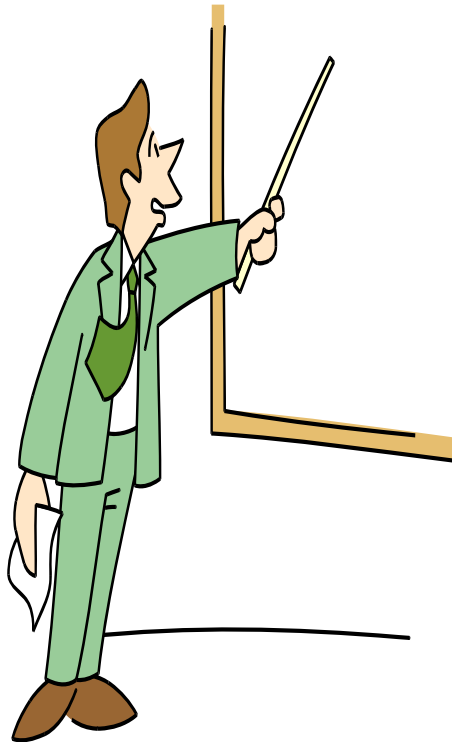


# **VIRTUAL STUDY CIRCLE MEETING ON “RECENT ADVANCE RULINGS UNDER GST & RELATED ISSUES”**



**ORGANIZED BY  
J.B. NAGAR CPE STUDY CIRCLE OF WIRC**

**PRESENTED BY**



**AN INVESTMENT IN KNOWLEDGE PAYS THE BEST RETURN**

# COVERAGE

<b>Sr. No.</b>	<b>Case</b>	<b>Issue</b>
<b>1.</b>	<b>M/s PENNA CEMENT INDUSTRIES LTD</b>	<b>NATURE OF SUPPLY IN CASE OF EX- FACTORY SALES MADE TO RECIPIENT LOCATED IN ANOTHER STATE</b>
<b>2.</b>	<b>M/s AMNEAL PHARMACEUTICALS PVT. LTD</b>	<b>APPLICABILITY OF GST ON RECOVERY OF NOTICE PAY BY EMPLOYER</b>
<b>3.</b>	<b>M/s SRI B R SRIDHAR</b>	<b>LEVIABILITY OF GST ON SALE OF FLATS RECEIVED BY LAND OWNER UNDER REVENUE SHARING MODEL</b>
<b>4.</b>	<b>SHREE DIPESH NAIK</b>	<b>APPLICABILITY OF GST ON SALE OF DEVELOPED PLOTS UNDER PLOTTING SCHEME</b>

# COVERAGE

Sr. No.	Case	Issue
5.	M/s JINMAGAL CORPORATION	APPLICABILITY OF GST ON ONE TIME PREMIUM / SALAMI PAID FOR LONG TERM LEASE
6.	M/s DIACEL CHIRAL TECHNOLOGIES (INDIA) PVT LTD	ELIGIBILITY OF ITC ON GST PAID ON ONE TIME PREMIUM, ANNUAL LEASE CHARGES AND MAINTENANCE CHARGES
7.	M/s ENFIELDS APPARELS LTD	APPLICABILITY OF GST ON ASSIGNMENT OF LEASEHOLD RIGHTS AND ELIGIBLE OF ITC ON GST PAID ON TRANSFER FEES
8.	M/s NCS PEARSON INC, USA	TAXABILITY UNDER OIDAR SERVICES .....”MINIMUM HUMAN INTERVENTION”

**EX- FACTORY SALES MADE TO  
RECIPIENT LOCATED IN  
ANOTHER STATE**

## M/s PENNA CEMENT INDUSTRIES LTD [2020-6-TMI -162] (TELANGANA AAR)

### **FACTS OF CASE**

- Applicant is manufacturer of cement having 2 cement plants in Telangana.
- They occasionally make sale of cement on ex-factory/works basis from their plants in Telangana, thereby goods are made available to recipient at factory gate
- The recipient assumes the charge of goods from factory gate for transportation up to the destination in another state

### **QUESTIONS BEFORE AUTHORITY:**

- What tax should be charged on ex-factory supplies made by them ? Whether this is interstate supply or intra state supply?

### **OBSERVATIONS & DECISION BY AAR :**

- Provisions u/ s 7(1), 7(2) and 8(1) of the IGST Act, in essence lay down that 'place of supply' and 'location of supplier' determine whether a supply can be treated as an intra-State supply or an inter-State supply.
- In the instant case, there is no uncertainty as regards to 'location of supplier' & clarity is sought only with regard to the 'place of supply'.

## M/s PENNA CEMENT INDUSTRIES LTD [2020-6-TMI -162] (TELANGANA AAR)

### **OBSERVATIONS & DECISION BY AAR :**

- Section 10(1)(a) of IGST Act....determination of 'place of supply' of goods where the supply involves movement .....
  - *(a) where the supply involves movement of goods, whether by the supplier or the recipient or by any other person, the place of supply of such goods shall be the location of the goods at the time movement of goods terminates for delivery to the recipient.*
- In case of ex-factory sales, since the delivery of goods to recipient takes place at factory gate so far as supplier is concerned, location of the supplier's factory can be reckoned as POS.
- However, section 10(1)(a) perceptibly indicates that the movement can be effected by the supplier or by the recipient or by any other person authorized by the recipient. Thus, movement of goods in case of ex-factory inter-State sales does not conclude at factory gate but terminates at the place of destination where the goods finally are destined as per the billing address.
- Here, termination of the movement of goods evidently takes place at the location to which the goods are consigned/destined.
- **The 'location of supplier' and the 'place of supply' fall under different states and the supply qualifies as inter-State supply. IGST chargeable.**

## M/s PENNA CEMENT INDUSTRIES LTD [2020-6-TMI -162] (TELANGANA AAR)

### ISSUES :

1. In case of Ex-factory supply whether supply involves any movement of goods, since risk and rewards are passed on to buyer at factory gate before commencement of movement.????
1. Whether 10(1)(a) or 10(1)(c) of IGST apply ???
2. How to interpret this condition “*movement of goods terminates for delivery to the recipient.*” laid down in 10(1)(a)
3. Can billing address determine point of termination of movement of goods for delivery to recipient ?
4. If in above example, E way bill is prepared by buyer and goods are further supplied by him to another person say XYZ located next door of original vendor, in such scenario where the movement terminates for delivery to recipient ??

# **APPLICABILITY OF GST ON NOTICE PAY RECOVERY**



## **M/s AMNEAL PHARMACEUTICALS PVT. LTD [2021-1-TMI -431] (GUJARAT AAR)**

### **FACTS OF CASE**

- applicant are 100% EOU & manufacturers of pharmaceuticals products.
- Contract with employee .....Terms of Employment .... either parties shall serve a 3 months mandatory notice to terminate this contract.
- If notice not served by employee, then company is entitled to recover the notice pay from the agreed portion of salary to compensate the loss to company.
- If notice not served by company, then company is obliged to pay the notice period salary to the employee to enable him to sustain himself till he finds suitable employment

### **QUESTIONS BEFORE AUTHORITY:**

- Whether GST leviable on recovery of Notice Pay from the employees who are leaving the company without completing the notice period as specified in the Appointment Letter ?

**ARGUMENTS BY APPLICANT**

- Notice pay recovery is nothing but the amount stipulated in the employment contract for breach in serving the stipulated notice period.
- It is a sum mutually agreed by the parties for breach of contract. It can be regarded as a consideration flowing from the employment contract itself read with Section 74 of the Indian Contract Act, 1872.
- An employer can only sue for recovery of such amount but cannot enforce mandatory serving of the notice period to employee.
- This cannot be termed as consideration for refrained from an act of suing the employee for mandatory serving against the notice pay recovery.
- Notice pay recovery is on account of violation of employment contract & not consideration for agreeing to obligation to refrain from an act or tolerate an act

## M/s AMNEAL PHARMACEUTICALS PVT. LTD [2021-1-TMI -431] (GUJARAT AAR)

### ARGUMENTS BY APPLICANT

- Notice pay recovery is nothing but a deduction from the salary payable to the resigning employee. It is not a separate consideration flowing from any independent contract and the employee is relieved from the services and issued a relieving letter only once the terms of employment agreement (Appointment Letter) are fulfilled.
- Therefore, it should form part of salary and covered within entry 1 of Schedule III.
- Reliance was placed on decision of Hon'ble Ahmedabad ITAT Nandinho Rebello v. Deputy CIT (2017) 80 taxmann.com 297 wherein the ITAT allowed deduction towards notice pay amount from the salary income of the assessee.
- Reliance also placed on decision in case of M/s. Gujarat State Fertilizers & Chemical Ltd (2016) wherein it was held that the cessation of employment should also be treated as employment service not liable for service tax.
- Allahabad CESTAT incase of M/s. HCL Learning Systems Vs CCE, Noida 2019(12) TMI 558 held hat when amounts are recovered out of salary already paid, such amounts would not be subject to service tax as salaries are not subject to tax.

**ARGUMENTS BY APPLICANT...CONTD**

- Reliance also placed on decision **Madras High Court in case of GE T&D India Limited dated 13th December, 2019** wherein it was held that “notice pay” recovered is outside the scope of service tax

*“The employer cannot be said to have rendered any service per se much less a taxable service and has merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit. The definition in clause (e) of Section 66E as extracted above is not attracted to the scenario before me as, **in my considered view, the employer has not 'tolerated' any act of the employee but has permitted a sudden exit upon being compensated by the employee in this regard.** Though normally, a contract of employment qua an employer and employee has to be read as a whole, there are situations within a contract that constitute rendition of service such as breach of a stipulation of non-compete. Notice pay, in lieu of sudden termination however, does not give rise to the rendition of service either by the employer or the employee.”*

## M/s AMNEAL PHARMACEUTICALS PVT. LTD [2021-1-TMI -431] (GUJARAT AAR)

### DECISION BY AAR :

- Notice Pay is nothing but the amount stipulated in the employment contract for breach in serving (not serving) the stipulated notice period .....Breach of contract
- It's a consideration to the employer for "tolerating the act" of the employee to not serve the notice period, which was the employee's agreed contractual obligation.
- The employee while accepting the offer of employment, has not only understood the intent on the part of the employer in prescribing this exit condition, but has also accepted it
- Employer agreeing to the obligation of tolerating an act (quitting without any advance notice) on the part of the employee, for payment of a sum (notice pay), will be covered under *Clause 5(e) to Schedule II*, as a declared service.
- Decisions relied upon by applicant relate to the disputes of Service Tax Regime & are not applicable to the present case in respect of levy of GST
- The applicant is liable to pay GST @ 18% under the entry of "services not elsewhere classified", on recovery of Notice Pay from the employees

## M/s AMNEAL PHARMACEUTICALS PVT. LTD [2021-1-TMI -431] (GUJARAT AAR)

### ISSUES :

1. Is there any separate contract in this case except contract of employment? If yes what is that?
2. The law under old regime of service tax was same as that under GST for this transaction?
3. What is essence of contract?

# LEVIABILITY OF GST ON SALE OF FLATS RECEIVED UNDER REVENUE SHARING MODEL

## M/s SRI B R SRIDHAR [2020-11-TMI -718] (KARNATAKA AAR)

### **FACTS OF CASE**

- The Applicant, being the owner of land entered into a Joint Development Agreement dated 19<sup>th</sup> May,2016 with M/S. SUPRABHAT CONSTRUCTIONS, a partnership firm, authorizing them to construct residential flats by incurring the necessary cost
- The Applicant had given irrevocable license to the Developer to execute and complete the project and till the developer's share is entirely conveyed to the Developer or his nominees.
- The Developer shall at its own cost, expense and responsibility, develop the scheduled property and the responsibility to obtain conversion orders, construction plans and other permissions is with him.
- The applicant gets 40% share of undivided right, title and interest in the land proportionate to super built up area and 40% of car parking spaces, vide Area sharing agreement dated 03<sup>rd</sup> January,2018.
- The flats pertaining to applicant's share were handed over by the Developer after obtaining occupancy certificate from the statutory authorities on 26<sup>th</sup> August,2019 in respect of 74 units/flats, by BRUHAT BENGALURU MAHANAGAR PALIKA (BBMP) .
- The developer had sole and exclusive right of marketing the entire project.



## M/s SRI B R SRIDHAR [2020-11-TMI -718] (KARNATAKA AAR)

### **QUESTIONS BEFORE AUTHORITY:**

- Whether GST is leviable on the flats sold or gifted after receipt of OC by the applicant pertaining to his share in JDA ?

### **ARGUMENTS BY APPLICANT :**

- The liability to pay GST by the applicant would not arise as the applicant has not entered any agreement with prospective buyers before receiving the completion certificate
- That clause 1.7 of Area Sharing Agreement restricts the right of the Applicant to execute any sale agreements or any conveyance deed till the applicant takes over their units and the occupancy certificate is issued.
- That the transaction of sale of residential flat amounts to “sale of land” and the same is neither a supply of goods nor supply of services, in terms of Entry No 5 of Schedule III.

## M/s SRI B R SRIDHAR [2020-11-TMI -718] (KARNATAKA AAR)

### **DECISION BY AAR :**

- Since, the applicant's share of residential flats have been handed over by the developer after the issuance of OC dated 26<sup>th</sup> August, 2019 & and also clause 1.7 of the Area Sharing Agreement restricts the right of the applicant to execute any sale agreement or any conveyance deed till the issuance of OC and taking over of their share of units / flats , the sale of said flats is not exigible to GST, if and only if they are sold after issuance of OC
- The applicant is silent about the fact that whether the developer had executed any sale deeds on behalf of the applicant in respect of the applicant's share of units/flats. Thus if the applicant themselves or the developer on behalf of the applicant have sold the applicant's share of units/flats prior to issuance of OC, then the transactions amount to supply of "Works Contract Service" are liable to GST.
- The value of the aforesaid supply is to be ascertained from open market & the time of supply would be the time at which the constructed flats are handed over by the developer to the applicant
- Therefore, the entire consideration related to such sale of flats is received after the issuance of OC, then said activities are treated neither supply of goods nor supply of service in terms of schedule III

## M/s SRI B R SRIDHAR [2020-11-TMI -718] (KARNATAKA AAR)

### ISSUES :

1. If few units are sold by the owner before receipt of completion certificate, whether GST is leviable ???
  - Furtherance of business ?
  - Whether construction service??
  - What is the rate of GST if tax is payable on this transaction by land owner?
  
2. Is it Joint Development Agreement ?.....SC in case of FAKIR CHAND GULATI..... SC in case of MEW HORIZONZ LTD vs. UOI

# **APPLICABILITY OF GST ON SALE OF DEVELOPED PLOTS**

## **M/s SHREE DIPESH NAIK [2020-TIOL -134] (GUJARAT AAR)**

### **FACTS OF CASE**

- The applicant owned vacant land outside the municipal area of town on which he has some proposed business plan/activity. He is having all the necessary approvals for the proposed project from the Plan Passing Authority (i.e. Jilla Panchayat).
- That as per the Plan Passing Authority, the seller of land is required to develop the primary amenities like Sewerage and drainage line, Water line, Electricity line, Land levelling for road, Pipe line facilities for drinking water, Street lights, Telephone line etc. Before implementation of his business plan.
- He intends to sell the individual plots to different buyers without any construction of structure but by providing the primary amenities as mentioned above, which are mandatory requirement of the approved Plan Passing Authority (i.e. Jilla Panchayat)

### **QUESTIONS BEFORE AUTHORITY:**

- Whether GST is applicable on sale of plot of land for which, as per the requirement of respective authority (i.e. Jilla Panchayat), Primary amenities such as, Drainage line, Water line, Electricity line, Land levelling etc. are to be developed by the applicant?

## M/s SHREE DIPESH NAIK [2020-TIOL -134] (GUJARAT AAR)

### DECISION BY AAR

- Schedule III provides that the transaction of sale of land shall be out of GST net only if the activity is exclusively dealing with transfer of title or transfer of ownership of land, which is immovable property or earth. Thus, Where the nature of activity is that of ONLY sale of immovable property of plot, it is excluded from GST levy
- Applicant develops the land with an infrastructure such as Drainage line, Water line, Electricity line, Land levelling etc. as per the requirement of the Plan Passing Authority & sales only developed land as plots.
- The plotted development is a scheme which involves forming land into layout after obtaining necessary plan approval from the Development Authority, get all other permission required to take up, commence and complete what would be the layout, comprised of individual sites
- In the activity of plot development, the following are done-----levelling the land, construction of boundary wall, construction of roads, laying of underground cables and water pipelines, laying of underground sewerage lines with sewer treatments plant, development of landscaped gardens, drainage system, water harvesting system, demarcation of individual plots, construction of overhead tanks, other infrastructure works.
- Sale of such sites is done to end customers who may construct houses/villas in the plots

## M/s SHREE DIPESH NAIK [2020-TIOL -134] (GUJARAT AAR)

### DECISION BY AAR

- The sellers charge the rates on super built-up basis and not the actual measure of the plot. The super built-up area includes the area used for common amenities, roads, water tank and other infrastructure on a proportionate basis
- **This indicates that sale of developed plot is not equivalent to sale of land but is a different transaction.** Sale of such plotted development tantamount to rendering of service. This view has also been taken by the SC in the case of *M/s Narne Construction P Ltd. reported at 2013 (29) STR 3 (SC)*.....***This decision is vis-à-vis consumer protection Act for determining “service” involved when the members of associations are allotted a developed plot.***
- The activity of the sale of developed plots would be covered under the clause 'construction of a complex intended for sale to a buyer' under clause 5(b) of Schedule –II. Thus, the said activity is covered under 'construction services' and GST is payable

## **M/s SHREE DIPESH NAIK [2020-TIOL -134] (GUJARAT AAR)**

1. The sale of plots after erecting various infrastructure such as drainage , sewage, water line etc whether changes the character of land ?
2. The Infrastructure Development undertaken by the owner is either on own account or through 3<sup>rd</sup> party before sale of plot to buyer. It was only value addition to the land and bringing the same in saleable condition as per requirement local municipal corporation. it will not change character of land, then why it is not transaction in sale of land ?
3. In any case clause 5 (b) of schedule II, considers the transaction as service only if consideration is received for construction of complex before OC. Here there is no element of any construction of structure involved.



**APPLICABILITY OF GST ON ONE  
TIME PREMIUM / SALAMI PAID  
FOR LONG TERM LEASE**

## M/s JINMAGAL CORPORATION [2021-1-TMI -549] (GUJARAT AAR)

### FACTS OF CASE

- The applicant secured bid from Ahmedabad Urban Development Authority (AUDA) during e-auction for leasing certain plots for a period of 99 years , which could be used only for the purpose of construction of commercial projects.
- They were required to pay one time lease premium /salami of Rs.35 Crores as consideration for the said plot . Besides, annual lease premium of ₹ 5 per Sq. Mtr each year for 99 years is also payable

### Questions before authority:

- Whether the one time long term lease premium payable/paid by applicant is supply and thus liable to pay GST?
- Whether applicant is required to discharge pay tax under RCM on one time lease premium payable to AUDA in light of notification No. 13/2017 as amended by 05/2019 ?
- Whether the annual lease premium payable/paid by the applicant is supply?

## M/s JINMAGAL CORPORATION [2021-1-TMI -549] (GUJARAT AAR)

### Arguments by applicant

- That a long term lease for a period exceeding 30 years tantamount to sale of the immovable property since the lessor is deprived of the right to use , enjoy and possess the property once the said lease has been granted
- As per Article 30 of Gujarat Stamp Duty Act the aforesaid transaction is treated as conveyance. The Stamp duty is levied on the value including upfront premium and 5 times the average annual rent reserved, which would constitute the market value of the said land. Transaction is akin to sale of land. Hence as per entry 49 List II of 7<sup>th</sup> Schedule to Constitution, only state is empowered to levy tax on land and building.
- Land includes benefit arising out of land .....Land Acquisition Act 1894 ,.....Bombay Land Revenue Code, 1879.....Section 3(26) of General Clause Act
- Lease premium referred to in Schedule II is a periodical payment, upfront premium / Salami is not covered therein.....**one time premium is distinct and different from lease rental which is periodical**
- If the intention of the legislation was to charge GST on this one-time lease premium, then, appropriate provisions would have been inserted

## M/s JINMAGAL CORPORATION [2021-1-TMI -549] (GUJARAT AAR)

### ARGUMENTS BY APPLICANT

- *SC in the case of Kaliaperumal vs Rajagopal and anr (AIR 2009 SC 2122) has observed that 'Sale' is defined as a transfer of ownership for a price. In a sale there is an absolute transfer of all rights in the properties sold. No rights are left with the transferor.*
- AUDA, a governmental authority, has issued a letter claiming that GST shall not be levied on such lease premium/salami treating the lease of 99 years has nothing but sale of land.

### DECISION BY AAR

- ‘Lease’ has not been not defined explicitly under GST Act .....However, under TOPA,1882 section 105 defines LEASE :
  - *“lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.”*
- The above definition of lease marks that lease could be of perpetuity. Therefore, quantum of time has no relation in determination of lease or sale of land

## M/s JINMAGAL CORPORATION [2021-1-TMI -549] (GUJARAT AAR)

### DECISION BY AAR

- The said lease agreement , contains following para:

*2. **The lease deed** will be a agreement between AUDA and the selected lessee and should be done within 3 months of the Letter of Possession of plot for construction. The original deed shall remain with the Lessee and duplicate shall be given to the AUDA. The lease period is of 99 years. **The period of lease may be extended or a fresh lease agreement may be entered with the lessee at the sole discretion of the Lessor for a further period 99 years or less for period as decided by Lessor, provided Lessee shall pay the lease rent at the enhance rate as may be fixed by the Lessor.***

*9. Plot shall be utilized only for the purpose of which it will be allotted any part of the building. Any part of the building or any unit/permissible therein cannot be sold or given on rent to anybody for the use other than the permissible use*

*12. **The Lessee shall not mortgage or transfer or part with permission or sublet the premises or apportion there or without the permission of AUDA.** After completion of construction/development of building over the plot, the lessee shall have the right to sell/ convey/transfer the built –up space / premise to the unit holder(s)/ occupant(s) along **with sub-lease/assignment of undivided leasehold rights in the land for residue period of lease only.***

## M/s JINMAGAL CORPORATION [2021-1-TMI -549] (GUJARAT AAR)

### DECISION BY AAR

- The said lease agreement , contains following para:

***22. In case of violation of any condition in the Lease Deed will automatically termed as cancelled and the lessee shall have no right for any compensation or any loss/damage.***

- That the agreement made between the applicant and the lessee for long term of 99 years is for lease with many restrictions and has right to further sell/convey/transfer to the unit holder(s)/occupant(s) along with sub-lease/ assignment of undivided leasehold rights in the land for residue period of lease only
- The lessee cannot mortgage or transfer or sublet the premises or apportion there or without the permission of AUDA

## M/s JINMAGAL CORPORATION [2021-1-TMI -549] (GUJARAT AAR)

### DECISION BY AAR

- On purchase of land, there is no requirement of renewal or extension of the sale period. ....no payment of any type of salami or annual lease premium.
- Purchaser have an absolute right of possession on land.
- Thus, his activity i.e. lease of plot and payment of one time lease premium /salami and annual premium paid by the applicant for lease of commercial plot/land is a 'supply' and covered under Section 7(1) of CGST Act, 2017,
- The upfront concession fee received against the lease paid for the industrial units or the developers in any industrial or financial business area for more than 30 years is exempted from the payment of GST under the provisions of entry No. 41 of Notification No. 12/2017-CTR
- 'industrial or financial business area' not defined in the notification. Reference can be made the definition of 'industrial or financial business area' from Gujarat Industrial Development Act, 1962 .....Industrial Area' means - "any area declared to be an industrial area by the SG by Notification in the Official Gazette, which is to be developed and where industries are to be accommodated"



## M/s JINMAGAL CORPORATION [2021-1-TMI -549] (GUJARAT AAR)

### **DECISION BY AAR**

- In the instant case, no such notification declaring the area taken on lease by applicant, is industrial/ financial area on record. Therefore, area cannot be treated as industrial or financial business area. Thus, benefit under notification 12/2017-CTR cannot be extended.
- The Hon'ble Bombay HC in case of Builders association of Navi Mumbai while deciding leviability of GST on long term lease granted by CIDCO for 60 years, held that same is supply of service and liable for payment of GST.
- Leasing of private property are classifiable under HSN 997212 under heading "Rental or leasing services involving own or leased non-residential property attracting 18% GST.
- In the instant case, one time premium paid to AUDA is leviable to GST & payable under RCM in view of notification 13/2017-CTR amended by notification 5/2019 CTR.

**ELIGIBILITY OF ITC ON GST  
PAID ON ONE TIME PREMIUM,  
ANNUAL LEASE CHARGES AND  
MAINTENANCE CHARGES TO  
LESSOR**

## **M/s DIACEL CHIRAL TECHNOLOGIES (INDIA) PVT LTD [2020-8-TMI -103] (TELANGANA AAR)**

### **FACTS OF CASE**

- The Applicant are *engaged in providing Pharmaceutical Research & Development services. These services involve preparative separation and analysis of pharmaceutical compounds which are commonly referred to as 'chromatography services'.*
- *They acquired land on lease from M/s. IKP Knowledge Park (lessor) for a period of 33 years, to cater to the growing demand for services*
- *Paid one-time lease premium at the beginning of the lease and also annual lease rentals & maintenance charges at the end of every year to the lessor*
- The lessor collected GST on the one time premium amount, annual lease charges and maintenance charges at the applicable rates.

### **QUESTIONS BEFORE AUTHORITY:**

- Whether the applicant is eligible to avail ITC of GST paid on payment of “lease premium charges (one-time charges)” , annual lease rentals”(recurring) , “maintenance charges” towards land lease for business purpose?

## M/s DIACEL CHIRAL TECHNOLOGIES (INDIA) PVT LTD [2020-8-TMI -103] (TELANGANA AAR)

### ARGUMENTS BY APPLICANT :

- The land so acquired on lease will be used by them in rendering the Chromatography services from the lab to be constructed on the land. Thus, they are a registered person and have taken input tax on services which are used in the course of his business .
- The definition of 'input services' clearly highlights the dichotomy of multifarious functions any business organization is required to undertake while pursuing their objectives .
- Therefore, the lease charges paid for land has been used in course of business and eligible for input credit under section 16(1) of the Act.
- GST is basically value added tax, it is a consumption tax which ultimately must be borne by the consumer. It is operative through credit mechanism wherein the input relief is to neutralize cascading effect of tax
- Hon'ble Bombay HC in ***Builders Association of Navi Mumbai case held*** that the activity of leasing of land is liable to GST as supply of service.
- Also, same doesn't get covered in the ineligible list of input services u/s 17(5) and accordingly, they are eligible to avail the GST levied by the lessor on supply of land on lease

## M/s DIACEL CHIRAL TECHNOLOGIES (INDIA) PVT LTD [2020-8-TMI -103] (TELANGANA AAR)

### DECISION BY AAR :

- Sec.17(5) starts with the phrase ‘notwithstanding anything contained in Section 16(1)’ which facilitates Sec. 17(5) to override the provisions of Sec. 16(1). Thus the pervasive domain of goods/services provided for under Sec. 16(1) was abridged by Sec 17(5) by specifying the situations wherein ITC in respect of certain goods/services has been restricted.
- Clause (d) of section 17(5) provides *that ITC is barred in r/o goods or services used for construction of immovable property (other than plant or machinery) including when such goods or services are used in the course or furtherance of business*
  - “Immovable property” as defined under General clauses Act.....*shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth*
  - The land acquired on lease by applicant for the purpose of construction of a building where their own laboratory would be accommodated. This is self evident from clause 5 of the agreement.
  - The ‘building’ constructed by the applicant unquestionably falls within the ambit of ‘immovable property’ Therefore ITC on all services i.e. one time premium, annual lease payment and maintenance charges **is barred under the provisions of clause (d) of Sec. 17(5).**

**M/s DIACEL CHIRAL TECHNOLOGIES (INDIA) PVT LTD [2020-8-TMI -103]  
(TELANGANA AAR)**

1. The lease was only for land and not for building. In that scenario can one say lease services was not used for construction of immovable property and therefore shall not falling u/s. 17 (5) (d)
  
1. In case of assignment of lease for land and sale of building thereon to other lessee after taking permission from lessor .....Whether the consideration / premium is liable for GST ??
  
2. If yes, whether the buyer/ lessee is entitled to ITC considering the fact that he is not going to construct any building thereon, whether restriction of 17(5)(d) will be applicable ??

**APPLICABILITY OF GST ON  
ASSIGNMENT OF LEASEHOLD  
RIGHTS AND ELIGIBLE OF ITC ON  
GST PAID ON TRANSFER FEES**

## M/s ENFIELDS APPARELS LTD [2020-TIOL -214] (WEST BENGAL AAR)

### Facts of Case

- The applicant was declared as corporate debtor by NCLT & Shri Dutta was appointed as the Liquidator to start the process of liquidating .
- One of the assets under liquidation is the leasehold factory unit along with car parking space (hereinafter the Demised Premises)
- The West Bengal Industrial Development Corporation Ltd (sub-lessor) granted the applicant possession of the Demised Premises for 99 years under a registered deed of sub-lease on payment of an up-front premium of Rs 5.07 crore and monthly lease rental of Rs 21,000/-. According to lease deed the applicant is entitled to assign to another person the unexpired residual period of the sub-lease after taking written approval of the Sub-lessor and on payment of transfer fee.

### Questions before authority:

- Whether GST is payable on the consideration receivable on such assignment. If so, what should be the SAC and the rate applicable?
- Whether ITC can be claimed for the GST paid on the transfer fee.



## M/s ENFIELDS APPARELS LTD [2020-TIOL -214] (WEST BENGAL AAR)

### **ARGUMENTS BY APPLICANT**

- Leasehold right to immovable property is an immovable property. Section 3 (26) of the General Clauses Act, 1897, which defines immovable property to include land, benefits to arise out of the land
- Even the transfer of development rights(TDR) in the land through joint development is treated as the sale of land....(relying on Chheda Housing decision).
- Therefore, it can be concluded that lease simplicitor alone should attract levy of GST. Assignment of leasehold rights on land, on the other hand, is nothing but the transfer of immovable property akin to the sale of land
- In the event it is held that the assignment of leasehold right is a supply of taxable service, then ITC of GST paid on transfer fee i.e. the consideration payable to the Sub-lessor for rendering service in the course or furtherance of business, shall be eligible.

## M/s ENFIELDS APPARELS LTD [2020-TIOL -214] (WEST BENGAL AAR)

### Decision by AAR

- Applicability of the General Clauses Act, 1897 is limited to areas where no express provisions are made under the CGST Act.
- Benefits arising from land in the forms specified i.e. any lease, tenancy, easement, license to occupy the land, letting out of a building, in paragraph 2 of Schedule II are not to be treated as transactions in immovable property but as the supply of service for the purpose of the GST Act.
- The Demised premises cannot be used for residential or any other unlawful activity other than stated in agreement or prior permission of sub-lessor. Therefore applicant has conditional possession of premises.
- The applicant, apart from the conditional possession of the Demised Premises, enjoys no title or ownership, which is central to sale of any immovable property within the meaning of section 54 of the Transfer of Property Act, 1882. The applicant can, therefore, transfer to the assignee only its right to receive the service of the lease for the unexpired period after obtaining prior approval of the Sub-lessor on payment of the transfer fee.

## M/s ENFIELDS APPARELS LTD [2020-TIOL -214] (WEST BENGAL AAR)

### Decision by AAR

- The applicant's reference to the case laws where joint development right is treated as the sale of an immovable property needs to be distinguished
- The activity of assignment is in the nature of agreeing to transfer one's leasehold rights. It does not amount to further sub-leasing, as the applicant's rights as per the Deed stands extinguished. Neither does it create fresh benefit from land other than the leasehold right is a service classifiable under 'Other miscellaneous service' (SAC 999792) and taxable @ 18% under Sr. No. 35 of Notification No. **11/2017-CTR.**
- The transfer fee charged by the WBIDC is in the nature of a consideration for tolerating an act that the applicant is otherwise refrained from doing in terms of clause 12.28 of the Deed.....It is service in the course or furtherance of business, more specifically because business includes supply or acquisition of goods or services in connection with the closure of a business in terms of section 2 (17) (d) of the GST Act. **Therefore, ITC of GST paid on transfer fees is eligible.**

**TAXABILITY OF OIDAR SERVICES  
....."MINIMUM HUMAN  
INTERVENTION"**

## M/s NCS PEARSON INC [2020-11-TMI -956] (KARNATAKA AAAR)

### Facts of Case

- M/s. NCS Pearson Inc, USA here is “the Respondent” & has a business division ‘Pearson VUE’ engaged in the provision of computer-based test administration solutions to its clients (test sponsors) like educational institutes, professional licensing organizations, etc.
- M/S NCS Person Inc is registered with Bangalore West Commissionerate as a supplier of OIDAR services
- Test-takers are typically individual candidates across the world including candidates from India, who are not registered under GST. 3 types of tests are offered by respondent :
  - Type 1 Test:** *Self-administered by the candidates and wholly digital in nature. contains only MCQ’s . The entire test process ranging from creating a personal profile selecting the desired test, remitting payment, taking the test, scoring and viewing results is electronic without any human intervention.*
  - Type 2 Test:** *Similar to type 1 test regarding the creating personal profile, schedule an appointment for the test and remitting payment on the Pearson VUE website, however, with the major difference being that on the day of the test, the candidate is required to go to the test centre, where an administrator will verify the identity of the candidate, validate test registration and appointment of the candidate. After that the test administrator will assign a computer to the candidate to take a test. Scores are provided by a computer-based algorithm on the electronic software.*

## M/s NCS PEARSON INC [2020-11-TMI -956] (KARNATAKA AAAR)

### Facts of Case

**Type 3 Test:** *These tests contain a mixture of MCQ's & analytical writing assessment section i.e. essay-based questions. Test is taken at test centres in India at a computer workstation which is physically administered and supervised by an invigilator (proctor) as described in the type 2 test above. The candidates may create a profile, schedule the appointment and remit payment using a registration centre (call centre). The test is completed in parts viz. at the end of the exam, the test-taker is able to see the final score for multiple choice questions and an indicative score (which is not final) for essay-based questions marked by the computer-based algorithm. However, the essay-based questions are then sent to a human-evaluator in the USA for assessment and final scoring. In addition to this, the essay is scored by an automated essay scorer. In case the difference in score for a single essay question between the electronic computed based algorithms scoring vis-a-vis human scoring is more than 1 point, then the essay-based questions are again sent to an expert evaluator for assessment and scoring. Once the entire aforesaid scoring activity is completed, the test-taker is then e-mailed a URL to access their official score.*

## M/s NCS PEARSON INC [2020-11-TMI -956] (KARNATAKA AAAR)

### Facts of Case

- Respondent Company has entered into contractual arrangements with independent third-party service providers in India including a subsidiary company of the Respondent to act as Pearson VUE Authorized Test Centres to provide secure test centre services to the Respondent Company for delivery of the tests including verification of candidates identity, invigilation etc.
- Respondent had filed application for Advance ruling in respect of following questions :
  - Whether Type 2 & Type 3 test classifies as OIDAR services?
  - If not, then whether they are liable to pay IGST on the supply of said services to non-taxable online recipients in India?
- The AAR arrived at the conclusion that the Type 2 test classifies as OIDAR service whereas the Type 3 test does not qualify as OIDAR services. Further in view of exemption under entry 10 of notification 9/2017-IG there will not be any liability on the supplier located outside India and hence the entire transaction is exempted both in the hands of the supplier and also the recipient.
- The jurisdictional CGST officer being aggrieved by the ruling passed with regard to Type 3 test, filed the appeal.

## M/s NCS PEARSON INC [2020-11-TMI -956] (KARNATAKA AAAR)

### QUESTIONS BEFORE APPELLATE AUTHORITY

- Whether the classification of the Type-3 test administrative solution offered by the Respondent Company to its clients in India, is an OIDAR service?

### ARGUMENTS BY DEPARTMENT (APPELLANT)

- Type 3 test is a mixture of MCQ) and essay-based questions.
- That MCQ's and its evaluation falls under OIDAR service as decided by the AAR in Type 2 test.
- The essay-based questions are also evaluated by the algorithm without any human intervention and the tentative marks are provided to the candidate immediately similar to Type-1 and Type-2 test. The only issue is that the evaluation done by the algorithm is validated through a human evaluator and only in case of difference of more than 1 point, a re-evaluation is done by a different human evaluator. That the above fact shows that that there is no human intervention in the basic evaluation done by the algorithm and it is only for the quality testing of the outcome that the human evaluation is brought into the picture
- That “minimum human intervention” can be broadly classified under 2 categories as detailed below (as per European Commission VAT Committee Guidelines) i.e. Passive human intervention & Active human intervention.



## M/s NCS PEARSON INC [2020-11-TMI -956] (KARNATAKA AAAR)

### **Arguments by Department (appellant)**

- That the human intervention case can be considered analogous to real time testing of a software, where the human intervention is required for optimum functioning of a software, supporting any search engine or any online database etc.
- Relied on the opinion of the VAT Committee of the European Commission with reference to the education services where an online course is not merely automated (i.e. text based) but involves lectures or seminars delivered by tutors and streamed in real-time, such that the internet is merely a means of transmission, these features are not sufficient to constitute more than minimal human intervention. The level of human intervention should be regarded as more than minimal only if the students have the option to ask questions to the tutor, even if the option is not exercised.
- Applying the above analogy to the present case in the Type-3 Test, human intervention is involved merely for ensuring accuracy of the algorithm and there is no direct submission of question paper from the test taker to the human evaluator and hence, the Type 3 test fulfils all essential requirements to be classified as an OIDAR service.

## M/s NCS PEARSON INC [2020-11-TMI -956] (KARNATAKA AAAR)

### Arguments by Assessee (Respondent)

- In the Type-3 test, only an indicative score card is given immediately on completion of the test but the final score card is given after 20 days i.e. after the essays are evaluated both by the Automated Essay Scoring (AES) system as well as a human scorer.
- That once the scorers have completed scoring the essay, the final score is an average of the human score and the final score when the difference between the AES score and the human score is within 1 point, the essay is routed to a human scorer for evaluation and the score given by the human scorer will be the final score. This is what makes the human intervention substantial.
- Human evaluation is not for the purpose of quality checking or improvement of the algorithm, but it is in fact a parallel evaluation which is done along with the algorithm and plays a critical role in the evaluation process directly intervening where they can make a difference in the scores achieved by the test takers
- Once the scorers (human as well as the AES) have completed scoring the essay, then the final score is an average of the human score and the AES score if the scores are within one-point difference.

## M/s NCS PEARSON INC [2020-11-TMI -956] (KARNATAKA AAAR)

### Arguments by Assessee (Respondent)

- In cases where the essay cannot be evaluated by the AES under the standard evaluation process, it is always routed to a second human scorer. Further, if the candidate believes that his/her essay score is not accurate, they have the option to request for their essay to be rescored using the Essay Rescore Request Form. When this option is exercised, then the essay goes directly to a human scorer to evaluate the essay response and provide a score. The re-score essays do not go through the AES system. Once the human scorer completes the review, a process confirms if the scores from the first round are in line with the re-score. If the scores are more than one-point difference from each round of scoring, then an expert human scorer will verify and provide a final score

### DECISION BY AAAR

- To qualify as OIDAR:
  - a) The service is to be delivered over the internet or an electronic network*
  - b) The supply of the service is essentially automated*
  - c) The service involves minimal human intervention, and*
  - d) The delivery of the service is impossible in the absence of information technology*

## M/s NCS PEARSON INC [2020-11-TMI -956] (KARNATAKA AAAR)

- The respondent's activity is primarily to conduct computer-based tests for their clients. It is the responsibility of the Respondent to provide the software to enable the candidates to take the online Type-3 test; appoint or establish test centres , provide software for scoring the tests and deliver the test results electronically to the candidate etc. Thus, the Type-3 test is conducted over the internet using a computer system.
- The process of the test registration, conduct of the test and communication of the result are automated and such a test will not be possible in the absence of information technology. Thus, three out of the four requirements of an OIDAR service are fulfilled
- The bone of contention is with regard to the fourth ingredient which is that the service should have minimum human intervention.
- There is no dispute on the fact that there is an element of human intervention involved in the process of scoring the essay responses in the Type-3 test. What needs to be decided is whether the extent of human intervention is 'minimum' or not. Since there are no guidelines in Indian laws regarding the concept of minimum human intervention in electronically provided services, we refer to the European Commission VAT Committee Working Paper No 896 wherein the notion of 'minimal human intervention' was discussed in the context of determining whether or not a service can be said to fall within the definition of electronically supplied services.

## M/s NCS PEARSON INC [2020-11-TMI -956] (KARNATAKA AAAR)

### **DECISION BY AAAR**

- The European VAT Committee had agreed that for the assessment of the notion of 'minimal human intervention', it is the involvement on the side of the supplier which is relevant and not that on the side of the customer. It is seen that scoring by a human scorer is just one of the processes involved in a computer-based test.
- One of the major benefits of a computer based test is the facility of obtaining immediate grading. While grading of multiple-choice questions is done instantaneously using an algorithm, grading of essays involves the use of AES which is a specialized computer program to assign grades to essays.
- The Respondent has an entity in the United States which has developed an AES for reliable scoring of essay responses in a computer-based test. How does one know that the automatic scoring system works well enough to give scores consistent with consensus scores from human scorers? Any method of assessment must be judged on validity, fairness and reliability. An AES would be considered valid if it measures the trait that it purports to measure and it would be considered reliable if its outcome is repeatable.

## M/s NCS PEARSON INC [2020-11-TMI -956] (KARNATAKA AAAR)

### DECISION BY AAAR

- A machine-human score correlation serves as a good indicator whether the AES is returning a stable consensus score of the essay. Therefore, the role of the human scorer is in effect a means to ensure the reliability of the AES program. We do not discredit the importance of a human scorer in the process of assessment of essay responses. However, the focus here is on a computer-based test where the intent is to also assess the performance of the candidate using an automated system.
- That the involvement of the human element in the assessment of essay responses is well within the realm of 'minimum human intervention'. Further, even from the perspective of the candidate, the human involvement is minimum in the entire process of the Type-3 computer-based test starting from the manner of registering for the test, the actual test-process and the outcome of the test, as all stages are automated.
- When the Type-3 computer-based test is viewed as a whole, the scoring done by the human scorer is to be regarded as being within the realm of minimum human intervention.
- It is held that service provided for the Type-3 test is classifiable as an OIDAR service.

WITH KNOWLEDGE..... WE KNOW THE WORDS,  
BUT WITH EXPERIENCE..... WE KNOW THE MEANING



**CA. Rajiv Luthia**

**R. J. LUTHIA & ASSOCIATES**

**CHARTERED ACCOUNTANTS**

610/611, Parmeshwari Centre, Above FEDEX, Dalmia Estate,  
Off. LBS Marg, Mulund (West), Mumbai-400 080.

Tel : 2564 1553/2569 4989 Mobile : 9821143524

Email: [rajiv@rjl.co.in](mailto:rajiv@rjl.co.in)