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**APPELLATE AUTHORITY FOR ADVANCE RULING, KERALA
PROCEEDINGS OF THE APPELLATE AUTHORITY FOR ADVANCE
RULING
(U/s.101 OF THE KERALA / CENTRAL GOODS AND SERVICES TAX ACT,
2017)**

Members present:

**Shyam Raj Prasad, IRS
Chief Commissioner
Central Tax, Central Excise & Customs
Thiruvananthapuram Zone**

**Dr. Rathan U. Kelkar, IAS
Commissioner
State Goods & Service Tax
Kerala**

Name and Address of the Appellant	M/s. Abbott Healthcare Private Limited XXI / 457 A1 & B, Vallathil Road, Poojari Valavu, Kalamassery, Ernakulam 683104
GSTIN	32AAACK3935DIZ1
Advance ruling against which appeal is filed	KER/97/2021 dated 07/05/2021
Date of filing Appeal	30-06-2021
Date of Personal Hearing	2/11/2021
Authorized Representative	Sri V. Sridharan, Senior Advocate

ORDER No. AAR/19/2021 dated 28 /01/2022

1. The appeal stands filed under section 100(1) of the GST Act, 2017, by M/s. Abbott Healthcare Private Limited, XXI / 457 A1 & B, Vallathil Road, Poojari Valavu, Kalamassery, Ernakulam 683104, bearing GSTIN 32AAACK3935DIZ1 (hereinafter also referred as the appellant) against the Advance ruling Order No: KER/97/2021 dated 07-05-2021 pronounced by the Kerala Authority for Advance ruling.

2. At the outset, the provisions of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as CGST Act) and the Kerala State Goods and Services Tax Act, 2017 (hereinafter referred to as KSGST Act) are same



except for certain provisions. Accordingly, a reference hereinafter to the provisions of the CGST Act, Rules and the notifications issued there under shall include a reference to the corresponding provisions of the KSGST Act, Rules and the notifications issued there under

3. Brief facts of the case:

3.1. The Appellant is a company incorporated under the Companies Act, 1956 having its registered office at 3, Corporate Park, Sion Trombay Road, Mumbai - 400071, India. The Appellant is inter-alia engaged in the sale of diagnostic reagents/kits etc. It is submitted that the business model of the Appellant inter-alia, in the State of Kerala, is that it places its owned diagnostics instruments at the premises of unrelated hospitals, labs etc. for their uses for a specified period without any consideration. To execute the aforesaid placement of instruments, the appellant inter-alia enters into reagent Supply and Instrument use Agreement ("the Agreement") with various hospitals, labs etc. A true photocopy of the sample agreement effective dated 01.06.2016 with the hospital/lab (Iqraa Hospital, Calicut) is produced.

3.2. The Appellant submits that following activities are carried out in terms of the said agreement.

Placement of specified medical instruments to unrelated hospitals, labs for their use, without any consideration, for a specified period: Under the Agreement, specified medical instrument (hereinafter referred to as the 'instrument') is provided by the appellant to the identified unrelated hospitals, labs etc. for their use for a specified period without any consideration. The instruments are placed at the unrelated hospital's/ lab's premises for use by them. The ownership in the instruments continues to be with the appellant and all rights, title and interest in the instruments are owned and vested in the appellant at all times during the instruments without any consideration. The said instruments have a period of use. The hospitals/labs only possess a permission to use the said instruments provided to the hospitals for a specified period and are returnable at the end of the specified period or at the earlier termination of the Agreement. The



instruments are centrally stocked by the appellant at its warehouse located in Ahmedabad, Gujarat. From the warehouse of the appellant, as and when required the instruments are transported to the identified unrelated hospitals, labs etc. located in Kerala (and/ or other States) under the cover of a delivery challan in accordance with the provisions of the CGST Act.

3.3. Supply of products (reagents, calibrators, disposables, etc.) are effected as provided in the agreement. As per the terms of agreement, the hospitals/ labs are required to purchase reagents, calibrators, disposables, etc. (hereinafter referred to as the 'products') at the prices specified in the Agreement. The products are supplied by the appellant to its distributors on payment of applicable GST. The distributors in turn supply the same to the hospitals/labs. The distributors also duly discharge the applicable GST on the price charged for supply of the said products. There is no direct sale/ supply of the products by the Appellant to the hospitals/labs. A sample copy of Agreement dated 20.12.2016 made between the appellant and the distributor for supply of product, sample GST invoices issued by the appellant for supply of the products to the distributors and the sample copies of the invoices issued by the distributors to the hospitals/labs were also submitted.

3.4. The appellant submits that the agreement carries a clause (clause 3.1) to the effect that if the hospital fails to purchase specified minimum quantum of the products, then the appellant is entitled to recover from the hospital, an amount equal to the deficit in the actual purchases vis-a-vis the minimum purchase required. This clause has never been acted upon by the appellant. In particular, no recoveries have been made or payment recovered from the hospital/labs. The appellant undertakes to pay GST if any recoveries would be made. In very few instances (approximately five), the appellant has raised suo-moto claim, on the hospital for payment of some amount. The same was not agreed to or accepted by the hospitals/labs. Accordingly, no amount has been paid/recovered. Thus, in effect, the clause has not been implemented by the appellant and hospitals/ labs. This business model is in place since past many years even prior to introduction of GST. Further, it is industry wide practice, even internationally, to supply



instrument free of cost to the hospitals/labs. This is to prevent blockage of funds by the hospitals/labs keeping in mind the commercial and business expediency of the pharma industry.

3.5. The order dated 02.05.2017 of Deputy Commissioner (Int.), Dept. of Commercial Taxes, Ernakulam, in the VAT regime, in the case of M/s. Prompt Enterprises (distributor of Appellant), in respect of detention of instrument belonging to the Appellant on 04.03.2016, demonstrates that the appellant was following the same business model even in the erstwhile VAT regime. This itself demonstrates that the model was adopted by the appellant due to commercial and business expediencies. A copy of the order dated 02.05.2017 of Deputy Commissioner (Int.), Dept. of Commercial Taxes, Ernakulam is also submitted with.

3.6. The appellant submits that the placement of the instrument was without any consideration. Consequently, the appellant believed that no supply was being made by the appellant to the hospitals/labs. Therefore, such instruments were moved to the premises of the hospitals/labs under the cover of delivery challan without any tax invoice. A consignment of instruments that was transported by the appellant to a Lab (M/s. Le Aayush Laboratory, Kozhikode, Kerala) without any consideration pursuant to the terms of the agreement between appellant and Lab, were seized by the Assistant State Tax Officer, Squad No. IV, State GST Dept., Kozhikode vide Order No. OR. 16/KGST /2017 /IV dated 13.02.2018. The said goods were seized on the grounds that they were not accompanied with a tax invoice but were being transported under a delivery challan since the same are not material, they are not being returned to them.

3.7. The Appellant had raised following question in the advance ruling application:

"Whether in the facts of the present case, the provision of specified medical instruments by the Appellant to unrelated parties like hospital(s), Lab(s) for uses without any consideration, constitutes a "supply" or whether it constitutes "movement of goods otherwise than by way of supply" as per provisions of the CGST / SGST Act, 2017



3.8. The Hon'ble Authority for Advance ruling Kerala vide Order No. KER/15/2018 dated 26.09.2018, held that the placement of specified medical instruments to unrelated customers like hospitals, labs, etc. constitute 'Composite Supply'. The principal supply is transfer of right to use of any goods for any purpose and is liable to GST under S1.No. 17(iii) - Heading 9973 of Notification No. 11/2017 Central Tax (Rate) dated 28.06.2017. The Appellant filed an appeal before this Hon'ble Appellate Authority against the order dated 26.09.2018. The Appellant was granted a personal hearing by the Appellate Authority for Advance Ruling on 03.12.2018. At the time of hearing, the appellant submitted additional submissions. This Hon'ble appellate authority vide order dated 14.12.2018 dismissed the appeal of the Appellant holding that no new argument or fact was brought before it which would require modification of the order dated 26.09.2018. Accordingly, the Appellate Authority for Advance Ruling affirmed the order dated 14.12.2018. Aggrieved by the order dated 14.12.2018 and 26.09.2018, the Appellant filed writ petition before the Hon'ble Kerala High Court.

3.9. The Hon'ble High Court of Kerala vide order dated 07.01.2020 (reported at 2020-TIOL-40-HC-KERALA-GST) held as under:

- (i) The order dated 14.12.2018 and 26.09.2018 went beyond the terms of reference. It was open to the authority to decide whether the supply of instrument is a supply for consideration but its findings regarding composite supply are wholly without jurisdiction.
- (ii) In the facts and circumstances of the case, the authority could not have held that the placement of instrument and the supply of reagents is a composite supply for the following reason:
 - a. The supply of instrument and the supply of reagent is by two separate persons, i.e., by the Appellant and the distributor of the Appellant. Supply by two persons cannot be fused together to make it a composite supply.
 - b. For two supplies to be composite supplies they have to be supplied on 'as is where is' basis, i.e.



case, continuous supply of service (right to use instrument) and periodic supply of goods / products cannot be composite supply.

3.10. The Hon'ble High Court quashed the order dated 14.12.2018 and 26.09.2018 and remanded the matter back to Ld. Authority for fresh determination of question posed by the Appellant, i.e., whether the placement of the instrument at the premises of the hospitals/ labs is a supply in terms of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act') and the Kerala Goods and Services Tax Act, 2017 (hereinafter referred to as the 'KGST Act').

3.11. The Appellant filed detailed submission before the Ld. Authority for advance Ruling Kerala explaining that the placement of instrument at the premises of the hospitals/labs is not a supply for a consideration. The Appellant appeared before the Ld. Authority on 28.10.2020 and reiterated the submissions made earlier. The Ld. Authority answered the question by holding that the placement of instruments at the premises of hospitals/labs is a supply for consideration. The findings of the Ld. Authority are summarized as under:

(1) For an activity / transaction to be a "supply" it should be a supply of goods or services, it should be made in the course or furtherance of business, and it should be for a consideration. The placement of instrument at the premises of the hospitals/labs is a supply of service as per Para 1(b) of Schedule II of the CGST Act which provides that any transfer of right in goods without transfer of title is a supply of service. The definition of the term "business" is very wide, and thus the placement of instrument will be a supply of service is in the course or furtherance of the business of the Appellant.

(2) The next and most important issue is whether the supply is a supply for a consideration. The definition of consideration includes payment in monetary or non-monetary form and also includes monetary value of any act or forbearance, in respect of, in response to, or for the inducement of supply of goods or services or both. The obligation of the hospitals/labs to purchase minimum value of reagents at the specified price and to pay deficit amount in case of short purchase is



the motivation for the Appellant to enter into contract with hospitals/labs and thus such obligation constitutes valid consideration for supply of transfer of right to use the instrument.

(3) The decision and the ruling relied by the Appellant are not applicable as language of the definition of the term "consideration" under the CGST Act is plain and unambiguous and thus there is no need to make any recourse to any other construction or interpretation.

(4) The decision of the Hon'ble Bombay High Court in the case of Keshub Mahindra v. Commissioner of Gift Tax [(1968) 70 ITR 1 Bom.] relied by the Appellant is not applicable as it is out of context and the said judgement deals with the issue of "consideration" under the Gift Tax Act which is not pari materia with the definition of the term "consideration" under the CGST Act.

4. Grounds of Appeal:

Being aggrieved and dissatisfied by the impugned order passed by the Ld. Authority, the Appellant has filed the present appeal, inter alia, on the following grounds, which are urged herewith without prejudice to each other:

4.1. The appellant submits that as per the first leg of Section 2(31)(a) of the CGST Act, consideration may be payment made in money or payment made otherwise than in money. However, it should nonetheless be 'payment'. Further the term "consideration" is defined under Section 2(31) of the CGST Act 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;

4.2. The general meaning of the term 'payment' is discharge of debt or an liquidated sum, which is discharged by making payment in money or otherwise. The dictionary meaning of the term payment as per the



Chambers Dictionary (1993 Edition) - Payment means the act of paying; the discharge of a debt by money or its equivalent in value; that which is paid. Further as per Cambridge International Dictionary of English (1996 Edition) - Payment means A payment is an amount of money paid; As per American Heritage Dictionary (Third Edition) the word pay means

1. To give money to in return for goods or services rendered: pay the cashier
2. To give (money) in exchange for goods or services: paid three dollars for a hamburger; paid an hourly wage
3. To discharge or settle (a debt or an obligation): paying taxes; paid the bill

As per Black's Law Dictionary (Tenth Edition) the term 'Payment' means

1. Performance of an obligation by delivery of money or some other valuable thing accepted in partial or full discharge of an obligation
2. The money or other valuable thing so delivered in satisfaction of an obligation.

4.3. The appellant further submits that "Kanga and Palkhivala" in his treatise on Income Tax Law and Practice (Eight Edition) in the context of Actual or Constructive receipt of income under Section 5 of Income Tax Act explained that income may be received in money or in money's worth as by way of adjustment, settlement of accounts, negotiable instrument, etc. The relevant extract is as under:

"Actual and constructive receipt. -- Income, profits and gains may be received in the form of money's worth as well as money, in kind as well as in cash (See under s. 4 "Income in money's worth or equivalent of cash", p.124) A sum of money may be received in more ways than one, for example, by the transfer of a coin or a negotiable instrument or the acceptance of a cheque or other document which represents and produces money; what amongst businessmen might be equivalent to receipt of a sum of money would be receipt within the meaning of the statute. Adjustment of cross-claims, a settlement of account, an exchange effected by a book



entry, or a set-off would be equivalent to actual receipt of a sum of money although no money may pass."

4.4. Further, the word 'otherwise' will take colour from the preceding word 'money'. Thus, payment will mean a payment in money or through cheque, credit card, bank transfer, account settlement which is equivalent of money. Also, payment will include a payment in kind, i.e., supply of goods or services in towards discharge pre-agreed payment.

4.5. It is submitted that In *Workmen of Rohtas Industries Ltd. v. H. K. Choudhuri*, AIR 1965 Pat 127, the Hon'ble Patna High Court Supreme Court observed that "In *White v. Elmdene Estates, Ltd.*, (1959) 2 All ER 605 Lord Evershed. M. R, has observed:

"...The word 'payment' in itself is one which, in an appropriate context, may cover many ways of discharging obligations."

4.6. The appellant further raised an argument about Section 2(31) that Clause (b) of definition of consideration includes monetary value of any act or forbearance. This is as opposed to clause (a) which covers payment in money or in kind. Further, the act or forbearance which to be treated as consideration should be capable of being expressed in monetary terms. If no monetary value can be attached/ascribed to the act or forbearance, they will not amount to "consideration" under the CGST Act. This is the most vital aspect to be noted in the present case. The legislature has used the term 'monetary value' specifically and expressly in the definition of the term "consideration". It is cardinal rule of interpretation that legislature is not presumed to waste its words or treat them as mere surplusages and meaning should be given to each and every word used in the statute and nothing should be rendered redundant. Thus, appropriate emphasis has to be given to the words "monetary value" used in the definition of the term "consideration". The term "monetary" and "value" is defined in the following online dictionaries as under:



Dictionary	Monetary	Value
Cambridge Dictionary	relating to money or in the form of money	the amount of money that can be received for something
Merriam Webster	Of or relation to money or to the mechanisms by which it is supplied to and circulates in the economy	the monetary worth of something
Collins Dictionary	Of or relation to money or currency	the value of something is how much money it is worth

4.7. The appellant submits that the term "monetary value" has been defined in various online resources as follows:-

As per vocabulary.com the property of having material worth (often indicated by the amount of money something would bring if sold).

As per definitions.net the property of having material worth (often indicated by the amount of money something would bring if sold).

As per accountingtools.com Monetary value is the amount that would be paid in cash for an asset or service if it were to be sold to a third path). For example, tangible property, intangible property, labor, and commodities are priced at their monetary value.

4.8. The appellant argues that thus only if something has a material worth, i.e., it is capable of being sold, then it will have monetary value or be payment for supply of goods or service. If a thing cannot be bought and sold and cannot be indicated by an amount of money it would fetch if sold, it will not have a monetary value. Such a thing cannot be a "consideration" for the purposes of the CGST Act.

4.9. It is further submitted that GSTR 2001/6 on non-monetary consideration issued by Australian Tax Department explains that consideration for a supply may include acts, rights, obligations; however, such acts, rights and obligations are often disregarded as they do not have economic value and independent identity. The relevant extract of the GSTR is as under:



"Economic value and independent identity

80. *As stated at paragraph 68, the test for determining whether a payment is consideration for a supply is whether there is sufficient nexus between the supply and the payment. Consideration for a supply may include acts, rights or obligations provided in connection with, in response to, or for the inducement of a supply. However, things such as acts, rights and obligations can often be disregarded as payments as they do not have economic value and independent identity separate from the transaction.*

81. *For a thing to be treated as a payment for a supply, it must have economic value and independent identity provided as compensation for the making of the supply. That is, it must be capable of being valued and be a thing that an acquirer would usually or commercially pay money to acquire. Whether this requirement is satisfied will usually be demonstrated by the parties to an arrangement assigning a specific or separate value to the thing. However, the assigning of a value by the parties is not necessary for a thing to have economic value.*

82. *Whether a payment is consideration for a supply depends on the true character of the transaction. Consideration for a supply is something the supplier receives for making the supply. Although a non-monetary payment (and acts or forbearances) can form consideration, the character of the transaction will determine whether it forms part of the consideration received by the supplier for making the supply.*

83. *Many transactions involve exchanging various rights and obligations between the parties to the transaction. In particular, the true character of the transaction may characterise the payment as a condition of the contract rather than the provision of non-monetary consideration. For example, in many cases, agreeing to enter into a contract to receive a supply for a specific period of time is not non-monetary consideration for that supply.*

84. *Also, subject to the terms of the agreement, transactions will often involve a supply made only for monetary consideration. In these circumstances, obligations entered into as part of the transaction by the entity that is liable to provide the money will not be separate parts of the consideration for the supply. Similarly, where the transaction in substance involves a supply made for a thing that is non-monetary consideration, the obligations to provide that thing will not constitute separate parts of the consideration.*

85. *Non-monetary consideration needs to have a clearly independent identity. Obligations that are essentially another way of describing the consideration do not have a separate existence.*

For example, the obligation to pay money does not exist separately from the payment of money for the purposes of identifying the consideration. Also, in most cases, the use of a particular method of payment is not considered a separate consideration. For example, where a supply is made for



a lower price if a customer uses a credit card, the use of the credit card is not non-monetary consideration."

4.10. The above GSTR also provides an example illustrating the aforesaid proposition. The example is identical to the facts of the present case. Under the example, Supply Co. places machines free of cost at the premises of Deli Co. which agrees to purchase minimum amount of supplies from the Supply Co. In such circumstances, it is stated that the obligation to purchase minimum supplies does not have any economic value or independent identity. Thus, the same does not qualify as non-monetary consideration. The relevant portion of the said example is as under:

"Example 16-promotion of a particular product

112. Deli Co, as part of an exclusive supply arrangement with Supply Co, agrees to purchase a minimum amount of supplies from Supply Co at a favourable price during a specified period. In return, Supply Co allows Deli Co to use some of its machines for the same period. The machines are used in connection with the supplies and are expected to become obsolete at the end of the period.

113. Although Deli Co enters into an obligation to purchase products of a minimum specified value, entry into this obligation does not constitute non-monetary consideration. It does not have an independent identity separate from the supply arrangement. The obligation merely defines the supply of the equipment and product by Supply Co for the monetary consideration provided by the customer.

114. The consideration that Supply Co receives for its supplies of the product and equipment is the money paid by Deli Co each time it purchases supplies from Supply Co, under the terms of the agreement."

4.11. It is further submitted that the relevant extract of the definition of Consideration is as under:

"9-15 Consideration

(1) Consideration includes:

(a) any payment, or any act or forbearance, in connection with a supply of anything; and

(b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.



(2) It does not matter whether the payment, act or forbearance was voluntary, or whether it was by the recipient of the supply."

4.12. The appellant had raised an argument that the definition of "consideration" under the CGST Act, is much narrower than the definition of the said term under the Contract Act. The agreement in the present case specifically says placement of instrument is without consideration. The definition of the term 'consideration' under the Contract Act is very wide and includes any act, abstinence or promise from the promisee in exchange of the promise by the promisor. Any benefit to the promisor or detriment to the promisee will be a sufficient consideration under the Contract Act. The relevant definition under Section 2(d) of the Contract Act is as under:

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise."

4.13. Under the Contract Act, consideration is a vital element of the contract. An agreement made without consideration is void and unenforceable. This is to ensure that the parties are serious while entering into contract and that they have taken active part in the bargain. However, to ensure that frivolous contentions, that the contract is without consideration, are not raised even in genuine contracts, the definition of the term 'consideration' has been widely defined. This definition under the Contract Act can be contrasted with the definition of the term 'consideration' in the CGST Act. The definition of 'consideration' in the CGST Act includes payment, whether in money or otherwise, and monetary value of any act or forbearance. Thus, the consideration requires passing of either money or something capable of being expressed in money, from the recipient of the supply to the supplier. In other words, any act or forbearance to which a monetary value cannot be ascribed, is not 'consideration' under the CGST Act.

4.14. The Appellant relies upon the decision of Hon'ble Bombay High Court in the case of Keshub Mahindra v. Commissioner of Gift Tax [1968 70 ITR 1



Bom]. The issue arose under the Gift Tax Act, 1958 was that Keshub Mahindra along with his two brothers held substantial shareholding in Mahindra & Mahindra Ltd (M&M). M&M was engaged in the business of supplying 'jeeps' manufactured by Willys Motors Inc. (manufacturer of jeeps, in USA). The jeeps were supplied by another company Willys Overland Export Corporation ('Export Co.). There was a contract between Export Co. and M&M that the Export Co. will have a right to elect to opt for the allotment of shares by M&M, as and when the shares will be issued. Subsequently, a contract was entered between Keshub Mahindra and two brothers on one hand and Export Co. on the other hand, wherein the Export Co. renounced its right in the earlier contract to elect to opt for the allotment of shares. In return, Keshub Mahindra and two brothers agreed to assign the right to take allotment of rights shares in favour of Export Co. which were to be exercised by Willys Motors Inc. The Gift-tax Officer alleged that the benefactor in the deal were Keshub Mahindra and two brothers when they gave away the rights free, whereas the beneficiary was Willys Motors Inc., but the benefit which Willys Motors Inc. conferred in return did not go to Keshub Mahindra and two brothers but to M&M. The term "gift" was defined in section 2(xii) of the Gift Tax Act, 1958 as: *"the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer of any property deemed to be a gift under section 4."* The Court while analysing the definition of the term 'gift' in the Gift Tax Act and the definition of the term 'contract' in the Indian Contract Act, 1872 observed as under:

"25. The second thing that has to be noted, so far as the definition of "consideration" in section 2(d) of the Contract Act is concerned, is the express modification made to that definition by the use of the words "consideration in money or money's worth" in the definition of "gift". Under the Contract Act, consideration must of course be something which the law can deem of some value but it need not necessarily be "money" or money's worth". Sir Dinshaw Mulla puts it thus at page 15 of his commentary on the Contract Act: "Apart from the peculiar case of a promise made by deed, English law will not enforce a promise unless it was given for value, that is, not necessarily for an adequate value, but for something which the law can deem of some value, and the parties treat as such by making it a subject of bargain. The value so received in exchange for the promise may consist in



present performance, for example, the delivery of goods, or it may itself be the promise of a performance to come. These elements are embodied in the definition of consideration by clause (d) of our section."

27. Now, it is undoubtedly the intention of the Gift-tax Act by the use of the words "consideration in money or money's worth" in section 2(xii) to limit the meaning of consideration to something which can be reckoned in terms of money and not to any and every obligation, e.g., a promise to marry, which would be a valid consideration under the ordinary law of contracts. It is a moot question whether "consideration in money or money's worth" is the same thing as "valuable consideration or something which the law deems of value" or whether it was intended by the definition to narrow down the concept of consideration. We have adverted to this distinction in order to emphasise the extent of the narrowness of the concept of consideration in the Gift-tax Act. The distinction, however, need not detain us here, for we shall proceed to consider whether the consideration in the present case was as stated in the Gift-tax Act definition "in money or money's worth."

The appellant submits that the above decision states that any and every obligation will not be a consideration where the statute requires that the consideration should be either money or in money's worth (or has a monetary value). The ratio of the above decision equally applies in the present case and the interpretation of the term "consideration" under the Gift Tax Act is relevant for determining the ambit of the said term in the CGST Act as the definitions are similar.

4.15. Further it is submitted that the agreement in present case specifically says that it is without consideration. In the present case, the placement of instruments by the Appellant at the premises of the hospitals/labs does not involve any payment made or to be made whether in money or in any other form to the appellant. This is also clear in terms of Clause 2.1 of the Agreement, which is re-produced hereunder:

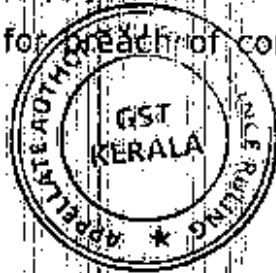
"2.1 Right to use the instruments: Abbott Health care hereby grants, subject to the terms and conditions specified in this Agreement, to the Customer a non-transferable right to use the Instruments without any consideration for the use per-se during the term of this Agreement.

Thus, the placement of instrument at the premises of the hospitals/labs is not a supply for a consideration.



4.16. Further the appellant contends that mere obligation to purchase minimum quantity of products does not have any monetary value and thus is not a 'consideration'. Clause 3.1 of the sample agreement submitted, provides that if the hospital fails to purchase specified minimum quantum of the products, then the Appellant is entitled to recover from the hospital, an amount equal to the deficit in the actual purchases vis-a-vis the minimum purchase required. It is submitted that this obligation to purchase of minimum quantity does not amount to "consideration" for the purposes of the CGST Act. The CGST Act requires that there should be monetary value of act or forbearance for it to amount to "consideration" for a supply. Thus, a mere obligation to purchase minimum quantity is not something which can be bought or sold, and also no money worth can be ascribed to it. Therefore, such an obligation does not have any monetary value. Hence, the observation of the Ld. Authority is incorrect.

4.17. It is further submitted that there is no nexus between the placement of instrument and consideration paid by the hospitals/labs for purchase of reagents. There must be a link or nexus between the supply of goods or services by a person and the consideration paid by another person. This is clear from the words 'in respect of, in response to, or for the inducement of'. In the present case, the hospitals/ labs places order for the purchase of reagents and make payment for the same. This is performance of the agreement to purchase reagent. Appropriate GST is being discharged on such supply by the distributor of the Appellant. Thus, the consideration paid by the hospital / labs is for supply of reagents. There is no nexus between the placement of instrument by the Appellant and the consideration paid (or obligation undertaken) by the hospitals/labs. Hence, the present transaction namely placement of instrument at the premises of the hospitals/labs is without any consideration. Hence, there is no supply. The hospitals/labs have agreed to purchase a minimum quantity of reagents under the agreement with the Appellant. The agreement provides that in case, the hospitals/labs fails to meet the minimum purchase obligation, they will be liable to pay deficit amount to the Appellant. Such payment of deficit amount is in the nature of damages / compensation for breach of contractual obligation to



buy minimum quantity of reagents and not a consideration for any supply even of reagents.

4.18. Further under the CGST Act, consideration is used in the sense of performance of the obligation and not entering into a contractual obligation. Under the Contract Law, there are two stages in a contract; formation of contract and performance of contract. The term "consideration" under the Contract Law is concerned with the stage of formation of contract. In other words, there should be consideration at the time of formation of contract and subsequent non-payment of consideration will not make a contract without consideration but it will amount to a breach of contract. Pollock and Mulla on Indian Contract Act (15th Edition) at page 56 explains this concept as under:

"The term "consideration" must be distinguished from the act of payment of agreed price. The act of payment of price (or its non-payment) is the performance of a promise already agreed. Consideration can exist or not exist, and must be reckoned, with reference to the making of a contract. If a promise to pay is the consideration for the promise, payment of price is performance of that promise and not its consideration. Not paying price agreed is non-performance or breach, and not lack of consideration."

4.19. The appellant submits that however, the term "consideration" under the CGST Act is not to be understood in the above sense. The term here is to be understood in the sense of actual act of payment in discharge of the obligation and not entering into the contractual obligation (or promise). It is clear from a perusal of the definition of consideration which include payment made or to be made whether in money or otherwise. When the payment is made, the anterior obligation to make payment is subsumed in it and does not have any independent existence. If even the entering into contractual obligation is also to be regarded as a consideration under clause (b) of Section 2(31) of the CCST Act, then a single transaction of supply will be taxed twice, one at the time of entering into obligation and second at the time of its performance, which is not the intention of the legislature. This is not the intention of the legislature to tax a single transaction of supply twice. Thus, a mere entering into contractual obligation is not consideration



for the purposes of the CGST Act. In the present case, the hospitals/labs have entered into a contractual obligation to purchase reagents from the distributors of the Appellant. The distributor supplies the reagents and discharge appropriate GST on the same. The act of purchase of reagents by the hospitals/labs is the performance of the contractual obligation on which GST has been discharged by the distributor. In other words, the said obligation has been subsumed in the supply made by the distributor. Thus, the said contractual obligation cannot be again treated as a consideration for the alleged supply made by the Appellant.

4.20. At the time of the hearing, the appellant has submitted the copy of the advance ruling orders issued by the authority for advance ruling in Karnataka (Advance Ruling No. KAR ADRG 118/2019 dtd. 30-09-2019) in the case of M/s. Randox Laboratories India Pvt. Limited), Bangalore, wherein the Authority for Advance Ruling held as follows:

"In this model, it is seen that the applicant is selling the reagents to the distributors and the distributors are selling the reagents to the end-customers. There may not be any supply from the applicant to the end-customers in so far as reagents are concerned. In such cases, the applicant transfers the property in goods in the form of reagents to his distributors and the distributors in turn sell it to the end-customers.

It may be a fact that the goods may not be available in the open market except with the distributors and the contract between the applicant and end-customer may stipulate the purchase of reagents from the distributor, it does not say about the details of such distributor specifically. The moot point is whether the agreement signed between the applicant and the end-customer be binding on the distributor unless the condition to that effect is present in the contract between the applicant and distributor. But the applicant states very clearly that he is selling the goods to the distributor and the distributor is also selling the goods to the end-customer. Hence, it is clear that the supply for reagents to the end-customer is from the distributor and the applicant is merely facilitating such supply by binding himself to provide the reagents as the equipment would not work without the reagents.



As far as equipments are concerned, the equipments are imported from outside the country or sometimes procured within the country and taxes gets paid on such transaction of inward supply. The equipments are not transferred to the end-customer though the equipments are given to them for use. The applicant also capitalizes the cost of such equipments and also claims depreciation on such equipment so given for use. If any consideration is received for this transaction, this would amount to giving the equipments on rentals and the same would be liable to be taxed under the Acts. But in this model of business, there is no rental charged and the value of the asset is charged to the profit received on the supply of reagents. The applicant would also charge the end-customer for damages in case the end-customer does not order for a threshold quantity of the reagents and this act of toleration would amount to a service as consideration is received for this. Since, in this RRC model, there is no consideration involved in the providing of equipments and the ownership lies with the applicant himself, the same could not be called as 'supplies' as per Section 7 of the CGST Act / KGST Act.

The sub-sec.(1) of Sec.7 of the CGST / SGST Act provides for the scope of supply and the same reads as under:

Sec.7. Scope of supply.-

For the purposes of this Act, the expression 'supply' includes-

- (i) 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;*
- (ii) import of services for a consideration whether or not in the course or furtherance of business;*
- (iii) the activities specified in Schedule I, made or agreed to be made without a consideration; and*
- (iv) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.*

As per clause (i) above, the rental of goods would amount to supply transaction, if it is made or agreed to be made for a consideration in the



course or furtherance of business. There is no dispute that this transaction involves delivery of goods for use and is in the course or furtherance of business. The only issue is about the consideration.

Clause (31) of Sec.2 of the CGST / SGST Act defines the term 'consideration' as under:

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

- 1. 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.*
- 2. The monetary value of any act or forbearance, 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.*

But there is an act of supply of equipment and in the second clause of the definition of consideration. It is seen that the monetary value of any act or forbearance 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. There is a clear inducement of supply of goods from the distributor and hence the monetary value of the act of supply of goods in the form of equipments would be the consideration for the supply of equipments. Since the monetary value of this transaction is NIL this cannot be considered as the consideration. Hence the delivery of the equipments by the applicant to the end customer without any charge under this model would not amount to supply under the Act. Accordingly the authority issued ruling as follows:-



- *The applicant (M/s Radox laboratories) is liable to pay GST on the machines given to the customers under PRC model but is not liable to pay GST on the machines or equipments given to the customers under RRC model.*
- *The supply of reagents along with the machine rental services in both RRC and PRC contract is a separate supply independent of machine rental services supplied , if any*
- *The rate of tax for the supply of rental service of equipment' s is 9% CGST and 9% KGST.*
- *The value on which GST has to be paid and the time of supply are*

In case of RRC model

- *For the supply of reagents - at the time of supply of reagent on the transaction value.*
- *For the supply services in the nature of an act agreeing to the obligation to refrain from an act or to tolerate an act or situation or to do an act for which a consideration is received - at the time of supply of such services on the transaction value.*

In case of PRC model

- *For the supply of rental services in equipments -at the time of supply of the equipments on the amount of refundable payment received or invoiced.*
- *For the supply of reagents - at the time of supply of reagents on the transaction value.*
- *For the supply services in the nature of an act agreeing to the obligation to refrain from an act or to tolerate an act or situation or to do an act for which a consideration is received - at the time of supply of such services on the transaction value".*



5. PERSONAL HEARING:

The appellant was afforded an opportunity of personal hearing via virtual mode on 02/11/2021. The authorized representative of the appellant Sr. Advocate Sri V. Sridharan appeared before the authority and reiterated the contentions raised in the appeal memorandum. They also submitted additional submission in their favour for consideration, which was also taken on record.

6. DISCUSSION AND CONCLUSION:

6.1. We have carefully gone through the facts of the case, the orders issued by the Authority for Advance ruling; the earlier order of this Authority; the judgment of the Hon'ble High Court of Kerala, the grounds of appeal and other written and oral submissions made by the appellant during personal hearing. The issue to be determined is, whether the placement of specified medical instruments by the appellant at the premises of unrelated hospitals, labs etc. in pursuance of the agreement for their use for a specific period constitute 'supply' as defined under the CGST/SGST Act, 2017.

6.2. The contentions raised by the appellant were examined in seriatim. The appellant claims that the placement of specified medical instruments at the premises of the unrelated hospitals is without any consideration hence it cannot be categorised as taxable supply under GST Act.

6.3. The provisions regarding Scope of supply is detailed in Section 7 of the CGST Act, 2017, as follows:-

(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;

(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;

(1A) 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 II.

(2) Notwithstanding anything contained in sub-section (1),-

(a) Activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of sub-sections (1), (1A) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods."

6.4. Schedule II to the CGST Act, 2017 lists a few activities or transactions which are to be treated either as supply of goods or supply of services. Vide Sl. No: 1(b) to schedule II of the Act, it is specified that any transfer of right in goods or of undivided share in goods without the transfer of title thereof is a supply of services.

6.5. The GST liability is attracted when there is a supply of goods or supply of services. In order to determine the fact in issue, the first condition to be verified is that whether the activity qualifies to be classified under the term "supply" as specified under section 7 of the Act. Further it is to be verified that whether the activity is supply of goods or Supply of services. It is noticed that the definition of the term "supply" is very wide and inclusive one. It includes all forms of supply such as sale, transfer, barter, exchange, licence, rental, lease or disposal. The definition requires certain parameters



for an activity / transaction to be categorised within the meaning and scope of 'supply' as detailed below:-

1. The supply shall involve goods or services;
2. The supply should be in the course or furtherance of business;
3. The supply should be made for a consideration except in the case of activities specified under Schedule I to the CGST/SGST Act.

6.6. From the contentions raised by the appellant, it reveals that they place their specified medical equipments to identified hospitals or laboratories as per the terms and conditions of the Reagent supply and Instrument Use agreement. Accordingly, the hospitals or laboratories where the equipments are installed have the right to use the machine during the period of contract; but the title and ownership of the instrument continues to be with the appellant and the customer has to return the instruments to the appellant at the end of the specified period or at the earlier termination of the agreement. It is further stated that the users of the instruments under the agreement only possess a non-transferable right to use the said instruments during the tenure of agreement. Hence, there is provision of transferring right to use the instruments from appellant to hospitals/labs for a fixed tenure. As per the provisions contained in Sl. No: 1(b) to schedule II of the Act, it is specified that any transfer of right in goods or of undivided share in goods without the transfer of title thereof is a supply of services. Hence, the activity of the appellant prima facie qualifies to be categorized as supply of services vide Schedule II to the Act.

6.7. The next condition to be satisfied is that the transaction / activity should be in the course or furtherance of business. Section 2 (17) of the CGST Act, 2017 defines business as follows:

(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) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;
- (d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;
- (e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;
- (f) admission, for a consideration, of persons to any premises;
- (g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;
- (h) activities of a race club including by way of totalisator or a license to book maker or activities of a licensed book maker in such club; 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.

6.8. The definition of 'business' is inclusive and wide in its scope and amplitude. The plain reading of the section reveals that any activity carried out by the entity in the course or furtherance of business is included within the ambit of the definition, whether or not it is for a pecuniary benefit. The entire activity of providing instruments and supplying reagents of the appellant is based upon a common agreement viz. Reagent supply and instrument use Agreement. The activity of the appellant of placing of instruments at the hospitals/labs is admittedly linked with sale of reagents in terms of the agreement, whereby it is evident that the entire activity is nothing but a commercial transaction which is undoubtedly in the course or furtherance of business.

6.9. The next condition to be satisfied is that the transaction / activity should be made for a consideration. The term 'consideration' is defined in Section 2 (31) of the CGST Act, 2017 as follows;



(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;

(b) the monetary value of any act or forbearance, 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:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply.

6.10. The definition of the term consideration under GST Act is inclusive one. The terms of the definition reveals that consideration can be either in monetary or non-monetary form or partly in monetary form and partly in non-monetary form. The requirement is that it should be in respect of or in response to or for inducement of supply. Clause (a) and (b) of the definition of 'consideration' are independent clauses and not dependant on each other. Therefore, consideration can be either payment in money or the monetary value of any act or forbearance. Monetary consideration includes payment by cash, cheque or credit card, bank transfer and deduction from bank account. Non-monetary consideration essentially means compensation in kind such as; (i) supply of goods and services; (ii) refraining or forbearing to do an act; (iii) tolerating an act or a situation; (iv) doing or agreeing to do an act.

6.11. From the terms of agreement entered by the appellant with their customers, it reveals that they are placing the instruments / machines at the premises of the hospitals / labs for a specified period for their use. The agreement also places certain covenants regarding the usage of the



instruments and purchase of reagents by the customer. The relevant clauses of the agreement are reproduced below:

Recitals: Abbott Healthcare is the sole owner of the instruments defined in Annexure - A. Whereas, Abbott Healthcare agrees to provide the instruments, more specifically described in Annexure - A, to the customer to use the Instruments and the Customer agrees to purchase certain Products (as defined below in Annexure B) from Abbott Healthcare in accordance with the terms and conditions specified in this Agreement.

Clause 1 of the agreement provides for Definitions:

"Instruments" means the diagnostic instruments specified in Annexure - A hereto, as amended or modified from time to time by the Parties in accordance with the terms of this Agreement; and

"Products" means the reagents and related diagnostic products specified in Annexure - B hereto, as amended or modified from time to time by the parties in accordance with the terms of this Agreement.

Clause 2 of the agreement provides for rights and Covenants regarding Instruments.

Right to use the Instruments - Abbott Healthcare hereby grants, subject to the terms and conditions specified in this Agreement, to the Customer a non-transferable right to use the instruments without any consideration for the use per se during the term of this Agreement

Title to Instruments. The Customer acknowledges and confirms that Abbott Healthcare owns all rights, title and interest in the Instruments and that the Customer has no right, title or interest in the Instruments other than the right to use the Instruments specifically granted pursuant to this Agreement.

Customer Covenants. As per clause 2.4(iii) of the agreement it is specified that, upon the termination of this agreement (except in the event the customer acquires title pursuant to section 5.1.2 hereunder), the customer shall immediately return the instruments to Abbot health care or permit its repossession by Abbott health care and shall extend any assistance that Abbott health care may require in respect of such repossession of the



instruments from the premises of the customer, the customer hereby waives any prior notice, any pre-seizure hearing or judicial process as conditions precedent to such repossession of instruments by Abbott healthcare. Further clause 2.4(v) of the agreement states that the customer shall use only such reagents, calibrators and disposables on the instruments as specified or approved in writing by Abbott Healthcare from time to time and shall ensure that only Abbott Healthcare personnel will have the authority to repair, upgrade or replace any parts necessary to keep the instruments in good working order;

Clause 3 of the agreement provides for Purchase of Products, Minimum Purchase Obligations.

As per clause 3.1 of the agreement contains the condition regarding the Purchase of Products accordingly, Every month the customer shall purchase its entire requirement of the Products from Abbott Healthcare (such exclusive purchase obligation, the "Exclusive Purchase Obligation") at the prices specified in Annexure B to the agreement (as amended and modified from time to time in accordance with the terms of this Agreement) (the "supply price"). The supply price will be exclusive of all applicable taxes. Abbott Healthcare has offered supply price of product at list price to which customer has opted for special prices negotiated by them which is in Annexure B based on volume given in Annexure B. If customer fails to meet specified volume as given in Annexure B then Abbott Healthcare has right to convert prices to list prices.

Further the clause regarding the Supply of product specifies that Customer has to place single order to Abbott healthcare by 10th of each month to which supply will be made in 7 days. Orders placed after given date will be executed based on the inventory which may take 7-15 days.

Clause 3.2 of the agreement provides for the Minimum Purchase Obligations. As per the clause, from the date of installation of the Instruments at the Customer's premises, the Customer agrees to purchase every month from Abbott Healthcare products of a value not less than as mentioned in Annexure A to the agreement (such minimum purchase obligation, the



"Minimum Purchase Obligation" exclusive of VAT and other applicable taxes, if any Applicable VAT/CST and other taxes would be charged additionally. If customers fail to meet the minimum purchase obligation on monthly basis then Abbott Healthcare will raise debit note equal to deficit amount which has to be paid by customer in 7 days from date of receipt. In case of additional placement of Instrument by Abbott, Minimum Purchase obligation will be revised upward proportionately for similar type of Instrument.

Annexure A to the agreement states the following

Architect ci 4100 - 1 unit

Monthly Minimum purchase obligation (MPO)

1) Complete RAP- Monthly minimum purchase obligation of reagents, calibrators, Controls and Accessory -

- Rs.4,00,000/Month for first 3 months
- Rs.6,00,000/ month for first 3-9 months
- Rs. 7,50,000/Month from 9 months onwards

Incremental volume : 10% YoY growth

Clause 5 of the Agreement states about the Damage to instruments : risk of loss

Clause 5.1 of the agreement specifies about the Customer liability : The customer shall be liable for the cost of any repairs required in connection with any damage caused by any instrument or any part thereof due to,

- a. any negligence on the part of or misuse or alteration in the manner of the instruments by the customer its representatives employees agents.
- b. due to any service or work performed on the instruments by any unauthorised personnel.
- c. if such damage may be directly or indirectly attributed to any act or omission on the part of a customer its representatives agents that is in breach of any obligation under this agreement.

Clause 5.1.2 of the agreement states that in the event that Abbott healthcare reasonably determines that the customer or its representatives or agents is liable for any damage to the instruments in accordance with



section 5.1.1 herein above and if the Abbott healthcare in its sole discretion determines that the damaged instrument cannot be repaired, the customer shall pay to Abbott health care, the current value of the instrument which the customer acknowledges to be (less any depreciation based on a straight - line method prorated monthly). On such payment being made by the customer to the Abbott health care, the title to such instrument shall stand transferred to the customer.

Clause 9 of the Agreement states about the termination.

Clause 9.2 of the agreement states about the Termination without cause : This agreement may be terminated by the customer by paying the WDV (written down Value) of the system if terminated earlier than the term of contract mentioned in 9.1.

Further Clause 9.3 of the agreement states about the Termination for cause. Accordingly without prejudice to any other provision of this agreement Abbott Healthcare may terminate this agreement with immediate effect in the event that (i) the customer fails to meet its exclusive purchase obligation or minimum purchase obligation contemplated in section 3.1 and 3.2 of this agreement respectively (ii) the customer fails to meet any of its payment obligation under this agreement in accordance with the terms of this agreement (iii) the customer is in breach of any material term or condition of this agreement.

Clause 9.4 of the agreement specifies about Automatic termination, wherein it is stated that, This agreement will stand automatically terminated in the event that the customer in any manner acquires title to the instruments including without limitation pursuant to section 5.1.2 hereof.

6.12. On a plain reading of the terms and conditions of the Agreement, it is revealed that the primary intention of the appellant is to enter into an agreement to place the instrument at the premises of those customer only where the customer in turn agrees to purchase products as defined in the Annexure A of the Agreement in accordance with the terms and conditions specified in the Agreement. The terms and conditions are specified in clauses 3.1 and 3.2 of the Agreement. According to these clauses, the



customer shall purchase the product exclusively from the appellant at the prices specified in Annexure B for a value not less than that is mentioned in Annexure A. In case of the monthly purchase falling short of the value agreed, the appellant has the right to raise debit note equal to the deficit amount. Further in clause 3.2 of the Agreement, it is specified that in case of additional placement of Instrument by Abbott, Minimum Purchase obligation will be revised upward proportionately for similar type of Instrument. Further the covenant of Automatic termination in the agreement also states that the agreement will stand automatically terminated in the event that the customer in any manner acquires title to the instruments. These facts itself shows that the Minimum Purchase obligation of the reagent and forbearance of the customer from using any other reagent than that is prescribed by the appellant serves as a consideration for the placement of the instrument at the premises of the customer.

6.13. The definition of the term consideration under the CGST Act as reproduced above clearly encompasses the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both. Hence the agreement of the customer to purchase the reagents, calibrators and disposables for use in the instrument exclusively from the appellant for a minimum value every month with obligation to pay the deficit amount in case the purchase in a month falls short of the minimum agreed value constitutes a valid consideration as defined under Section 2 (31) of the CGST Act, 2017. Therefore, there is no doubt that the transaction / activity is made for a consideration within the meaning of CGST Act, 2017. Moreover, it is admitted by the appellant in their appeal too that in some instances, the appellant had raised suo-moto claim, on the hospital for payment of some amount, where the customers failed to fulfil the conditions of minimum purchase of reagents etc. In the light of the discussion above, it is evident that the transaction / activity in issue in hand satisfies all the essential ingredients of 'supply' as defined under Section 7 of the CGST Act, 2017.

6.14. The appellant has raised an objection in the written submission as well as during personal hearing that the obligation to purchase minimum



quantity of products is not a "consideration" for the purpose of the CGST Act. It was also contended by the appellant that the definition of consideration in Sec.2(31) of the CGST Act can be contrasted with the definition of consideration in Sec.2(d) of the Contract Act and it can be seen that the consideration as defined in GST is narrower in scope than that in Contract Act and hence any act or forbearance which does not have any monetary value is not consideration under the CGST Act. Therefore, the obligation to purchase minimum quantity of products may be treated as a consideration in terms of the law of contracts but cannot be a consideration under the GST law. This contention was examined in the light of the definition of the Consideration provided under the GST Act. As per sub clause (b) to subsection (31) of Section 2, to the Act it is specified that Consideration in relation to the supply of goods or services includes the monetary value of any act or forbearance, 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. Accordingly, it is clear that monetary value of any act or forbearance which causes the inducement of supply of goods or service or both is included in the definition. Thereby the act of assurance from the part of the customer for exclusive usage of reagents, calibrators and disposable in the instruments according to the approved directions of the appellant and the obligation to purchase minimum assured quantity on the agreed price from the appellant constitutes a valid consideration for inducement of the supply of these services. Further the terms of the agreement reveals that "if the customer fails to meet the minimum purchase obligation on monthly basis the appellant will raise debit notes equal to deficit amount which has to be paid by the customer in 7 days from the date of receipt". Section 15 of the Act specifies about the value of taxable supply. Sub-section (4) to section 15 specifies that where the value of the supply of goods or services or both cannot be determined under subsection (1) the same shall be determined in such manner as may be prescribed. Rule 27 to 32 of the GST rules specifies about the determination of value of supply of goods or services, where the consideration is not wholly in money. The supply such as sale, transfer,



barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person involves an element of contractual relationship i.e. Contractual reciprocity wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration. Moreover, it is admitted by the appellant in appeal memorandum too that in a few instances, the appellant had raised suo-moto claim, on the hospital for payment of some amount, where the hospital failed to adhere with the conditions of minimum purchase of reagents etc as per agreement. Further, it is not clear from the records of the case that whether the appellant were selling the same reagents, etc at the same price to other hospitals/labs where no such instruments were placed for use by them. This information was sought for by us during the course of hearing but the same was not submitted by the appellant despite granted sufficient time for the same. The chances of charging extra price for the reagents etc in case of instruments placed for use cannot be ruled out as the appellants are not doing welfare activities to the hospitals otherwise. However, in absence of said information too, it is evident from the clauses of the Agreement that the conditional purchase of reagents etc is clearly linked with the right to use of the instruments by the customers. Hence, the arguments of the appellant that no consideration is involved in the transaction in terms of GST law are not tenable in view of explicit and unambiguous provisions contained in Section 7 read with section 2(31) of CGST Act, 2017.

6.15. The appellant has placed their reliance on the judgment of the Hon'ble High Court of Bombay in the case of Keshub Mahindra Vs. Commissioner of Gift Tax (1968 70 ITR 1 Bom) in support of the contention that the scope of consideration under GST law is narrow than the scope of consideration under Contract law and what is a valid consideration under Contract law will not be consideration under GST law. Further it was contended that there should be economic value and independent identity for something to qualify as consideration and the obligation to purchase minimum supplies has no economic value or independent identity to constitute consideration under the GST law. They have also relied upon the advisories issued by the Tax



Department of Australia and the definition of consideration in the GST law of Australia.

The Hon'ble High Court of Bombay in the Keshub Mahindra case considered the scope of the term "consideration" as defined in Section 2 (d) of the Contract Act vis-a-vis the scope of the word "consideration" as used in the definition of gift in Section 21(xii) of the Gift Tax Act and came to the conclusion that the word consideration in the definition of gift is qualified by the words "in money or money's worth" and hence it limits the meaning of consideration to something which can be reckoned in terms of money and not to any and every obligation which could be valid consideration under the law of contracts and accordingly held that the word consideration as used in the definition of gift in the Gift Tax Act is narrower in scope than the term consideration as defined in the Contract Act. The judgment is not relevant to the instant case not only because the facts and circumstances are distinguishable but also due to the fact that the statutory provisions dealt with are not parimateria as the issue in that case was limited to the meaning and scope of the word consideration as used in the definition of gift in Gift Tax Act. We find that the term "consideration" has been defined clearly and unambiguously vide sub-section (31) to Section 2 of the CGST Act 2017 as discussed above, which encompasses in it the transactions involved in the issue in hand. Hence there is no need for recourse to any construction interpretation to understand the meaning of the term. The meaning of the term consideration is clear from the plain language used in the definition. It is settled position of law that where the language of the statute is plain and unambiguous, there does not arise a need for interpretation. Hence there is no need for reference to the definition of consideration under Australian Law or the advisories issued there under too.

6.16. In the case of Bhavnagar University Vs Palitana Sugar Mill (P) Ltd reported in AIR 2003 SC 511 the Hon'ble Supreme Court held;

"that recourse to construction or interpretation of the statute arises only when there is ambiguity, obscurity or inconsistency therein or otherwise. The basic principle of construction of statutes is that they should be read as a whole, then chapter by chapter, then section by section and then word by



word. True meaning of a provision of law has to be determined on the basis of clear language with due regard to the scheme of the law. No words shall be added, altered or modified unless it becomes necessary to do so to prevent the provision becoming unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute."

6.17. The Hon'ble Supreme Court in the case of Dayal Singh Vs Union of India reported in AIR 2003 SC 1140; held that;

"where the language of the statute is clear and unambiguous, nothing can be read into it by implication and the intention of the legislature has to be gathered from the language used."

6.18. The Hon'ble Supreme Court in the case of Union of India Vs Dharamendra Textile Processors reported in 2008 (231) ELT 3 (SC) held that;

"It is a well settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent."

6.19. It is well settled principle that a taxing statute must be interpreted in the light of what is clearly expressed; it cannot imply anything, which is not expressed, it cannot import provisions in the statute so as to supply any assumed deficiency. Further it is pertinent to note that it is the settled legal position that a judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered.

6.20. In the case of Union of India & Ors Vs Dhanwanti Devi & Ors reported in (1996) 6 SCC 44, the Apex Court while dealing with the law of precedent and the principle of ratio decidendi held that;

"It is not everything said by a judge while giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well settled theory of precedents, every decision contains three basic



postulates - (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment."

It was further held that-

"The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding."

It was also held that

"In order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law."

6.21. We have gone through the decision of the Authority for Advance ruling in Karnataka (Advance Ruling No.KAR ADRG 118/2019 dtd.30-09-2019) in the case of M/s. Radox Laboratories India Pvt. Limited), submitted by the appellant. We decide to deviate from the decision for the following reasons:

1. As per the definition of the term consideration under subsection (31) of section 2 of the Act, it can be either monetary or non monetary. In the instant case, it reveals from the terms of agreement that there is an obligation and forbearance on the part of the customer which serves as consideration for the placement of equipments as detailed above.

2. The value of the supply can be determined in accordance with provisions of section 15 of the CGST Act read with Rule 27 to 32 of the CGST Rules. Further Section 15 of the Act specifies about the value of taxable



supply. Subsection (4) to section 15 specifies that where the value of the supply of goods or services or both cannot be determined under subsection (1) the same shall be determined in such manner as may be prescribed. Rule 27 to 32 of the GST rules specifies about the determination of value of supply of goods or services where the consideration is not wholly in money. From the definition of the term consideration, it is revealed that it includes monetary value of an Act or forbearance i.e. any consideration received for doing something or promise to refrain from doing something is subject to GST.

3. The ruling does not disclose the terms and conditions of the agreement completely.

6.22. Moreover as per section 103 of the GST Act specifies about the applicability of advance ruling.—

(1) The advance ruling pronounced by the Authority or the Appellate Authority under this Chapter shall be binding only,—

(a) on the applicant who had sought it in respect of any matter referred to in sub-section (2) of section 97 for advance ruling;

(b) on the concerned officer or the jurisdictional officer in respect of the applicant.

The subsection (2) to Section 103 further reads that the advance ruling referred to in sub-section (1) and sub-section (1A) shall be binding unless the law, facts or circumstances supporting the original advance ruling have changed.

Accordingly the decision taken by authority of advance ruling or appellate authority of advance ruling of other state does not have a precedent value and not binding on this authority.

6.23. Based on the above discussion, it is evident that the activity or transaction undertaken by the appellant qualifies to be categorised as "supply" as defined in Section 7 of the CGST Act, 2017. Accordingly, it is concluded that the placement of specified medical instruments to unrelated



customers like Hospitals, labs etc for their use by the appellant constitutes supply of services under CGST Act, 2017.

6.24. In view of the observations as above, the following orders are issued;

ORDER

1. Whether the placement of specified medical instruments to unrelated customers like hospitals, labs etc for their use without any consideration for a specific period constitute supply?

Yes, the above transaction constitutes "supply" as defined under Section 7 of the CGST Act, 2017.

2. Whether such movement of goods constitutes otherwise than by way of supply under GST?

No.

In nut shell, the Advance Ruling Order No. KER/97/2021 dated 07/05/2021 of the Advance Ruling Authority, Kerala stands upheld with aforesaid modification and consequently the appeal filed by the appellant is rejected.


Shyam Raj Prasad, IRS
Chief Commissioner
Central Tax, Central Excise & Customs
Thiruvananthapuram Zone


Dr. Rathan U. Kelkar, IAS
Commissioner
State Goods & Service Tax
Kerala



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