

COMMISSIONER (APPEALS) CENTRAL GOODS AND SERVICE TAX, JAIPUR

BHARTI HEXACOM LTD.

7 to 11 (MAA)CGST/JPR/2021

Dated: - 13-1-2021

Judgment / Order

Shri Manzoor Ali Ansari, Additional Commissioner (Appeals)

ORDER

These five appeals have been filed under Section 107 of the Central Goods and Services Tax Act, 2017 by M/s. Bharti Hexacom Limited, K-21, Sunny House, Malviya Marg, C-Scheme, Jaipur (hereinafter also referred to as "the appellant") against the Orders-in-Original (hereinafter as "the impugned orders") passed by the Deputy Commissioner, Central Goods & Services Tax Division-H, Jaipur (hereinafter called as "the adjudicating authority") as mentioned below. As common issue is involved in all these five appeals therefore, I take up the same for decision simultaneously.

S. No.	Appeal No.	Order-in-Original No & date (Impugned order)	Period of dispute	Order sanctioning/ rejecting refund
1	2	3	4	5
1	C. No. APPL/ JPR/CGST/JP/05/II/2020/	226/GST/Refund/Final/2018-19, dated 6-11-2019	July, 2017	Refund rejected ₹ 8,21,17,976/- (CGST) + ₹ 8,21,17,976/- (SGST) Total ₹ 16,42,35,952/-
2	APPL/JPR/ CGST/JP/19/ 111/2020/	ZO0812190239578, dated 24-12-2019	October, 2017	Refund rejected ₹ 7,01,22,423/- (CGST) + ₹ 7,01,22,423/-

				(SGST) Total ₹ 14,02,44,846/-
3	C. No. APPL/ JPR/CGST/JP/28/VI/2020/	ZQ0803200171492, dated 11-3-2020	January, 2018	Refund rejected ₹ 4,17,10,946/- (CGST) + ₹ 4,17,10,946/- (SGST) Total ₹ 8,34,21,892/-
4	C. No. APPL/ JPR/CGST/JP/62/VIII/2020/	ZY0806200005451, dated 1- 6-2020	April, 2018	Refund rejected ₹ 1,18,49,147/- (CGST) + ₹ 1,18,49,147/- (SGST) Total ₹ 2,36,98,294/-
5	C. No. APPL/ JPR/CGST/JP/63/VIII/2020/	ZT0806200005406, dated 1- 6-2020	March, 2018	Refund rejected ₹ 3,65,98,608/- (CGST) + ₹ 3,65,98,608/- (SGST) Total ₹ 7,31,97,216/-

2. Brief facts of the case :

2.1 The appellant having GSTIN No. 08AAACHI766P1Z5 in State of Rajasthan is engaged in the business of providing telecommunication services in India having their principal place of business at K-21, Sunny House, Malviya Marg, C-Scheme, Jaipur, Rajasthan, 302001 has filed refund claims under Section 54 of CGST Act, 2017 in respect of CGST and SGST wrongly paid on License Fee and Spectrum Uses Charges.

2.2 On examination of refund claims filed by the appellant the adjudicating authority observed and has issued a show cause notices in Form GST-RFD-08, dated 20-9-2019, 28-11-2019, 24-2-2020, 18-5-2020, and 20-4-2020 respectively were liable to be rejected on account of the following reasons and directed to the appellant to furnish a reply to the notice within fifteen days from the date of service of the notice.

- (1) Spectrum User Charges, License Fees are supply under Section 7 of the Central Goods and

Services Tax Act and service provided by the Central Government to a business entity is taxable in terms of Sl. No. 5 of the Notification No. 13/2017-Central Tax (Rate), dated 28-6-2017, GST. Further, with regards to ITC, since GST is payable on Spectrum User Charges, License Fees in respect of spectrum allotted by the Central Government under RCM, hence ITC can be availed by the claimant. Therefore, no question arises of refund.

(2) Refund claim is not covered vide Section 54 of CGST Act, 2017.

(3) As per Para 9 of the C.B.I. & C. Circular No. 192/02/2016-S.T., dated 13-4-2016 Service Tax on Spectrum User Charges and License Fee is applicable after 1-4-2016 and vide Notification No. 24/2016-S.T., dated 13-4-2016 in Rule 7 of the Point of Taxation Rules, 2011 after the third proviso the following proviso inserted :-

“Provided also that in case of services provided by the Government or local authority to any business entity, the point of taxation shall be the earlier of dates on which, -

- (a) any payment, part or full, in respect of such service becomes due, as specified in the invoice, bill, challan or any other document issued by the Government or local authority demanding such payment; or
- (b) payment for such service is made”.

In response to show cause notice dated 28-11-2019, the appellant vide their letter dated 5-12-2019 has stated therein that they have been unable to view the SCN on the GST portal and were given the hard copy of show cause notice by the adjudicating authority. Further, they stated that they shall submit the response to the show cause notice and attend the personal hearing in the week ending 13th December, 2019 and requested to grant extra time to appear for the personal hearing.

3. The Adjudicating Authority further intimated to the appellant vide Letter C. No. V(18)Div-H/Ref/BHL/21/2019, dated 16-12-2019 and stated therein “that as per your request a personal hearing has been fixed on 19-12-2019 you are requested to attend the hearing personally or send your authorized representative, along with all the documents and evidences, which you wish to produce in support of your defence and also intimated that if you or your representative does not appear for hearing, the matter will be decided ex parte on the basis of documents, facts and evidences available on the record.

4. Further, the adjudicating authority vide impugned Orders-in-Original in Form RFD-06, dated 6-11-2019, 24-12-2019, 11-3-2020, 1-6-2020, and 1-6-2020 respectively has passed the orders-in-original and rejected the refund claims for the period and amount mentioned at above in Para-1 in column No. (4) and (5) filed by the appellant.

5. Being aggrieved with the impugned orders dated 6-11-2019, 24-12-2019, 11-3-2020, 1-6-2020, and 1-6-2020, the appellant has filed these appeals on the following grounds which are summarized as under :-

- that the Appellant is engaged in the business of providing telecommunication services in India. The Appellant has been granted a telecom license under Section 4 of the Telegraph Act, 1885 (‘the Telegraph Act’) by the Government for the provision of telecommunication services. As per the terms and conditions of licensing agreement, the Appellant is required to pay License Fee to the Government, which is paid as a share of Adjusted Gross Revenue (‘AGR’) every quarter as per the terms of the unified license.

- that the Appellant, in addition to a unified license under Section 4 of the Telegraph Act for access service, has also acquired spectrum through auctions on payment of one-time spectrum acquisition charge, which can be paid in a single upfront payment or deferred payment. Further, as per para 18.3 of the unified license, the Appellant is required to pay Spectrum Usage Charges for use of spectrum. SUC is paid as a percentage of the AGR of the Appellant and are paid as per the spectrum slabs/rates notified by the Government from time to time.
- that in terms of Section 9(3) of the Central Goods and Services Tax Act, 2017 ('CGST Act'), the Central Government has issued the Notification No. 13/2017-Central Tax (Rate), dated 28 June, 2017 which inter alia provides that the GST liability in respect of services supplied by the Government (except a few services) to a business entity located in the taxable territory shall be paid under reverse charge by the recipient i.e. the business entity. For ease of reference, the relevant extract of the notification is reproduced as under :

5	<p>Services supplied by the Central Government, State Government, Union territory or local authority to a business entity excluding, -</p> <p>renting of immovable property, and (1)</p> <p>services specified below - (2)</p> <p>services by the Department of Posts by way of speed post, express (i) parcel post, life insurance, and agency services provided to a person other than Central Government, State Government or Union territory or local authority;</p> <p>services in relation to an aircraft or a vessel, inside or (ii) outside the precincts of a port or an airport;</p> <p>transport of goods or passengers. (iii)</p>	Central Government, State Government, Union territory or local authority	Any business entity located in the taxable territory.
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- that it is submitted that due to the evolving law, the Appellant paid CGST and SGST under the category of telecommunication service falling under HSN Heading 9984 on reverse charge basis on the LF and SUC paid to the Government as a matter of abundant caution and availed input tax credit of the GST so paid. It is further submitted that the Heading 9984 pertains to provision of telecommunication services and per se does not apply to the grant of license and allocation of spectrum.
- that the Appellant believes that no GST is leviable on LF and SUC charges paid to the Government and accordingly, the Appellant had filed a refund of tax paid on LF and SUC paid in the return for the month of July, 2017. The Appellant has also filed a writ before the Delhi High Court in this regard.
- that the Appellant accordingly had filed a refund claim under Section 54 of the CGST Act, 2017 read with Rule 89 of Central Goods and Services Tax Rules, 2017 (hereinafter referred to as 'CGST Rules, 2017') to seek refund of CGST and SGST wrongly paid on LF and SUC for the month of July, 2017, amounting to ₹ 16,42,35,952/- vide Refund ARN No. AA080819019895H, dated 15th August,

2019.

- that a copy of application along with relevant documents was physically submitted with the Office of the Asstt. Commissioner of Central Tax, the respondent on 9th September, 2019.
- that pursuant to the filing of refund application, show cause notice dated 20 September, 2019 ('SCN') was issued by the respondent seeking explanation on the following :
- that License Fee and Spectrum Usage Charges are supply under Section 7 of the Goods and Services Tax Act, 2017 and services provided by the Central Government to a business entity is taxable in terms of Sl. No. 5 of the of the Notification No. 13/2017-Central Tax (R), dated 28 June, 2017.
- that further, with regards to ITC, since GST is payable on License Fees and Spectrum Usage Charges in respect to spectrum allotted by the Central Government under reverse charge mechanism, the Company is eligible to avail Input Tax Credit. There is no specific bar for claiming ITC on the same and therefore, no question of refund.
- that the refund claim is not covered under 'Any other category' prescribed vide Section 54 of Central Goods and Services Tax Act, 2017.
- that on reading of para 9 of the C.B.I. & C. Circular No. 192/02/2016-S.T., dated 13-4-2016 Service Tax on License Fee and Spectrum Usage Charges is applicable after 1-4-2016. Further, Rule 7 of the Point of Taxation Rules, 2011 was modified vide Notification No. 24/2016-S.T., dated 13-4-2016. The said notification inserted a proviso stating that in case of services provided by the Government or local authority to any business entity, the point of taxation shall be the earlier of dates in which, (a) any payment, part or full, in respect of such services becomes due, as specified in the invoice, bill, challan or any other document issued by the Government or local authority demanding such payment or (b) payment for such service is made.
- that the Appellant was also directed to appear before the Office of Assistant Commissioner on 30 September, 2019.
- that the Appellant submitted a letter requesting additional time for submission of reply and adjournment of personal hearing on 30 September, 2019 to any date after 15 October, 2019.
- that the Appellant did not receive any fresh notice of personal hearing and the respondent without even giving an opportunity to furnish a reply to the SCN, rejected the entire refund claims.
- that in the Impugned Order, it has been observed that License Fee and Spectrum Usage Charges are supply under Section 7 of CGST Act and services provided by the Central Government to a business entity is taxable in terms of Sl. No. 5 of the Notification No. 13/2017-Central Tax (Rate), dated 28 June, 2017 GST.
- that in this regard, at the outset, the Appellant humbly submits that Section 9 of the CGST Act provides that GST is leviable on supply of goods or services at the rates to be notified by the Government. Thus, for the charge to be attracted it is essential that the following conditions are cumulatively satisfied :

- (a) there is a supply
 - (b) supply is of goods or service
 - (c) supply is for consideration and in course or furtherance of business
 - (d) the rate has been notified for levy of tax
- that in absence of any of the aforesaid requirements, the charge of tax under the CGST Act would not be attracted. It is submitted that there is neither any supply of goods nor supply of services in the present case.
 - that there is no supply of goods or services
 - that it is submitted that the grant of license and allocation/use of spectrum under Section 4 of the Indian Telegraph Act does not constitute supply of goods or supply of service inasmuch as there are no goods that are provided/supplied by the Government. The license and allocation and usage of spectrum so granted are neither goods nor immovable property. The Government merely grants/delegates permission of carrying out the establishing, maintaining and working telegraphs under Section 4 of the Telegraph Act.
 - that it is further submitted that the grant of license or allocation of spectrum would not even qualify as service. In the present facts, the LF and SUC charges are paid to the Government by the Appellant due to the former parting with its privilege to allow the latter to provide telecommunication services and for allocation/usage of spectrum. The parting of the privilege by the Government does not result in any supply of goods or services under the GST Law. Thus, the relationship between the Government and the Appellant is not in the nature of service provider - service recipient and the same does not qualify as 'service' under the GST laws.
 - that the Appellant further submits that the mere fact that term 'license' is covered under the definition of supply under Section 2(83) and Section 7 of the CGST Act, it does not mean that the grant of permission by the Government for establishing, maintaining and working of telecom network and allocation/use of spectrum to the telecom operators would qualify as 'license' as covered under the definition of supply under the CGST Act. To the contrary, it is only a permission granted by the Government in exercise of its sovereign function and grant of permission to operate as a telecom operator per se is not a license to be covered under the purview of the term 'license'.
 - that there is no furtherance of business.
 - that the Appellant humbly submits that one of the essential elements for an activity to qualify as supply is that the activity should be in the course and furtherance of business. To the contrary, in the present facts, the Government is not engaged in the trade or commerce or business while it grants a permission to operate as a telecom operator.
 - that the allocation of spectrum by the Department of Telecommunication ('DoT') is not akin to providing any goods or services and no business is carried out by the Government when it allocates spectrum so as to be subjected to levy of GST. The regulation of telecommunication service and right of use of radio frequencies/spectrum by the DoT is in discharge of its statutory functions. The Government is not engaged in activity of buying and selling in grant of license and allocation of

spectrum for provision of telecommunication service. Moreover, the functions of a Government are only constitutional and statutory in nature which cannot be deemed to be a business.

- that Under Section 4 of the Telegraph Act, the DoT regulates the provision of telecommunication service and grant of license and allocation of spectrum cannot be construed as any 'business' carried out by the Government. The grant of license by the DoT is not akin to providing any goods or services and no business is carried out by the Government when it grants license or allocates spectrum under Section 4 of the Telegraph Act so as to be subjected to levy of GST.

In view of the above submissions, it is clear that there is no supply of goods or service which is in course or furtherance of business. Accordingly, Section 9 of the CGST Act read with Notification No 13/2017-

Central Tax (Rate), dated 28 June, 2017 is not applicable in the present case as alleged by the authorities. Therefore, Impugned Order is liable to be set aside on this ground alone.

- that clarifications or circular cannot bring a levy or exempt a levy.
- that in the Impugned Order it has been observed that in para 9 of the Circular No. 192/02/2016- S.T., dated 13 April, 2016, it has been clarified that Service tax is payable on yearly instalments due after 1 April, 2016 in respect of spectrum assigned before 1 April, 2016 in view of Rule 7 of Point of Taxation Rules, 2011 as amended vide Notification No. 24/2016-S.T., dated 13 April, 2016.
- that in this context, it is reiterated that in absence of any supply of goods or services (explained in Ground A above), which is one of the essential conditions for levy of GST, no GST can be levied on the LF and SUC charges paid to the Government.
- that in view of the above submissions, it is clear that clarification issued vide 192/02/2016-S.T., dated 13 April, 2016 is of no consequence in the present facts. Further, it is submitted that the clarification was issued under the erstwhile service tax regime, which is of no relevance under the GST regime. Accordingly, the impugned order is liable to be set aside on this ground alone.
- that LF and SUC are not consideration for supply
- that It is submitted that the grant of license by the Government to the Appellant on the payment of fees under the Telegraph Act cannot be considered as an activity carried out for a consideration. It is a very well settled that by issuing the licenses Government parts with its exclusive privilege to regulate telecommunication services.
- that there is no element of quid pro quo in case of regulatory fees
- that it is submitted that the view that GST is leviable on any payment in lieu of any license granted by the Government is patently inconsistent with the position that any payment made as a quid pro quo for the service received from the Government has to be regarded as a consideration for that service.
- that it is respectfully submitted that the requirement for quid pro quo is not satisfied in the case of fees paid for grants of licenses or permissions where such fees are in the nature of regulatory fees. The Hon'ble Supreme Court has consistently held in its judgments over the last five decades that a

license fee may either be regulatory or compensatory, and that the element of quid pro quo is not sine qua non for a fee.

For instance, in the case of Secunderabad Hyderabad Hotel Owners' Assn. v. Hyderabad Municipal Corpn., AIR 1999 SC 635, the Hon'ble Supreme Court held as under :

“A license fee may be either regulatory or compensatory. When a fee is charged for rendering specific services, a certain element of quid pro quo must be there between the service rendered and the fee charged so that the license fee is commensurate with the cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be charged. License fees can also be regulatory when the activities for which a license is given require to be regulated or controlled. The fee which is charged for regulation for such activity would be validly classifiable as a fee and not a tax although no service is rendered. An element of quid pro quo for the levy of such fees is not required although such fees cannot be excessive.”

In view of the above submissions, the grant of license and allocation of spectrum by the Government under the Telegraph Act, which is in exercise of its statutory powers, does not fulfil the elements of 'service' for the purposes of the charging provisions of the CGST Act and does not constitute supply of goods or service under GST regulations. Therefore, no GST is applicable on price for parting the privilege by the Government.

- that issuance of license and allotment/use of spectrum does not attract any charge.
- that without prejudice to the above submissions, in the following paragraphs the Appellant humbly submits that even if it is assumed without admitting that the transactions in question qualify as supply under the GST law, then also, no GST rate was prescribed during the relevant period.
- that Section 9 of the CGST Act provides for levy of GST on supplies of goods or services at rates as may be notified by the Government. Consequently, specific notifications have been issued for providing the classification and rates applicable on supply of services and goods.
- that in the context of services, the Central Government has issued Service Rate Notification to provide for the GST rate as applicable on the different heading of services. The Notification No. 1/2017-Central Tax (Rate), dated 28 June, 2017 ('Goods Rate Notification') provides for rate of CGST, applicable in case of goods based on HSN classification thereof.
- that the scheme of determining rate of GST as prescribed under the 'Service Rate Notification' is as follows :
 - (i) Classification of various types of services is prescribed under the Annexure to the notification. The classification of services starts from 2 digits level and is sub-classified up to 6 digits level.
 - (ii) GST rate is prescribed at 4 digits level with corresponding columns prescribing the "types of services covered", "conditions, if any" and the applicable GST rate".
- that it is submitted that one very important aspect which requires consideration for the purpose of determining the GST rate on supply of service(s) is that, though the sub-classification is prescribed

at 6 digits level, the GST rates are prescribed at 4 digits level. As a result, under the present scheme, the GST rates for services have been prescribed only for the specific services covered under the Heading at 4 digits level and not for all the services mentioned at 6 digits level. Consequently, only if a classification of a particular service is prescribed in the description/types of services mentioned against the 4 digits Heading under the Service Rate Notification there will be a GST levy.

- that there is a specific 4 digits classification for “leasing and rental services” which includes within its ambit licensing services, prescribed at 6 digits level. It is therefore, humbly submitted that if at all there could be a classification for licensing arrangements in question, it could only be Heading 9973 and not Heading 9991 as inter alia observed in the Impugned Order. The Heading 9991 merely covers public administration services provided to community as whole. In this regard, the grant of license to use spectrum is not a service provided to community as whole but is a mere contract entered into between DoT and the Appellant. Accordingly, the grant of license is not covered by the Service Codes under Heading 9991 in Annexure to the Service Rate Notification and can at best be covered under Heading 9973.
- that for ease of reference, the relevant extract of the relevant Scheme of Classification of Heading 9973 is reproduced as under :
- that as submitted earlier, the GST rates are prescribed under the Service Rate Notification at 4 digits level whereas service descriptions under the scheme of classification are sub-classified up to 6 digits level. It thus become imperative for the purpose of determining GST rate as to what all services prescribed at 6 digits level are covered under the Service Rate Notification.
- that the point to note is that GST will not be applicable for the description of services classified under the classification scheme at 6 digits level for which no corresponding GST rate is prescribed under the Service Rate Notification. The following submissions would substantiate that during the relevant period no GST rate was prescribed for LF and SUC services.
- that Sl. No. 17 of the Service Rate Notification prescribes GST rate(s) applicable to services covered under Heading 9973 i.e. Leasing or rental services, with or without operator. During the relevant period, there are six sub-categories of Sl. No. 17 covering different types of services.

Sl. No.	Chapter, Section, Heading or Group	Service Code (Tariff)	Service Description
232	Heading 9973		Leasing or rental services with or without operator

250	Group 99733		Licensing services for the right to use intellectual property and similar products
258		997338	Licensing services for right to use other natural resources including Telecommunication spectrum
259		997339	Licensing services for the right to use other intellectual property products and other resources nowhere else classified

(a) Entries (i) and (ii) of Sr. No. 17 to the Service Rate Notification pertains to 'Temporary or permanent transfer or permitting the use or enjoyment of Intellectual Property (IP)'. However, as the license per se is not an intellectual property, the same would not get covered under the purview of entries (i) and (ii) of the Sr. No. 17. Accordingly, the license cannot be subject to tax under entry (i) or (ii) of Sr. No. 17 of the Service Rate Notification.

(b) Entries (iii) to (v) to Serial No. 17 specifically deal with transfer of right to use goods. However, the granting of license and allotment of spectrum by any stretch of imagination cannot be construed as goods and would not get covered under the purview of entries (iii) to (vii) of Sr. No. 17. Accordingly, the transaction in question cannot be subject to tax under (iii) to (vii) of Sr. No. 17 of the Service Rate Notification. The submission in the following paragraphs will clarify that the transactions in question were outside the scope of this entry, (c) Entry (viii) of Sr. No. 17 of the Service Rate Notification provides residual rate for HSN 9973 pertaining to leasing or rental services, with or without operator, which are not covered under any other specific entries provided therein [Entry (i) to (vii)]. The scope of services covered under Entry (viii) is limited to those situations for which GST of goods has been defined under goods notification.

- that it is submitted that all the services falling under entry (viii) of Sl. No. 17 of the Service Rate Notification shall be taxable at the rate of tax which is applicable on supply of like goods underlying such services. Thus the "residuary entry (viii)" covers within its ambit only those services which are provided in relation to "goods" which are prescribed under the Goods Rate Notification read with Customs Tariff Act, as mentioned in Para 4 of the Service Rate Notification and Explanation No. (iii) of the Goods Rate Notification. Thus, during the relevant period, there was no rate prescribed for the arrangement in question.

- Notwithstanding the above submission and without conceding the fact that grant of telecommunication license and assignment/use of Spectrum by Government under Section 4 of the Telegraph Act, is supply of goods or service under CGST Act, even if it assumed that LF and SUC arrangement are treated as pure service arrangement, then no GST rate is prescribed for such an arrangement. This leads to the point that the only situation where LF and SUC arrangement would attract GST during the relevant period would be if the LF and SUC paid to DoT are not only classified as goods but are also those goods which are covered under the Customs Tariff Act, as has been specifically been made the criterion under the Service Rate Notification as well Goods Rate Notification for levying GST.
- that the Goods Rate Notification also does not prescribe any rate for levy of GST on LF and SUC. Additionally, the residuary entry of the said notification under Sl. No. 453 of the Schedule III only includes goods covered under the Customs Tariff Act, 1975 whereas LF and SUC are not covered under any heading of the Customs Tariff Act, 1975. Therefore, LF and SUC will not attract any levy of tax.

In view of the above submissions, the grant of license and allocation of spectrum by the Government under Section 4 of the Telegraph Act, which is in exercise of its statutory powers, does not attract GST irrespective of whether the arrangement is evaluated from the perspective of being a pure service arrangement or the one where the services are in relation to the “goods covered under the Customs Tariff Act”.

- that it is also a well settled principle that the prescription of chargeability is imperative consideration and merely classification of an arrangement under the scheme of law will not result in levy of tax. Merely by mentioning a particular goods or service in classification schedule, charge cannot be created.
- that Refund claim is covered under Section 54 of the CGST Act.
- that in the Impugned Order it has been observed that the refund claimed filed by the Company is not covered under ‘Any other category’. Section 54 of the CGST Act, 2017 allows any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may any application in such form and manner as may be prescribed. Further Rule 89 of the CGST Rules, 2017, prescribe the procedure for filing the application for refund tax, interest and penalty, fees or any other amount through GST RFD-01 on the common portal.
- that the Impugned Order passed by the respondent is in violation of the ‘Principles of Natural Justice’

It is humbly submitted that the respondent did not provide any opportunity of being heard to the Appellant and the refund application was rejected without seeking any explanation from the Appellant. The Appellant had submitted a letter on 30 September, 2019 for Adjournment of Personal Hearing scheduled by the respondent on 30 September, 2019 to any date after 15 October, 2019 and seeking additional time to furnish reply to the SCN. Thereafter, the respondent proceeded to reject the application without giving an opportunity of being heard to the Appellant and giving time to furnish the reply to the SCN. Thus, the Impugned order is liable to be set aside for being passed in violation of the principle of audi alteram partem causing severe prejudice to the rights of the appellant.

Further the appellant has cited various case laws in their defence are as under :-

Jagatjit Industries v. Union of India, W.P. (C) No. 3277/ 2017 [2019 (22) G.S.T.L. 350 (Del.)] and the Punjab and Haryana High Court order dated 27 August, 2018 in case of Divya Singla v. Union of India - 2018 (16) G.S.T.L. 530 (P & H)

Union of India v. Kerala State Insurance Department - 2016 (43) S.T.R. 173 (Ker.)

Gannon Dunkerley and Co. v. The State of Rajasthan and Ors., 1994 (1) WLN 652

Har Shankar v. Dy. Excise and Taxation Commr., (1975) 1 SCC 737

State of Andhra Pradesh v. Y. Prabhakara Reddy, (1987) 2 SCC 136

CCE v. WIMCO Ltd. reported in 2007 (217) E.L.T. 3 (S.C.) and Grasim Industries v. Union of India reported in 2011 (273) E.L.T. 10 (S.C.)

Asahi Songwon Colors Ltd. v. Commr. of C. Ex. & S.T., Vadodara-I, 2018 (361) E.L.T. 435 (Guj.)

Dharampal Satyapal Ltd. v. Dy. Commissioner of C. Ex., Gauhati, 2015 (320) E.L.T. 3 (S.C.)

Asstt. Commr., Commercial Tax Department v. Shukla & Brothers, 2011 (22) S.T.R. 105 (S.C.)

Oryx Fisheries Private Limited v. Union of India, 2011 (266) E.L.T. 422 (S.C.);

TRF Ltd. v. Commissioner of Central Excise and Service Tax, 2013 (293) E.L.T. 172 (Jhar.)

6. Personal hearing in virtual mode through video conference was held on 18-12-2020. Shri Chirag Bhatia, Shri Punit Bhardwaj, Chartered Accountants appeared on behalf of the appellant and explained the case. They explained each and every points of grounds of appeal filed to this office. Further, Shri Bhardwaj requested for additional submission through Email after conducting personal hearing. In view of the above grounds of appeal they have requested to decide the case at the earliest.

7. I have gone through the facts of the case and the oral as well as written submissions made by the appellant in their Appeal memo and also additional submission at the time of personal hearing and accordingly I proceed for deciding the appeal.

Discussion and findings :

8. On going through the case records and written as well as oral submissions of the appellant, I find that the issues involved in the present case for consideration are as under :

- (a) whether payment, in the form of License Fee (LF) for issuance of License and Spectrum Usage Charges (SUC) for use of spectrum, as a percentage of the 'Adjusted Gross Revenue' (AGR) to 'Department of Telecommunications' (DoT) is a 'Supply' under GST law or not?
- (b) whether issuance of license and allotment of spectrum as a 'Statutory fee' attract any levy of tax as per GST law.
- (c) whether LF and SUC charges are 'consideration' for supply as per GST law or not?
- (d) whether Refund claim is covered under any other category specified under Section 54 of the CGST Act, 2017 read with Rule 89 of CGST Rules, 2017?

- (e) whether License fee and Spectrum usage charges paid by the Appellant are covered in Service Rate Notification and are leviable to tax or not?
- (f) whether clarifications or circulars can bring a levy or exempt a levy?
- (g) whether issue can be decided where the issue is under litigation (writ petition filed by the appellant in the Hon'ble High Court, Delhi), whether it would be appropriate to grant/sanction refund at this juncture of time?
- (h) whether principle of natural justice has been properly followed in the instant case?
- (a) In respect of issue at S. No. (a) I find that :-

As per Section 2(83), Section 7 of the CGST Act, 2017, which reads as under :-

“(83) - outward supply in relation to a taxable person, means supply of goods or services or both, whether by sale, transfer, barter, exchange, licence, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business;”

”7. Supply includes -

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;”

The term ‘licence’ is specifically covered under both aforesaid sections of the CGST Act, 2017. Hence, there is no ambiguity that it is a ‘Supply’.

As per Entry No. 62 of Notification No. 25/2012-S.T., dated 20-6-2012 (as amended) w.e.f. 1-4-2016 services, provided by Government by way of allowing a business entity to operate as a telecom service provider or use radiofrequency spectrum on payment of licence fee or spectrum user charges, as the case may be, was taxable.

Further, with regard to taxability of “assignment of spectrum” C.B.I. & C. has issued a Circular No. 192/02/2016-Service Tax, dated 13-4-2016 wherein at S. No. 9 of the table it was clarified that ‘any periodic payment required to be made by the assignee, such as Spectrum User Charges, license fee in respect of spectrum, shall be taxable.’

As per Cambridge dictionary the term ‘license’ has been defined as :

“to give someone official permission to do something”

As per para A4 of the appeal “The Government merely grants/delegates permission of carrying out the establishing, maintaining and working telegraphs under Section 4 of the Telegraph Act”. Granting permission for carry out the establishing, maintaining and working telegraphs and allocation of spectrum is a service which falls under HSN Head 9973 38 which specifically defines “Licensing services for right to use other natural resources including telecommunication spectrum”. In the instant case, consideration in the form of LF and SUC is also available.

In view of the above, it is construed that there is a supply of service as per aforesaid statutory provisions. Further, the supply of service in lieu of “License and Spectrum” are basically for furtherance

of the business of the appellant since purpose for attaining license and for allotment of spectrum is purely to do business with various buyers through telecommunication services. The appellant vide para A9, A10 and A11 has mis-interpreted the fact of “furtherance of business” as per the Government lateral whereas it was for the person who is running a business, here the appellant. Accordingly the levy of GST is appropriately applicable on the appellant as per sub-section (3) of Section 9 of the CGST Act, 2017 read with Notification No. 13/2017-Central Tax (Rate), dated 28 June, 2017.

Further, if there was any doubt regarding ‘taxability of service’ then the appellant was free to approach the Authority for Advance Ruling as per sub-section (2) of Section 97 of CGST Act, 2017, because question of law about determination of the liability to pay tax on any service may be sought for advance ruling to AAR as per GST law, but the same was not opted by the appellant.

(a) In respect of issue at S. No. (b) I find that :

As per decision of the Constitution Bench of the Hon’ble Supreme Court in the case of Har Shankar v. Dy. Excise and Taxation Commr., (1975) 1 SCC 737) -

The word “license fee” or “fixed fee” is meant the price of consideration which the Government charges to the licenses for parting with its privilege and granting them to the licenses. ”

On reading the decree it emerges that ‘Price of a privilege’ was affirmed by the Constitution Bench in the case where fee is fixed but not in the cases where fee is fluctuating as per percentage share (LF & SUC) of revenue (AGR) like in the instant case. Therefore, the permission of granting of License by DoT for business activities of the appellant as it is directly nexed with their revenue.

As per Section 4 of the Telegraph Act “The Government merely grants/delegates permission of carrying out the establishing, maintaining and working telegraphs”. Granting permission for carry out the establishing, maintaining and working telegraphs and allocation of spectrum is a service which falls under HSN head 9973 38 which specifically defines “Licensing services for right to use other natural resources including telecommunication spectrum”.

If no GST is leviable on grant of license then why a service categories at HSN head 9973 38 as “Licensing services for right to use other natural resources including telecommunication spectrum”. Else all tax liability would be null, which is wrong interpretation of the aforesaid verdict.

(b) In respect of issue at S. No. (c) I find that :

As per clause (31) of Section 2 of CGST Act, defines consideration, which reads as under :-

(31) - consideration in relation to the supply of goods or services or both includes -

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

As per Section 4 of the Indian Telegraph Act, 1885 “power to grant licences” has been specified as :-

“4. Exclusive privilege in respect of telegraphs, and power to grant licenses.

(1) Within [India], the Central Government shall have exclusive privilege of establishing, maintaining

and working telegraphs :

Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of [India] :

[Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working -

(a) of wireless telegraphs on ships within Indian territorial waters [and on aircraft within or above [India], or Indian territorial waters], and

(b) of telegraphs other than wireless telegraphs within any part of [India].

[Explanation. - The payments made for the grant of a licence under this sub-section shall include such sum attributable to the Universal Service Obligation as may be determined by the Central Government after considering the recommendation made in this behalf by the Telecom Regulatory Authority of India established under sub-section (1) of section 3 of the Telecom Regulatory Authority of India Act, 1997.]

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-section (1).

Definition of LF & SUC :-

Further, the telecom sector was liberalised under the National Telecom Policy, 1994 after which licenses were issued to companies in return for a fixed license fee. To provide relief from the steep fixed license fee, the Government in 1999 gave an option to the licensees to migrate to the revenue sharing fee model. Under this, mobile telephone operators were required to share a percentage of their AGR with the Government as annual License Fee (LF) and Spectrum Usage Charges (SUC). License agreements between the Department of Telecommunications (DoT) and the telecom companies define the gross revenues of the latter. AGR is then computed after allowing for certain deductions spelt out in these license agreements. The LF and SUC were set at 8 per cent and between 3-5 per cent of AGR respectively, based on the agreement.

LF & SUC has also been defined in Para 18.2 & 18.3 respectively of the Unified License Agreement as :

“18.2 License Fee :

18.2.1 In addition to the Entry Fee, an annual License fee as a percentage of Adjusted Gross Revenue (AGR) shall be paid by the Licensee service-area wise, for each authorized service from the effective date of the respective authorization. The License fee shall be 8% of the AGR, inclusive of USO Levy which is presently 5% of AGR :

Provided that from Second Year of the effective date of respective authorization, the License fee shall be subject to a minimum of 10% of the Entry Fee of the respective authorized service and service area as in Annexure-II.

18.2.2 In case the Licensee obtains access spectrum for operation of any authorized service in a service area, a 'presumptive AGR' for that authorized service and service area shall be arrived at in accordance with the relevant provisions of the Notice Inviting Application (NIA) document of the auction of spectrum or conditions of spectrum allotment/Lol as the case may be. The License Fee based on presumptive AGR shall be applicable from the date of issue of Letter of Intent earmarking such spectrum or the effective date of the license/authorization, whichever is later. The Licensee shall, in such cases, pay the license fee on the presumptive AGR or actual AGR or the minimum license fee referred in condition 18.2.1, whichever is higher. In case, the Licensee obtains spectrum for any service and service area in different bids, the total presumptive AGR shall be the sum of the presumptive AGRs calculated on the basis of the respective Bid amounts as prescribed in the respective NIA or conditions of spectrum allotment/Lol as the case may be.

18.2.3 The Licensor reserves the right to modify the above mentioned License fee as percentage of AGR any time during the currency of this agreement.

18.3 Spectrum Related Charges :

In case the Licensee obtains spectrum, the licensee shall pay spectrum related charges, including payment for allotment and use of spectrum, as per provisions specified in the relevant NIA document of the auction of spectrum or conditions of spectrum allotment/Lol/directions/instructions of the Licensor/WPC Wing in this regard. The spectrum related charges shall be payable in addition to the License fee.

20. Schedule of payment of ANNUAL LICENSE FEE and other dues :

20.1 License Fee shall be payable in four quarterly installments during each financial year (FY) commencing 1st of April.

In view of the above, it is concluded that consideration in the form of LF and SUC paid by the appellant to the Government is 'consideration' as per clause (31) of Section 2 of CGST Act which cover all the elements specified under ibid section of the Act. There are service provider as well as service recipient and the element of consideration is also involved in the instant case. Hence, the taxability is fasten on these payments as per GST Act.

(c) In respect of issue at S. No. (d) I find that :

With regard to the contention of the adjudication authority that the refund in the instant case is not covered under the 'any other category', refund of unutilized input tax credit is prescribed as per Section 54(3) of the CGST Act, 2017, which allows refund of accumulated input tax credit on 'input' only. In Act and as well as Rules, there is no provision for refund of input tax credit accumulated on input services. Hence, the category specified by the appellant during filing of refund is improper and there is no legal backing in this regard.

(d) In respect of issue at S. No. (e) I find that :

Appellant has paid GST under the HSN Head 9984 meant for Telecommunication Services wrongly whereas, proper HSN head for the payment of GST under Reverse Charge Mechanism for 'Grant of License' and 'Allocation of Spectrum' is 9973 meant for 'Leasing and Rental services with or without operator'. As per Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017 rate of GST is defined at S. No. 17 against clause (vi). HSN sub-heading 9973 38, meant for "Licensing services for right to use other natural resources including telecommunication spectrum" is the proper classification of the nature of service in question.

Service tax codes is specified for the service under question as tabulated below :

Sl. No.	Chapter, Section, Heading or Group	Service Code (Tariff)	Service Description
232	Heading 9973		Leasing or rental services with or without operator
250	Group 99733		Licensing services for the right to use intellectual property and similar products
258		997338	Licensing services for right to use other natural resources including telecommunication spectrum

Besides above, it is stated that GST rates are prescribed under the Service Rate Notification at 4 digits level (HSN Heading) whereas service descriptions under the scheme of classification are sub- classified up to 6 digits level (HSN sub-heading). HSN Heading is a cluster which consist of various sub-headings. Hence, sub-headings have a firm nexus with heading of HSN and rate of heading will be fully applied on its all sub-headings. Therefore, Rate of Tax that will be applicable in the instant case will be tantamount to 'same rate of central tax as applicable on supply of like goods involving transfer of title in goods' at the period in question.

(e) In respect of issue at S. No. (f) I find that :

As per Section 2(83), Section 7 of the CGST Act, 2017, which reads as under :-

“(83) - outward supply in relation to a taxable person, means supply of goods or services or both, whether by sale, transfer, barter, exchange, licence, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business;”

“7. supply includes -

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;”

The term ‘licence’ is specifically covered under both aforesaid sections of the CGST Act, 2017. Hence, there is no ambiguity that it is a ‘Supply’.

As per Entry No. 62 of Notification No. 25/2012-S.T., dated 20-6-2012 (as amended) w.e.f. 1-4-2016 services, provided by Government by way of allowing a business entity to operate as a telecom service provider or use radio frequency spectrum on payment of licence fee or spectrum user charges, as the case may be, was taxable.

As per Cambridge dictionary the term ‘license’ has been defined as :

“to give someone official permission to do something”

GST is levied as per Section 9(3) of the CGST Act, 2017, reads as under :-

9. Levy and Collection. -

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

Further, Levy of GST is also notified vide Notification No. 13/2017-Central Tax (Rate), dated 28 June, 2017 wherein at Sr. No. 5 it is mentioned that services provided by the Central Government to a business entity is taxable under Reverse Charge in terms of Section 9(3) of the CGST Act, 2017.

In view of the above, it is implied that statutory liability to pay GST on the Services of ‘Grant of License’ and ‘Allocation of Spectrum’ by the appellant was there. Historically, LC and SUC was taxable under Service Tax regime, it clearly shows that this activities falls under the ambit of ‘Service’. Quoting the circular of Service Tax regime was only for the sake of defining these activities as ‘Service’. However, in the instant case ample statutory provisions are available to fasten liability to pay GST on the appellant.

(g) In respect of issue at S. No. (g) I find that :

In as per para 10(g) of appeal memo, the appellant has stated that a writ petition has been filed before the Hon’ble High Court, Delhi. It is well settled law that if any issue is under litigation in Higher Court, then no matter can be finalized till the decision of the Higher Court. Further, I find that appellant is one hand filing refund for granting the same, whereas on other hand they are under litigation for taxability of the issue before High Court simultaneously. In this juncture of time, when the matter is sub judice, hence I am in the opinion that it would not be appropriate to grant refund and filing of refund application

on the litigated issue itself becomes premature.

(h) In respect of issue at S. No. (h) I find that :

Further, with regard to above, the appellant emphasized that the impugned order passed by the adjudicating authority is in violation of principle of natural justice, I find that in all cases proper opportunity have been provided to the appellant by issuing the show cause notices and by hearing the averment of the appellant before passing of the impugned order. Further, all the submissions/averment have been taken up in the appeal also. Therefore, I do not find any merit of the appellant in this context.

9. Further, I find that the appellant has cited various case laws for buttress of their submission. On going through the judgments, it is observed that the facts mentioned in the pronouncements are not squarely applicable in the instant case as the facts of the instant case are different.

10. In view of the above, I do not find any infirmity in rejecting the refund, therefore, I reject the all appeal filed by the appellant in the instant case.

11. Accordingly, all the above five appeals are disposed off in above manner.