	KERALA AUTHORITY FOR ADVANCE RULING GOODS AND SERVICES TAX DEPARTMENT, TAX TOWER, KARAMANA, THIRUVANANTHAPURAM – 695002
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BEFORE THE AUTHORITY OF :Shri. Sivaprasad S, IRS&
: Shri. Senil A K Rajan

Legal Name of the applicant	M/s. Abbott Healthcare Pvt. Ltd.
GSTIN	32AAACK3935D1Z1
Address	XX1/457A1, PoomkudyBuilding, Vallathil Road, Poojarivalavu, Kalamassery, Ernakulam - 683104.
Advance Ruling sought for	Whether in the facts of the case, the provision of specified medical instruments by the applicant to unrelated parties like hospitals, labs etc for use without any consideration constitutes a “supply” or whether it constitutes “movement of goods” otherwise than by way of supply as per provisions of CGST / SGST Act, 2017?
Date of Personal Hearing	28.10.2020
Authorized Representative	Shri. V.Sridharan, Senior Advocate

ADVANCE RULING No. KER/97/2021 dated 07.05.2021

1. M/s. Abbott Healthcare Private Limited (hereinafter referred to as the applicant) is a company incorporated under the Companies Act, 1956 having its registered office at 3, Corporate Park, Sion Trombay Road, Mumbai - 400 071, India. The Applicant is registered under Goods and Services Tax in the

State of Kerala and are holders of GSTIN 32AAACK3935D1Z1 with principal place of business at XX1/457A1, PoomkudyBuilding, Vallathil Road, Poojarivalavu, Kalamassery, Ernakulam - 683104.

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.

BRIEF FACTS OF THE CASE:

3. The Applicant is engaged inter alia in the sale of pharmaceutical products, diagnostic kits, diagnostic instruments etc. As part of its business activity the applicant places specified medical instruments to unrelated hospitals, labs etc for their use for a specified period without any consideration. In order to execute the placement of instruments, the applicant enters into Reagent Supply and Instrument Use Agreement (**hereinafter referred to as "Agreement"**) with various hospitals, labs etc. The copy of the sample agreement is produced as Annexure – 2 to the application. The Applicant by application dated 28.05.2018 sought for advance ruling on following;

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 a “supply” or whether it constitutes movement of goods otherwise than by way of supply as per provisions of the CGST / SGST Act?

4. The Authority for Advance Ruling by Ruling No. KER/15/2018 dated 26.09.2018 ruled as follows;

“The placement of specified medical instruments to unrelated customers like hospitals, labs, etc. for their use without any consideration, against an agreement containing minimum purchase obligation of products like reagents, calibrators, disposals etc for a specified period constitute 'Composite Supply'. The principal supply is transfer of right to use of any goods for any purpose and is liable to GST under Sl.No.17 (iii) - Heading 9973 of Notification No.11/2017 Central Tax (Rate) dated 28.06.2017.”

5. Aggrieved by the above ruling the applicant preferred appeal before the Appellate Authority for Advance Ruling, Kerala. The Appellate Authority by Order No. AAR 04 / 2018 dated 14.12.2018 upheld the ruling of the Authority for Advance Ruling as legally correct and proper.

6. Consequently, the applicant filed Writ Petition (Civil) No. 17012 of 2019 before the Hon'ble High Court of Kerala challenging the rulings of the Authority on Advance Ruling as well as the Appellate Authority on Advance Ruling. The Hon'ble High Court by Judgment dated 07.01.2020 quashed the

rulings of the Authority for Advance Ruling as well as the Appellate Authority for Advance Ruling and remitted the matter back to the Authority for Advance Ruling for a fresh decision based on the observations in the judgment and after hearing the applicant within a period of six weeks from the date of receipt of the copy of the Judgment. The observations made by the Hon'ble High Court in the above judgment are reproduced below;

“On a consideration of the facts and circumstances of the case and the reasoning of the AAR and the Appellate Authority, it is my view that while it may have been open to the AAR to enquire, based on the terms of the agreement, whether the supply of the medical instruments to the customer, although styled as a free supply, was in fact one for valid consideration, its findings as regards a composite supply are wholly without jurisdiction. It is apparent that the AAR went beyond the terms of reference in embarking upon an enquiry as to whether the supplies effected under the agreement between the petitioner and the customer hospitals/laboratories, constituted a composite supply. As a consequence, the AAR did not go into the real issue of whether the supply of instruments per se constituted a taxable supply under the CGST Act.

For a supply to be seen as composite supply, it must answer to the definition of the term composite supply at the time of its supply. As per sec 2(30) of the CGST Act composite supply means “a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business one of which is a principal supply”. Many aspects of the transactions envisaged under the agreement entered into between the petitioner and its customer hospitals / laboratories militate against viewing

them as a composite supply as defined above. Firstly, the supplies are made by two different taxable persons; the supply of instrument being by the petitioner and the supply of the reagents, calibrators and disposables being by his distributor, who purchases it from him on principal to principal basis. Although it could be argued that there is a relationship between the said persons that influences the valuation of the supply, the same does not take away from the fact that the supplies are, in reality, made by two different taxable persons.

Secondly, the two supplies do not answer to the description of being "naturally bundled and supplied in conjunction with each other in the ordinary course of business". While they were not bundled together as a matter of fact, in the instant case, there is also no material to suggest that they are so bundled and supplied in conjunction with each other in "the ordinary course of business". In fact, the business model followed by the petitioner appears to have held the field for a considerable period of time and would show that in the ordinary course of business, the supplies are not bundled.

In my view, a finding as regards composite supply must take into account supplies as effected at a given point in time on "as is where is" basis. In particular instances where the same taxable person effects a continuous supply of services coupled with periodic supplies of goods / services to be used in conjunction therewith, one could possibly view the periodic supply of goods / services as composite supplies along with the service that is continuously supplied over a period of time. These, however, are matters that will have to be decided based on the facts in a given case and not in the abstract as was done by the AAR."

PERSONAL HEARING:

7. In compliance of the direction of the Hon'ble High Court as detailed above the Authority for Advance Ruling granted opportunity of hearing to the Applicant on 28.10.2020 by virtual mode. Shri.V.Sridharan, Senior Advocate attended the hearing on behalf the applicant. They invited attention to the written submissions dated 05.03.2020 and also produced certain records in support of their submissions. They also made a detailed presentation emphasizing and elaborating the various grounds relying on case laws in support of their contention that the activity carried out by them does not constitute a "supply" as defined in Section 9 of the CGST Act.

8. In the written submission dated 05.03.2020 and in the course of personal hearing on 28.10.2020 they stated as follows;

8.1. They are engaged in the sale of pharmaceutical products, diagnostic kits etc. The business model of the Applicant, inter-alia, in the state of Kerala, is that it places its own diagnostics instruments at the premises of unrelated hospitals, labs etc for their use for a specified period without any consideration. To execute the aforesaid placement of instruments, they inter-alia enters into the Agreement with various hospitals, labs etc. The photocopy of the sample agreement effective from 01.06.2016 with IQRAA International Hospital, Calicut is produced as Annexure -2. In terms of the Agreement, two streams of transactions are undertaken;

- i. Placement of specified medical instruments to unrelated hospitals, labs for their use, without any consideration, for a specified period to the

identified unrelated hospitals, labs etc for their use. The ownership in the instruments continues to be with them and all rights, title and interest in the instruments are owned and vested in them at all times during the period of use. The hospital only possesses a non-transferable right to use the said instruments without any consideration. The said instruments are provided to the hospitals for a specified period and are returnable at the end of the specified period or on earlier termination of the Agreement. The instruments are centrally stocked by them at their warehouse located in Ahmedabad, Gujarat. As and when required the instruments are transported to the identified unrelated hospitals, labs etc located in Kerala or other States under the cover of a delivery challan in accordance with the provisions of the CGST Act. The photocopy of sample delivery challan dated 25.01.2018 is produced as Annexure – 3.

- ii. Supply of products (reagents, calibrators, disposables etc) as provided in the Agreement. As per the agreement the hospitals/ labs are required to purchase specified quantities of reagents, calibrators, disposables etc at the prices specified in the Agreement. The products are supplied by them to their distributors on payment of applicable GST. The distributor in turn supplies 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 them to the hospitals/labs. The photocopy of Agreement dated 20.12.2016 made between them and the distributor namely; M/s Element Enterprises, Calicut for supply of products is

produced as Annexure - 4; copy of GST invoice issued by them to distributor is produced as Annexure - 5 and copy of the invoices issued by the distributor to the hospitals / labs are produced as Annexure - 6. As the instruments are placed at the premises of the hospitals / labs without any consideration they do not make any supply for consideration.

8.2. The Agreement carries a clause (clause 3.1) which provides that if the hospital fails to purchase specified minimum quantum of the products, then they are entitled to recover from the hospital, an amount equal to the deficit in the actual purchases vis-a-vis the minimum purchase required. Though, such clause exists in the agreement, the same has not been acted upon by them to maintain relation with the customer. Thus, no amount has been recovered towards such deficit by them till date. If any amount is charged by them from the hospitals /labs pursuant to this clause, they will duly discharge the GST liability on the same. The distributor has also not recovered any such amount from the hospitals/labs. In fact, the distributor cannot recover any such amount as there is no agreement in respect of instrument between the distributor and the hospitals/labs. This business model is in place since past many years. Further, it is industry practice, even internationally, to supply instrument free of cost to the hospitals / labs to prevent blockage of funds by the hospitals/labs keeping in mind the commercial and business expediency of the pharma industry.

8.3. The Order dated 02.05.2017 of Deputy Commissioner (Intelligence), Dept. of Commercial Taxes, Ernakulam, in the VAT regime, in the case of

M/s Prompt Enterprises (distributor of Applicant), in respect of detention of instrument belonging to the Applicant on 04.03.2016, demonstrates that they were following the same business model even in the erstwhile VAT regime. This demonstrates that the model adopted by them even in the past was not a tax planning device from Tax/VAT angle but was necessary due to commercial and business expediencies. A copy of the Order dated 02.05.2017 of Deputy Commissioner (Intelligence), Dept. of Commercial Taxes, Emakulam is produced as Annexure - 7.

8.4. On the basis of the Judgment dated 07.01.2020 of the Hon'ble High Court of Kerala, the only question that arises for determination in the present proceeding is whether the placement of the instrument at the premises of the hospitals/ labs is a supply in terms of the CGST Act. The further questions as to valuation, classification, nature of supply, rate of tax etc are outside the scope of the present proceeding. In other words, the only issue involved in the present proceeding is whether present transaction is leviable to GST or not.

9. Section 9 of the CGST Act levies tax on all intra-State supplies of goods or services. Thus, the taxable event for levy of Goods and Services Tax is 'supply of goods or services or both'. The meaning and scope of the term 'supply' is specified under sub-section (1) of Section 7 of the CGST Act.

9.1. Section 7(l)(a) of the CGST Act defines the term supply as all forms of supply made for a consideration by a person in the course of furtherance of business. Thus, supply made without consideration is not a "supply" as per

the CGST Act. The only exception is clause (c) of Section 7(1) of the CGST Act, i.e., the activities specified under Schedule I of the CGST Act. Their case is not covered by the activities specified in Schedule I of the CGST Act. In their case the placement of instrument at the premises of the hospitals/labs is without consideration.

9.2. The term "consideration" is defined under Section 2(31) of the CGST Act. As per the provisions of CGST Act consideration in relation to the supply of goods or services includes:(a) Payment made or to be made, whether in money or otherwise; and (b) Monetary value of any act or forbearance. The general meaning of the term 'payment' is discharge of debt or an obligation by money of its equivalent. The dictionary meaning of the term payment as per The Chambers Dictionary (1993 Edition); Payment:- the act of paying; the discharge of a debt by money or its equivalent in value; that which is paid; as per Cambridge International Dictionary of English (1996 Edition); Payment :- A payment is an amount of money paid; as per American Heritage Dictionary (Third Edition); Pay means to; (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 and as per Black's Law Dictionary (Tenth Edition); Payment means; (1) Performance of an obligation by delivery of money of 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.

9.3. Palkhivala in his treatise on Income Tax Act (Eight Edition) in the context of Actual or Constructive receipt of income under Section 5 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."

Further, the word 'otherwise' in the definition of consideration 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.

9.4. Clause (b) of definition of consideration includes monetary value of any act of forbearance. This will include barter transactions where the payment is made by supplying some goods or services. Further, the act or

forbearance to be treated as consideration should be capable of expressed in monetary terms. If no monetary value can be attached to any act or forbearance, it will not amount to consideration under the CGST Act. The position has been summarized in Lexis Nexis Butterworths De Voil Indirect Tax Service (March 2015), commentary on UK VAT Act, 1994 wherein the meaning of consideration has been explained as under:

"Consideration can be money or something other than money, or a combination of both. Monetary consideration includes cash and payment by cheque, credit card, bank transfer and deduction from pay. Non monetary consideration comprises goods or services provided as payment as in a "barter" or part exchange transaction."

9.5. In their case, the placement of instruments by the Applicant 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 them. This is clear from the terms of Clause 2.1 of the Agreement, which is reproduced as follows.

"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."

Further, there is no act or forbearance, in respect of or in response to the placement of instrument between them and the Hospitals / Labs. Thus, the placement of instrument is without consideration and hence not a supply.

10. The obligation to purchase minimum quantity of products is not a 'consideration' for the purpose of the CGST Act. The same may be a consideration in terms of the law of contracts as the definition of consideration under the CGST Act is narrower. There should be economic value and independent identity for something to qualify as consideration. Section 2(d) of the Contract Act defines 'consideration' as follows;

"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."

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. 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. The above definition under the Contract Act can be contrasted with the definition of the term 'consideration' in the CGST Act. The definition '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 money's worth from the recipient of the supply to the supplier. In other words, any act or forbearance which does not have any monetary value is not 'consideration' under the CGST Act. Reliance is placed on the decision of the Hon'ble High Court of Bombay in the case of Keshub Mahindra Vs Commissioner of Gift Tax [1968 70 ITR 1 Bom]. The issue arose under the Gift Tax Act, 1958. 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 that "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." 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 things 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 emphasize 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."

10.1. 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. In the present case also, the CGST Act requires that there should be monetary value of act or forbearance. Thus, for a thing to be treated as a consideration for a supply, it must have some economic value and independent identity. Reference is made to the GSTR 2001/6 on non-monetary consideration issued by Australian Tax Department. The GSTR states that consideration for a supply may include acts, rights and 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 (or a supply may include acts, rights or obligations provided in connection with, in response to, or (or 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 forbearance) 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 (or a specific period of time is not non-monetary consideration (or 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 (or the purposes of identifying the consideration. Also in most cases the use of a particular method of payment is not 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.

10.2. 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 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 agreementemphasis supplied.

10.3. The definition of 'consideration' in the GST Act of Australia is similar to the definition of the term in the CGST Act. The relevant extract of the definition 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.

10.4. In view of the above, the obligation of the hospitals/labs to purchase minimum quantity of products is not a consideration for the purposes of the CGST Act. Further, 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 their 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 their distributor. Thus, the consideration paid by the hospital / labs is for supply of reagents. There is no nexus between the placement of instrument by them and the consideration paid (or obligation undertaken) by the hospitals/labs. Therefore, the transaction of placement of instrument at the premises of the hospitals/labs is without any consideration. Hence, there is no supply.

10.5. The transaction is also not covered by Schedule I of the CGST Act. Schedule I provide that the following activities shall be treated as supply even if made without consideration:

1. Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.

2. Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business: Provided that gifts not exceeding fifty thousand rupees in value in a financial year by an employer to an employee shall not be treated as supply of goods or services or both.
3. Supply of goods- (a) by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal; or (b) by an agent to his principal where the agent undertakes to receive such goods on behalf of the principal.
4. Import of services by a taxable person from a related person or from any of his other establishments outside India, in the course or furtherance of business.

10.6. In terms of Para I of Schedule I, a permanent transfer or disposal of business assets without consideration on which input tax credit has been availed comes under the purview of supply. The transaction does not involve any permanent transfer or disposal of business assets. They have only placed the instrument at the premises of the hospitals for their use. There is no transfer of ownership to the hospitals. This is evident on the perusal of the Agreement. Therefore, the transaction does not come within the ambit of supply under Clause (a) of Schedule I the CGST Act.

10.7. Clause (b) of Schedule I provide that supply of goods and/or services made between related or distinct persons as specified in Section 25 of the CGST Act in the course or furtherance of business and without consideration

is a supply under the CGST Act. The Explanation to Section 15 of the CGST Act provides the definition and scope of 'related persons'. The hospitals / labs in which the instruments are placed are independent entities and do not fall under any of the categories specified under the definition of related person. Thus, the Applicant and hospitals are not 'related persons'.

10.8. As regards 'distinct persons', the meaning of the said term is provided under Sub section (4) and (5) of Section 25 of the CGST Act. The Applicant and the hospitals / labs are independent and distinct legal entities and do not fall under the ambit of 'distinct persons' as provided under Section 25. Consequently, the Clause (b) of Schedule I is not applicable to the facts of their case.

10.9. Clause (c) of Schedule I deals with transactions between a principal and his agent. There is no principal-agent relationship between the Applicant and the hospitals / labs. Consequently, the transaction is not covered under Clause (c) of Schedule I of the CGST Act. Clause (d) of Schedule I deals with services imported from a related person. Their case does not involve any import of services. Consequently, the transaction cannot be held liable to GST in terms of Clause (d) of Schedule I of the CGST Act. Thus, the transaction is also not covered by clause (c) of Section 7(1) of the CGST Act.

11. Since, the transaction is not a supply movement of instrument can be made through delivery challan as Rule 55 of the CGST Rules provides that where the transportation of goods is for reasons other than by way of

supply, a delivery challan may be issued. Accordingly, the movement of the instrument can be made under the cover of delivery challan.

DISCUSSION AND CONCLUSION:

12. We have gone through the application; the earlier ruling of the Authority; the order of the Appellate Authority; the judgment of the Hon'ble High Court of Kerala; the written submissions; the documents produced and also heard the detailed submissions made by the authorized representative of the applicant during personal hearing. The only issue to be decided is;

Whether the placement of specified medical instruments by the applicant 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 Act, 2017?

13. In order to decide the above issue, it is necessary to analyse the definition of the term "supply" as defined under CGST Act, 2017. Section 7 of the CGST Act, 2017 which defines the term "supply" is reproduced below; "Section 7. Scope of supply.— (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.”

13.1. A plain reading of the definition of the term, "supply" as above would indicate that the meaning attributed to the term is that of wide amplitude, but, yet is an inclusive one. On a perusal of the definition it can be seen that the essential ingredients required for an activity / transaction to come within the meaning and scope of supply as defined above are;

1. The activity / transaction shall involve goods or services;
2. The activity / transaction should be in the course or furtherance of business;
3. The activity / transaction is made for a consideration.

13.2. Therefore, the first issue to be decided is whether the transaction / activity involve goods or services. If the transaction / activity do not involve goods or services or is of anything other than goods or services then the transaction / activity will not come within the scope of supply as defined above. In the instant case it is stated that the applicant is placing its own specified medical equipments to identified hospitals or laboratories by executing an agreement. As per the agreement, the hospitals or laboratories where the equipment is 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 applicant and the instruments are to be returned to the applicant 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.

13.3. Section 2 (52) of the CGST Act, 2017 defines goods as follows;

(52) “goods” means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply.

Thus it can be seen that instrument / machine installed at the premises of the hospitals / labs by the applicant clearly fall within the definition of goods as above and the right granted by the applicant to the hospitals / labs to use the machine for a specified period as per the agreement falls within the scope of the term “transfer” in clause (a) of sub –section (1) of Section 7 of the CGST Act, 2017.

13.4. The second issue to be examined is whether the transaction / activity is 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.

The definition of business is inclusive and wide in its scope and amplitude and the transaction / activity of the applicant is undoubtedly in the course or furtherance of business.

13.5. The net issue to be determined is whether the transaction / activity is 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.

13.6. From the above definition, it is evident that consideration can be in monetary or non-monetary form or partly in monetary form and partly in non-monetary form. Clause (a) and (b) of the definition of consideration are independent clauses and not dependant on each other. Therefore, consideration can be 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.

13.7. The applicant is placing the instruments / machines at the premises of the hospitals / labs for a specified period for their use on the basis of the agreement. The relevant clauses of the agreement are reproduced below;

Recitals:

Abbott Healthcare is the sole owner of the instruments as 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 (b) 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.

1. 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.

2. Instruments.

2.1. 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.

2.2. 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.

2.4. Customer Covenants.

(v) 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;

3. Purchase of Products, Minimum Purchase Obligations.

3.1. Purchase of Products. 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 hereto (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 than Abbott Healthcare has right to convert prices to list prices.

3.2. Minimum Purchase Obligations. 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 (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.

13.8. On a plain reading of the preamble of the Agreement itself it is evident that the primary motivation for the applicant to enter into the Agreement to place the instrument at the premises of the customer is the agreement of the customer to purchase Products as defined in the Annexure B 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 the above clauses the customer shall purchase the product exclusively from the applicant at the prices specified in Annexure B for a value not less than that as mentioned in Annexure A. In case of the monthly purchase falling short of the value agreed the applicant has the right to raise debit note equal to the deficit amount.

13.9. 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 applicant 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. In the light of the discussion above, it is evident that the transaction / activity satisfies

all the essential ingredients of supply as defined under Section 7 of the CGST Act, 2017.

14. The applicant has strongly contended in the written submission as well 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 applicant that the definition of consideration in Section 2 (31) of the CGST Act can be contrasted with the definition of consideration in Section 2 (d) of the Contract Act and it can be seen that the consideration as defined in GST is narrower in scope than the consideration 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 a consideration in terms of the law of contracts but cannot be a consideration under the GST law. The applicant relied 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. In support of the contention the applicant relied on the advisories issued by the Tax Department of Australia and the definition of consideration in the GST law of Australia.

15. 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. In the instant case the term “consideration” is defined clearly and unambiguously in Section 2 (31) of the CGST Act, 2017 and 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. Hence there is no need for reference to the definition of consideration under Australian Law or the advisories issued there under. 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 it 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.”

In the case of Dayal Singh Vs Union of India reported in AIR 2003 SC 1140; the Hon’ble Supreme Court 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.”

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.”

It is well settled by a catena of decisions of the Apex Court 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.

16. The applicant has relied heavily on the Judgment of the 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 hence the obligation to purchase minimum quantity though can be a consideration under contract law cannot be a consideration under GST law. In this connection 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. In the case of UOI &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.”

The Hon'ble High Court of Bombay in the 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 2 (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 the case was the meaning and scope of the word consideration as used in the definition of gift in Gift Tax Act but in the instant case the term consideration itself is clearly defined in Section 2 (31) of the CGST Act, 2017 and as per clause (b) of the definition every act or abstinence that is a motivation to induce a person is consideration and there is no requirement that it must be in monetary form.

17. Having come to the conclusion that the activity / transaction undertaken by the applicant is a supply as defined in Section 7 of the CGST Act, 2017; we may now proceed to determine whether it is a supply of goods or services. Sub-section (1A) of Section 7 of the CGST Act, 2017 reads as follows;

(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. As per Para 1 (b) of Schedule II to the CGST Act; any transfer of right in goods or undivided share in goods without transfer of title thereof, is a supply of services. In the instant case the applicant grants a non-transferable right to use the goods for a specified period without transferring the title of the goods as evident from the terms and conditions of the agreement reproduced above. It is further stated in the agreement that the applicant 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 as specified in the agreement. Therefore, the placement of the instruments by the applicant at the premises of the customer qualifies to be categorized as supply of services. Thus it is evident that the activity / transaction undertaken by the applicant constitute supply of services as per the CGST Act, 2017.

18. On the basis of the above discussion it is concluded that the placement of specified medical instruments to unrelated customers like

Hospitals, labs etc for their use by the applicant constitutes supply of services under CGST Act, 2017. Accordingly the following ruling is issued.

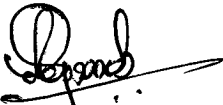
RULING

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.



SIVAPRASAD S

JOINT COMMISSIONER OF
CENTRAL TAX
MEMBER



SENIL A K RAJAN

ADDITIONAL COMMISSIONER
OF STATE TAX
MEMBER

To,

M/s Abbott Healthcare Pvt Ltd

XX1/457A1, PoomkudyBuilding,
Vallathil Road, Poojarivalavu,
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Copy to;

1. The Chief Commissioner of Central Tax and Central Excise, Thiruvananthapuram Zone, C.R.Building, I.S.Press Road, Cochin-682018. [E-mail ID: cccochin@nic.in]
2. The Commissioner of State Goods and Services Tax Department, Tax Towers, Karamana, Thiruvananthapuram - 695002.
3. The State Tax Officer, 1st Circle, Thrissur.