Dimensions – 25th Edition

Rulings / Judgments under GST era:

1. M/s Chowgule Industries Private Limited[1]	
Issue for Consideration	Whether input tax credit (ITC) can be availed on motor vehicles purchased as demo cars for providing trial runs to the customers?
Discussion & Ruling	**Discussion:** • The Applicant is an authorized dealer for sale of motor vehicles of Maruti Suzuki India Limited. • The Applicant purchases the vehicles against tax invoices and reflects them as capital assets in their books of accounts. The vehicles are then used as demo cars for providing trial runs to customers which is an essential part of marketing and sales promotion. Every sales outlet is bound to maintain one demo vehicle of each model per location, as per the dealership norms. • The vehicles are usually held for two years or 40,000 km, whichever is earlier. They are then sold by charging GST on the selling price. • The Applicant contended that the ITC should be available on such demo vehicles on the following grounds: - As per section 16(1) of the CGST Act, the capital goods i.e. vehicles, have been used in the course or furtherance of business; - As per section 17(5) of the CGST Act, the ITC shall not be available in respect of motor vehicles except when they are used for making further taxable supply of such motor vehicles. The demo vehicles are sold after a specified period by charging GST. There is no time specified within which the further supply is to be effected.

[1] Order No. GOA/GAAR/07 of 2018-19/4796 dated March 26, 2019

	Accordingly, the restrictions under section 17(5) of the CGST Act would not be applicable; - The availability of input tax credit shall be subject to the provisions of section 18(6) of CGST Act. • The Authority agreed with the contentions raised by the Applicant and observed that the demo vehicle is an indispensable tool for the promotion of sale of vehicles. **Ruling:** ITC can be availed on the demo motor vehicles purchased for providing trial runs to the customers.
Dhruva Comments / Observations	• A similar ruling was delivered by the Kerala Advance Ruling Authority in the case of *A. M. Motors* [2018 (18) GSTL 93 (AAR-GST)]. • Section 17(5)(a)(A) of the CGST Act, restricts the credit of motor vehicles, except when they are used for making '*further supply of such motor vehicles*'. It would be interesting to see as to how the higher Courts would interpret the phrase 'further supply of such motor vehicles' so as to include supply of used motor vehicles also within its ambit.

2. M/s Greentech Mega Food Park Pvt. Ltd. – Rajasthan[2]	
Issues for Consideration	• Whether the lease agreement for a period of 99 years can be construed as a sale of immovable property and thereby outside the purview of GST? • If answer to the above is in negative, then what would be the HSN code and the rate of GST applicable to such supply?
Discussion & Ruling	**Discussion:** • The Applicant is a SPV, set up for establishing a 'Mega Food Park'. As a part of development of food park, the Applicant has developed certain individual plots on the project site and wishes to lease such plots for a total period of 99 years for a consideration towards booking and allotment of developed plot. The Applicant has approached the Authority to provide ruling in respect of the aforementioned questions. • The Authority observed the following: - The activity of leasing land is covered by section 7(1) of the CGST Act and therefore can be construed as a supply under GST. Further, as per Schedule II of the CGST Act, the activity of leasing is treated as a supply of service; - As per the definition of 'lease' under the Transfer of Property Act, 1992, lease could be for perpetuity. Therefore, the quantum of time for which the plot is proposed to be leased has no role in determining whether the transaction constitutes a lease or sale;

[2] Order No. RAJ/AAR/2019-20/10 dated May 28, 2019

	- The High Court of Mumbai in the case of *Builders Association of Navi Mumbai and others* v. *UOI* [Writ petition no. 12194 of 2017 dated March 28, 2018] has sustained the applicability of GST on long term lease of plots for 60 years; - The Agreement between the Applicant and the lessee is a long-term lease agreement of 99 years with many restrictions and the lessee has no right to further sell the allotted plot. Whereas, in case of a sale deed, the purchaser becomes the absolute owner of the plot and is not dependent on the lessor for renewal or extension of the lease period; - The charging of stamp duty on lease agreement at par with sale deed by the Registration and Stamps department of Government of Rajasthan does not change the status of the document from lease agreement to sale deed; - Leasing of private property is classifiable under HSN 997212 – 'renting or leasing services involving own or leased non-residential property' attracting GST at 18%. **Ruling:** The lease agreement between the Applicant and the lessee for a period of 99 years is a leasing service classifiable under HSN 9972 and chargeable to GST at 18%.
Dhruva Comments:	• Under Pre-GST regime, the High Court of Allahabad in the case of *Greater Noida Industrial Dev. Authority* v. *Commr. Of Cus., C. Ex.* [2015 (40) S.T.R. 95 (All.)] held that the periodicity of lease has no role to determine whether the transaction constitutes a lease or sale of property. • Further, it is also relevant to note that the judgment pronounced by the High Court of Bombay in the case of Builders Association of Navi Mumbai *(supra),* has been appealed before the Supreme Court and is pending adjudication.

3. Venkatasamy Jagannathan – Tamil Nadu[3]	
Issue for Consideration	Whether the Profit-Sharing Agreement (PSA) between the Applicant as an employee of Star Health and Allied Insurance Company Limited (SHA) and the shareholders of SHA would attract GST in the hands of the Applicant?
Discussion & Ruling	**Discussion:** • The Applicant is employed as Chairman and Managing Director (CMD) of SHA and is also a stakeholder in the company. • The Applicant has entered into a PSA which states that if not less than 51% of the equity shares are transferred in a strategic sale or on listing after an IPO at a price of not less than ₹75 per share, the economic benefit (the difference of sale price and base price of ₹47 per share) arising out of such sale or an IPO will be passed on to him by the shareholders to the extent of the number of shares mentioned in the agreement or in

[3] Order No. 19/AAR/2019 dated May 21, 2019

case of an IPO, the consideration payable to the CMD by each party shall be percentage of the holding of the parties on total shareholding of SHA.

- The Applicant contended the following:
  - The PSA is only due to the Applicant's contribution as Managing Director. Hence, the transaction would fall under employer/employee activities which are exempt under GST;
  - The PSA is not only among the shareholders and the Applicant but also with other employees who are nominated by the Applicant for additional entitlement. This indicates that remuneration in this profit sharing is based on employee contract with the employer and their performance as an employee;
  - As per the PSA, in case of the Applicant's termination with a cause, his right to receive remuneration under the PSA will be forfeited on the date of termination. This clause signifies that the PSA is based on employment contract of the Applicant;
  - The Applicant is being remunerated for achieving good results through aggressive efforts by virtue of his employment in SHA. Hence, it will tantamount to services by an employee to employer and thereby should be treated neither as supply of goods nor supply of service as per Schedule III of the CGST Act.
- The Authority observed the following:
  - The PSA is between various investors/shareholders of the company and the Applicant. The shareholders are not the company and they cannot/do not act on behalf of the company. Hence, it is clear that the PSA is between the shareholders and the Applicant and not between the company and the Applicant. Thus, the aforesaid transaction cannot be treated as services by an employee to the employer;
  - As per Section 3 of the Transfer of Property Act, 1882, actionable claim means *'**a claim** to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of moveable property or **to any beneficial interest in moveable property not in the possession**, either actual or constructive, **of the claimant**, **which the civil Courts recognize as affording grounds of relief**, whether such debt or beneficial interest be existent, accruing, conditional or **contingent'**;*
  - The Applicant's claim to the specified amount is contingent on the occurrence of strategic sale or IPO. Further, the profit arising out of sale or IPO which is a 'moveable property' in this case is currently not in the possession of the Applicant;
  - Clause 11 of the PSA which provides for arbitration states that civil courts can recognise and can provide grounds for relief if the Applicant makes a claim to such beneficial interest in future profits;
  - Therefore, the PSA is covered under the definition of 'actionable claim` as defined under section 2(1) of the CGST Act read with section 3 of the Transfer of property Act, 1882.

	Ruling: The PSA between the Applicant and the various shareholders of SHA is an actionable claim, not relating to lottery, betting and gambling and is to be treated as neither a supply of goods nor a supply of services as per Schedule III of the CGST Act. Hence, the said PSA is not taxable under GST.
Dhruva Comments:	GST laws being in its nascent stage provide limited guidance on transactions that could be construed as an actionable claim and resultantly excluded from the purview of law. The ruling critically explains the aspect of 'beneficial interest in moveable property not in possession of the claimant'. This is a welcome ruling!

Rulings / Judgments under Pre - GST era:

4. The Principal Commissioner v. Alembic Ltd.[4]	
Issue for Consideration	Upon receipt of the completion certificate (CC), whether the credit availed on input services used for construction of residential complex, received prior to obtaining the CC, is required to be reversed proportionately?
Discussion & Judgment	**Discussion:** • The Respondent was engaged in providing taxable services of construction of residential complex and had paid service tax under works contract service for the residential units sold to various customers. • In respect of a residential project, it had obtained the CC on July 24, 2014, and as on said date 32% of the flats were unsold. The Respondent informed the department that they would be availing the credit of input services on a proportionate basis post obtaining the CC. • Thereafter, during the departmental audit the Respondent reversed the credit proportionately under protest, availed on the input services from 2010-11 till the date of obtaining the CC, based on the number of units remaining unsold since no service tax would apply thereon. • The Respondent filed a refund application for the credit paid under protest since no show-cause notice (SCN) was issued. The department subsequently issued a SCN demanding 6%/8%/10%, under Rule 6 of the CENVAT Credit Rules, 1994 ('CCR'), of the amount of sale of immovable property after obtaining CC, on the ground that it had availed Cenvat credit and provided taxable and exempted service and had not maintained separate books of accounts. • The SCN was upheld by the Commissioner and the amount paid under protest was adjusted against the demand confirmed. The Tribunal however, allowed the appeal of the Respondent. • The Hon'ble High Court after analysing the facts and the various provisions observed as follows:

[4] 2019-VIL-335-GUJ-ST

	- Upon receipt of completion certificate, the output activity of sale of residential units becomes “non-service” as per the provisions of section 65B(44) of the Finance Act, 1994 (FA); - Explanation 3 to Rule 6(1) of the CCR was amended on April 13, 2016 whereby a deeming fiction was created that for the purposes of Rule 6 of CCR, exempted services shall include an activity, which is not a service as defined in section 65B(44) of FA, provided that such activity has used inputs or input services. Thereby, for the period prior to the amendment, Rule 3 of CCR would be applicable; - Sale of immovable property is not an exempt service prior to April 13, 2016 and accordingly, Rule 6 of CCR is not applicable; - Even after April 13, 2016, since only proportionate credit was availed after CC, which was backed by a Chartered Accountant certificate and certified working sheets, it can be said that the Respondent has maintained separate books of accounts in terms of Rule 6(2) of CCR. Accordingly, no liability to pay an amount equal to 8%/10% of sale of immovable property arises on the Respondent; - The Tribunal on a harmonious construction held that once the credit has been legally and validly availed, the same cannot be denied or recovered on the ground that the output activity became exempt later on unless specific machinery exists for the same. The credit entitlement has to be examined only at the time of receipt of input services; - As per Rule 4(7) of the CCR, the credit of input service can be claimed immediately after the receipt of bill and an assessee is not required to wait till the output service is sold to the service recipient. As at the time of taking credit there was no existence of any exempt service, hence, Rule 6 does not apply; - Rule 6 of the CCR, would be applicable only after the CC has been obtained and the Respondent availed proportionate credit attributable to the taxable output service. **Judgment:** The Respondent is not required to reverse the credit availed prior to obtaining the CC as no exempted services were provided till this point of time.
Dhruva Comments / observations	• The judgment brings much required respite to the real estate industry as this was a long-standing issue. • Interestingly, the said issue may not arise under the GST regime, as the law has recently been amended to provide a mechanism for computing the eligible credits in such scenario.

Circular:

1. Clarification on intermediary and ITeS services[5]	
Background	The Ministry of Finance, Government of India issued circular no. 107/26/2019-GST dated July 18, 2019 clarifying doubts related to supply of Information Technology enabled Services ('ITeS') and the applicability of GST on the same.
Clarification	A brief synopsis of the circular is outlined below: • The definition of intermediary provides specific exclusion of a person who supplies goods or services or both or securities on his own account. Therefore, such supplier will not be treated as an 'intermediary' even if the supplier qualifies as an 'agent / broker / any other person' if he is involved in the supply of services on his own account; • Since the ITeS is not defined under the GST law, the definition given under Rule 10A of the Income Tax Rules, 1962 may be referred. ITeS services includes back office operations, call centres or contact centre services, data processing, claim processing, legal databases, translation services, payroll, revenue accounting, support centres, website services, data search integration and analysis, remote education, clinical database management services etc. The definition specifically excludes research and development services whether or not in the nature of contract research and development services; • Scope of intermediary services has been clarified by way of the below scenarios: - **Scenario I** – The supplier supplies ITeS services defined above, the supplier will not fall under the ambit of intermediary where such services will be provided on his own account by the supplier. Furthermore, it has been clarified that in case the supplier supplies ITeS services to customers of his client on clients' behalf, but actually supplies the services on his own account, the supplier will not be categorized as an 'intermediary'; - **Scenario II** – The supplier of back-end support services (e.g. support services during pre-delivery, delivery and post-delivery of goods etc.) located in India arranges or facilitates supply of goods or services or both to the customers of his client. Such supplier will be considered as intermediary as these services are merely for arranging or facilitating supply of goods or services or both between two or more persons; - **Scenario III** – The supplier of services is engaged in the provision of both the aforesaid services (i.e. providing ITeS services and facilitating / arranging of supply of support services). In this case, the supplier will be engaged in two sets of supplies i.e. ITeS services and support services to his client or to the customer of the client. Whether such supplier will qualify as intermediary service or not would depend on the facts and circumstances of each case.

[5] Circular no. 107/26/2019 - GST dated July 18, 2019 issued by the Ministry of Finance, Government of India

	• It has further been clarified that the supplier of ITeS Services, who is not an intermediary, can avail benefits of export of services if he satisfies the criteria prescribed under IGST Act, 2017.
Dhruva Comments / Observations	• In light of the adverse advance rulings on classification of back office services as intermediary services, there was an apprehension in the industry regarding potential litigation. • The circular has come as a welcome step which has clarified various issues and thereby avoiding potential litigation.

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