/B-50 dated May 4, 2019

sponsors. For such services, the Applicant will raise an invoice on the sponsor and receive consideration in foreign currency.

- The Applicant submitted that the Clinical Research services proposed to be provided by them to the sponsors would amount to export of services on the following basis:
  - The Applicant referred to the decisions of the Tribunal (Mumbai Bench) in *Principal Commissioner of C. Ex. Pune-I* v. *Advinus Therapeutics Ltd.* [2017 (51) S.T.R. 298 (Tri.-Mumbai)] and *Commissioner of Central Excise Pune-I* v. *Sai Life Sciences* [2016 (42) STR 882 (Tri.-Mumbai)] and contended that the place of supply as given under section 13(3)(a) of IGST Act would be applicable only in those cases where service in the nature of repairs, testing, etc. is performed on the goods provided by the service recipient and not in those cases where the service is provided **using** the goods provided by the service recipient or in cases where the goods sent are altered (consumed) while providing the service.
  - The Applicant further contended that the administration of drugs to the volunteers is merely the first step in providing the clinical research service and the service is not completed at this stage. The Applicant thereafter is required to record the test results and analyse the results (which requires an expert knowledge) and submit a report detailing the same. It is for the report that the sponsors engage the Applicant and not for merely administering the drug and recording the results alone. Therefore, the service provided is not in respect of the goods given by the recipient. Further, the Applicant is not required to give the goods back to the service recipient and the goods cease to exist after the study. The Applicant contended that the service provided by them is not covered by section 13(3)(a) of IGST Act rather such services would get covered by section 13(2) of IGST Act. Thereby, the place of supply should be outside India.
  - In view of the above, the Applicant stated that the supplier of services (i.e. the Applicant) is located in India, the recipient (i.e. the sponsor) is located outside India, the place of supply is outside India, the payment has been received in convertible foreign exchange and the supplier and recipient of service are not merely establishments of a distinct person. Thereby, all the conditions as enumerated under section 2(6) of IGST Act for a service to get qualified as export of service are satisfied and therefore the clinical research service should be treated as export of service.
  - The Applicant further contended that since GST is consumption-based tax, no tax can be levied on the Applicant as long as the consumption of the service is outside India.
  - The Applicant referred to its own case as well as various pre-GST regime case laws wherein it was held that even though the test has been conducted in India and the test reports were prepared in India, the service will be treated as export of service as the service is consumed outside India.

	• The Authority observed the following: - The services provided by the Applicant is a pilot study/research to test the effect/efficacy of their product in healthy adult male subjects under fed conditions. Thus, the product provided by the sponsors is of prime importance without which the research study cannot take off. The research services are in respect of the subject products and the same are required to be made physically available by the recipient to the supplier of services. Therefore, the said services should fall under section 13(3)(a) of IGST Act and not under section 13(2) of IGST Act. The said section does not give any exemption to goods that are consumed in the process of research. - The Applicant has already issued three invoices wherein they have charged IGST at the rate of 18%. Further, the case laws cited by the Applicant are pertaining to the pre-GST regime where section 13 of the IGST Act was not there and hence cannot be relied upon. - In view of the above, the Authority stated that since the place of supply is in India, the provisions of section 2(6) of the IGST Act are not fulfilled and therefore, the clinical research services provided by the Applicant cannot be considered as export of services as per the GST law. **Ruling:** • The Clinical Research services proposed to be provided by the Applicant to the entities located outside are not eligible to be treated as an export of service under section 2(6) of the IGST Act. • The said services are liable to CGST and SGST as the location of 'supplier of service' and the 'place of supply' is in the same State, in terms of section 13(3)(a) of the IGST Act
Dhruva Comments/ Observations	• The instant transaction of conducting clinical research / technical testing and whether the same qualifies as export or not has been a subject matter of litigation. • The provisions contained in Section 13(3)(a) of IGST Act and Rule 4 of erstwhile Place of Provision of Services Rules, 2012 are pari materia in nature. However, the ruling has neither commented nor distinguished the judicial precedents pronounced under Rule 4 as relied upon by the Applicant. • In a recent Advance Ruling in the case of *Behr-Hella Thermocontrol India Pvt Ltd.* [Order No. GST-ARA-12/2018-19/B-116 dated September 15, 2018], it was held that the testing services performed on prototypes do not qualify as zero rated supply and should be liable to IGST considering the supplier located in India and service receiver located outside India in terms of Section 7(5) of IGST Act. • It could be interesting to explore whether the provisions contained in Section 13(3)(a) of IGST Act could apply to situations where work is performed on those goods or even in cases where the goods are consumed in the course of rendition of the service?

3. M/s Cengres Tiles Limited v. State of Gujarat[3]	
Issue for Consideration	Can the authority pass orders of provisional attachment of goods and bank accounts without first raising demand for payment of tax?
Discussion & Judgment	**Discussion:** • The Petitioner filed a Writ Petition challenging the provisional attachment orders passed by the authorities directing the attachment of bank accounts and the stock held by the Petitioner. • The Petitioner submitted that the orders for provisional attachment passed under section 83 of the CGST Act is illegal and contrary to the scheme of the GST law. It was also submitted that the proceedings under section 83 of the CGST Act could not be invoked without appropriate action being taken under section 46 and 62 of the CGST Act. • The authorities submitted that no error of law was committed while passing the impugned orders. Furthermore, the order for provisional attachment should be construed as the initiation of proceedings under section 62 of the CGST Act. • The Hon'ble High Court observed as follows: - As per section 46 of the CGST Act, a notice requiring the submission of returns within fifteen days shall be issued where the taxpayer fails to furnish the prescribed returns; - Section 62 of the CGST Act provides for a best judgment assessment of liability and issuance of assessment order within five years from the prescribed date in cases where the taxpayer has failed to furnish returns despite issuance of notice under section 46 of the CGST Act; - As per section 83 of the CGST Act, the authorities may, by order in writing, provisionally attach any property including the bank accounts to protect the interest of the revenue during pendency of the proceedings under section 62 of the CGST Act. • The Hon'ble High Court observed that the authorities erred in straightaway resorting to provisional attachment without first issuing a notice under section 46 and conducting assessment under section 62 of the CGST Act. **Judgment:** • The Hon'ble High Court quashed and set aside the impugned orders of provisional attachment of bank account and stock. • The authorities submitted that proceedings under section 62 of the CGST Act have been initiated and the liability of the Petitioner shall be assessed in accordance with the law. The Petitioner also submitted that they would continue to deposit the tax amount in monthly instalments in accordance with the undertaking filed. The Hon'ble

[3] 2019-VIL-294-GUJ – The High Court of Gujarat

	High Court requested the authorities to expeditiously finalize the proceedings in accordance with the law.
Dhruva Comments / Observations	• The instant judgment draws attention to the approach adopted by authorities in cases where the taxpayers fails to undertake the monthly compliance of filing returns and payment of tax. • Since the levy is in its nascent stage, this judgement should also serve as a guideline for the authorities on procedural aspects.

Notification and Circulars under GST:

1. Notification no. 31/2019 - Central Tax dated June 28, 2019	
Key Amendments	• The value of supply of goods or services or both on which Kerala Flood Cess is levied under clause 14 of the Kerala Finance Bill, 2019 shall be deemed to be the value determined in terms of section 15 of the CGST Act but shall not include the said cess. • With effect from a date to be notified later, a registered person may transfer any amount of tax, interest, penalty, fee or any other amount available in the electronic cash ledger under the CGST Act to the electronic cash ledger for integrated tax, central tax, State tax or Union territory tax or cess through Form GST PMT-09. • Retail outlet established in departure area of an international airport, beyond the immigration counters, supplying indigenous goods to an outgoing international tourist who is leaving India shall be eligible to claim refund of tax on a monthly / quarterly basis (Form GST RFD-10B) paid by it on inward supply of such goods. In this regard, the expression 'outgoing international tourist' shall mean a person not normally resident in India, who enters India for a stay of not more than six months for legitimate non-immigrant purposes. • With respect to Anti-profiteering provisions, time limit of two months has been prescribed for the State Level Screening Committee to examine the application. Further, said time limit may be extended by one month by the National Anti-Profiteering Authority ('NAA') upon recording reasons in writing. • Time limit within which investigation has to be completed by the Directorate General of Anti-Profiteering ('DGAP') has been increased from three months to six months. Similarly, the time limit within which the NAA shall pass the order has also been increased from three months to six months. • The NAA may order deposit of profiteering amount in the consumer welfare fund along with interest @ 18% from the date of collection of the higher amount till the date of deposit of such amount. • In case the NAA has reasons to believe that there has been contravention of anti-profiteering provisions, the NAA may direct the DGAP to initiate investigation or enquiry in respect of goods or services or both other than those covered under the report forwarded by the DGAP to NAA. Please note that such investigation / enquiry

	shall be deemed to be a new investigation / enquiry for the purpose of other anti-profiteering provisions. • The validity period of e-way bill for over dimensional cargo shall also be applicable to multimodal shipments in which at least one leg involves transport by ship. • The validity of the e-way bill may be extended within eight hours from the time of its expiry. • After a registration certificate is made available on the common portal and assignment of GSTIN, the registered person would be required to furnish bank account details and any other necessary information on the common portal within forty five days of grant of registration or due date of furnishing of return, *whichever is earlier*. The registration is liable to be cancelled in case the said details are not furnished in the specified period. • With effect from a date to be notified later, the Government on recommendation of the GST council may notify that tax invoice and bill of supply shall have Quick Response ('QR') code.

2. Circular No. 102/21/2019-GST dated June 28, 2019	
Clarifications	**Supply of taxable goods:** • The Circular clarifies that additional / penal interest is to be included in value of supply and accordingly liable to GST. **Supply of lending services:** • The Circular clarifies that additional interest / penal interest levied on account of delay in payment of instalments should get covered under sr.no. 27 of Notification No. 12/2017-Central Tax dated 28 June 2017 ('notification') and should be exempt from GST. • The said additional / penal interest satisfies the definition of interest as defined under the notification and should not be subject to GST. • Any service fee / any other charges levied in relation to extending loans / deposits does not qualify as interest and should be subjected to GST.
Dhruva Comments	• The FAQ's issued by the Central Board of Indirect Taxes & Customs on Banking, Insurance and Stockbrokers sector stated that additional interest arising on default in payment of instalment will be included in the value of supply and accordingly liable to GST. • Further, the advance ruling in the case of *Bajaj Finance Ltd.* [Order no. ARA-22/2018-19/B-85 dated August 6, 2018] held that GST should be applicable on penal interest charged to customers for delayed payment of instalments on the loan. • The aforesaid clarification would provide the much-needed clarity to bank's / NBFC's as there were adverse rulings / FAQ's on the said subject.

3. Circular No. 103/22/2019-GST dated June 28, 2019	
Clarifications	**Clarification on place of supply (POS) of services** • **Cargo handling services** POS in case of services provided by port in relation to cargo handling such as services in respect of arrival of wagons at port, haulage of wagons inside port area up-to place of unloading, siding of wagons inside the port, unloading of wagons, movement of unloaded cargo to plot and staking hereof, movement of unloaded cargo to berth, shipment/loading on vessel etc will be determined basis the location of service recipient both under section 12 and section 13 of the IGST Act and are not related to immovable property. • **Cutting and polishing services of unpolished diamonds which have been temporarily imported into India and are not put to any use in India** POS in respect of such goods should be determined in accordance with section 13(2) of the IGST Act, since the goods are temporarily imported into India and not put to any use in India.

4. Circular No. 104/23/2019-GST dated June 28, 2019	
Clarifications	**Processing of refund applications wrongly mapped on the Common portal** • It is clarified that where the functionality of reassignment on the common portal is not possible, then, the respective State / Central authority to whom the application is forwarded by the common portal shall process the refund claim; • After processing the refund, such authority should inform the common portal about such incorrect mapping.

5. Circular no. 105/24/2019-GST dated June 28, 2019	
Clarifications	**Treatment of secondary post-sale discounts** • If the post-sale discount is given by the supplier of goods to the dealer without any further obligation or action required at the dealer's end, then the post-sale discount will be related to the original supply of goods and it would not be included in the value of supply of goods subject to fulfilment of conditions specified under section 15(3) of the CGST Act. • If the additional discount given by the supplier of goods to the dealer is the post-sale incentive requiring the dealer to do some act like undertaking special sales drive, advertisement campaign, exhibition etc. then such additional discount will be considered as a separate supply of service by the dealer to the supplier of goods. Accordingly, the dealer would be required to charge applicable GST on the value of such additional discount and supplier of goods will be eligible to claim Input Tax Credit ('ITC') of the GST charged by the dealer.

	• If the additional discount is given by the supplier of goods to the dealer to offer a special reduced price by the dealer to the customer to augment the sales volume, then, such additional discount would represent the consideration flowing from the supplier of goods to the dealer for the supply made by the dealer to the customer and accordingly, same would be considered for the purpose of arriving at the value of supply under section 15 of the CGST Act. However, the customer (if registered) would be eligible to claim ITC of the tax charged by the dealer only to the extent of the tax paid by the said customer to the dealer. • In case of issue of financial / commercial credit notes by the supplier of goods to the dealer, the supplier will not be required to reduce GST liability. Furthermore, the dealer will not be required to reverse ITC attributable to the tax already paid on such post-sale discount received by him through issuance of financial / commercial credit note subject to fulfilment of other conditions as specified under section 16 of the CGST Act.
Dhruva Comments	The interpretation made by authorities on the post-sale discount scheme will have far reaching implications. Various industries have been extending such discounts routinely. Taxation of some of these discounts will have implications even for the previous regime.

6. Circular No. 106/25/2019-GST dated June 29, 2019	
Clarifications	**Refund of taxes paid on inward supplies of indigenous goods by retail outlets at departure are of international airport** • The Government has clarified the process of claiming the refund of taxes paid on inward supply of indigenous goods by retail outlets (Duty Free shops or Duty Paid Shops) established at departure area of the international airport beyond immigration counters when supplied to outgoing international tourist against foreign exchange; • The refund scheme shall be effective from July 01, 2019 and would be applicable in respect of all supplies made to eligible passengers after the said date. The refund can be claimed of the goods purchased prior to the said date; • The refund would not be granted on the basis of the accumulated ITC but based on the invoices of the inward supplies of indigenous goods received by them; • Also, the retail outlets will be required to prominently display a notice that international tourists are eligible to purchase goods without payment of domestic taxes.

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