THE MAHARASHTRA APPELLATE AUTHORITY FOR ADVANCE RULING FOR GOODS AND SERVICES TAX

(constituted under Section 99 of the Maharashtra Goods and Services Tax Act, 2017)

ORDER NO. MAH/AAAR/SS-RJ/31/2018-19 **Date- 11.04.2019**

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri. RajivJalota, MEMBER

GSTIN Number	27AAACK7310G1ZT
Legal Name of Appellant	Kolte Patil Developers Ltd.
Registered Address	First 201A, City Point, Dhole Patil Road, Pune, Maharashtra – 411 001
Details of appeal	Appeal No. MAH/GST-AAAR-31/2018-19 dated 18.01.2019 against Advance Ruling No. GST-ARA-40/2018-19/B-118 dated 24.09.2018
Jurisdictional Officer	Asstt./Dy. Commr., Division-VI, Koregaon park, CGST, Pune-I Commissionerate

PROCEEDINGS

(under Section 101 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the MGST Act.

The present appeal has been filed under Section 100 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter

referred to as "the CGST Act and MGST Act"] by Kolte Patil Developers Ltd. (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-40/2018-19/B-118 dated 24.09.2018

BRIEF FACTS OF THE CASE

A. Kolte Patil Developers Ltd ('the Appellant') is engaged in the activity of Construction of Residential and Commercial complex.

B. The application for Advance Ruling (AR) dated 19th June 2018 was filed by them with an intent to seek clarification whether the Service Tax/VAT paid earlier can be claimed as credit or allowed as refund to property buyers.

C. The facts in the instant case are that at the time of booking of flat by the customer, the applicable Service Tax and Maharashtra VAT (MVAT) was deposited. Given this, the Service Tax and MVAT burden borne by the individual customer on flat booked in pre-GST regime ranged from 4.50%- 5.50%. However, due to certain reasons, the flats booked by the customer in the pre-GST regime, are cancelled by the customer on or after 1st July 2017 (i.e. after implementation of GST).

D. In pre-GST regime, Developer was entitled to avail service tax credit in case of cancellation flat as per Rule 6(3) of Service Tax Rules, 1944. Hence, the customer who cancelled flat was not required to bear indirect tax cost as the CENVAT credit for the same was available to the Developer.

E. In view of the above, the issue for determination before the Authority for Advance Ruling ('AAR') was :-

a. Whether GST input tax credit of Service Tax and State VAT paid while booking of flat is available to the Developer, if cancelled in GST regime?

b. What will be the methodology to avail Input Tax Credit on the said taxes paid?

F. At the time of preliminary hearing dated 17th July 2017, the legal aspect of the submission were discussed and Advanece Ruling Authorities were of the view that, refund of Service Tax is required to be claimed under Pre-GST regime, hence, the underlying question may not be admissible for Advance Ruling. However, Authorities requested for additional submissions to share the contention as to why the underlying question can be considered for Advance Ruling.

G. Accordingly, additional submissions were submitted on 24th July 2018. Further, hearing in respect of the same was held on 01st August 2018.

H. After going through the cumulative submissions, the Authority passed an Advance Ruling that the instant case is not maintainable as it is not covered under the ambit of section 97 (2) of CGST Act.

Grounds of Appeal

The question/ issue before determination with the Authorities was what is the legal procedure for cancellation of flat which is booked in pre-GST Regime and cancelled in post-GST Regime in two scenarios (i.e. cancelled with some retention amount or without any retention amount.)

1.1 As per para 5 of the ruling given by AAR-

'It has been submitted before us that the cancellation with retention of some amount is being considered as a service by the applicant and GST is being discharged in respect of the same. ***For the reason being so, the applicant has decided not to contest, in the present proceedings, the issue about cancellation with retention of some amount.***

1.2 The AAR had incorrectly mentioned that the Appellant had decided not to contest ruling in case of cancellation with the retention amount.

1.3 The issue under consideration was to determine the legal procedure in case of cancellation of flat booked in pre-GST regime and cancelled in GST regime in two-scenario given below

- Cancellation with retention of certain amount (may be called as cancellation charges) from customer and
- Cancellation without retention of any amount from customer (i.e. total amount refunded to the customer)

1.4 During the hearing dated 19th September 2018 the AAR had asked to submit the clarity whether the question under consideration was also for applicability of GST on retention charges collected from the customer.

1.5 As per the additional submission the primary question for advance ruling waswhether GST input tax credit of Service Tax and State VAT paid while booking of flat wasavailable

to the Developer, if cancelled in GST regime (with and without retention amount) and not the applicability of GST on retention charges collected from the customer.

1.6 Given the aforesaid, the contention of the AAR that, the applicant had decided not to contest the issue about cancellation with retention of some amount is incorrect. Hence, both the question given below amongst which one question wrongly has not been considered by the AAR need to be considered:

- What is the legal procedure in case of cancellation with retention of certain amount (could be referred as cancellation charges)
- What is the legal procedure in case of cancellation without retention of any amount.

The underlaying transaction is well covered under GST law and hence can be considered for determination of GST liability.

1.7 As per para 5 of the of the ruling given by AAR:

'That being so, it would be but obvious an inference that no transaction has taken place in the GST regime. There is no 'supply' under the GST Act.

1.8 It is pertinent to note that, the underlaying transaction can be divided in two-fold given below

Sr. No.	Nature of transaction	Period	Applicability Taxes
1.	Booking of Flat	Pre-GST Regime	Service Tax (4.5%) and VAT (1%)
2.	Cancellation of flat	Post-GST Regime	GST?

1.9 It is to be noted that, the Developer has paid service tax at the rate of 4.50% and MVAT @1%[1] in pre-GST regime. Given this, indirect tax burden on flat booked in pre-GST regime was ranging from 4.50%- 5.50%.

1.10 Rule 6(3) of Service Tax Rules, 1944 states-*'Where an assessee has* ***issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason or where the amount of invoice is***

[1] As per Trade Circular. No. 18T of 2017 dated 31st May 2017 issued by Maharashtra State Authorities

renegotiated due to deficient provision of service, or any terms contained in the contract, the assessee may take credit of such excess service tax paid by him, if the assessee,-

(a) ***has refunded the payment or part thereof, so received for the service provided to the person from whom it was received;*** *or*

(b) has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued '

1.11 Given the aforesaid, if flat was cancelled in pre-GST regime as per the aforesaid rule of Service Tax Rules, 1944 taxpayer allowed to avail credit of such excess service tax paid if an invoice is issued for which service is not provided.

1.12 However, as transaction is cancelled in GST regime the reference of the transitional provision of GST law can be taken to determine the availability of deduction for taxes which were already paid under GST law.

1.13 Given this, the contention of the authority that, reference to GST law cannot be taken as no transaction has taken place in GST regime is incorrect.

A. <u>Allegation with respect to availability of Service Tax Paid in Pre-GST regime</u>

The cancellation of contract could be equated with the downward revision of price then if will be covered under Section 142 (2) of the CGST Act, where the credit note can be raised with GST.

1.14 As per Section 142 (2) of the CGST Act, credit note can be raised:

a. ...

b. where, in pursuance of a contract ***entered into prior to the appointed day, the price of any goods or services or both is revised downwards on or after the appointed day****, the registered person who had removed or provided such goods or services or both* ***may issue to the recipient a credit note, containing such particulars as may be prescribed, within thirty days of such price revision*** *and for the purposes of this Act such credit note shall be deemed to have been issued in respect of an outward supply made under this Act:*

Provided that the registered person ***shall be allowed to reduce his tax liability on account of issue of the credit note only if the recipient of the credit note has reduced his input tax credit*** *corresponding to such reduction of tax liability.*

1.15 Given the aforesaid, the situation like revision of price upward or downward is addressed via subclause (a) and subclause (b) of Section 142 (2) of the CGST Act wherein credit note can be raised if the revision of price is downward.

1.16 In this regard, the authority has not given any rational about why cancellation of flat cannot be equated with the downward revision of price to nil (for cancellation of flat without retention) or to retention amount (for cancellation of flat with retention) so that to determine the applicability of section 142(2) of the CGST Act.

1.17 The cancellation of flat can be equated with the downward revision of price as said section does not appear to exclude cancellation of contract cases. The legal analysis of the provision to support that the cancellation of contract is to be equated with the downward revision of price as specified under section 142(2) of the CGST Act is given below:

1.	**Cancellation of contract can be equated with the revision in contract**
	I. Cancellation of flat can be equated with downward revision of price as intention behind Section 142 (2) of the CGST Act is to allow the credit of taxes paid in the pre-GST regime **in case of revision of contract.** II. Here, it is important to understand the legal meaning of the '**Downward revision of price**'. Generally, the term amendment and revision are used interchangeably. However legal meaning of both the words are different and used in different context. III. Amendment means "A minor change or addition designed to improve or change a contract," whereas revision is defined as "the action of revising" something. IV. Taking that into context, the main difference between the terms is that amendment means to add or remove something from the original, while revision implies making changes to the original. These changes can be small or big. V. Also, it is to be noted that depending on how they are used, the

	implication of the terms is different. Revision can be equated with complete change in contract. VI. Further, as per Oxford Dictionary meaning of down is *'at lower place or level or directed and moving downward or* ***from earlier to a later point***' VII. Given the aforesaid, downward revision of price can be interpreted as complete change in the contract and entering in to new contract. VIII. Hence, 'cancellation' of flat is nothing but revision of contract to new contract and hence, said transaction can be concluded as per section 142(2) of the CGST Act.
2.	**Express and implied intention of repealed statute shall be used for Interpretation of the provisions of the new statute**
	I. As per the Service Tax Rules, 1994[2] if an invoice is issued for which service is not provided then the **taxpayer allowed to avail credit of such excess service tax paid.** II. Reference is drawn to section 174(2) of the CGST Act, *the repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not—* *a. ...* *b.* ***affect the previous operation*** *of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or* ***c. affect any right, privilege, obligation, or liability acquired, accrued or incurred*** *b. ....* III. Accordingly, the GST law cannot be interpreted to withdraw the rights of the Repealed Act (i.e. Finance Act, 1994) IV. It is important to note that as per the Principles of Statutory Interpretation

of Law the meaning should lead to some results which are reasonably be supposed to have been the intention of the legislature'.

V. Further, we would like to refer the essence of the Law wherein according to Salmond, *'the primary and foremost task in interpreting a* ***statute is to ascertain the intention of the legislature, actual or imputed.*** *The words of the statute are to be construed* ***so as to ascertain the mind of the legislature from the natural and grammatical*** *meaning of the words which it has used. [Jurisprudence, Eleventh edn, p 152.]*

VI. As per principles of Repealed Statute the use of any particular form of word in new statute is not necessary to bring about an express repeal. All that is necessary is that the words used show an intention to abrogate the Act or provision in question.

II. The nature of rights and obligation resulting from the provisions of the Temporary Act/ Old Act and their character, may have to be regarded in determining whether said rights or obligation is enduring or not.

III. Also, under section 4 of VI Geo.4 c 133, every person who held commission or warrant as surgeon or assistant surgeon become entitled to practice as an apothecary without having passed the usual examination. This statute was temporary and expired on 1st August 1826. It was held that, *the person who had acquired a right to practice as an apothecary under the Act without passing the usual examination was not deprived of that right on expiration of the Act.*

IX. In the case of ICICI Bank v. Municipal Corporation of Greater Mumbai (2005 (6) SCC 404, P. 414) it was held that *'In the construction of Statutes* ***means the Statute as a whole, the previous state of the Law, other Statutes in the pari-materia, the general scope of the Statutes and the*** *mischief that the intend to remedy'.*

X. Thus, it can be stated that the context i.e. change of tax regime from erstwhile Service Tax regime to the new GST regime also should be considered to interpret the terminology.

XI. Given the aforesaid, it could be construed that while interpreting the word

	downward revision in Section 142(2) of the CGST Act, the express and implied intention of the old statute should be considered. The Finance Act, 1994 allow **to avail credit of excess service tax paid in case of cancellation. Hence, new statute shall not be interpreted to** abrogate the provision in question.
3.	**Cancellation is covered under downward revision as there is no restriction in the law**
	I. It is to be noted that GST law does not provide any specific restriction to cover cancellation of flat within the provision of downward revision of price. II. As per the Subordinate Legislation under Repealed Statute when the statute is repealed and re-enacted, Section 24 of the General Clause Act, 1897, provides for continuous of any appointment, notification, order, scheme, rule, form or byelaws made or issued under the repealed statute in so far as it is not inconsistent with the provisions re-enacted. Such appointments, notification, order, scheme etc. are deemed to be made under the corresponding provisions of the new statute and continue to be enforce unless suspended by appointments, notification, order, scheme etc. under new statute. III. Hence, unless a specific exclusion the cancelation of the contract will be interpreted as downward revision for Section 142(2) of the CGST Act. IV. Further, as per the Principle of Interpretation of Statute, words must be ascribed that natural, ordinary or popular meaning which they have in relation to subject matter with reference to which and context in which they have been used in the statute. V. Additionally, as per the 'Cardinal Rule of Interpretation', "*whenever you have to constitute a statute or a document* ***you do not constitute it according to the mere ordinary general meaning of the words, but according to the mere ordinary meaning of the word as applied to the subject matter which regards to which they are used.***"

VI. Therefore, in determining the meaning of any word or phrase in a statute the first question to be asked is- "What is the natural or ordinary meaning of the word or phrase in its context in the statute?

VII. Hence, considering no specific restriction of the inclusion of the cancellation for the section 142 (2) of the CGST Act is to conclude that said section allow the credit of taxes paid in the pre-GST regime in case of cancellation of flat.

4. **New law cannot be interpreted to restrict the rights of old statute**

I. As discussed aforesaid, developer can avail the credit of Service Tax paid as per Finance Act, 1994 whereas as far as Maharashtra VAT Act is concerned, the VAT is payable at the time of registration of the Agreement. Hence, there are very few instances where VAT is paid in case of cancelled agreement. Further, erstwhile developer can adjust said excess paid tax against subsequent agreement.

II. Erstwhile, Point of Taxation Rules, 2011 was prescribed for the payment of Service Tax. Hence, service tax paid is on the basis of earlier of following events (Rule 3) :-

a. *The time when the invoice for the service provided or to be provided is issued OR*

b. *Where the person providing the service, receives a payment*

Provided that the invoice has been issued within 30 (45 in case of banking services) days from the completion of provision of Service. If invoice has not being issued within stipulated time then POT shall be the date of completion of provision of Service

Given the aforesaid, there could be instances where amount received form the customer is lower than Service Tax paid.

III. Given the aforesaid, even if refund is to be filed under erstwhile provisions of the Act it will be difficult to define the person responsible for claiming the refund i.e. Developer or Buyer.

IV. As per section 174 (3) of the CGST Act, *the mention of the particular*

	matters referred to in sub-sections (1) and (2) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 with regard to the effect of repeal that as per the clause. V. Hence, reference to Section 6 of the General Clause Act is required to be taken for interpretation of GST Law. VI. Further, cause (c) to (e) of Section 6 of the General Clauses Act, 1987 is speaking briefly to prevent the obliteration of a statute in spite of it's repeal to keep rights acquired or accrued and liabilities incurred during its operation and permits continuance or institution of any legal proceedings or recourse to any remedy which may have been available before the repeal for enforcement of such rights and liabilities. VII. Given this, section 142(2) of the CGST Act is interpreted as to save the effect of rights available to the builder under Finance Act, 1994 and Maharashtra VAT Act.
5.	**New law cannot create a situation to deny the benefit available under earlier law**
	I. As per the principle of interpretation of statute wherein beneficent construction involves giving the widest meaning possible to the statutes. When there are two or more possible ways of interpreting a section or a word, the meaning which gives relief and protects the benefits which are purported to be given by the legislation, should be chosen. II. A beneficial statute has to be construed in its correct perspective so as to fructify the legislative intent. Given this, in case of legislations which have may two different interpretations, the legislation which favours the class of persons for which it is purported should be preferred. III. *The rule of beneficial construction requires that even ex post facto law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and common sense [T. Barai Vs*

Henry Ah Hoe (1983-1-SCC-177)].

IV. In the case of Commissioner of Central Excise, Ludhiana V. Ralson India Ltd 2006 (202) ELT 759 (P&H) has ruled that *"this provision allows to a manufacturer credit of any duty of excise etc. paid on the goods used in the manufacture of the specified goods and being a beneficial legislation, its object of input duty relief to a manufacturer should not be defeated on technical and strict interpretation of the Rules governing Modvat".*

V. Hon'ble Supreme Court in the case of UOI, *Suksha International and Nutron Gems & Others, 1989 (39) E.L.T. 503 (S.C.), has observed that an interpretation unduly restricting the scope of beneficial provision is to be avoided so that it may not take away with one hand what the policy gives with the other.*

1.18 Hence, the cancellation of flat shall be equated with the downward revision of price to allow the benefit available to the builder in erstwhile law.

The Developer/ Builder is eligible for refund as per Rule 6(3) of Service Tax Rules, 1944

1.19 **When the transaction itself is cancelled the Government has no right over the taxes from the citizen.**

I. In this regard, refererence is drawn to Rule 6(3) of Service Tax Rules, 1944 which states that, in accordance with Section 11B of Central Excise Act, 1944 *'Any person claiming refund of any duty of excise may make an application for refund of such* ***duty to the Assistant Collector of Central Excise before the expiry of one year from the relevant date in*** *such form as may be prescribed and the application shall be accompanied by such documentary or other evidence '*

II. The expression 'relevant date' has been defined in clause (f) of Explanation (B) to Section 11B of the CE Act as *"the date of payment of duty"*

III. Construction of immovable property is a continuous supply service and required sufficient time to complete the same. The one-year time limit is not justifiable in the said case.

IV. Hon'ble Apex Court in the case of Mafatlal Industries Ltd Vs. UOI 1997 (89) ELT 247 held that, ... *All refund claims to be adjudicated under Sec. 11B except where the levy is held to be unconstitutional.*

V. Given the aforesaid, it is important to analyse whether the one-year time limit is applicable in case of excess of payment of service tax due to cancellation of flat.

VI. As per Section 66B of the Finance Act, 1994 specifies the charge of service tax which is essentially that service tax shall be **levied on all services provided or agreed to be provided** in a taxable territory, other than services specified in the negative list.

VII. Given this, in case of cancellation of flat service is not provided which is agreed to be provided. Hence, service tax is not levied at all.

VIII. What is paid erroneously which was not required to be paid at all by the law and doesn't become of the nature of service tax.

IX. Given this, if assessee has paid service tax which was not payable at all, then time limit does not apply to amount paid which is not service tax (as no service is provided).

X. In this regard, reference can be had to the case of Madhvi Procon Pvt. Limited [2015 (38) S.T.R. 74 (Tri. - Ahmd.) wherein it was held that,

'The issue involved in the present proceedings is as to whether amount of Rs. 19,11,331/- paid by the Respondent should be considered as payment of 'duty' or an amount paid as 'deposit'. From the facts available on ***records Service Tax was paid on the amount of advances received by the Respondent but ultimately no service could be provided as the said works contract got terminated****. In the case of Addition Advertising v. UOI (supra) jurisdictional Gujarat High Court has, inter-alia,* ***held that if no service is provided then there is no Service Tax. It means that once service is not rendered then no Service Tax is payable.*** *Similarly Karnataka High Court in the case of CCE, Bangalore v. Motorola Private Limited (supra) held that any duty paid by mistake cannot be termed as 'duty'. Similar view has been taken in the other case laws relied upon by the Respondent. In view of the above, it has to be held that the amounts paid by the Respondent cannot be* ***termed as payment of duty but has to be considered as a 'deposit' to which provisions of Section 11B of the Central Excise Act, 1944 will not be applicable.***

XI. Further, In the case of Jyotsana D. Patel [2014 (35) S.T.R. 77 (Tri. - Mumbai) it is held that,

'It is admitted fact that the ***appellant was not required to pay any service tax for acquisition of residential unit as held by the Hon'ble High Court in K.V.R. Constructions (supra).*** *As it is not an amount of service tax, therefore, provisions of Section 11B of the Central Excise Act are not applicable to the facts of this case.* ***Therefore, the time limit prescribed under 11B is not applicable.*** *Hence impugned order deserves no merit and same is set aside. Appeal is allowed with consequential relief. Stay petition also disposed of in the above terms.*

XII. Karnataka high could in the case of KVR Construction [2012 (26) S.T.R. 195 (Kar.) held that,

'Where the claim of the respondent/assessee is on the ground that they have paid the amount by mistake and therefore they are entitled for the refund of the said amount. If we consider this payment as service tax and duty payable, automatically, Section 11B would be applicable. When once there was no compulsion or duty cast to pay this service tax, the amount of Rs. 1,23,96,948/- paid by petitioner under mistaken notion, would not be a duty or "service tax" payable in law. Therefore, once it is not payable in law there was no authority for the department to retain such amount. By ***any stretch of imagination, it will not amount to duty of excise to attract Section 11B. Therefore, it is outside the purview of Section 11B of the Act.'***

XIII. In the case of ITC Limited [1993 (67) E.L.T. 3 (S.C.)] honourable Supreme court upheld the *view taken by the Division Bench of the Delhi High Court with regard to the question of limitation. On the question of limitation, the Division Bench of the Delhi High Court had observed that* ***"the duty of excise is that which is levied in accordance with law" and that "any money which is realised in excess of what is permissible in law would be a realisation made outside the provisions of the Act".***

XIV. Therefore, in case service tax paid which was not payable then refund of same is allowable and Section 11B of Central Excise Act is not applicable as for period of time limitation.

XV. Also, Sub Section 5 of Section 140 of CGST Act, reproduced below:

"Every claim filed by a person after the appointed day for refund of tax paid under ***the existing law in respect of services not provided shall be disposed of in***

accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, *notwithstanding anything to the contrary contained under the provisions of existing law other than the* ***provisions of sub-section (2) of section 11B of the Central Excise Act, 1944."***

XVI. Given the aforesaid, the amount already paid in pre- GST regime towards Service tax or Excise, could be refunded in cash, as it is specifically not carried forward in GST regime.

XVII. Further, citizen of India who will cancel flats for any reason may not have to bear the impact. Also, anyways, the developers will pay the GST, if applicable, on the supply of said flats to another customer. Certainly, levying double taxes is not the intention of Government having deliberate shift of focus towards building more affordable homes for citizens.

XVIII. Thus, refund of service tax paid on cancellation of flat where service is not provided shall be allowed without limitation of time as prescribed in the section 11B of the Central Excise Act, 1944.

1.20 **Time limit should apply from date of cancellation as that is the trigger point (and not payment of tax) - Law cannot enforce impossible condition to claim within one year if the contract is cancelled after 1 year (say in July 2018)**

I. Without prejudice to aforesaid submission even the time limit of one year is applicable in the given case it should be considered from the date of cancellation of flat.

II. As per the Principles of Interpretation it is well settled law that there are two exceptions to non-compliance of mandatory requirement viz:

a. When the performance of the requirement is impossible in such cases the performance is excused.

b. If the requirements are provided by Statue in the interest of a particular person, the requirement although mandatory may be waived by him. In such cases the act done will be considered as valid act [Wilson v. McIntosh (1894) AC 129].

III. In the given case it is not possible for the assesse to file a claim of refund by complying conditions of one year due to implementation of GST law from 1st July

2017 and hence based on the aforesaid principle it can be said that the requirement is impossible to be complied with.

IV. Further, there are a plethora of judicial pronouncements wherein it has been held that the time limit of one year is to be considered from the date of revision of price, or cancellation of contract (i.e. from the date of issue of credit note and not from the date of payment of service tax.)

No.	Case law	Decisions
1.	M/s. Chambal Fertilizers and Chemical Ltd [2017-TIOL-407-CESTAT-DELHI = 2017 (52) S.T.R. 329 (Tri. - Del.)]	*It was held that for the purpose of computing the time limit under Section 11B, the date of issue of credit notes is relevant and then only the provisional price gets finalized*

V. Thus, practically the period of one year should be reckoned from the date of cancellation of flat and not from the date of payment of service tax. Thus, refund should be allowed in such cases as per new law without any time restriction to file refund claim.

B. <u>Allegation with respect to availability of MVAT Paid in Pre-GST regime</u>

1.21 Section 142(2) of the CGST is applicable in case of contract related to goods or services or both entered in pre- GST regime is revised downwards on or after the appointed day. Given this, in case of MVAT paid (if any) on such contract we hold all the contention as aforesaid made with respect to issue of credit note with GST for service tax paid.

1.22 Further, reference is drawn to the below para 5 (d) of the ruling given by AAR:

The above provision says that the goods which are being returned should have been sold not earlier than six months prior to the appointed day and which is 1st July 2017. Since no document has been provided, the date of sale is not known to us. *Further, the provision says that the goods should have been returned within a period of six months from the appointed day and such goods are identifiable to the satisfaction of the proper officer. Even this information about date of return of goods is not available to us. But the point to be noted is that mere return of goods within the specified time is not enough.*

1.23 In this regard, refer section 142(1) of the MSGST Act, *where any* ***goods on which tax, may, had been paid under the existing law at the time of sale thereof not being earlier than six months prior to the appointed day are returned to any place af business on or after the appointed day,*** *the registered person shall be eligible for refund of the tax paid under the existing law where such goods are returned by a person, other than a registered person, to the said place of business within a period of six months from the appointed day and such goods are identifiable to the satisfaction of the proper officer*

Provided that if the said goods are returned by a registered person, the return of such goods shall be deemed to be a supply.

1.24 Given this, it could be construed that if goods are returned by a unregistered person, the refund of the taxes paid can be claimed by the registered person.

1.25 In case of a particular contract which qualify as a 'works contract', tax can be levied by the State Government on the value of the transfer of property in goods involved in the execution of such a contract.

1.26 In this regard, it is important to note that under the sales tax laws, tax can be levied on the 'sale price' of goods. The term, 'goods' defined to include all kinds of moveable properties.

1.27 Given this, it could be construed that, section 142(1) of the MSGST Act is applicable in the given scenario to the extent of value of goods cancelled. (i.e. to the extent of VAT paid)

1.28 However, the AAR has not clearly prescribed whether said provisions are applicable to the MVAT paid on goods portion of the works contract.

The underlaying transaction well covered under the questions which can be posed for advance ruling as per section 97(2) of the CGST Act.

1.29 Reference is drawn to the para 5(h)(i) of the ruling where in the authority states that,

' ... it can be seen that the questions posed before ***us are not the questions in respect of which an Advance Ruling can be sought under the GST A****ct. In view thereof, the impugned application is not maintainable. No proceedings of Advance Ruling under the GST Act lie in the instant case. For want of any merit, we discuss no further.'*

1.30 As per the ruling given by AAR, in the present proceedings is not in respect of input tax credit as defined as per section 2(63) and section 2(62) of the CGST Act.

1.31 However, it is to be noted that, the authority has failed to refer the deeming section of tax paid and credit to be availed in case of transitional provision.

1.32 The underlaying transaction will cover within the ambit of Section 97(2)(d) of the CGST Act, which is referred as

'admissibility of input tax credit of ***tax paid or deemed to have been paid.***

1.33 Hence, sub-clause (d) of the section 97(2) of the CGST Act, even the admissibility of the input tax credit where tax **deemed to have been paid.**

1.34 As per section 142(2) of the CGST Act, in case of downward revision of price a registered person can issued the credit note for the contract entered in Pre-GST regime and for the purposes of this Act such credit note **shall be deemed to have been issued in respect of an outward supply made under this Act.**

1.35 Further it is pertinent to note that, as per proviso to section 142(2) of the CGST Act, the registered person **shall be allowed to reduce his tax liability on account of issue of the credit note**. Alternately, it could be construed that said proviso allow to avail the input tax credit of taxes deemed to have been paid.

1.36 Without prejudice to the aforesaid, proviso to section 142(2) of the CGST Act allow to reduce GST liability on account of issue of credit note. Hence, the Advance Ruling Application will cover within the ambit of Section 97 (2) (e) of CGST Act which is stated as

'The determination of the liability to pay tax on any goods or services or both'

1.37 Given the aforesaid, the present case is covered under the ambit of 'determination of liability to pay tax' or 'admissibility of the input tax credit where tax deemed to have been paid'.

1.38 Hence, the order passed by the AAR is not in tune with GST law.

Without requesting any documents, the AAR has passed an order of non-maintainability of transaction for Advance Ruling

1.39 Reference is drawn to the para 5(c) of the ruling of AAR:

"The applicant has not provided any details as to when the flat was sold, neither any detail as to when the booking was cancelled is provided. We have been given no agreement or document as such. Therefore, applicability of MVAT Act or Finance Act, 1994 cannot be checked."

1.40 It is to be noted that, all documents were submitted. The AAR had not asked for any documents and/or agreement with respect to booking and cancelation of the flat.

1.41 Hence, the contention of the AAR that applicability of MVAT Act or Finance Act, 1994 cannot be checked due to unavailability of document is incorrect.

1.42 Recently, in the writ petition filed by the Khandelwal Extractions Ltd the [2018-TIOL-189-HC-ALL-GST] the honourable High Court held that ARA have been constituted to avoid the litigation. Any, assessee who seeks an advance ruling discloses his intent to avoid possible litigation hence ARA is required to pass an order only after considering all the facts and documents necessary to arrive at a conclusion. Reference to the para given below of the said writ petition can be taken

13. Having heard learned counsel for the parties and having perused the record, in the first place, the Authority for Advance Ruling and the Appellate Authority have been constituted principally, to nip the litigation in its bud. Any assessee who seeks an advance ruling discloses his intent to avoid possible litigation, in future. He only seeks answer on an issue/question that potentially contains the seeds of future litigation. The legislative intent appears to be to provide resolution of such issues in a time bound manner.

14. Looked from that perspective, rejection of the adjournment sought for the first date fixed by the Appellate Authority, that too when the Appellate Authority itself could not convene or could not hear the matter for the first 60 days of the period contemplated under Section 101 (2) of the Act, appears wholly harsh and unreasonable on the part of the Appellate Authority to have refused the short adjournment sought, and to have proceeded to decide the appeal itself on merits.

1.43 Given the aforesaid, unless requesting of the documents and/or agreement (if any) required by the AAR the order passed is not sustainable.

The eligibility of refund or credit of Service Tax paid and VAT paid in erstwhile law in case of goods are returned and/or services not provided should be as per the discretion of taxpayer.

1.44 Reference is drawn to the sub para (d) and (f) of the Ruling given by ARA:

(e)The above provision says that the goods which are being returned should have been sold not earlier than six months prior to the appointed day and which is 1st July 2017.

Since no document has been provided, the date of sale is not known to us. Further, the provision says that the goods should have been returned within a period of six months from the appointed day and such goods are identifiable to the satisfaction of the proper officer. Even this information about date of return of goods is not available to us. But the point to be noted is that mere return of goods within the specified time is not enough. The return has to survive the test of identification to the satisfaction of the proper officer.

(f)In respect of services not provided, claim is to be filed by a person after the appointed day for refund of tax paid under the existing law. Such a claim shall be disposed of in accordance with the provisions of the existing law which would be the Service Tax Act in the instant case.'

1.45 Referring aforesaid para of the Ruling it could be construed that the service tax and MVAT paid can be claimed as refund under erstwhile law by the Developer subject to satisfying the certain conditions.

1.46 It may be noted that had the earlier regime continued, the taxpayer was having right to utilise the excess tax paid (arising due to cancellation of booked flats) against any other Service Tax liability. Now, as the cancellation is taking place in GST regime, typically, cancellation is the trigger point which should either enable the taxpayer (i.e. developer) to claim credit or the customer claim the refund.

1.47 Also, it is to be noted that erstwhile in the Pre-GST regime as per rule 6(3) of Service Tax Rules, 1944 the builder/ developer is allowed to avail credit of such excess service tax paid against the invoice issued for which service is not provided then the taxpayer.

1.48 It is pertinent to note that, the erstwhile law did not provide for any restriction on cancellation (as even the wholly cancelled contracts were eligible for the benefit of Rule 6 (3) of Service Tax Rules, 1994) and thus, the new provision which essentially is to cover the scenarios provided for under earlier law, cannot curtail the rights of the taxpayers.

1.49 Thus, the substantial benefit should not be denied to the applicant because of new law which assessee was eligible under pre-GST regime.

1.50 Hence, it is settled position in law that procedural aspect should not take away substantial benefits of the assessee.

1.51 In said scenario, as discussed aforesaid as per section 142(2)(b) of the CGST Act, credit note can be raised for cancellation of flat by the builder and same is treated as 'Outward Supply'. Further, as per proviso to said section **tax liability on account of issue of credit note can be reduced only if the recipient of credit note has reduced his input tax credit.**

1.52 As regards to said legal pronouncement tax liability is to be reduced to the extent of input tax credit reduced/reversed by the recipient. With respect to cancellation of flat this could be construed as the Builder/Developer is required to reduce GST to the extent of Service Tax or VAT paid at the time of booking of flat.

1.53 Also, it is to be noted that in case of citizen, who were not registered under indirect tax, the question of availment of cenvat credit not arises. Further, cenvat credit with respect to construction service in Service Tax was not available as per Finance Act, 1994 hence, in case of registered business entity also, the same was not available.

1.54 Additionally, the Proviso to section 142 (2) specifically provides that *'Provided that the registered person* ***shall be allowed to reduce his tax liability on account of issue of the credit note only if the recipient of the credit note has reduced his input tax credit*** *corresponding to such reduction of tax liability.'*. Thus, this proviso specifically appears to link and then restrict the amount of re-credit to the extent of amount paid by recipient (as the credit note is permissible *only if the recipient of the credit note has reduced his input tax credit corresponding to such reduction of tax liability).*

1.55 Thus,it can be construed as the credit note can be issued to the extent of earlier taxes paid (which effectively could be 5.50%) than 12% (i.e. the GST rate applicable on under-construction flats in GST regime).

1.56 Additionally, the disclosing the aforesaid credit note, may be a disclosure challenge in GST return.

1.57 However, the Government has clarified this aspect by way of circular No. 76/50/2018-GST dated 31st December 2018 wherein in it is clarified that in said scenario the rate as per the provisions of the GST Acts (both CGST and SGST or IGST) would be applicable. The clarification states that :

Issue

In case a debit note is to be issued under section 142(2)(a) of the CGST Act or a credit note under section 142(2)(b) of the CGST Act, what will be the tax rate applicable – the rate in the pre-GST regime or the rate applicable under GST?

Clarification

i. *It may be noted that as per the provisions of section 142(2) of the CGST Act, in case of revision of prices of any goods or services or both on or after the appointed day (i.e., 01.07.2017), a supplementary invoice or debit/credit note may be issued which shall be deemed to have been issued in respect of an outward supply made under the CGST Act.*

ii. *It is accordingly clarified that in case of revision of prices, after the appointed date, of any goods or services supplied before the appointed day thereby requiring issuance of any supplementary invoice, debit note or credit note, the rate as per the provisions of the GST Acts (both CGST and SGST or IGST) would be applicable.*

1.58 Given this it could be construed that, developer/builder can raise credit note with applicable rate of GST under GST law which will also address the challenge to be faced by the taxpayer for disclosure in GST return in such senario.

1.59 Thus, developers and property buyers are seeking clarity on the aforesaid as to whether the Service Tax/VAT paid earlier can be claimed as credit or allowed as refund to property buyers at a discretion of the taxpayer.

Personal Hearing

A personal Hearing in the matter was conducted on 14.03.2019, wherein ShriPritam, Advocate, representative of the Appellant, attended and stated that the Appellant is concerned about the refund of Service tax paid. However, he did not reiterate the grounds of appeal in the matter. Ms. Kanika Sharma, Asstt. Commissioner, appearing as jurisdictional officer, reiterated the submissions made before AAR.

Discussion and Findings

2. We have gone through the record, facts of the case and have also taken on record the written and oral submissions made by the appellant as well as by the department. We have also gone through the impugned order issued by the Advance Ruling Authority, which says that since questions or issues raised in the Advance Ruling application filed

by the Applicant is not covered under the set of the questions/issues, as provided under Section 97(2) of the CGST Act, 2017, the application filed by them is not maintainable, and hence is rejected.

3. The questions posed by the Appellant, on which the Advance Ruling were sought for, are enumerated as under:

   a. Whether GST Input Tax Credit of Service Tax and State VAT paid while booking of flat is available to the Developer, if cancelled in the GST regime.

   b. What will be the methodology to avail the Input Tax Credit on the said Taxes paid?

4. Now, on perusal of the impugned Ruling passed by the Advance Ruling Authority and contention made by the Appellant against the impugned ruling, we will first discuss the findings of the Advance Ruling Authority, which explicate that the questions posed by the Appellant are not covered under the scope of the pre-defined set of the questions on which the advance ruling could be sought for before the Advance Ruling Authority. Now, let us analyse the spectrum of the questions provided in the Section 97(2) of the CGST Act, 2017, on which the advance ruling could be sought for by any applicant. Section 97(2) of the CGST Act, 2017 encompassing thequestions,in relation to which the advance ruling can be sought for, is reproduced herein under for the sake of reference:

   "(2) the question on which the advance ruling is sought under this Act, shall be in respect of,-

   (a) classification of any goods or services or both;

   (b) applicability of a notification issued under the provisions of this act;

   (c) determination of time and value of supply of goods or services or both;

   (d) admissibility of input tax credit of tax paid, or deemed to be have been paid;

   (e) determination of the liability to pay tax on any goods or services or both;

   (f) whether applicant is required to be registered;

   (g)whether any particular thing done by the applicant with respect to any goods and services or both amounts to or results in a supply of goods or services or both."

5. On perusal of the above provisions which comprised of the above enumerated questions on which advance ruling can be sought by any applicant, it is observed that the above

said provision deals only with the admissibility of the input tax credit of the tax paid or deemed to have been paid. To understand the implication of this provision, we will first discuss the input tax credit as defined in the clause (63) of Section 2 of the CGST Act, 2017, which is being reproduced herein under:

"(63) 'input tax credit' means the credit of input tax;"

Now, the input tax has defined in Clause (62) of Section 2 of the CGST Act, 2017, which has been reproduced herein under:

"(62) 'input tax', in relation to a registered person, means the Central Tax, State tax, Integrated Tax, or Union Territory Tax charged on any supply of goods or services or both made to him and includes –

.....

.....;"

Thus, reading both the above provisions viz.- Clause (63) and (62) together, it is aptly clear that the question enumerated at (d) of Section 97(2), supra does not deal with the admissibility of the credit of taxes paid other than the taxes mentioned in the Clause (62) of Section 2 of the CGST Act, 2017, which has been cited herein above. In other words, Section 97(2), which encompasses the questions, meant for the ruling by the AAR or AAAR, does not deal with the input tax credit of the service tax or VAT paid under the existing laws.

6. Since the Appellant has raised questions on the admissibility of the credit of the service tax and VAT paid under the pre-GST regime, it is held that neither AAR nor AAAR has the jurisdiction to pass any ruling on such matters. Accordingly, we pass the following order:

Order

We do not find any reason to differ with the ruling pronounced by the Advance Ruling Authority.

-Sd/-

(RAJIV JALOTA)

MEMBER

-Sd/-

(SUNGITA SHARMA)

MEMBER

Certified true copy

सी. पी. एस. चौहान/C. P. S. CHAUHAN
उप आयुक्त/DEPUTY COMMISSIONER
वस्तु एवं सेवा कर अग्रिम अधिनिर्णय अपील प्राधिकरण, महाराष्ट्र
The Maharashtra Appellate Authority
for Advance Ruling for Goods & Services Tax

Copy to- 1. The Appellant

2. The AAR, Maharashtra

3. The Pr. Chief Commissioner, CGST and C.Ex., Mumbai

4. The Commissioner of State Tax, Maharashtra

5. The Jurisdictional Officer

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