

Amnesty Scheme,2023

The Government of Maharashtra has announced waiver scheme (Amnesty,2023) under MVAT and Allied Laws and for the said purpose Maharashtra Act. No. XVIII of 2023 dated 6.4.2023 is enacted, which is effective from 1.5.2023.

A further notification dated 28.4.2023 is also passed under above Act, so as to delegate the power and duties under the said Act.

Circular

The Commissioner of State Tax has issued Circular no. 10T of 2023 dated 3.5.2023 by which clarifications regarding generation and quoting of Document Reference Number (RFN) on communication/document pertaining to search and inspection issued by the officers of the State Goods and Services Tax Department are given.

1. Case: M/s AIRPORT AUTHORITY OF INDIA [2023-4-TMI -959] [RAJASTHAN AAR]

Facts of the Case:

1. The Applicant "Airports Authority of India" (the 'AAI') is the authority created under the Airports Authority of India Act,1994 (the 'AAI Act'). AAI was established to provide for the better administration and cohesive management of the airports. AAI has been created for the purposes of establishing or assisting in the establishment of the airports and for matters connected thereto.
2. In pursuance of Section 12A of AAI Act, applicant invited bids for undertaking the operation, management and development of certain airports of the AAI on a public private partnership basis to bring efficiency in service delivery, expertise, enterprise and professionalism and to harness necessary investment.
3. After all the approvals, the applicant accepted the bid of Adani Enterprise Limited and issued letter of Award dated 01.09.2020 which required Adani Enterprise Limited to execute the concession agreement through a special purpose vehicle for its Jaipur International Airport located at the Site, which includes civil, mechanical and electrical works, the Terminal Building, Cargo Facilities, Runway and all Project Assets necessary for and associated with operation and expansion of the Airport.
4. Adani Enterprise Limited has promoted and incorporated a special purpose vehicle as Adani Jaipur International Airport Limited (herein after referred "AJIAL"). Concession agreement dated 19th January,2021 was entered between AAI & AJIAL for Operations, Management and Development of Jaipur Airport through Public Private Partnership subject to the terms of the agreement. Accordingly, subject to the provisions of the Agreement and applicable laws the applicant has granted Concessionaire the exclusive right, lease and authority to operate, manage and develop the Airport for a period of 50 years
5. The terms project and projects assets is defined in clause 1.1 of Article 1 of the concession agreement.

"Project" means the operations, management and development of the Airport in accordance with the provisions of this agreement, and includes all works, services and equipment relating to or in respect of the scope of the project.

"Project Assets" means all physical and other assets relating to or forming part of the Site including:

- (a) rights over the Site in the form of lease, right of Way or otherwise;
- (b) the Aeronautical Assets and the Non-Aeronautical Assets;
- (c) tangible assets such as civil works and equipment including foundations, drainage works, electrical systems, communication systems and administrative offices;
- (d) Project Facilities situated on the Site;
- (e) buildings and immovable fixtures or structures forming part of City Side Development;
- (f) all rights of the Concessionaire under the Project Agreements;
- (g) financial assets, such as receivables, security deposits, all negotiable instruments etc;
- (h) insurance proceeds; and

(i) Applicable Permits and authorizations relating to or in respect of the Airport;

In nutshell the whole airport operations which were run by the applicant would be given to the Concessionaire for the period of 50 years for agreed consideration.

6. AJIAL agrees to pay the following :

- a. Rs. 2,53,00,00,000/- towards Estimated Deemed Initial Regulatory Asset Base (RAB) i.e. estimated depreciated value of Investments made by the Applicant in the Aeronautical Assets
- b. Rs. 2,56,00,000/- towards Estimated Initial Non-Aeronautical Investments i.e. estimated depreciated value of investments made by the applicant towards development of the Non-Aeronautical Assets
- c. Actual amount incurred by AAI in respect of contracts relating to Work-in-Progress as on the Commercial Operation Date (COD)
- d. Reimbursement of salaries incl. of other cost paid to employees of AAI having designation of Asst.General Manager and below during the Joint Management Period and deemed deputation period
- e. Monthly concession Fee during the concession period shall be calculated asunder:
(Per Passenger Fee for international Passengers * International Passenger Throughput for that month) + (Per Passenger Fee for Domestic Passengers * Domestic Passenger Throughput for that month)
- f. Monthly Concession Fee as consideration for granting lease right of land, building and the immovable assets,

Questions before AAR:

1. Whether the transfer of business be treated as Supply ?
2. Whether the transfer of business is treated as supply as going concern and covered in clause 4 of schedule II of CGST Act ?
3. Whether the transfer of business is covered under the Entry No. 2 of the exemption notification No 12/2017 CTR?
4. If the answer is negative, then whether GST is leviable on the transfer of Existing assets(RAB ,Aeronautical Assets, non-aeronautical assets and Capital work in progress?)
5. Whether the aforesaid transfer of asset be treated as services and the classification for the same?
6. Whether the concession fees paid by M/s. AJIAL to M/s. AAI of India be treated as consideration for transfer of business?
7. Whether GST is applicable on Monthly/Annual concession fees? If Yes, What rate?
8. Whether GST is leviable on the invoice raised by the Applicant for reimbursement of the salary/ staff cost? If yes, at what rate?
9. Whether GST is applicable on the reimbursement claimed of Municipal tax, Property Tax and Water Charges by the Applicant? If yes, at what rate?
10. Whether any reversal is required in accordance with section 17 (2)/ (3) of CGST Act?

Arguments by Applicant :

1. The underlying transaction business of operation, management and development of the airport which is getting carried out by them will be undertaken by the Concessionaire AJIAL. Thus, in common parlance it can be said that present transaction amount to transfer of business. *As business cannot be said to be movable, transfer of business cannot be said to be a transfer of goods.* As per the definition of services, anything other than goods is called a service. Therefore, the above transaction of transfer of business will be supply of services.
2. Further, the exemption in Sr. No. 2 of the Notification No. 12/2017 – CTR essentially lays down the following conditions viz: Service by way of transfer; *The 'transfer' should be of the going concern; Such transfer must be as a whole or an independent part thereof.*
3. It would be worthwhile to note that whilst the definition of supply includes sale but the exemption notification does not refer to sale of going concern to be exempted. It uses the word 'transfer'. Given that there is no definition of 'transfer', two views are possible. The first view is that it could mean an outright sale. The second view could be that it may not necessarily mean outright sale because if the intention of the legislature was to exempt sale of going concern, it could have used the term sale. However, it has used the word transfer of going concern to be an exempt transaction. In the present case, there is transfer of business of operating, managing and developing of the airport for a period of 50 years. Hence, it can be said that there is temporary transfer of

business. Reliance placed on decision of *Union of India vs Dr. Maqsood Ahmed* [AIR 19 63 Bom 110, 114], wherein, the Court has held that: "the Whether the transfer of business means of a lease, mortgage or sale or in any other mode.

4. Under exemption entry 2 of the Notification No. 12/2017 –CTR, there is no specific mention to cover only permanent transfer. Hence, it can be concluded that even temporary transfers are covered in the said entry.
5. Secondly, term going Concern is not defined under CGST Act. However, going concern is an accounting principle which indicates that business would continue, and management is not intending to liquidate or stop business for near future.
6. Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business. Such transfer of business as a whole will comprise comprehensive transfer of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc.
7. In the present case, the above test is satisfied because, even after transfer, concessionaire will be in position to manage, operate airport and undertake the functions as were undertaken by applicant. Moreover, there will not be any interruption in the operations of the airport on account of the underlying transaction. Hence, it can be said that there is a going concern.
8. The third question arises is whether the transfer is a whole or an independent part thereof. In the present case the applicant is not transferring the entire business, however the applicant is transferring its independent unit i.e. Jaipur International airport. The Jaipur airport of the applicant is the independent part of the applicant. However, rights to operate manage and maintain the airport will be transferred. that the Airport is capable of operating as an independent unit. The operation of the airport can generate revenue. Hence, it can be said that the airport is an independent part of a going concern of the applicant.
9. The AAI and concessionaire had taken following steps to ensure business continuity. As per the concessionaire agreement, apart from a lump sum consideration, monthly concession charges would also be paid by the Company to AAI. Thus it can be regarded that the entire arrangement as one and covered within the meaning of transfer of going concern and thus exempted under entry 2 of notification 12/2017.
10. Monthly/ annual concession fees paid by the concessionaire to them is for granting lease right of land, building and the immovable assets for 50 years which is long term lease. Applicant is of the view 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
11. *The applicant submits that it receives reimbursement of property tax, water tax, electricity etc payable from the concessionaire. The applicant submits that the said reimbursements are in nature of pure agents and thus cannot be treated as supply under section 7 of the CGST Act.*
12. Further, the issue of reimbursement of staff cost has arisen in pursuance to the terms of subject contract wherein the 'supply of transfer of going concern service' is exempt from GST. The contract is for 'transfer of going concern service', therefore the consideration/reimbursement of cost is exempt from GST.

Decision of AAR :

1. We observe Business' may be covered under the umbrella of the definition of Service, in accordance to Section 2(102) CGST Act and the activity of transfer of business is in the nature of supply.
2. We observe that for 'transfer of business of going concern, any agreement must have some contents –
 - (a) *business should be continued for a foreseeable period,*
 - (b) *There is no intention to liquidate the business and there should be continuity of the same business by the transferee as was being carried on by the transferor,*
 - (c) *Business activity constituted by transfer of assets and liabilities should have capability to run independently.*
3. We hold that transfer of a going concern means transfer of a running business which is capable of being carried on by the transferee as an independent business in continuity without any hindrance for a foreseeable period. Such transfer of business will comprise transfer of assets for running the business. Such transfer as going concern may involve transfer of employees as requisite to carry on the business without interruption. In effect, it implies that the business will continue in the new hands with regularity and a nature of permanency.

4. We observe after going through the concession letter dated 16.01.2021, that M/s AAI has transferred the business for operation, management and development of the Jaipur International Airport, Jaipur to SPV (AJIA) for a period of 50 years which establishes that there is continuance of business for the foreseeable future. We also find many provisions in the agreement in respect of business continuity.
5. That the SPV shall assume control of all Aeronautical Assets, Non Aeronautical assets and Terminal Building on the commercial operation date. We find that as per Article 16.1.1 of the agreement, all revenues, receipts, expenditure and other financial transactions for and in respect of the Airport shall be deemed to be transferred from the AAI to SPV on COD and all rights, obligations and liabilities in respect thereof shall vest exclusively in the SPV until the transfer date.
6. Furthermore, we are of the opinion that it is not essential to transfer all assets and liabilities against a transaction to qualify for a 'transfer of business. That is to say that even if some assets are retained by the AAI, and the SPV after such takeover carries out subject business activities without any obstruction then it shall qualify to be a transfer of a business.
7. We would like to discuss that if liabilities have not been transferred, even if it compromises the definition of outgoing concern. We observe that it is not necessary for an entity to shift its whole of assets or liability. Here in this case AAI have vast assets but they have transferred Jaipur International Airport through concessional agreement for the sustainability and continuity of business after transfer of business to SPV. Thus we can reach on conclusion that if any enterprise is having the intention to continue the business even if all assets or liability are not transferred and if only those assets which are essential to continue the business are transferred as an whole or independent part than, it may be treated as going concern.
8. **Thus, we are of the view that the business arrangement between AAI and SPV vide Concession Agreement dated 16.01.2021 is squarely covered under transfer of going concern.**
9. The other part of question is whether the transfer of business is covered in clause 4 of schedule II of CGST Act i.e. transfer of business assets. Schedule II (4) CGST Act stipulates whether the transactions with respect to 'Transfer of Business Assets' to be treated as supply of Goods or supply of services. Having gone through the subject Contract, we find the subject business arrangement is 'transfer of going concern'. As such, we find no merit to vivisection the subject Contract and examine the treatment of aeronautical assets/ non aeronautical assets/ other business assets in the Contract entered between AAI and SPV.
10. We observe that Consideration for Services by way of transfer of a going concern may be as per the terms and conditions of the Contract and there is no restriction on consideration being upfront/ one time/in installments. **Concession fees is payable by SPV to AAI during the concession period, calculated on a formula based on passenger footfall. The same is part of consideration for transfer of business assets.**
11. The monthly/annual concession fees is also part of consideration for Services by way of transfer of a going concern and exempted from GST.
12. It is clarified that the Concessionaire shall not be liable to bear any costs in respect of the Senior Personnel, rather than it shall on the expiry of such 03 month period shall be transferred out of the airport and redeployed by the Authority. Hence in this regard there is borne entirely by the Authority. Hence in this regard there is no case of GST on payment of salary.
13. But, that the Concessionaire shall bear the Select Employee cost of the Joint Management period and Deemed Deputation period. Here, a perusal of conditions clearly stipulates that the Select Employees, who are appointed and deployed by the AAI, are not part of the transfer of business as a whole till the time they are absorbed in and by the recipient SPV because their absorption in the new entity is conditional to acceptance of offers of employment by the employees of AAI. As such, the emoluments paid to employees of AAI till their acceptance of employment offers, is not governed by the tenets of transfer of business as a going concern. We observe that points of agreements that payment of salary or emoluments of staff is onus of applicant i.e. AAI.
14. The SPV (AJIAL) from paying emoluments to the manpower which is engaged in providing their services in operation of the airport and this manpower can demand or will receive their emoluments from the AAI only. Further, AAI will receive interest on delayed payment of reimbursement. Thus we observe in light of condition the emoluments received by the AAI form a part of services by transfer of outgoing concern, it seems the supply of manpower services by AAI to the SPV.
15. Thus there is no case for exemption on the reimbursement of emolument of employees to the AAI as services of manpower supply is provided by one distinct entity to another distinct entity and hence taxable @ 18%.

16. We observe that the reimbursement of municipal tax, property tax and water charges has occurred in light of the terms of the Concession Agreement and falls under the 'Supply of Transfer of Going Concern Service', which is exempt from GST.
17. Further, as per sec. 17 read with rule 42 of CGST Rules, 2017, in case any registered person is having any exempted supplies, then ITC pertaining to such exempted supplies shall be reversed proportionately.
18. In view of the foregoing, we rule as follows: -
 - a. The Subject Supply of Transfer of Going Concern service is Supply u/s 7 CGST Act.
 - b. The subject Supply is 'Transfer of Going Concern Service' and the same is not covered in clause 4 of schedule II of CGST Act
 - c. The subject Supply is covered at Entry No. 2 of Notification 12/2017-CT(R).
 - d. Concession Fee is a part of the Consideration paid by SPV to AAI in subject matter
 - e. Monthly/Annual concession fees are exempt from GST vide Entry No. 2 of Notification 12/2017-CT(R)
 - f. Reimbursement of the salary/ staff cost is liable to GST @ 18%
 - g. Reimbursement claimed of Municipal tax, Property Tax and Water Charges is not liable to GST.
 - h. Proportionate reversal of ITC is required in accordance with section 17 (2)/ (3) of CGST Act

2. Case: M/s EDEN REAL ESTATES PVT LTD [2023-5-TMI-748] (WEST BENGAL AAAR)

Facts of the Case:

1. The appellant is engaged in the business of construction of residential apartments intended for sale to buyers and one such project is named "EDEN CITY MAHESHTALA" which has multiple towers in different stages of completion. The said project was commenced prior to 01.04.2019 and the Appellant exercised option to remain in the old tax rate prior to 01.04.2019.
2. That the prospective buyers are given an option to acquire car parking space along with the apartment being booked by them and accordingly the buyers who opt to avail the car parking facility are charged a certain sum towards the car parking space and the same forms part of the total consideration charged by the Appellant from the prospective buyer.
3. The appellant had sought ruling before West Bengal advance ruling authority regarding taxability on sale /right to use of car/two wheeler parking space. WBAAR observed that as parking facility was an optional facility the services of right to use of parking space is not a naturally bundled service along with the construction services of the apartment and should not be construed as a composite supply. According to the observation of the WBAAR the rate of GST applicable for such supply of services of right to use of open parking space will be 18% (CGST 9%+WBGST 9%) without any abatement on value of land. It also ruled that in those cases where sale of apartments along with parking spaces are executed after receipt of completion certificate, then as they are not bundled service, tax will be payable only on the consideration for services of right to use of parking spaces.
4. Being unsatisfied with above ruling, present appeal was preferred.

Questions before AAAR:

1. Whether the amounts charged by the applicant for right to use of car/two wheeler vehicle parking space along with the sale of under constructed apartments to its prospective buyers is to be treated as a composite supply of construction of residential apartment?
2. If not, then the rate of tax applicable on such charges collected from the prospective customers?
3. If such apartments are sold after receipt of completion certificate from the competent authority, then whether the amounts collected for right to use of car parking space will also be treated as anon GST supply under Schedule III ?
4. Whether the taxability would change if such charges for right to use of car parking space is collected after the sale of the apartment has been done i.e. the customer had not opted for the car parking space at the time of purchase of the under constructed unit. But had sought for the same after the unit was handed over to customer after receipt of the completion certificate ?

Arguments by Appellant :

1. The WBAAR failed to pass a speaking order and merely referred to the earlier order of the Appellate Authority without analyzing the facts of the instant case and ignored the submissions made by the Applicant

2. The WBAAR has failed to realize the aspect that the car parking space cannot be given to any person who does not possess/opt for a residential unit inside the project area and stamp duty is paid on the entire consideration charged by the Applicant towards the unit price of the apartment and car parking space at the time of conveyance of the said property.
3. The project has multiple towers in different stages of completion with both covered and open car parking facilities. The prospective buyers can opt for car parking facility at the time of booking apartments or at a later date. This option is open only to a prospective buyer of apartment or an existing apartment owner.
4. The Appellant is not treating open and covered parking spaces in the same manner. In case of open parking space the consideration received from customer is treated as consideration for **services rendered for right to use of such parking space**.
5. That this service of right to use of parking space along with the construction services of apartment constitutes composite supply of services to the customer where the main supply is that of construction services for the apartment.
6. The primary objective of a customer is to buy an apartment in such residential project which also offer some added benefits like parking facility, landscaped gardens, community and recreational centre, swimming pool, etc. As the parking space came with the apartment they were naturally bundled.
7. Further argued that these open parking spaces have been shown in the sanctioned plan of the project and at the time of registering the deed of conveyance appropriate stamp duty is paid on the entire consideration received from this right to use of parking space.

Decision of AAAR :

1. It transpires from plain reading of the above provisions of RERA that though a sanctioned plan requires inclusion of parking layout, an uncovered parking space such as open parking area is not included in the definition of "garage" but falls within the meaning of "common area".
2. Now the "common area" belongs to all apartment owners jointly or the owners' association when formed and no portion can be sold/transferred/leased out to any person by the promoter.
3. In the instant case the sanctioned plan may have open parking spaces but the Appellant has no right to transfer ownership or lease out or allow right to use of the said spaces to allottees.
4. So it is clear that the consideration collected from allottees for right to use of open parking spaces will not form a part of value of composite supply as prayed for by the Appellant. The amount charged by the appellant for right to use of car/two wheeler vehicle parking space, though not permissible as per RERA, constitutes a separate supply under the GST Act and the appellant is therefore liable to pay tax @ 18% on such supply.
5. Further, the question of one-third abatement of valuation of land for open parking space is not maintainable as the "common area" which includes such open parking space is considered in the valuation of apartment and one-third abatement on supply of construction services is being availed before levy of tax under the GST Act.
6. A customer of a flat may avail car parking facility even after the issuance of completion certificate of the project. A customer may choose to opt or not opt for car parking at the time of purchase/booking of an apartment. Hence, it is evident that sale/right to use car parking service and construction services are separate services which are not dependent on sale and purchase of each other. Therefore, sale/right to use car parking is not naturally bundled with construction services and hence, it cannot be treated as composite supply of construction services.
7. In view of the above discussion WBAAR Ruling No. 19/WBAAR/2022-23 dated 22.12.2022 is confirmed.