ADVANCE RULING

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History of Advance Ruling

Standard 9.9 of the Revised Kyoto Convention, which is the International Convention on the Simplification and Harmonization of Customs procedures and was, adopted in **June, 1999** as a blueprint for modern and efficient Customs procedures in the 21st century, deals with Advance Rulings.

Further, the **WTO Agreement on Trade Facilitation signed on 6/12/2013 at Bali, Indonesia**, under Article 3, also make it obligatory for the member countries to have mechanism of Advance Ruling.

In his Budget **Speech of 1992-93**, the then Finance Minister had assured that, in the interest of avoiding needless litigation and promoting better taxpayers relation in a scheme for giving advance rulings in respect of transactions involving non-residents was being worked out. Though the system in 1993, the concept of Advance Rulings was conceptualized in the Direct Taxes Enquiry Committee, 1971 headed by Justice K. N. Wanchoo.

Advance rulings were conceived to furnish taxpayers with an avenue where interpretation of tax laws could be sought. The Authority for Advance rulings was instituted as a mechanism to prevent litigation, plan tax liability, and to generally foster a business-friendly environment where taxpayers may approach Revenue Authorities for ascertaining the proper legal position.

From the bygone era of laws dealing with Central Excise, Value Added Tax & Service Tax, the concept of issuing **Advance Rulings has been grandfathered into the GST regime as well**.

'Advance Ruling' u/s 95 means a decision provided by the Authority for Advance Ruling (hereinafter referred to as '**Authority**') or the Appellate Authority for Advance Ruling (hereinafter referred to as '**Appellate Authority**') to an applicant in **written form** on matters or on questions specified in relation to the supply of goods and/or services proposed to be undertaken or being undertaken by the applicant.

The Authority/Appellate Authority is **State/Union Territory specific**.

Objective of having a mechanism of Advance Ruling

- Provide **certainty for tax liability** in advance in relation to a future activity to be undertaken by the applicant.
- Attract Foreign Direct Investment (**FDI**)
- **Reduce litigation** and costly legal disputes
- Give decisions in a **timely, transparent and inexpensive** manner

Questions on which Advance Ruling can be sought (Sec. 97(2))						
Classification of goods and / or services or both	Applicability of notification issued under the Act	Determining the time and value of goods or services or both	Input credit admissibility of tax paid or deemed to be paid	Determination of liability to tax on goods or services or both	Registration requirement of an applicant	Whether any particular thing done by the applicant amounts to or results in supply of goods or services or both

Questions on which Advance Ruling cannot be sought (Sec. 98)		
Application is already pending in any proceedings in the case of an applicant	Application is already decided in any proceedings in the case of an applicant	Application is related to provisions related to Place of Supply

Procedure for obtaining Advance Ruling (Sec. 97(1) read with Rule 104)

An applicant (who is registered or is desirous to be registered under GST) who seeks an advance ruling should make an application in the prescribed **FORM GST ARA-1** with a fee of **Rs.5000/-**for CGST & SGST each, and should state the question on which such a ruling is sought.

Procedure on receipt of application (Sec. 98)

On receipt of an application in FORM GST ARA -1, the Authority shall forward a copy to the concerned officer and, if necessary, direct him to furnish the relevant records. The records so called for by the Authority should be returned as soon as possible to the concerned officer. The Authority, at its discretion, would examine the application and the records called for, and after hearing the applicant and concerned officer pass an order, **either admitting or rejecting** the application.

Before rejecting the application, the applicant ought to be given an opportunity of being heard. Where the application is finally rejected, the reasons for such rejection shall be stated in the order. A copy of every order made shall be sent to the applicant and to the concerned officer.

Where the application is **admitted**, the AAR shall proceed as follows:

- Examine such further material as may be placed before it by the applicant or obtained by the AAR.
- Provide opportunity of being heard to the applicant or his authorized representatives and concerned officer or this authorized representative.
- **Pronounce its advance ruling** on the question specified in the application in writing **within 90 days of the receipt of application**.

Reference to Appellate Authority

Where the members of the Authority **differ on any question** on which the advance ruling is sought, they shall **state the point/s of difference** and **refer it to the Appellate Authority** for advance ruling for final decision.

The Appellate Authority to whom a reference is made due to difference of opinion is required to pronounce the ruling **within 90 days of such reference**.

Submission of advance ruling pronounced (Rule 105 & 107)

A copy of the advance ruling pronounced by the concerned Authority/Appellate Authority, duly signed by the Members and certified, shall be **sent to the applicant and to the concerned officer** after pronouncement.

Applicability of advance ruling (Sec. 103)

The advance ruling pronounced by the Authority shall be binding only on the **applicant** and on the **jurisdictional officer** in respect of the applicant.

The advance ruling shall be binding on the said persons/authorities **unless there is a change in law or facts or circumstances**, on the basis of which the advance ruling has been pronounced. When any change occurs in such laws, facts or circumstances, the advance ruling shall no longer remain binding on such person.

If the Authorities (i.e. Authority & Appellate Authority) find that the advance ruling order has been obtained by the applicant/appellant by **fraud** or **suppression** of material facts

or **misrepresentation** of facts, it may, by order, declare such ruling to be **void ab initio u/s 104**. Consequently, all the provisions of the Act shall apply to the applicant as if such advance ruling had never been made.

Rectification of advance ruling (Sec. 102)

An advance ruling may be amended by the authority or appellant authority, as the case may be, within a period of **6months from the date of order** with a view to rectify any mistake apparent from the record, which:

- is noticed by the Authority or Appellate Authority on its own, or
- is brought to the notice of the Authority or Appellate Authority by the concerned or the jurisdictional officer or;
- is brought to the notice of the Authority or Appellate Authority notice by the applicant

If such rectification has the effect of enhancing the tax liability or reducing the amount of admissible input tax credit, then, applicant or the appellant has to be given an opportunity of being heard.

Appeal to Appellate Authority (Sec. 100 read with Rule 106)

An appeal can be filed by the applicant in **FORM GSTARA 02** with a fee of **Rs. 10,000/-**for CGST & SGST each, or the concerned or jurisdictional officer in **FORM GSTARA 03** with no fee, who is aggrieved by the ruling **within 30 days from the date of receipt of the ruling**, which may further be extended for another 30 days.

The Appellate Authority is required to pass an order within ninety days from the date of filing of the appeal **u/s 98**.

Constitution for Advance Ruling

Authority (Sec. 96 of SGST Act)	Appellate Authority (Sec. 99 of SGST Act)
•one member from amongst the officers of Central tax •one member from amongst the officers of State tax/ Union Territory	•Chief Commissioner of central tax as designated by the Board •the Commissioner of State Tax

Ruling on Supply of food and beverages in trains

Till now many rulings have been given by the **AAR** under GST, one of the examples for the same is the recent ruling on **supply of food and beverages in trains,** where the issue was whether the supply of food and beverages in trains is 'supply of goods' or 'supply of service' and if it is a service, then what is the applicable rate?

LAW

Supply of food by restaurants, hotels, food joints etc. will be classified as composite supply as there is supply of goods and supply of services based on the provisions of **'supply of service'** - Para 6(b) of schedule II of CGST Act. Supply, by way of or as part of any service or in any other manner, whatsoever, of goods, being food or any other article for human consumption or drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration is supply of service.

The applicable tax rate for such supplies is 5%, provided that credit of input tax charged on the goods and services used in supplying the service has not been taken.

From the above provisions in GST, it is clear that it is the supply of service but as per the provisions of the Constitution of India, it is supply of goods. The provisions of the CGST Act are contradicting with that of the provisions of the Constitution. As per Article 366(29A)(f) of constitution of India, a tax on the supply, by way of or as part of any service or in any other manner, whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be **deemed to be a sale of those goods** by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

'Outdoor catering' means caterer engaged in providing services in connection with catering at a place provided by way of tenancy or otherwise by the person receiving such services.

The applicable tax rate for such supplies is 18%. Further, the credit of input tax charged on goods and services used in supplying the service are allowed to avail.

Mere supply of food at customer's place without serving it, there would not have come within the definition of outdoor catering.

CASE

The AAR ruling came in response to an application by **Deepak & Co.** that entered into an agreement with the Indian Railways for supply of food and beverages (packaged, cooked or at MRP) on mail and express trains. It had also signed an agreement to open food stalls and food plazas at railway stations. The contention of applicant was supply of food to passengers or at food plaza/ food stall would be the supply of service and would attract tax rate of 5% without the benefit of ITC.

The **Jurisdictional officer** was of the opinion that the supply of service by applicant is outdoor catering as service is provided in a place other than applicant's premises, thus, the applicable tax rate is 18%. However, the contention related to supply of food at food stall/ food plaza seems correct and the applicable tax rate is 5%.

Central Board of Indirect Taxes and Customs *vide* Circular F. No. 354/03/2018-TRU dated 31 March, 2018, has clarified that the rate of GST applicable on supply of food and drinks made available in trains, platforms or stations by the Indian Railways or IRCTC or their licensees, whether in trains or at platforms (static units), will be 5% without input tax credit.

Further, the circular from Central Board of Indirect Taxes and Customs, announcing lower GST rate for food on trains, did not say whether such transactions shall be treated as supply of goods or services.

On the contrary to all above, the **Delhi bench of authority for advance ruling** has ruled that train is a medium of transport and cannot be termed as restaurant, eating joint, mess or canteen etc., hence, catering services provided on-board is not a supply of service. The supply of food and beverages on board to the passengers as per the menu/ rates fixed by IRCTC/Railways does not have any element of service and shall be considered as pure supply of goods. Accordingly, GST shall be charged on individual items at the respective applicable rates.

Also, it has been held in the said ruling that the supply of food and beverages to passengers/general public at fixed rate (By IRCTC/Indian Railways) at Food Stalls on Railway Platform does not have any element of service and hence, the same shall be considered as pure supply of goods. Mere heating/cooling of beverages or similar other services are incidental and minimally required to supply such food items and such supply cannot be said to be a 'composite supply'.

Conclusion

Hence, the ruling decided by the authority has held that the supply of food and beverages in trains will attract GST as applicable on such item, not the concessional rate of 5% as clarified by the Government itself in a Circular issued earlier in this regard.

Further, as the relevant documents pertaining to details of items supplied, pricing details, extent of services provided are not submitted, no ruling has been given in respect of supply from food plaza on the railway platform.

Impact

The aforementioned contradiction by the advance ruling authority and the clarification provided by CBIC may have far reaching impact on railways. The ruling given by the authority may impact the prices of railway tickets as the rate for supply of food will differ from item to item, which may enhance the prices of ticket. Further, if contractor supplies food at platform, it will create a chaos at what rate it should be supplied at, as no ruling has been given by the authority on it.

Also, various questions arise like - Whether circulars are binding on the revenue?; Whether revenue can challenge circulars issued by its own board?; Whether revenue has the power to issue show cause notice taking a view contrary to a favorable circular?

Another challenge is the people selling the food stuff at stations and in the train will be the same as they are from the same contractor and as a result of it, they will get confused on charging the money from the passengers. Or there will be cases where the items are shifted from the food plaza at the station to the train to be sold to passengers or vice versa. This will create chaos in the accounting and tracking of the same. Same item is being sold at two different locations by the same taxpayer and it being taxed separately; this increases the complexity of the business and defeats the intent of simplification of taxation.

The same logic should be applicable in the case of airlines or in buses operated by various state road transporters, private operators etc.

As per section 103 of the CGST Act, 2017, the Advance Ruling is binding only on the applicant and the concerned officer or the jurisdictional officer in respect of the applicant. As per the GST Law, the board cannot quash the orders of the AAR. So, at least as far as the applicant and his jurisdictional officer are concerned, the AAR ruling is binding. The contrary views of AAR and CBIC lead to an absurd position under GST which is built on the premise of "One Nation One Tax".

Ruling on Construction of Solar Plant

Advance ruling mechanism under GST is at the state level and here, we have a case where two different state advance ruling authority has given two different ruling. This has put the taxpayers in a fix. In case of **Construction of Solar Plant,** the issue was whether the Construction of Solar Plant is a 'Works Contract' and liable to 18% GST or 'Composite Supply' and liable to concessional rate of 5%.

LAW

As per Section 2(30) of CGST Act, **Composite Supply** means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.

As per Section 2(90),**Principal Supply** means the supply of goods or services, which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary.

As per Section 2(119) of CGST Act, **Works Contract** means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration, or commissioning of any immovable property wherein, the transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract "

Works contract has been deemed to be a service under GST - Schedule II of GST law specifies that composite supply of works contract would be deemed to be a service. The general rate of works contract service is 18%.

CASE

The AAR ruling came in response to an application by **M/s Giriraj Renewables Private Ltd.** who is an EPC contractor and has entered into agreement with various developers who desire to set up and operate solar photovoltaic plants for supply of generated power. The contracts are for supply of goods as well as services. The applicant has contended that:

- The agreement is construed as a composite supply; the principal supply would be the supply of PV Modules which again are liable to tax @ 5%.
- He is engaged in the business of supply of 'solar power generating system' and the same should be liable to tax at 5%.
- The proposed agreement with its customers should be taxable @5% GST, and the same should be applicable to sub-contractors as well.

Karnataka Authority of Advanced Ruling (AAR)

- The major component (PV Module) said to have constituted 70% of the whole project procured by the owner himself. Therefore, the same cannot be construed as a principal supply by the applicant and hence, it cannot be construed to be a principal supply of the project and thereby cannot be a composite supply.
- EPC contract for the construction of solar power project in which both goods and services are supplied cannot be interpreted as a composite (a mix of components, which make up a solar project) supply contract. Therefore, the supply of each component in a 'Solar Power Generating System' cannot have a flat tax rate of 5 percent GST.
- Further, the authority clarified that the rate of GST will depend on the supply type as the sub-contractor is an individual supplier and cannot avail any GST at concessional rate.

Maharashtra State Authority of Advanced Ruling (AAR)

Has, in response to an application by Giriraj Renewables Pvt. Ltd., clarified that irrespective of the fact that there are separate contracts for supply of goods and services for a solar power plant, the entire project of setting up and operation of a solar photovoltaic plant shall qualify as a works contract and shall be taxable at 18%.

Conclusion

Two separate Authorities for Advance Rulings (**AAR**) on the GST rate applicable on installation of solar plants have thrown the solar industry into confusion. The industry has knocked at the doors of the government seeking clarity on the matter.

Two rulings, from the Maharashtra AAR, have favored a GST rate of 18%, treating installation as a whole works contract. The Karnataka AAR, however, has ruled to treat installation at the concessional rate of 5% applicable on equipment. The challenge for the applicant is as he has to maintain it differently in both the states as one has given it at 5% and another at 18%.

To avoid such confusion, it may be proposed to have a central body for advance ruling so that the trade and industry can really benefit from the same. The current mechanism does not have any representation from the Judiciary and for this a petition is already filed in the High Court of Gujarat and it posted for hearing on 2nd July 2018. Keeping in view of all the above, the advance ruling mechanism should be revisited in GST else it will defeat the objective of having such a mechanism.