

WEST BENGAL AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX
14 Beliaghata Road, Kolkata – 700015
(Constituted under section 96 of the West Bengal Goods and Services Tax Act, 2017)

Members present:

Mr Brajesh Kumar Singh, Joint Commissioner, CGST & CX
Mr Joyjit Banik, Senior Joint Commissioner, SGST

Preamble

A person within the ambit of Section 100 (1) of the Central Goods and Services Tax Act, 2017 or West Bengal Goods and Services Tax Act, 2017 (hereinafter collectively called 'the GST Act'), if aggrieved by this Ruling, may appeal against it before the West Bengal Appellate Authority for Advance Ruling, constituted under Section 99 of the West Bengal Goods and Services Tax Act, 2017, within a period of thirty days from the date of communication of this Ruling, or within such further time as mentioned in the proviso to Section 100 (2) of the GST Act.

Every such appeal shall be filed in accordance with Section 100 (3) of the GST Act and the Rules prescribed thereunder, and the Regulations prescribed by the West Bengal Authority for Advance Ruling Regulations, 2018.

Name of the applicant	KARNANI FNB SPECIALITIES LLP
Address	HAUTE STREET BUILDING, 1ST FLOOR, 86A, TOPSIA ROAD SOUTH, TOPSIA, PINCODE-700046
GSTIN	19AAOFK8859P1ZZ
Case Number	WBAAR 24 of 2022
ARN	AD190822015684W
Date of application	September 02, 2022
Jurisdictional Authority (State)	Ballygunge Charge
Jurisdictional Authority (Central)	Chowringhee Division, Kolkata North Commissionerate
Order number and date	22/WBAAR/2022-23 dated 09.02.2023
Applicant's representative heard	Mr. Sujit Ghosh , Authorised Advocate

1.1 At the outset, we would like to make it clear that the provisions of the Central Goods and Services Tax Act, 2017 (the CGST Act, for short) and the West Bengal Goods and Services Tax Act, 2017 (the WBGST Act, for short) have the same provisions in like matter except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the WBGST Act. Further to the earlier, henceforth for the purposes of these proceedings, the expression 'GST Act' would mean the CGST Act and the WBGST Act both.

1.2 The applicant is engaged in the business of providing restaurant services from its lounge bar called "The GRID" and is also providing catering services as well as banquet renting services. Along with such supplies or on a standalone basis, at times, the applicant is also engaged in selling/serving of alcoholic liquor for human consumption to its customers.

1.3 The applicant has made this application under sub section (1) of section 97 of the GST Act and the rules made there under raising following questions vide serial number 14 of the application in FORM GST ARA-01:

- (i) Whether the Constitution of India has conferred any power onto the Parliament to legislate on sale of alcoholic liquor for human consumption with reference to the Goods and Service tax regime, considering the provision of Article 246A read with Article 366(12A)?
- (ii) If the answer to question (1) is in the negative, then whether the Central Goods and Services Tax Act, 2017 (CGST Act) can directly or indirectly deal with aspects touching upon sale of alcoholic liquor for human consumption by the applicant either with reference to levy of tax on such sale or with reference to reversal of credit solely because the applicant is effecting sale of such alcoholic liquor?
- (iii) Under these circumstances, whether the definition of exempt supply as provided under section 2(47) of the CGST Act, read with definition of the term 'non-taxable supply' under section 2(78) can therefore include sale of alcoholic liquor for human consumption by the applicant?
- (iv) Whether in order to qualify as non-taxable supply under section 2(78), a transaction must first qualify as supply as defined in section 7 of the CGST Act read with Article 246A and Article 366(12A) of the Constitution and as such therefore, sale of alcoholic liquor for human consumption cannot be said to qualify as a 'supply' for the above purposes under the ambit of the CGST Act.
- (v) Consequently, whether the applicant is obliged to reverse input tax credit (ITC) under section 17(2) of the CGST Act read with rule 42 of the Central Goods and Services Tax Rules, 2017 (CGST Rules) in view of the sale of alcoholic liquor for human consumption effected by it at its premises under the facts & circumstances of the present case?

1.4 The concerned officer from the revenue has submitted that the principal question raised by the applicant is whether the applicant is required to undertake reversal of ITC in terms of Rule 42 to the extent of turnover that relates to sale of alcoholic liquor for human consumption. This very question is not in compliance with the provisions of section 97 of the GST Act and hence the application for advance ruling should not be admitted.

1.5 This authority, however, is of the view that the questions except that under serial number (v) above are not covered under any of the clauses of sub-section (2) of section 97 of the GST Act. On being pointed out the aforesaid observation in course of hearing, the applicant has withdrawn the questions under serial number (i) to (iv) and has also rephrased the question under serial number (v) as under:

- Whether or not the applicant is obliged to reverse Input tax Credit ('ITC') under Section 17(2) of the CGST Act read with Rule 42 of the Central Goods and Services Tax Rules, 2017 ('CGST Rules'), in view of the sale of alcoholic liquor for human consumption effected by it at its premises under the facts & circumstances of the present case?

1.6 The aforesaid question, in our conscious opinion, is in respect of admissibility of input tax credit and therefore found to be covered under clause (d) of sub-section (2) of section 97 of the GST Act. We do not agree with the submission made by the concerned officer from the revenue on this issue.

1.7 The applicant states that the question raised in the application has neither been decided by nor is pending before any authority under any provision of the GST Act.

1.8 The application is, therefore, admitted.

2. Submission of the Applicant

2.1 The applicant submits that since the instant application pertains to the sale of alcoholic liquor for human consumption by the applicant to its customers and credit related implications thereto, it is germane to understand the provisions for ITC and its proportionate reversal under the CGST Act and the CGST Rules. The applicant, thus, submits as follows:

Provision mandating ITC reversal under the GST law

2.2 Section 16 of the CGST Act deals with the eligibility and conditions for taking ITC for Input Tax charged on any supply of goods or services or both, which are used or intended to be used in the course of furtherance of business. Section 17 (2) of the CGST deals with apportionment of credit i.e. it mandates that a registered supplier providing 'taxable supplies' as well as 'exempt supplies' to reverse ITC to the extent of the latter. The relevant portion of the same is reproduced hereunder for ease of reference:

"Apportionment of credit and blocked credits

17. (1) *Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.*

(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

(3) The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

Explanation.-For the purposes of this sub-section, the expression "value of exempt supply" shall not include the value of activities or transactions specified in Schedule III, except those specified in paragraph 5 of the said Schedule.

...

2.3 Thus, the CGST Act permits utilization of ITC to the extent of input tax paid on inputs and input services that are used towards making supplies on which tax is payable. ITC attributable to 'exempt supplies' is to be reversed as per the prescribed formula.

2.4 The manner of determination of ITC of inputs and input services utilized towards such 'exempt supplies' is determined according to the formula prescribed under Rule 42 of the CGST Rules. The relevant extract of the Rule is as follows-

"42. Manner of determination of input tax credit in respect of inputs or input services and reversal thereof.-(1) The input tax credit in respect of inputs or input services, which attract the provisions of sub-section (1) or sub-section (2) of section 17, being partly used for the purposes of business and partly for other purposes, or partly used for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies, shall be

attributed to the purposes of business or for effecting taxable supplies in the following manner, namely,-

2.5 Since the ITC required to be reversed pertains to exempt supplies, it becomes imperative to understand the meaning of the term 'exempt supply'. 'Exempt supply' is defined under Section 2(47) of the CGST Act, in the following manner-

"exempt supply" means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply;

2.6 'Non-taxable supplies' have also been defined under the CGST Act, under Section 2(78) in the following manner-

“non-taxable supply” means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act”

2.7 Thus, for a transaction to be deemed as 'exempt supply', it will have to fall within the following threshold-

- (a) It must be a supply of goods or services or both,
- (b) It must either-
 - Attract 'Nil' rate of tax, or
 - Be wholly exempt from tax under Section 11 of the CGST Act or Section 6 of the IGST Act, or
 - Be a 'non-taxable supply' under Section 2(78) of the CGST Act.

2.8 We may now examine if the sale of alcoholic liquor meets the above- mentioned essentials of an 'exempt supply':

2.9 Sale of Alcoholic liquor for human consumption:

- (a) Cannot fall under 'supply' of goods or services or both since by virtue of Section 7 of the CGST Act read with Article 246 A (which grants the power to the Parliament to levy 'tax on goods and services') and Article 366- (12 A) (which defines the term 'tax on goods and services' by specifically excluding supply of liquor), sale of alcohol is outside the realm of GST itself.
- (b) Is not subject to 'Nil' rate of tax
- (c) Is not exempted under Section 11 of the CGST Act and Section 6 of the IGST Act which empowers the Government to exempt specific goods or services by way of a Notification.

2.10 Thus, it becomes relevant to examine whether selling alcoholic liquor to the customers falls under the definition of a 'non-taxable supply' under the CGST Act.

'Non-taxable supply' under the GST law

2.11 As defined under the CGST Act, 'exempt supply' also includes a 'non- taxable supply'. As mentioned above, 'non-taxable supply' is defined under section 2(78) of the Act. The essential requirement under the definition is that the activity must (a) be a supply of goods or services or both (b) not be leviable to tax under the CGST Act or IGST Act.

2.12 It is pertinent to note that at present alcoholic liquor for human consumption, has been deliberately kept outside the scope of GST. Article 366(12A) of the Constitution of India, the very fountainhead of GST, determines the scope of the tax by way of defining “Goods and Services Tax” as ‘any tax on supply of goods, or services or both, except for taxes on the supply of the alcoholic liquor for human consumption.’

2.13 Thus, by virtue of Article 366 (12A), the scope of GST has been restricted, under the Constitution of India, to specifically exclude sale of alcoholic liquor for human consumption. Therefore, selling ‘alcoholic liquor for human consumption’ cannot even be treated as a ‘supply’ as envisaged under the Act, much less an exempt supply which is ‘not leviable to tax’ under the CGST or IGST Act, simply because it cannot even be treated as a subject-matter on which any GST legislation may extend so as to render it either ‘leviable’ or ‘not leviable’ under the statute.

2.14 The scope of ‘non-taxable supply’ thus, must necessarily be limited to those supplies over which the legislature can exercise its legislative competence and impose tax. These may include-

- (a) Supplies mentioned under Section 9(2) of the CGST Act i.e. supply of petroleum crude, high speed diesel, motor spirit, natural gas and aviation turbine fuel- which is at present ‘not leviable to tax’ under GST law and *which will be brought under such levy with effect from such date as may be notified by the Government on the recommendations of the Council*. In other words, supply of petroleum, high speed diesel are indeed subjects on which the legislature has the competence to levy GST, however solely as a policy decision, it has been kept out of the realm of GST until the contrary is notified by the Government.
- (b) Activities listed under Schedule III of the CGST Act, such as services by an employee to their employer, services by a court or tribunal. These services have been deemed to be as neither supply of goods nor as supply of service, and therefore by virtue of the statute itself have been ousted from the levy of GST. However, levying GST on such services at any given future date, will very well be within the legislative competence of the Parliament.

2.15 Therefore, the scope of ‘non-taxable supply’ is limited to those activities which would ordinarily attract the levy of GST but which have been deliberately been kept outside the purview thereof and not those supplies for which the legislature lacks the necessary constitutional mandate.

No legislative competence to levy (or not levy) GST on supply of alcohol for human consumption

2.16 The fact that the legislature did not even intend to include sale of alcoholic liquor as “not leviable” to GST becomes further clear by way of reference to the Preamble of the CGST Act. The Preamble is extracted hereinbelow –

“An Act to make a provision for levy and collection of tax on intra-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto.”
(emphasis supplied)

2.17 Reference herein may again be made to Article 366(12A) of the Constitution as extracted above, which specifically ejects taxes on alcoholic liquor from its scope. Thus, the

term 'Goods and Services Tax' being already defined by the Constitution to exclude 'taxes on supply of alcoholic liquor' would reinforce the understanding of the phrase and the intention of the legislature that 'levy and collection of tax on intra-state supply of goods or services or both' means categorically excluding levy and collection of any tax on sale of alcoholic liquor.

2.18 That it is a settled law that the Preamble to a statute is an important aid to construction. It lays down the broad scope and intent of an enactment and can be referred to alleviate any ambiguity. Reliance in this regard is placed on the case of Superintendent and Remembrancer of Legal Affairs, West Bengal v. Girish Kumar Navlakha and Ors., (1975) 4 SCC 754, where the Hon'ble Supreme Court observed that '*the preamble provides the key to the general purpose of the Act.*' Reliance is also placed on the case of Popatlal Shah v. State of Madras, 1953 SCR 677, wherein the Hon'ble Supreme Court held as follows-

"7. It is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself. The title of the Madras Sales Tax Act describes it to be an Act, the object of which is to provide for the levy of a general tax on the sale of goods in the Province of Madras and the very same words are repeated in the preamble which follows. The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the legislature and indicate the scope and purpose of the legislation itself. The title and preamble of the Madras Sales Tax Act clearly show that its object is to impose taxes on sales that take place within the province, though these words do not necessarily mean that the property in the goods sold must pass within the province. The expression "sale of goods" is a composite expression consisting of various ingredients or elements. Thus, there are the elements of a bargain or contract of sale, the payment or promise of payment of price, the delivery of goods and the actual passing of title, and each one of them is essential to a transaction of sale though the sale is not completed or concluded unless the purchaser becomes the owner of the property. The question is what element or elements have been accepted by the Madras Legislature as constituting a sale in the province upon which it is the object of the statute to levy tax. Section 2(h) gives the definition of "sale" and it is defined as meaning, "every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge"

2.19 From the above, it is clear that the legislative intent was nowhere to bring alcoholic liquor into the ambit of the statute and any reading of the provisions that permits it, would only render the provisions ultra vires the Constitution. It is therefore humbly submitted that reading the definition of 'non-taxable supply' under Section 2(78) to include sale of alcoholic liquor, would mean that the legislature has clearly transgressed the limited power conferred by the Constitution.

2.20 Moreover, it is to be noted that tax on alcohol is subject under Entry 51 of the State List, which reads as follows-

"Entry 51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:— (a) alcoholic liquors for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in subparagraph (b) of this entry."

2.21 This position has remained unchanged even after the amendment of the Constitution which introduced provisions in relation to levy of GST i.e. Article 246A of the Constitution, extracted hereinbelow for ease of reference-

“246A. Special provision with respect to goods and services tax —

(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation —The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.”

2.22 On a reading of the aforesaid, it emerges that the Constitution only empowers the State Government to levy excise duty on alcoholic liquor for human consumption as a necessary corollary liquor does not form the subject matter of GST to be levied either by the State or the Central Government. Thus, due to lack of legislative competence, the CGST Act or any other State GST legislation cannot charge GST on sale of alcoholic liquor fit for human consumption. Therefore, the question, that whether supply of alcohol is ‘non-taxable’, is secondary given that it does not even qualify as supply under the Act.

2.23 Given this background, it is the applicant’s humble submission that the latitude of Section 2(47) read with Section 2(78) of the CGST Act cannot exceed the scope as put forth in the Preamble of the Act and the Constitution of India and therefore if sale of alcohol do not qualify as supply under GST, any revenue earned out of sale of alcohol cannot be termed to be either an exempt supply under section 2(47) of the CGST Act or non-taxable supply under Section 2(78) of the CGST Act and therefore qualification under Rule 42 of the CGST Rules and question of reversal of credit does not arise.

In any case if two interpretations are possible for a given provision, the interpretation that saves its constitutionality must be adopted

2.24 The applicant submits that even if it is possible to interpret the term ‘non-taxable supply’ to include sale of alcoholic liquor, such an interpretation should necessarily be avoided as that would render the provisions in question under the Act, ultra vires the Constitution, for it is a settled law that if there are two views possible, one making the provision in the statute constitutional and the other making it unconstitutional, the former should be preferred.

2.25 Reliance in this regard is placed on the decision in Re: Hindu Women’s Rights to Property Act, 1937, AIR 1941 FC 72, wherein the Federal Court held that since an adverse reading of the term “” in the Hindu Women’s Right to Property Act, 1937 as passed by the Indian Legislature would cause it to include ‘agricultural land’ in the Governors’ province, which would be ultra vires the powers of such Legislature, it was read down to and narrowed in scope so as to preserve it as an “Act which is complete, intelligible and valid and which can be executed by itself”. It was thereby held to apply to property other than agricultural land.

2.26 It is humbly submitted, that adopting a meaning where alcoholic liquor is within the scope of ‘non-taxable supply’, would also render the charging provision of the CGST Act which defines the term ‘supply’ also unconstitutional by virtue of being ultra vires Article 366-12(A) of the Constitution of India.

2.27 As stated in the foregoing paragraphs, the first requirement of a non-taxable supply is to qualify as a 'supply of goods or services or both'. The CGST Act, defines 'supply' under Section 7 as follows-

"7. (1) For the purposes of this Act, the expression "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;..."

2.28 As discussed above, the term 'supply' for the purpose of GST would not include 'sale of alcoholic liquor' within its fold, since, such an inclusion would be beyond the Constitutional mandate. Any reading to the contrary, cannot be sustained and even if the term 'supply' as defined under Section 7, was intended by the legislature to be read so, it would have to be read down in order to save the vires of the legislation and hence the question of treating sale of alcohol under Rule 42 of the CGST Rules does not arise.

What is prohibited to be done directly, cannot be done indirectly

2.29 The Applicant submits that Section 17 of the CGST Act contemplates reversal of credit in certain situations viz "exempt supplies", and "supply for purposes other than business". In other words, when an assessee, for instance, makes an exempt supply, it is not allowed to utilize credit for making payment of its tax liability, rather it will have to reverse the credit which is akin to demand of tax liability.

2.30 In a situation where supply of alcohol is treated as a non- taxable supply and thereby an 'exempt supply', the applicant will have to consequently reverse ITC. In effect, the applicant will be discharging GST liability on output supply of alcoholic liquor by way of reversal of ITC.

2.31 In this context, the Applicant relies upon the maxim Quando aliquid prohibetur fieri, prohibetur ex directo et per obliquum- The maxim denotes the settled position of law that whenever a thing is prohibited, it is prohibited, whether done directly or indirectly.

2.32 As stated above, "tax on goods and services" has been defined to unequivocally exclude taxes on alcoholic liquor. Thus, when sale of alcoholic liquor cannot be brought to tax directly, it cannot even be brought to tax indirectly by way of reversal of ITC. Reliance in this regard is placed on the decision in the case of *Commissioner of Central Excise, Pondicherry v. Acer India Ltd.*, (2004) 8 SCC 173, wherein while holding that the value of software pre-loaded into computers cannot be included in the 'transaction value' of such goods for the purpose of levy of excise duty, in the absence of a valid levy tax thereon, the Hon'ble Supreme Court held as follows-

"84. In other words, computers and softwares are different and distinct goods under the said Act having been classified differently and in that view of the matter, no central excise duty would be leviable upon determination of the value thereof by taking the total value of the computer and software. So far as, the valuation of goods in terms of 'transaction value' thereof, as defined in Section 4(3)(d) of the Act is concerned, suffice it to say that the said provision would be subject to the charging provisions contained in Section 3 of the Act as also Sub-Section (1) of Section 4. The expressions "by reason of sale" or "in connection with the sale" contained in the definition of 'transaction value' refer to such goods which is excisable to excise duty and not the one which is not so excisable. Section 3 of the Act being the charging section, the definition of 'transaction value' must be read in the text and context thereof and not de'hors the same. The legal text contained in Chapter 84, as explained in Chapter Note 6, clearly states that a software, even if contained in a hardware, does not lose

its character as such. When an exemption has been granted from levy of any excise duty on software whether it is operating software or application software in terms of heading 85.24, no excise duty can be levied thereupon indirectly as it was impermissible to levy a tax indirectly. In that view of the matter the decision in PSI Data Systems (supra) must be held to have correctly been rendered.

2.33 Thus, the Hon'ble Supreme Court held that when software has already been granted an exemption, it was not open to the Department to levy tax on it by including it in the value of another excisable commodity i.e. what could not have been done directly could not be done indirectly either.

2.34 It is therefore, submitted that the CGST Act ought not to be interpreted in manner prejudicial to such settled position, where the applicant has to bear tax on such activity in an indirect manner where it is directly and expressly excluded from the scope of the statute.

Exclusion of sale of alcoholic liquor for human consumption from the scope of Section 9(1) immaterial

2.35 Section 9(1) of the CGST Act reads as follows-

- ***“Levy and collection***

(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.”

2.36 Similar to the submissions made above, the applicant submits that when the Constitution under Article 366-(12A) itself did not confer the power to the legislature to levy tax on sale of alcoholic liquor, it is not the prerogative of the CGST Act or any other Act intending to levy a tax on supply of goods or services or both, to exclude the 'supply of alcoholic liquor for human consumption' from its levy. In other words, implicit in the constitutional framework of GST is that alcoholic liquor is excluded from the purview of GST. Therefore clarification of the same under Section 9(1) of the Act is not only superfluous but also does not grant render the sale of alcohol as “not leviable” under the Act.

2.37 In sum and substance, the applicant reiterates that since the scope of the GST as set out in the Constitution excludes alcoholic liquor, it is not open for the Act to legislate on it, even for the purpose of stating that it is not leviable to tax (which is established from its exclusion in the Constitution itself) and more so, not for the purpose of requiring the applicant or other such class of registered persons to reverse ITC thereon in terms of Rule 42 of the CGST Rules read with Section 17(2) of the CGST Act.

2.38 Thus, the Applicant is of the firm view that sale of alcohol being outside the ambit of GST, it is not liable to reverse ITC on such a supply by way of treating it as non-taxable supply under Section 2(78) of the CGST Act (and therefore, exempt under Section 2(47)).

Lastly, excluding sale of alcoholic liquor for human consumption outside the meaning of the term exempt supply would be in line with the objective of GST Act

2.39 Fundamentally, credit of taxes incurred on inputs must be denied where inputs have not been used for making taxable supply (i.e., on which output tax is not payable). This is on the basis that where no output tax is payable, there can ever be any cascading effect of taxes, with regard to the taxes incurred on the inputs which have been put to use for making the output supply, and accordingly, concept of input tax credit would be wholly not warranted. This would also include cases where the inputs on which credits are sought to be claimed have no nexus whatsoever with the output taxable supplies or these are used for non-business purposes.

2.40 In the present case, as set out in the facts of this application, none of the credit availed by the applicant pertains to purchase of alcoholic liquor for human consumption. To put it differently, the entire credit availed by the applicant pertains to those input goods and input services that have been used in making taxable supplies only.

2.41 Under these circumstances, if “exempted supply” is read to include sale of alcoholic liquor for human consumption, even though none of the credits availed by the applicant was on account of procurement of alcoholic liquor for human consumption, then that would (apart from being contrary to the legislative power of the Parliament) run contrary to the very objective of the legislation. This is on the basis that even where the credits have no nexus with the output supply of alcoholic liquor for human consumption and have nexus solely with the taxable goods and services supplied by the applicant, it is nonetheless being asked to reverse part of that credit.

2.42 As such therefore, such an interpretation would be entirely against the very fundamental basic structure and philosophy of GST and thus erroneous and cannot be applied.

2.43 It is submitted that for the purposes of this application, the reference to the provisions of CGST Act also includes the reference to the provisions of WBGST Act.

3. Submission of the Revenue

The submission of the officer concerned from the revenue is reproduced as follows:

3.1 Section 17(2) of the WBGST Act, 2017 states that where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supply under this Act or under IGST Act and partly for effecting exempt supplies under this Act, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

3.2 The key points here in relation to the reversal of ITC under section 17 of WB GST Act, 2017 for supply of liquor for human consumption is to understand “supply”, “exempt supply” and “non taxable supply”:

3.3 The applicant has submitted that supply of liquor for human consumption is not supply of goods. In support of its claim the applicant has invoked Article 366(12A) which empower parliament to levy tax on supply of goods and services excluding liquor for human consumption. So this article only provides power to levy tax. But Section 7(1) of the WBGST Act, 2017 define the term “supply” which includes all form of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in course of furtherance of business. It is clear that supply of liquor for human consumption is also supply as per definition given in section 7(1) of the WBGST Act, 2017.

3.4 The next issue is whether it is non-taxable supply or not. The applicant has contended that the supply of liquor is not non-taxable supply as this is not at all should be considered as supply under GST Act invoking article 366(12A) of Constitution of India where constitution excludes alcohol for human consumption from the ambit of levying tax.

3.5 But Section 2(78) of the WBGST Act defines non-taxable supply as supply of any goods or services or both which is not leviable to tax under this Act or under the IGST Act. The definition given here is in consonance of article 366(12A) which only empower to levy tax. So definition of non-taxable supply as per section 2(78) is complete and cannot be restricted and conditioned invoking article 366(12A) of Constitution. So from the above discussion it is clear that supply of liquor is non-taxable supply.

3.6 Now we need to understand exempt supply. Section 2(47) of the WBGST Act defines exempt supply as supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11 or under section 6 of IGST Act, **and includes non-taxable supply.**

3.7 As supply of liquor is non-taxable supply, it also comes under exempt supply. So it comes under the purview of reversal of ITC as per section 17(2) of the WBGST Act, 2017 when such supply is effected along with taxable supply.

3.8 The applicant has given some case reference like Superintendent and Remembrance of Legal Affairs, West Bengal Vs Ors.,(1975) 4 SCC 754 , Popatlal Shah Vs State of Madras , 1953 SCR 677 to clear that the legislative intent was nowhere to bring alcoholic liquor into the ambit of statute and any reading of the provisions that permits it would only render the provision ultra vires the Constitution. Completely agreeing on this point it should be remembered that in order to understand the legislative intent we need to interpret it according to its true essence and purpose of the law without trying to restrict, condition it by referring other article/section in completely different prospective.

3.9 To sum up, ITC should be reversed since the applicant effects sale of alcoholic liquor for human consumption in addition to supply of restaurant and outdoor catering services.

4. Observations & Findings of the Authority

4.1 We have gone through the records of the issue as well as submissions made by the authorised advocate of the applicant during the course of hearing. We have also considered the submission made by the officer concerned from the Revenue.

4.2 As seen from the facts of the case, the applicant supplies restaurant services, catering services and banquet renting services. Further, the applicant undertakes sale of alcoholic liquor for human consumption along with such supplies or on a standalone basis, as the case may be. It is not in dispute that tax is levied under sub-section (1) of section 9 of the GST Act on intra-state supply of restaurant services, catering services and banquet renting services at such rates as it has been notified by the Government. It is also not in dispute that the aforesaid sub-section specifically excludes levy of tax on the 'supply of alcoholic liquor for human consumption'. However, the question on which the advance ruling is sought is not related to taxability of such services rather it is related to apportionment of input tax credit under sub-section (2) of section 17 of the GST Act read with rule 42 of the Central Goods and Services Tax Rules, 2017/ West Bengal Goods and Services Tax Rules, 2017 (the GST Rules, for short).

4.3 Section 16 of the GST Act deals with eligibility and conditions for taking input tax credit which entitles a registered person to take credit of input tax charged on any supply of goods

or services or both to him which are used or intended to be used in the course or furtherance of his business. The GST Act allows a registered person to utilize such input tax credit, to the extent of its eligibility, for making payment of output tax. Section 17 of the GST Act, on the other hand, refers apportionment of input tax credit and blocked credits. With a view to appreciate the submissions made before us by the applicant on the issue involved in the instant case, we proceed to decide first whether the item alcoholic liquor for human consumption can be considered as 'goods' under the GST Act and whether sale of this item qualifies as 'supply' within the meaning of scope of supply as defined in an inclusive manner in section 7 of the GST Act.

4.4 As per clause (52) of section 2 of the GST Act, 'goods' means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply. The said definition thus excludes only money and securities meaning thereby only money and securities cannot be treated as goods under the GST Act. In absence of any such exclusion for alcoholic liquor for human consumption, which is undisputedly a movable property, thus qualifies as goods under the GST Act.

4.5 We further find that the expression 'supply' is defined in section 7 to include 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 in the course or furtherance of business. The expression 'supply' thus includes sale of goods. Sale of goods namely alcoholic liquor for human consumption for a consideration by the applicant in the course or furtherance of business, thus, comes under the purview of supply as defined in section 7 of the GST Act.

4.6 We therefore hold that the activities of selling of alcoholic liquor for human consumption by the applicant qualifies as supply under the GST Act. The applicant contends that by virtue of Article 366 (12A), the scope of GST has been restricted, under the Constitution of India, to specifically exclude sale of alcoholic liquor for human consumption. We are unable to accept this proposition. Article 366(12A) of the Constitution as amended by 101st Constitutional Amendment Act, 2016 defines the Goods and Services Tax (GST) as a 'tax on supply of goods or services or both, except taxes on the supply of alcoholic liquor for human consumption'. It, therefore, stands to reason that the taxable event under the GST Act is supply i.e., goods and services tax is a tax which is levied on supply of goods or services or both. The specific exclusion delineates that tax shall not be levied on supply of alcoholic liquor for human consumption. Accordingly, section 9 of the GST Act which deals with 'Levy and collection' excludes levy of tax on the 'supply of alcoholic liquor for human consumption'.

4.7 It follows from above that sale of alcoholic liquor for human consumption is a supply under the GST Act on which tax is not leviable. A supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act is defined as 'Non-taxable supply' in clause (78) of section 2 of the GST Act. Thus, sale of alcoholic liquor for human consumption shall be treated as non-taxable supply, as discussed. Further, 'exempt supply' as defined in clause (47) of section 2 of the GST Act includes non-taxable supply. A conjoint reading of section 2(47) and 2(78) thus denotes clearly that the aforesaid supply would also be treated as 'exempt supply' under the GST Act.

4.8 We finally take the issue of reversal of input tax credit in respect of which the applicant has made this application. Sub-section (2) of section 17 of the GST Act read with rule 42 of the GST Rules allows a registered person to utilize input tax credit to the extent of input tax paid on inputs and input services that are used for making taxable supplies including zero-rated supply. Credit of input tax attributable to 'exempt supplies' is to be reversed as per the prescribed formula. As we hold that the activities of selling of alcoholic liquor for human

consumption by the applicant would be treated as 'non-taxable supply' and therefore falls under the category of 'exempt supply' under the GST Act, the applicant is required to reverse input tax credit attributable to the exempt supply under sub-section (2) of section 17 of the GST Act read with rule 42 of the GST Rules.

4.9 We find that placing reliance on the maxim *Quando aliquid prohibetur fieri, prohibetur ex directo et per obliquum*, the applicant contends that reversal of input tax credit would other way mean discharging of GST liability on output supply of alcoholic liquor for human consumption. We do not incline to accept the argument. Sub-section (2) of section 17 of the GST Act restricts the amount of input tax credit as is attributable to the taxable supplies including zero-rated supplies. On a plain reading of the above provisions, it clearly emerges that the statutory scheme, as envisaged under the Act requires reversal of tax which is charged on inward supply of goods or services or both. Input tax is totally different and distinct from outward supply. Since tax is not leviable on supply of alcoholic liquor for human consumption under the GST Act, there cannot be any inward supply to the applicant of the said item on which tax is to be charged by its supplier or the applicant is liable to pay tax under reverse charge mechanism. We reiterate that input tax, in relation to a registered person means the tax which is charged on his input, input services and capital goods while output tax, in relation to a taxable person means the tax chargeable under the GST Act on taxable supply of goods or services or both made by the taxable person. Thus reversal of tax charged on inward supplies which are altogether different from outward exempted supplies of alcoholic liquor for human consumption would no way lead to discharging of GST liability on outward supply.

In view of the above discussions, we rule as under:

RULING

Question: Whether or not the applicant is obliged to reverse input tax credit ('ITC') under Section 17(2) of the CGST Act read with Rule 42 of the Central Goods and Services Tax Rules, 2017 ('CGST Rules'), in view of the sale of alcoholic liquor for human consumption effected by it at its premises under the facts & circumstances of the present case?

Answer: Under the facts & circumstances of the present case, the applicant is required to reverse input tax credit ('ITC') in terms of sub-section (2) of section 17 of the GST Act read with Rule 42 of the GST Rules for sale of alcoholic liquor for human consumption.

(BRAJESH KUMAR SINGH)
Member
West Bengal Authority for Advance Ruling

(JOYJIT BANIK)
Member
West Bengal Authority for Advance Ruling

Place: Kolkata
Date: 09.02.2023

To,

KARNANI FNB SPECIALITIES LLP

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- (2) The Commissioner of State Tax, West Bengal, 14, Beliaghata Road, Kolkata-700015
- (3) The Joint Commissioner, Ballygunge Charge, 14, Beliaghata Road, Kolkata-700015
- (4) Office Folder