Dimensions – 38th Edition

Ruling / Judgment under GST era:

1. M/s Ascendas Services (INDIA) Pvt Ltd. – Karnataka[1]	
Issues for Consideration	• Whether the Applicant is only facilitating the bus service between the commuters and the Bangalore Metropolitan Transport Corporation (BMTC) and is thereby, acting as an intermediary in terms of section 2(13) of IGST Act? • Whether the money collected for the bus passes from the commuters and paid to BMTC should be added to the value of facilitation fee charged by the Applicant to the commuters?
Discussion & Ruling	**Discussion:** • The Applicant is engaged in operation and maintenance of International Tech Park, Bangalore (ITBP). It also facilitates service of transportation for the employees of the tenants of the business parks for which it has entered into an agreement with BMTC. • The Applicant receives two types of bus passes from BMTC i.e. Non-AC and Combo bus passes which can be used for AC and Non-AC buses. For every 50 bus passes, BMTC would allot one bus to the Applicant, which would be in the nature of a chartered bus and would stop between the designated bus stops and business park. BMTC charges GST, as applicable, on the passes sold to the Applicant. • The Applicant charges a separate 'facilitation fee' of ₹ 300 plus GST @ 18% for arranging this facility for both the AC and Non-AC buses. • The Applicant approached the Authority to contend that it is only facilitating the said service and acts as an intermediary between the commuters and BMTC. Also, the value

[1] Order no. KAR ADRG 114/2019 dated September 30, 2019 / [2019 (10) TMI 797]

charged by BMTC should not be added to the value of facilitation fee. The grounds taken by the Applicant are as follows:

Intermediary service

- BMTC owing to the practical difficulty of raising invoices on each customer raises a consolidated invoice on the Applicant;
- Only the actual amount incurred is recovered for obtaining such bus passes. Such an activity of recovery of actual cost is merely an act without any quid pro quo;
- The Applicant acts as a passthrough by mediating the transportation service provided by BMTC;
- The Applicant falls within the definition of an intermediary under section 2(13) of the IGST Act. Reference was also made to the Education Guide issued under the erstwhile Service tax regime which provided various factors to determine whether a person can be regarded as an intermediary;
- Also, basis various terms of the agreement the Applicant is only acting as an intermediary.

Valuation

- As per section 15(1) of the CGST Act, the value attributed to arranging transportation service is the value of facilitation fee charged by the Applicant;
- The value of bus passes is not covered under any clause of section 15(2) of CGST Act. Accordingly, the value of bus pass should not be added to the facilitation fees.

- The Authority observed as follows:
  - The Applicant being liable to pay consideration for bus passes would be regarded as the recipient of chartered bus service in terms of section 2(93) of the CGST Act;
  - Based on the various clauses of the agreement, BMTC is providing the services to the Applicant and not the commuters. The default clauses also state that the Applicant is in receipt of the services and the monthly pass is only for identification and calculation of the value of service;
  - The commuters or the companies are not party to the agreement (*supra*) and the Applicant is providing the services after obtaining the same from BMTC;
  - In the present case, the Applicant is receiving the services from BMTC and providing transportation to the commuters on a principal to principal basis and the Applicant is neither an agent of the BMTC nor commuter;
  - The value of monthly passes should be added to the facilitation fee in terms of section 15 of CGST Act.

Ruling:

- The Applicant is not acting as an intermediary;
- The value of bus passes distributed by the Applicant should be included in value of facilitation fee charged by the Applicant.

Dhruva Comments / Observation	• While there would be no doubt amongst commuters and ITBP that the services are rendered by BMTC to commuters and ITBP is merely facilitating the transaction for an identified fee. On the contrast, the agreement between ITBP and BMTC reveal that the services are rendered by BMTC to ITBP for onward rendition to individual commuters. The instant case is a classic example of non-alignment between intent of the transaction and construct of the agreement. • The concept of 'intermediary' has been the subject matter of dispute since the service tax regime and hence it would be critical to examine facts of each transaction and assess whether or not the transaction qualifies as an intermediary service.

2. Shewratan Company Pvt Ltd. – West Bengal[2]	
Issue for Consideration	Whether supply of stores to foreign-going vessels can be treated as zero rated supplies and the Applicant would be liable to pay GST on such supplies?
Discussion & Ruling	**Discussion:** • The Applicant supplies stores like paint, rope, spare parts, electronic equipment etc. to foreign-going vessels. • The Applicant submitted that such supplies should amount to exports under section 16 of the IGST Act basis the following provisions: - Section 2(4) of the IGST Act defines the customs frontier of India as the limits of a customs area as defined in section 2 of the Customs Act, 1962 ("the Customs Act"); - Section 88(a) of the Customs Act provides that any warehoused goods may be taken on board any foreign-going vessel as stores without payment of import duty subject to fulfilment of conditions such as presentation of a shipping bill / bill of export, etc.; - Section 89 of the Customs Act provides that the goods, manufactured in India and required as stores on any foreign-going vessel, may be exported free of duty. • The Applicant also relied upon a ruling in the case of *Fairmacs Shipstores Pvt Ltd.*[3], wherein certain warehoused goods were supplied to an ocean-going merchant vessel on a foreign run. The master of vessel would not open the seal and not consume such goods, until vessel crosses the international waters. After examining various provisions under the Customs Act and IGST Act, the Advance Ruling Authority held that such supplies would be treated as exports. • The Authority observed the following: - The export of goods under section 2(5) of the IGST Act and section 2(19) of the Customs Act means taking the goods from India to a place outside India. When warehoused goods are used as stores in a foreign-going vessel, such goods are neither taken to a place outside India (unless specifically marked for a foreign destination) nor are they cleared for home consumption.

[2] Order No. 30/WBAAR/2019-20 dated October 21, 2019 / [2019-VIL-404-AAR]
[3] Order No. AAR/AP/10(GST)/2018 dated August 20, 2018 by Andhra Pradesh Authority for Advance Ruling

	- A foreign-going vessel anchored within the territory of India is not a place outside India and taking the stores on board such a vessel does not amount to supply to a location outside India. Thus, section 69 of the Customs Act cannot cover the case where the warehoused goods are taken on board a foreign-going vessel. A special provision needs to be made under section 88(a) of the Customs Act to extend the facility of exemption from import duty to such imported stores. - Section 69 and section 88(a) of the Customs Act have very little relevance as the Applicant has not claimed that its supplies are restricted to warehoused goods. - Both the supplier (i.e. the Applicant) and the recipient (i.e. the foreign-going vessel) are in India. Thus, the above supply cannot be construed as 'export' unless specifically marked for a location outside India. - The reference to the ruling in the case of Fairmacs Shipstores Pvt Ltd (*supra*) is misplaced because in that case, the supplier was supplying warehoused goods as stores where the goods are not to be consumed until the vessel crosses the territorial waters of India. **Ruling:** The Applicant's supply of stores to foreign-going vessels is not export or zero-rated supply, unless marked specifically for a location outside India. Hence, the Applicant is liable to pay tax on such supplies under the GST law.
Dhruva Comments / observations	• Interestingly, in the case of M/s. *Wilhelmsen Maritime Services Pvt. Ltd.*[4], the Maharashtra Advance Ruling Authority did not entertain the application stating that the question of whether the transaction could be considered as exports is not covered under section 97 of the CGST Act. Whereas, in the instant case, the Authority has examined the relevant provisions under GST law as well as the Customs Act to determine whether the said supply could qualify as exports under the GST law. • It would also be relevant to evaluate the implications on sale of goods by duty free shops basis the principle laid down by this advance ruling.

3. M/s Santhos Distributors – Kerala[5]	
Issues for Consideration	• Whether the amount shown in the commercial credit note issued by the Principal to the Applicant, attracts proportionate reversal of input tax credit (ITC)? • Whether the discount provided by Castrol India Ltd. (Principal) to their dealers through the Applicant would be liable to GST?
Discussion & Ruling	**Discussion:** • The Applicant is an authorised distributor of the products of the Principal. All distributors are mandatorily required to use the software of the Principal for further supply of goods to the dealers.

[4] Order No. GST-ARA-136/2018-19/B-71 dated June 15, 2019
[5] Order no. KER/60/2019, dated September 16, 2019

	• The billing done by the Applicant is based on various rate schemes pre-fixed by the Principal in the billing software. • At the time of generation of bill by the Applicant, the software deducts the discounts as per the schemes and the net price is charged by the Applicant to the customer. Such discount / rebate is subsequently reimbursed by the Principal as commercial credit notes. • The Applicant approached the Authority in respect of the above-mentioned issues. The Authority observed as follows: - The commercial credit notes do not satisfy the conditions of section 15(3) of CGST Act. Since the original tax liability is not reduced, the ITC will be eligible as per the invoice raised by the Principal, subject to the payment of the value of supply reduced by the value of commercial credit notes plus the amount of the original tax charged; - The additional discounts given by the Applicant is as per the directions of the Principal and is intended to augment the sales. The Applicant has no control over the discount schemes; - The discount represents the consideration flowing from the Principal to the Applicant for the supply made to the customer. This discount is liable to be added to the value of supply made to the customer in terms of section 15 of the CGST Act. Also, such discount would be regarded as consideration flowing from the Principal to the Applicant in terms of section 15 of the CGST Act. **Ruling:** • Proportionate reversal of ITC is not required in respect of commercial credit notes; • The additional discount offered by the Applicant and later received as reimbursement from the Principal should be added to the value of supply made by the Applicant to the customer for the purpose of computing GST.
Dhruva Comments / Observations	The above ruling appears to have been issued in terms of circular no. 105/24/2019 GST dated June 28, 2019 which provided clarifications in respect of treatment of post sales discounts. However, the said circular has been withdrawn w.e.f. October 03, 2019 vide circular no. 112/31/2019 dated October 03, 2019.

4. M/s Sutherland Global Services Pvt Ltd v. Asst. Comm. CGST and Central Excise & Others[6]	
Issues for Consideration	Whether carry forward and utilisation of accumulated credit pertaining to Education cess (EC), Secondary & Higher Education cess (SHEC) and Krishi Kalyan cess (KKC) is available through filing of Form GST TRAN-1?
Discussion & Judgment	**Discussion:** • The Petitioner is engaged in providing information technology enabled services to its customers worldwide. In the pre-GST regime, the Petitioner was assessed to Service tax and was availing and utilising Cenvat credit against payment of Service tax liability.

[6] TS-938-HC-2019-MAD - The High Court of Judicature at Madras

- On introduction of GST, the Petitioner requested the Assessing officer to allow the carry forward and utilisation of accumulated credit pertaining to EC, SHEC and KKC through filing of Form GST TRAN-1.
- The Assessing Officer passed an order rejecting the Petitioner's request on the ground that the explanation to section 140(1) of the CGST Act read with rule 117 of the CGST Rules allows set-off of credit only against specific duties and taxes which does not cover cesses such as EC, SHEC, and KKC and hence could not be carried forward. Aggrieved by the aforesaid order, the Petitioner filed a Writ Petition before the Hon'ble High Court.
- On analysis of section 140 of the CGST Act read with rule 117 of the CGST Rules and various Supreme Court and High Court judgments, the Hon'ble High Court observed the following:
  - Reliance placed on para 5.25 of the report of the Thirteenth Finance Commission issued in 2009 which stated that GST was introduced with an intention to subsume various indirect taxes and to provide seamless mechanism for transition of all credits availed by an assessee under the pre-GST regime;
  - An assessee is entitled to claim the set-off of credit till such time express provisions are made applicable for the said credits to lapse. Further, no notification or circular or instruction has been issued to provide that accumulated credit shall no longer be available. The High Court also referred to section 140(1) and 140(8) of the CGST Act and the explanation thereunder to observe that the balance of all available credits on the date of transition would be available to an assessee for set-off under the GST regime;
  - Reliance was placed on the judgment pronounced by the Hon'ble Supreme Court in the case of *Eicher Motors and another* v. *Union of India and others*[7] while examining the applicability of rule 57F which provided for lapse of unutilised credit. It was held that MODVAT credit lying to the balance of an assessee represented a vested right accrued or acquired by the assessee and the said right became absolute when the inputs were used in the manufacture of the final products;
  - The Hon'ble High Court negated the reliance placed by the Respondents on the Delhi High Court decision in the case of *Cellular Operators Association of India and others* v. *Union of India and another*[8] where Court was deciding the issue related to cross utilisation of EC and SHEC against Excise duty or Service tax. It was held that the Cesses cannot be treated on the same level as Excise duty or Service tax and their cross utilisation is not permitted;
  - Instructions issued by the CBEC dated December 7, 2015 do not allow utilisation of the accumulated credit of EC and SHEC. However, the instruction nowhere states that the balance of said credit stands lapsed. Further, since no notification or circular or instruction was expressly issued providing for lapse of accumulated credit, section

[7] 106 ELT 3
[8] W.P. (Civil) No. 7837 of 2016

	140 of the CGST should be given full effect and meaning thereby continuing the availability of such credits; - Section 140(1) and (8) of the CGST Act, subject to fulfilment of conditions, provides for transition and carry forward of all credits and levies furnished in earlier returns filed by the assessee, except for those which are specifically barred. The transition of such credits cannot be barred since all the conditions have been satisfied by the Petitioner. **Judgment:** The Hon'ble High Court ruled in favour of the Petitioner thereby allowing the transition of accumulated credits of EC, SHEC and KKC into the GST regime.
Dhruva Comments / Observations	• This judgment opens up a window of opportunity for the taxpayers to avail the credit of the erstwhile cesses into the GST regime. • While the cesses have been abolished (except KKC), it would be relevant to see whether the same continues as a vested right in the absence of any notification / order expressly stating the denial of such credits. • Explanation 3 to section 140 of the CGST Act was recently inserted, with retrospective effect from July 1, 2017, to restrict the transition and carry forward of credit of cesses under the GST regime. It would be relevant to see how Courts would interpret the retrospective amendment and whether it would amount to violation of doctrine of promissory estoppel. • The tax authorities could still litigate the matter considering the retrospective amendment.

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