COMMISSIONER (APPEALS) CENTRAL GOODS AND SERVICE TAX, JAIPUR

VODAFONE MOBILE SERVICES LTD.

44 to 46 (MAA) CGST/JPR/2021

Dated: - 19-2-2021

Judgment / Order

Shri Manzoor Ali Ansari, Additional Commissioner (Appeals)

ORDER

These three appeals have been filed under Section 107 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "Act") by M/s. Vodafone Mobile Services Limited, Gaurav Tower-I, 4th & 5th Floor, Plot No. 1, Indira Palace, Malviya Nagar, Jaipur-302017 (hereinafter also referred to as "the appellant") against the Orders-in-Original (hereinafter as "the impugned orders") passed by the Deputy Commissioner, Central Goods & Service Tax Division-E, Jaipur (hereinafter called as "the adjudicating authority") as mentioned below. As common issue is involved in all these three 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 rejecting refund
1	2	3	4	5
1	APPL/JPR/CGST/JP/ 84/IX/20/	ZY0805200179261, dated 20-5-2020	March, 2018	Refund rejected ₹ 4,98,41,700/-
2	APPL/JPR/CGST/JP/ 85/IX/20/	ZZ0805200179249, dated 20-5-2020	April, 2018	Refund rejected ₹ 1,54,52,949/-
3	APPL/JPR/CGST/JP/ 152/XII/20/	ZV0809200299165, dated 20-9-2020	July, 2018	Refund rejected ₹ 3,62,76,476/-

2. Brief facts of the case :

2.1 The appellant having GSTIN No. 08AAACB2100P1ZX is engaged in providing telecommunication services all across India with its offices in different States has filed refund claims under Section 54 of CGST

Act, 2017 in respect of Tax paid inadvertently to the government exchequer.

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 28-4-2020, 28-4-2020 and 26-8-2020 respectively wherein following reasons have been mentioned. Further, directed to the appellant to furnish a reply to the notice within fifteen days from the date of service of the notice.

"GST is not exempted on leasing and renting services with or without operator as per Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017. Thus the refund is inadmissible".

In response to show cause notices, the appellant vide their letter dated 19-5-2020, 19-5-2020 and 10-9-2020 has submitted their reply and contended therein as under :-

- that under GST law, charging Section is 9(1) of CGST Act which provides that GST shall be levied on supply of goods/services at such rate as may be notified. Relevant portion of Section 9(1) is reproduced below :

"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."

Thus as per Section 9(1), the rate of GST applicable on supplies has to be prescribed under notifications issued in this regard. Accordingly, Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017 is prescribed for services. Similar notifications are issued under IGST Act and Rajasthan SGST Act. As per the classification prescribed, payments made towards License Fee and Spectrum usage charges has been classified under Heading 997338 as "Licensing services for right to use other natural resources including telecommunication spectrum". Relevant rates for GST for services classified under Heading 9973 is prescribed under Sr. No. 17 of the said notification.

As per the notice, these services have been covered under the Entry No. 17(vi) which is residuary entry for the group "Leasing and Rental Services with or without Operator" under Chapter Heading 9973. In this regard we respectfully submit that rate prescribed for Sr. No. 17(vi) in column (4) is "Same rate of central tax as applicable on supply of like goods involving transfer of title in goods". We further submit that "Licensing services for right to use other natural resources including telecommunication spectrum" are not goods and hence there cannot be any rate prescribed in the GST tariff for goods. Consequently, no GST is payable on this. Hence it cannot be considered as supply of goods or services.

3. Further, the adjudicating authority vide impugned Orders-in-Original in Form RFD-06, dated 20-5-2020, 20-5-2020 and 20-9-2020 respectively has passed the orders-in-original and rejected the refund claims as inadmissible as Service is not exempted from GST for the period and amount mentioned at above in Para-1 in column No. (4) and (5) filed by the appellant.

4. Being aggrieved with the impugned orders dated 20-5-2020, 20-5-2020 and 20-9-2020, the appellant has filed these appeals on the following grounds which are summarized as under :-

that the transaction is not a 'supply';

- that the Appellant submits that such transaction made by the Government is not a supply itself. The

Appellant seeks to refer the relevant section wherein the term supply is defined. Section 7 of the CGST Act explains the scope of supply. In this regard, Section 7(1) provides that 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;

(b) import of services for a consideration whether or not in the course or furtherance of business; and

(c) the activities specified in Schedule I, made or agreed to be made without a consideration.

- that it may be noted that clause (d) that included the activities to be treated as supply of goods or supply of services as referred to in Schedule II as part of supply has been omitted w.e.f. from 1-7-2017 and Section 7(1A) has been introduced which reads as under :

"where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule If"

- that from a reading of Section 7 it emerges that GST is leviable on supply of goods and services for consideration in furtherance of business. What constitutes business in terms of the GST regime is defined in Section 2(17) of the CGST Act which reads as under :

(17) "business" includes - (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

(b) any activity or transaction in connection with or incidental or ancillary to sub-clause

(a) ;

(c) .

(d) ……..

(e) .

(f) .

(g) .

(h) ; and

(i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities :

- that Section 4 of the Indian Telegraph Act, 1885, gives the Government exclusive privilege in respect of telegraphs, and power to grant licenses -

(1) Within India, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs : Provided that the Central Government may grant a licence, 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

- that Section 4 of Indian Telegraph Act is precisely clear while mentioning that the exclusive privilege of establishing, maintaining and working telegraphs is with the Central Government and it is just that the Government is sharing its privilege to private entities such as Appellant.
- that by issuing telecom license, DoT, Ministry of Communication, Government of India, is parting with it exclusive privilege and regulates the telecommunication services in discharge of its statutory functions which cannot be said to be rendition of any service. There is no quid pro quo in this transaction and therefore subsequently there is no 'supply'. The license has no connection with any services being provided or to be provided by the DoT in return for consideration in the form of fees paid by the Appellant.
- that the regulatory fees by the Government because of allocation of spectrum by DoT to the appellant under Telegraph Act cannot be considered as an activity under GST Act. It is well settled law that such activity for distribution of a natural resource undertaken by the Government as a custodian of the natural resource and payment received by the government against the same cannot be treated as consideration.
- that from a reading of the definition of 'supply', it emerges that GST is leviable inter alia on supply of services for consideration in furtherance of business. Business is defined in Section 2(17) to include any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, if it is for a pecuniary benefit or any activity or transaction about or incidental or ancillary to it. The definition of 'businesses further includes any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities. It is submitted that the clause (i) of Section 2(17) of the CGST Act is manifestly arbitrary and beyond Article 246A of the Constitution of India as it includes activities undertaken by the Central Government, State Government or any local authority within the meaning of business, thereby, deeming the functions of the government as supply being exigible to tax. It is submitted that the functions of a government being constitutional and statutory in nature cannot be deemed to be business. The allocation of spectrum by the 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 and in furtherance of the Directive Principles of State Policy enshrined in Article 39 and cannot be considered as business carried on by the DoT.
- that such regulatory fees collected by the DoT are a compulsory exaction of money by a public authority for public purposes enforceable by law and is therefore, in the nature of a tax. It is respectfully submitted that such regulatory fees charged by the Government exchequer forms part of the Consolidated Fund of India and subjected to audit by the CAG. They are a compulsory exaction of money by the Government from the Appellant for public purposes and as taxes, cesses or duties levied are not consideration for any service, the levy of GST on regulatory fees chargeable by the DoT is arbitrary and contrary to the GST Acts.
- that to summarize, the provisions of Section 2(17) clause (i) to the extent they treat all government activities as business and thereby creating charge of GST on activities of the government are

manifestly arbitrary, unreasonable and in contravention of Articles 14, 19(1)(g), 246A and 265 of the Constitution of India.

- that the Respondent contends that the refund is rejected as the service is not exempted from GST. It is submitted that an activity can be exempted from the levy of GST only if such a transaction falls under the meaning of supply under Section 9(1) of CGST Act.
- that the appellant submits that for an activity to fall under Section 9(1) of CGST Act, all the following preconditions have to be satisfied simultaneously -

  (a) There must be a supply of goods or services

  (b) There must be a value/consideration for such supply

  (c) There must be a taxable event

- that an activity is chargeable to tax under Section 9(1) of CGST Act, 2017 only when the above conditions are fulfilled. In the instant case, payment of LF/SUC does not satisfy the first condition itself and hence the question of chargeability (whether exempt or not) does not arise
- that definition of exempt supply under Section 2(47) of CGST Act 2017 states “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.
- that Section 11 of CGST Act, 2017, grants power to the government to exempt a supply of goods or service from the whole or part of the tax leviable there. Since the payment of license fee towards spectrum is not a supply per se, the question of exempting the said service from GST is void - ab initio.
- that Assuming without admitting that such transaction tantamount to supply of service, there is no GST rate prescribed for such supply;
- that chargeability is primary and classification is secondary. Merely by mentioning a particular goods or service in classification schedule, charge cannot be created.
- that thus, without admitting the chargeability, assuming that such transaction is a supply of service, without prejudice to any other contention, it is submitted that there is no rate prescribed for the services rendered by DoT in respect of the regulatory fees paid by the Appellant.
- that with the advent of GST, the applicable rate of GST on provision of services is required to be determined basis of a tariff based classification system, akin to the system which is adopted to goods in erstwhile indirect tax/negative list regime. Such tariff based rate applicable to provision of services was notified by the Government under the Notification No. 11/2017-GST (Central Tax - Rate), dated 28-6-2017. Relevant portion of such notification is reproduced below.

Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017 Rate of GST on intra-State supply of specific services with Service Code Tariff (SAC)

In exercise of the powers conferred by sub-section (1) of section 9, sub-section (1) of section 11, sub-section (5) of section 15 and sub-section (1) of section 16 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, and on being satisfied that it is necessary in the public interest so to do, hereby notifies that the central tax, on the intra-State supply of

services of description as specified in column (3) of the Table below, falling under Chapter, Section or Heading of scheme of classification of services as specified in column (2), shall be levied at the rate as specified in the corresponding entry in column (4), subject to the conditions as specified in the corresponding entry in column (5) of the said Table

TABLE

Sl. No.	**Chapter, Section or Heading**	**Description of Service**	**Rate (per cent.)**	**Condition**
(1)	(2)	(3)	(4)	(5)
17	**Heading 9973** (Leasing or rental services, with or without operator)	Temporary or permanent transfer or (i) permitting the use or enjoyment of Intellectual Property (IP) right in respect of goods other than Information Technology software.	6	-
		Temporary or permanent transfer or (ii) permitting the use or enjoyment of Intellectual Property (IP) right in	9	-

		respect of Information Technology software. [Please refer to *Explanation* no. (v)]		
		Transfer of the right to use any goods (iii) for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.	Same rate of union territory tax as on supply of like goods involving transfer of title in goods	-
		Any transfer of right in goods or of (iv) undivided share in goods without the transfer of title thereof.	Same rate of union territory tax as on supply of like goods involving transfer of title in goods	-

		Leasing of aircrafts by an operator for (v) operating scheduled air transport service or scheduled air cargo service by way of transaction covered by clause (f) paragraph 5 of Schedule II of the Central Goods and	2.5	Provided that credit of input tax charged on goods used in supplying the service has not been taken [Please refer to *Explanation* no. (iv)l

		Services Tax Act, 2017. *Explanation.* - "operator" means a person, organisation or (a) enterprise engaged in or offering to engage in aircraft operations; "scheduled air transport service" means an (b) air transport service undertaken between the same two or more places operated according to a published time table or with flights so regular or frequent that they constitute a recognisable systematic series, each flight being open to use by members of the public; "scheduled air cargo service"			

		means (c) air		
		transportation of cargo or mail on a scheduled basis according to a published time table or with flights so regular or frequent that they constitute a recognisably systematic series, not open to use by passengers.		
		Leasing or rental services, with or (vi) without operator, other than (i), (ii), (iii), (iv) and (v) above.	Same rate of union territory tax as applicable on supply of like goods involving transfer of title in goods	-

…...

…...

4. Explanation - For the purposes of this notification

(i)

(ii) Reference to “Chapter”, “Section” or “Heading”, wherever they occur, unless the context otherwise requires, shall mean respectively as “Chapter, “Section” and “Heading” in the annexed scheme of

classification of services (Annexure).

(iii) …..

- that In addition to that, it is pertinent to note that the Annexure to the said rate notification provides an item code wise detailed list for classification of all services, which must mandatorily be referred and relied upon, in terms of Explanation (ii) to the rate notification, for all issues arising under such notification in relation to the appropriate classification of such services which is necessarily required for determining the applicable tariff on those services.
- that the tariff list provided under the rate notification is divided into various categories depending on the nature of services. Also, the broad category are further divided into various sub-categories which deal with carious elements of such broad category. Therefore, for classifying a particular service, it has to be necessarily be determined whether the said service is classifiable under one of the broad category and then only, further sub-classification be resorted to and should not be considered for residual category.
- that in this case in hand, the most appropriate tariff classification of the transaction is in nature of licensing/assignment of the right to use telecommunication spectrum for providing telecommunication service. Since the services of leasing, which as per the Annexure - Scheme of Classification of Service indicates, includes services of licensing, are specifically covered under the broad category/Heading 9973.
- However, on a reading of Heading 9973 of the rate notification, ibid, none of the sub-categories, specifically covers the services of licensing of assigning the right to use spectrum. Accordingly, in terms of explanation (ii) to the rate notification, reference must be made to the Annexure to the Rate notification to determine the appropriate classification of such service.

“Heading 9973 - Leasing or rental services with or without operator

‘(vi) Leasing or rental services, with or without operator, other than (i), (ii), (iii), (iv), (v) above

read with Service Code (Tariff) in Annexure A being.

(i) 997338 - Licensing services for right to use other natural resources including telecommunication spectrum and

(ii) 997339 - Licensing services for the right to use other intellectual property products and other resources nowhere else classified

- that the above entry in Heading 9973(vi) stipulates that the rate for such service will be the same rate of central tax as applicable on supply of like goods involving transfer of title in goods’. However, by granting license under Section 4 of the Telegraph Act, the Government is not leasing or renting any goods. Therefore, this rate is also not applicable to the transaction in question i.e. regulatory fees payment.
- that no rate is prescribed for the service codes as contained in the Annexure and as such the charge of tax is not attracted. It is thus submitted that till 31-12-2018 there was no rate prescribed for levy of tax on the License Fees and as such the tax deposited by the Appellant is liable to be refunded.
- that the Notification No. 11/2017 till 31-12-2018 provided the rate of tax under Heading 9973 (Leasing or rental services, with or without operator, not covered by other entries under 9973) to be equivalent

to the rate of tax on supply of goods. The Notification No. 11/2017 was amended by Notification No. 27/2018-C.T. (Rate), dated 31-12-2018 w.e.f. 1-1-2019 to introduce a residuary entry to specifically provide for rate of 9% for leasing or rental services with or without operator, not covered by other entries under 9973.

- that with effect from 1-1-2019, this newly introduced residuary entry under Heading 9973 - 'leasing or rental services, with or without operator' would also apply in context of immoveable property/goods. The term lease or rent has not been defined anywhere in GST Act. We may refer to the Transfer of Property Act, 1882 to understand these terminology. The term "leasing" is defined in The Transfer of Property Act, 1882 to define that lease is a transfer of right of an immovable property to enjoy such property and whereas the term rent is also associated with leasing service and in turn is associated with immovable property only.
- that in common parlance renting service never associated with intangible property and therefore the terms 'leasing' or 'rental' do not cover grant of license under Section 4 of the Telegraph Act. Licensing service is a mere permission. A lease or rent is a transfer of an interest in a specific immovable property, while licence is a bare permission, without any transfer of an interest. A lease or rent creates an interest in favour of the lessee with respect of the property, but a licence does not create such an interest. As such no GST can be levied on the License Fees payable by the Appellant under the newly introduced residuary entry too.
- that without prejudice to the above, even if in the event it is held that the grant of license is covered by the term 'leasing or renting' under the newly introduced residuary entry, the same shall apply only from 1-1-2019 since the entry is not retrospectively introduced and therefore no tax was leviable till 31-12-2018.
- that it is a well settled law that when an entire new entry is inserted by the legislature, it would meant that such entry was never in existence before and therefore was such transaction was not taxable for the prior period. Legislature could have easily provided for such an entry. Absence of such entry and introduction of that entry provides only one conclusion that the rate was never prescribed till 1-1-2019.
- that Article 265 of the Constitution of India mandates that No tax shall be levied or collected except by authority of law. In the present case in hand, the tax has been paid by the Appellant and retained by the Government exchequer without authority of law.
- In view of the above submissions, it is prudent to say that the tax already paid by the Appellant was inadvertently and during the period of dispute, there was no rate prescribed for such regulatory payments made to government. Further, the Appellant has already submitted required documents including document (CA Certificate) certifying that the tax burden has not been transferred to any other person and therefore the Appellant will not be unjustly enriched if the tax paid by the Appellant be refunded back.
- that the Impugned Order is not a speaking order. The Learned respondent has not given any findings as to why the refund is not in accordance with the legal provisions and procedures of refund related to Sec. 54 of RGST Act, 2017. There as on for treating the refund inadmissible is null and void.
- that the Impugned Order has not discussed the submissions made by the Appellant with regards to the GST rate for such supply. The Appellant in its reply submission has categorically submitted that there is no GST rate was prescribed for this transaction.

- that as mentioned above, the said notification prescribes the rate of GST on provision of services and is nowhere related to granting of exemption from GST. The finding given by the respondent treating the refund as inadmissible is null and void in law. However, the Learned Respondent have not paid heed to such submission of the Appellant and gave such a finding which does not hold legally correct and the very fundamental and elementary understanding of the law is violated. This makes the impugned order a non-speaking order wherein no explicit or valid reason or finding has been given to reject the refund claim.

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

United Telecoms Ltd. v. CST, Bangalore-I as reported in 2020-TIOL-811-CESTAT-BANG = 2020 (43) G.S.T.L. 521 (Tri. - Bang.)

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

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

Indian National Shipowners' Association v. UOI as reported in 2009 (14) S.T.R. 289 (Bom).

Kranti Associates (P) Ltd. v. Masood Ahmed Khan, (2010) 9 SCC 496 = 2011 (273) E.L.T. 345 (S.C.)

Siemen Engineering & Mfg. Co. Ltd. v. Union of India, AIR 1976 SC 1785

5. Personal hearing in virtual mode through video conference was held on 5-2-2021. Miss Richa Gupta, Authorized Representative of the appellant appeared for personal hearing. She reiterated the written submission and explained the case in details. She pleaded for all the three appeals. In view of the written as well as oral submission she requested for early decision in the matter.

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

Discussion and findings :

7. 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 'Regulatory fee' attract any levy of tax as per GST law or not?

(c) Whether LF and SUC charges are 'consideration' for supply as per GST law or not?

(d) Whether License fee and Spectrum usage charges paid by the Appellant are covered in Service Rate Notification and are leviable to tax or not?

(e) Whether impugned order is non-speaking order?

(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" CBIC 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 appeal memo in terms of Section 4 of the Telegraph Act, "The Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs : Provided that the Central Government may grant a licence, 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. Granting permission for carry out the establishing, maintaining and working telegraphs and allocation of spectrum is a service which falls under HSN Head 997338 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.

Further, the definition of "business" is prescribed in Section 2(17), which is reproduced below :-

"**17. Business includes -**

……

……

(i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities.

In view of the above, it is implied that the rendering of service from the Government (DoT) to business entities, (in the instant case 'the appellant') established from the aforesaid statutory provision. Therefore, 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 (AAR) as per clause (e) of 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.

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

With regard the contention of the appellant regarding License Fee (LF) and Spectrum User Charges (SUC) is a kind of regulatory fee and Government parting such fee by exercising sovereign functions, in this context, it is submitted that the appellant is mis-interpreted that fee of LF and SUC, which is a percentage share of revenue (AGR) is a fluctuating charges in the instant case. Therefore, the permission of granting of License by DoT and allotment of spectrum on the basis of SUC for business activities is directly nexed with their revenue, hence, it cannot be held that these charges are regulatory fee.

Further, 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 997338 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 category at HSN Head 997338 as "Licensing services for right to use other natural resources including telecommunication spectrum" has been specified in the GST Act. Thus, it can be concluded that such type of services 'License Services for right to use other natural resources including Teleservices Spectrum' are not regulatory fee and are taxable as per GST law under the specific Head 997338 meant for such services.

(c) 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 it its powers under the first proviso to sub-section (1).

Definition of LF & SUC :

8. 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/LoI 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/LoI 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/LoI/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.

9. 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, 2017 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.

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

On perusal of Tax Invoice filed with appeal memo, it reveals that appellant has paid GST under the HSN Head 9973, under Reverse Charge Mechanism, meant for 'Leasing or rental services with or without operator' which is proper head for the services of 'Grant of License' and 'Allocation of Spectrum'. 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 997338, 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 Group	Service Code (Tariff)	Service Description
232	Heading 9973		Leasing or rental services with without operator

250	Group 99733		Licensing services for the right to intellectual property and similar products
258		997338	Licensing services for right to use other natural resources including telecommunication spectrum

Besides above, it is submitted 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.

- It is to be noted that there was no explicit exemption extended to licensing services. Further, on examining the Notification No. 27/2018-Central Tax (Rate), dated 31-12-2018 which has been issued on the recommendations of the GST Council to further amend the Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017, I find that the same has been issued consequent upon decisions of the 31st GST Council meeting held on 22-12-2018. In this connection, for proper understanding of the issue, I have gone through the Agenda for 31st GST Council Meeting proposals recommended by Fitment Committee and Minutes of the Meeting of the Council available in GST Council website. Sl. No '18' of Annexure-II of Agenda Item 6, which is relevant to the issue is produced below :

<table>
<tr><th>S. No.</th><th>Proposal</th><th colspan="5">Comments</th></tr>
<tr><td rowspan="3">18</td><td rowspan="3">To Clarify GST rate applicable on the right use Intellectual Property and similar</td><td colspan="5">Recommendation : It is proposed that to bring clarity, the residuary rate entry for Heading 9973 in Notification No. 11/2017-C.T. (R), dated 28-6-2017 may be split in two parts as follows.</td></tr>
<tr><td rowspan="2"></td><td colspan="2">Existing</td><td colspan="2">Proposed</td><td rowspan="2"></td></tr>
<tr><td>Description of services</td><td>Rate %</td><td>Description of services</td><td>Rate %</td></tr>
</table>

	products other than IPR		Sl. 17 Heading 9973 (Leasing or rental services, with or without operator)				
			(viii) Leasing or rental services, with or without operator, other than (i), (ii), (iii), (iv), (v), (vi) and (vii) above	Same rate of Central Tax as on supply of like goods involving	(viia) Leasing or renting of goods	Same rate of Central Tax as on supply of like goods involving	
					(viii) Leasing or rental services, with or without operator, other than (i), (ii), (iii), (iv), (v), (vi), (vii) and (viia) above	18	

		IPR, as held in several decisions of the Tribunal and the Courts, refers to rights in intellectual property protected by the relevant IPR law in force. Intellectual property not protected by IPR law in force cannot be termed as IPR. 2. The residuary entry for the Heading 9973, *i.e.* entry Sl. No. 17(viii) prescribes GST rate as "same rate of Central Tax as on supply of like goods involving transfer of title in goods".

I have also gone through the minutes of the 31st GST Council Meeting held on 22nd December, 2018, where in, against the aforesaid proposal, it has been minuted as follows :

> "Annexure-H 14 41. The Council agreed to the proposals contained in S. Nos. 1 to 19 of Annexure II, recommended by Fitment Committee in its meeting of 14th and 15th December, 2018."

- From the aforesaid discussion, it may be appreciated that amendment of Entry Sl. No. 17(viii) was approved merely to clarify the GST rate applicable to the right to use Intellectual Property and similar products other than IPR which are covered under Group 99733. There was no such proposal either to enhance or reduce the rate of tax as is discussed in earlier Para, the impugned service received by the Applicant is appropriately covered under description Licensing services for the right to use other natural resources including telecommunication spectrum which is classifiable under SAC 997338 under Group 99733.

On a conjoint reading of the Notification No. 27/2018-Central Tax (Rate), dated 31-12-2018, Minutes/Agenda/Proposal/Discussion of the GST council, I am of the view that amendments have been carried out vide the aforesaid notification to clarify the legislative intent as well as to resolve the unintended interpretations. It is well settled law that the legislative intent cannot be defeated by adopting interpretations which is clearly against such interpretations.

I am also inclined to rely on the decision of the Hon'ble Supreme C India in the case of W.P.I.L. Ltd. v. Commissioner of Central Excise, Meerut, U.P. [2005 (181) E.L.T. 359 (S.C.)] which is also applicable to the present case, where in a 31 Judges Bench of the Hon'ble Supreme Court while interpreting applicability of exemption notifications have observed in Para 15 as follows :

"15. The Learned Counsel for the appellant is also right in relying upon a decision of this Court in Collector of Central Excise. Shillong v. Wood Craft Products Ltd., [(1995) 3 SCC 454]. In that case, this Court held that a Clarificatory notification would take effect retrospectively Such a notification merely clarified the position and makes explicit what was implicit. Clarificatory notifications have been issued to end the dispute between the parties."

From the above discussion, the fact to be appreciated is that the rate amendments carried out vide Notification No. 27/2018-Central Tax (Rate), dated 31-12-2018 is nothing but to clarify the legislative intent as well as to resolve the unintended interpretations. Hence, the rate of tax specified vide Notification No. 27/2018-Central Tax (Rate), dated 31-12-2018 is very much applicable to the disputed period and as such the prevalent rate, at which appellant has paid, found in order.

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

In this regard, I am agree with the contention of the appellant that the order is non-speaking order. However, I am also in the view that "Licensing services for right to use other natural resources including telecommunication spectrum" is specified in HSN sub-heading 997338, whereby taxability of said service has been fastened as per Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017. Since, taxability of service in question has been specified in the Act, then it cannot be interpreted that it

will not be taxed and refund will be issued for the GST payment in this regard. Further, all the submissions/averment of the appellant have been taken up for discussion in the instant appeal case. Therefore, I do not find any merit of the appellant in this context.

10. Further, I find that the appellant has cited various case laws for buttress of their submission. Ongoing through the cited 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.

11. In view of the above, I do not find any infirmity in rejection of the refund, therefore, I reject the appeals filed by the appellant in the instant case.

12. Accordingly, all the above three appeals are disposed off in above manner.