

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Judgment reserved on 01-09-2023****Judgment delivered on 17 -10-2023****WPT No.117 of 2022**

M/s Shree Jeet Transport Through Proprietor, Arvinder Singh Bhatia, S/o Jagjeet Singh Bhatia, Aged About 40 Years, R/o 127, Ward 15, Kharora, Raipur (Chhattisgarh) --- **Petitioner**

Versus

1. Union of India Through its Secretary, Ministry of Finance, Government of India, New Delhi.
2. State of Chhattisgarh through The Secretary, Department of Commercial Tax, Government of Chhattisgarh, Mantralaya, Mahanadi Bhawan, Nawa Raipur, Atal Nagar, Naya Raipur, District Raipur Chhattisgarh
3. GST Council, through its Chairperson, 5th Floor, Tower II, Jeevan Bharti Building, Janpath Road, Connaught Place, New Delhi
4. Authority of Advance Ruling, State of Chhattisgarh, 3rd and 4th Floor, Vanijya Kar GST Bhawan, Sector 19, Atal Nagar, Raipur Chhattisgarh
5. Appellate Authority of Advance Ruling, State Of Chhattisgarh, 3rd And 4th Floor, Vanijya Kar GST Bhawan, Sector 19 Atal Nagar, Raipur Chhattisgarh --- **Respondents**

For Petitioner

Mr. Kavin Gulati, Sr. Advocate with Mr. Raja Sharma & Mr. Abhishek Anand, Advocates

For Respondent/UOI

Mr. Ramakant Mishra, Dy. Solicitor General with Ms Anmol Sharma & Ms Anuja Sharma, Advocates

For Respondent/State

Mr. S.C. Verma, Advocate General with Mr. Vikram Sharma, Dy.Govt. Advocate

**Hon'ble Mr. Justice Goutam Bhaduri, Judge &
Hon'ble Mr. Justice Sachin Singh Rajput, Judge**

CAV Judgment

Per Goutam Bhaduri, J,

Facts of the case :

1. (a) This instant petition is filed to challenge the order dated 28-2-2022 (Annexure - P/5) passed by the Appellate Authority for Advance Ruling, Chhattisgarh (for brevity 'the AAAR') as no decision was rendered in terms of Section 101 (3) of the Central Goods and Service Tax Act, 2017 (for brevity 'the CGST') and the Chhattisgarh Goods and Service Tax Act, 2017 (for brevity 'the CHGST') and the order dated 4-1-2021 (Annexure – P/6) passed by the Authority for Advance Ruling, Chhattisgarh (for brevity 'the AAR') to be illegal wherein it was held that Goods and Services Tax (for brevity 'the GST') would be leviable on the value of diesel provided by the service recipient Free of Cost (for brevity 'FOC').

(b) The petitioner also challenges the provisions of Section 101 (3) of the CGST and CHGST along with agenda of the 8th GST Council Meeting held on 3rd & 4th January, 2017 at New Delhi on the ground that the same is constitutionally invalid and *ultra vires* to Articles 14 and 19 (1)(g) of the Constitution of India, to the extent the provision provided that no decision would be rendered by the AAAR because of difference of opinion between the two

members, which would lead to arbitrary and unreasonable distinction and left the parties without any remedy.

(c) The petitioner is a Goods Transport Agency (for brevity 'the GTA') service provider, engaged in providing service of transportation of goods by road. It is pleaded that the petitioner intends to enter into an agreement with service recipient for providing GTA services. As per the proposed terms of agreement, it was agreed that the petitioner would provide trucks/trailers along with driver for transportation of goods belonging to the service recipient on a day-to-day and non-exclusive basis and further as per Clause 2 of the draft agreement, the service recipient will be responsible for providing fuel in the trucks/trailers supplied by the petitioner on free of cost basis (FOC) thereby it was agreed that component of fuel would not be the responsibility of the petitioner, who is a GTA, in the scope of service recipient. Copy of draft agreement has been annexed with this petition as Annexure – P/7. Clauses 1 & 2 of the draft model agreement are relevant and the same are quoted below :

1. TRANSPORTATION OF MATERIAL

1.1 By virtue of this Agreement, the Transporter is engaged, at the discretion of the Company, as a Registered Service Provider of the Company for providing GTA services to transport material from the Company's factory at to its Units by engaging trucks/trailers. If material is required to be delivered from and/or to any other destination in the future, the terms of agreement for such

GTA service would be separately agreed upon.

1.2 The Transporter will ensure placement of adequate number of trucks/trailers on the basis of the dispatch planning of the Company as intimated by the Company from time to time. The trucks so placed by the Transporter shall be engaged on dedicated trip charter basis for transporting the Company's intermediary goods. In case, the Transporter fails to engage trucks committed to the Company, the Company reserves the right to arrange for alternate source of transportation of the material at the cost and risk of the Transporter.

1.3 The Company doesn't own any responsibility after the consignment has been loaded in truck and moved out of factory. For any deviation and consequent losses, if any to the Company, the Transporter will be solely responsible.

1.4 In case, if the consignment is not accepted for any reason whatsoever, the Transporter's driver should contact the Company's office for suitable advice/instructions. Under no circumstance, the consignments should be brought back to siding without the prior approval of the Company. In case of non-compliance of this obligation, the Company will not be responsible for any expenses on this account.

1.5 Shifting/unloading of consignments en route would not be allowed unless specifically permitted by the Company. The Transporter is strictly instructed that under no circumstances would any quantity of material carried in the truck be disposed off in any manner other than by way of delivery of the goods to the destination against receipt.

2. FUEL

2.1 Fuel, a consumable, is in the scope of the

company and would be provided to the truck for use exclusively for the required transportation of the goods loaded in the truck.

2.2 Such fuel shall be filled in the truck that is engaged for the concerned trip at the point of origin or at destination. The freight declared and agreed will not account for any cost/charges for fuel and the Transporter would not have any liability to pay for fuel for the said trip to be made by the Transporter. It is expressly clarified that the value of fuel which is in the scope of the Company shall by no means be interpreted as additional consideration payable for the transportation service provided by the Transporter or having been provided to the vehicle in lieu of freight. The said fuel would be issued by the Company for exclusive usage, as a consumable, in the underlying transportation only and the ownership of the fuel would at no point be transferred to the Transporter or to the vehicle engaged. The truck is required to use the fuel only for the specific transportation and would not be eligible to dispose of the same in any other manner. In case fuel is given at the destination, the quantity required would be as per the pre-determined basis of the Company and all the conditions specified herein would be applicable as if fuel has been given at the source.

(d) Under these circumstances, as per Section 95 read with Section 97(1) of the CGST, which enables the registered person who undertakes the supply of goods or service to seek an advance ruling on the questions enumerated in Section 97(2) of the CGST by filing an application before the AAR. The petitioner filed an application for advance ruling before the AAR raising a point that whether the value of fuel provided by the service recipient on FOC basis in terms of the draft agreement was required to be

included in the value of GTA being proposed to be rendered by the petitioner for the purpose of discharge of GST.

(e) After hearing the petitioner, the AAR initially passed an order holding that the petitioner was required to include the cost of free supplied fuel in the value of GTA service and thereby would liable to pay GST on the same.

(f) Being aggrieved by the order of AAR, the petitioner filed an appeal before the AAAR. Since it was presided-over by two members there was a difference of opinion between the members of State and Centre. The SGST (State Goods and Service Tax) member held that the value of FoC would not be inclusive in the taxable value for the purpose of discharge of GST whereas the CGST (Central Goods and Services Tax) member held that as per circular issued by the CBIC (Central Board of Indirect Taxes and Customs) the GST at the applicable rate would be leviable on the value inclusive of cost of diesel filled by service recipient. The findings of the CGST and SGST members are quoted below for ready reference :

“5. Findings as per the CGST Member :

xxx xxx xxx

5.21 Thus I find no reason to differ from the findings of the Authority of Advance Ruling, Chhattisgarh under its order No.STC/AAR/07/2020 Raipur dated 04/01/2021 that diesel to be filled free of cost by the service recipient in the

engaged chartered (dedicated) vehicles as per the proposed draft agreement would form part of value of supply of service charged by the appellant and accordingly GST at the applicable rate would also be leviable on the value inclusive of the cost of diesel filled by the service recipient, under GTA service and there is no merit in the appeal filed by the Appellant Shri Arvinder Singh Bhatia, M/s Shree Jeet Transport, 127, Ward 15, Kharora, Raipur, Chhattisgarh having GSTIN-22AKDPB5992PIZU against the Advance Ruling Order dated 04/01/2021.

6. Findings as per the SGST Member :

xxx xxx xxx

6.7 Therefore, in light of the above, in my view the value of diesel which is in the scope of service recipient would not be included in taxable value of supply of the service provider.”

(g) Therefore, no ruling was rendered in terms of Section 101(3) of the CGST and CHGST. The petitioner, therefore, contended that since no ruling was given, the petitioner has been rendered remediless. Thus, on various grounds, the petitioner has preferred the instant writ petition.

Submissions of the parties :

2. Mr. Kavin Gulati, learned senior Advocate appearing with Mr. Raja Sharma & Mr. Abhishek Anand, learned counsel for the petitioner, would submit that :

- the object of advance ruling sought for by the petitioner has been defeated as divergent opinion has been given by two members of AAAR.
- learned counsel would submit that the petitioner, which is a GTA, transports the goods with a contract and thus entered into contract with the different recipients and according to it, the vehicle was to be supplied by him and the cost of fuel, which keeps on fluctuating would be borne by the recipient. The said contract which was proposed was sent for determination of tax as the diesel i.e. fuel was not the part of the supply made or agreed to be made;
- learned counsel would also submit that the contract would show that component of diesel was out of the ambit of contract;
- he would further submit that under these circumstances by Annexure- P/8 advance ruling was sought for with the specified question as under :

Whether diesel filled free of cost by the service recipient in the engaged chartered (dedicated) vehicles, would form part of value of supply of service charged by the applicant and whether GST would be leviable on value of diesel filled free of cost by the service recipient or otherwise under GTA

service.

- learned counsel would also submit that along with such question for advance ruling the draft agreement was also attached and as per the agreement, the fuel was to be supplied by the recipient company and the responsibility of the petitioner was only for the supply of goods. Therefore, the scope of supply does not include the cost of fuel;
- learned counsel would submit that as per Section 9 of the CGST the levy of tax is on ‘supplies’ of goods or ‘services’ or both on ‘value determined under Section 15’ at the rates as may be notified;
- according to the learned counsel, term of ‘supply’ is not defined under the Act, but the term of ‘supplier’ is defined in Section 2 (105) of the CGST as being a person supplying goods or services or both; and Section 7 deals with ‘scope of supply’ and Section 7(1) (a) provides that the term of supply would include all forms of supply made or agreed to be made for a consideration;
- learned counsel would submit that the expression agreed to be made indicates that the mandate of the Act is to see what are the services which are being agreed

between the parties to be supplied;

- he would therefore submit that Section 7(1)(a) has to be read in conjunction with Section 15 which deals with value of taxable supply;
- he would further submit that perusal of Section 15(1) would indicate that the value of supply shall be the transaction value, which is the price actually paid or payable and the words ‘said supply’ in conjunction with the phrase ‘price actually paid or payable’ is directly relatable to such supply agreed to be made;
- learned counsel would submit that when the agreement has been entered between the parties, the same cannot be ignored while examining the tax liability. To buttress his contention, learned counsel would place upon the decision rendered by the Supreme Court in the matter of *Commissioner of Service Tax v Bhayana Builders Private Limited*¹ In the said case examining the valuation provisions under the Service Tax Act, it is held that free supplies made by the service recipient cannot be added to the taxable value of the service provider;
- according to the learned counsel the AAR has taken

¹ (2018) 3 SCC 782

note of this fact but failed to interpret it correctly.

- learned counsel would submit that the value of supply would be a transaction value and price actually paid;
- he would submit that while the initial draft was prepared, legislation was conscious about such consideration and when the final draft came, the free supply was kept out of the legislation;
- while placing reliance upon the decision rendered by the Supreme Court in the matter of *Union of India v Mohit Minerals Private Limited through Director*² learned counsel would submit that model GST though prepared but eventually not included. With respect to interpretation of fuel, it is not in consideration in the agreement. Initially the authority came to a finding that the fuel is a necessary ingredient and it cannot be ignored, but the members of the appellate authority deferred in their opinion;
- he would submit that the taxable event under the GST supply of service and scope of petitioners taxable supply is to be determined by agreement and the GST, which is a tax on value addition and is distinction based tax on consumer so the bargain between the

2 (2022) 10 SCC 700

parties cannot be ignored. In support of his contention, learned counsel would place reliance upon the decision rendered by the Supreme Court in the matter of *Union of India v VKC Footsteps India Private Limited*³;

- learned counsel would submit that to interpret certain Section, the draft legislation history would be important. What was sought to be included and the free supply which was earlier part of included for taxable income to be taken into consideration for levying tax;
- he would submit that the GTA is defined in para 2 (ze) of notification No.12/2017-Central Tax (Rate) dated 28-6-20217, which means that person engaged in relation to transport of goods by road and issues consignment note, therefore, when the agreement is entered into by the goods transport recipient and diesel is supplied free it would not be an issue to be determined to levy the tax;
- learned counsel would submit that the tax regime prior to GST whether can be included as a service was decided by the Supreme Court in the matter of *Union of India v Intercontinental Consultants and*

3 (2022) 2 SCC 603

*Technocrats Private Limited*⁴ wherein it was held that service tax can be imposed only on the value of the service agreed to be provided and when there is no service tax payable on the value of fuel it cannot be subject matter of taxation in GST;

- learned counsel would also submit that it is not a case that tax is not being paid on the fuel and the fuel is amenable to VAT (Value Added Tax) and 23% tax is payable as a VAT in the State of Chhattisgarh and whenever the legislature wanted it could have included the same in Section 7(1)(c) read with Schedule-I, which provides for supplies to be taxable even when there is no consideration. Since the fuel is not included in Schedule I, it cannot be amenable for addition of tax;
- he would submit that there is no effort on tax evasion; the tax statute is to be interpreted by plain language of the statute; and the intention cannot be gone into;
- according to the learned counsel, the respondents cannot insist recovery even if it is not supported by statute. He would place reliance upon the decisions rendered by the Supreme Court in the matters of *Union*

4 (2018) 4 SCC 669

*of India v Azadi Bachao Andolan and Another*⁵ and *Commissioner of Income Tax, Mumbai v Walfort Share and Stock Brokers Private Limited*⁶;

- learned counsel would submit that with respect to the valuation, the language used in Finance Act, 1994 (Service Tax) and the CGST was substantially similar and Section 67 of the Finance Act, which deals with the service tax was also similar. Reliance is placed on **(2018) 4 SCC 669 & (2018) 3 SCC 782**.
- he would submit that Section 101 (3) of the CGST is manifestly arbitrary for the reason that when there is a difference of opinion between the appellate members, it would render the petitioner remediless except to file a petition under Article 226 of the Constitution. Since in the instant case because of difference of opinion in the appellate stage, no decision is rendered under Section 101 (3) as such the doctrine of merger will not apply;
- he would submit that availability of constitutional remedy like Article 226 would not make the provision of Section 101(3) of the CGST *intra vires*, as the situation of like nature leaves the petitioner with no

5 (2004) 10 SCC 1

6 (2010) 8 SCC 137

statutory redressal; and

- learned counsel would next submit that when the basic intent behind the advance ruling mechanism is to bring about certainty and avoidance of dispute, a provision like Section 101 (3) of the CGST defeats the same. Therefore, it is manifestly arbitrary and the petition deserves to be allowed.

3. Mr. Ramakant Mishra, learned Deputy Solicitor General appearing with Ms Anmol Sharma & Ms Anuja Sharma, learned counsel for the Union of India, would submit that :

- as per definition under Section 2 (31) of the CGST, the word ‘consideration’ in relation to supply of goods or services or both include any payment made or to be made
- learned counsel would submit that any payment made or to be made, whether in money or otherwise in respect of or in response to or for the inducement of supply of goods or services or both cannot escape liability;
- he would submit that as per Section 2 (93) the word ‘recipient’ has been said to be recipient of supply of goods or services or both where a consideration is

payable or when no consideration is payable the person to whom would also include;

- he would submit that Section 2 (105) defines the word 'supplier' in relation to any goods or services or both and Section 2 (108) defines the words 'taxable supply', which means a supply of goods or services or both which is leviable to tax under this Act;
- according to the learned counsel, as per Section 7 of the CGST, the expression supply includes all forms of supply of goods or services or both and Section 9 makes mandatory that tax would be payable on all intra state supplies of goods or services or both;
- learned counsel would submit that in order to agitate the value of taxable supply, Section 15 would be applicable and the value of supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services and value of supply shall also include;
- he would also submit that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and included in the price actually paid or payable for the goods or services or

both;

- learned counsel would next submit that the language used in Section 15(2)(b) “*any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both*” would include the supply of diesel and in the instant case the petitioner tried to by-pass the object of legislation; and
 - learned counsel would lastly submit that the vehicle cannot ply without diesel which is an important component, therefore, the contract though has been entered cannot override the plain language of GST whereby the petitioner would be liable to pay on inclusion of tax.
4. Mr. S.C. Verma, learned Advocate General appearing with Mr. Vikram Sharma, learned Dy. Govt. Advocate for the State, would submit that :
- for diesel no GST is applicable and Section 7 of the CGST would show all forms of supply of goods or services or both are to be considered. Therefore, if the diesel is supplied free of cost, which is essential for plying the transport vehicle eventually for calculating

the value of supply the service rendered by the transporter cannot be ignored without cost of diesel;

- learned counsel would further submit that as per Section 15 of the CGST the value of taxable supply is required to be considered qua section 15 of CGST Act. As per Section 15(2)(b) any amount of supply is liable to pay the tax and Section 2(31) defines the word ‘consideration’, which otherwise include that when it is liable to pay is also to be included in supply of goods; and
 - learned counsel would lastly submit that the attempt made by the petitioner would amount to tax evasion and the petitioner cannot escape from the liability.
5. We have heard learned counsel appearing for the parties and have perused the documents appended thereto.

Observations and order of the Court :

6. The petitioner is a GTA. It provides service to various companies by issuing a consignment note and thereafter carrying the goods and material from designated places specified by the service recipient to other specified places of delivery for which the petitioner charges the freight as its consideration and entered into contract with the service recipient that the fuel would be outside

the scope of service of the petitioner as it would be supplied FOC by the recipient in the trucks deployed for transporting the goods.

7. The question falls for consideration is that

“whether diesel filled by the service recipient FoC in the truck of the GTA can be added to value of supply being rendered by the GTA for the purpose of levy of GST under the CGST Act, 2017 ?”

8. In the matter of *Mohit Minerals Private Limited* (supra) the Supreme Court held that in assessing the claim, the Court is bound by a decision of the Constitution Bench of the Supreme Court rendered in the matter of *Mathuram Agrawal v State of Madhya Pradesh*⁷, which has identified three essential elements of taxation i.e.

(i) the subject of the tax;

(ii) the person who is liable to pay the tax; and

(iii) the rate at which the tax is to be paid.

9. The aforesaid test was further elaborated by a two Judge Bench of the Supreme Court in the matter of *Messrs Govind Saran Ganga Saran v Commissioner of Sales Tax and Others*⁸ by further requiring the designation of the measure or the value to which the rate of the tax will be applied. Thus, the four canons of taxation are as follows :

“(i) The taxable event;

⁷ (1999) 8 SCC 667

⁸ 1985 (Supp) SCC 205 : AIR 1985 SC 1041

- (ii) The person on whom the levy is imposed;
 - (iii) The rate at which the levy is imposed; and
 - (iv) The measure or the value to which the rate will be applied.”
10. In the case at hand since the diesel is supplied by the service recipient FOC to the GTA the measure or the value to which the rate of the tax is required to be assessed.
11. The petitioner who is a GTA under the CGST Act approached the AAR to determine its tax liability in advance under the Advance Ruling Mechanism in GST. The advance ruling mechanism is introduced to help any assessee to its activities which are liable for payment of GST, well in advance. It also brings certainty in determining the tax liability, as the ruling given by the Authority for Advance Ruling is binding on the applicant as well as Government authorities. Further, it helps in avoiding long drawn and expensive litigation at a later date. The object of seeking an advance ruling is inexpensive and the procedure is simple and expeditious.
12. Consequent thereto under Section 97 of the CGST the petitioner applied for advance ruling by an application dated 4-8-2020 before the AAR. Along with the said application the draft proposed agreement with the service recipient was also annexed. The question which was required to be answered was framed as quoted in the preceding para of this judgment.

13. The AAR by its order dated 4-1-2021 held that the cost of fuel though is not included in the scope of work of the petitioner and the diesel is provided FOC by the service recipient would nevertheless would be added to the value of taxable service for the purpose of GST on application of Section 15 (1) read with Section 2 (31) of the CGST. It was further held that since fuel was an essential ingredient without which the transport service cannot be rendered, the cost of fuel cannot be ignored.
14. The petitioner having not satisfied with such ruling, filed an appeal before the Appellate Authority i.e. AAAR wherein the AAAR passed an order dated 28-2-2022. The Member of the CGST (Central) upheld the view of the AAR and held that diesel, which is filled FoC by the service recipient in the engaged chartered (dedicated) vehicles as per the proposed draft agreement would form part of value of supply of service charged by the appellant and applicable rate of GST was to be leviable whereas the SGST Member held that considering the provisions of Section 15(2)(b) which provides that any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply does not include FoC diesel for the simple reason that the liability to pay for the diesel as per draft contract is of service recipient.
15. In order to appreciate the rival submission of the parties, certain provisions of the CGST Act, 2017 are relevant, which are quoted

below :

2. **Definitions.**--In this Act, unless the context otherwise requires,--

xxx xxx xxx

(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;

xxx xxx xxx

(93) "**recipient**" of supply of goods or services or both, means--

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to

whom possession or use of the goods is given or made available; and

(c) where no consideration is payable for the supply of a service, the person to whom the service is rendered,

and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;

XXX XXX XXX

(105) "**supplier**" in relation to any goods or services or both, shall mean the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied;

XXX XXX XXX

(108) "**taxable supply**" means a supply of goods or services or both which is leviable to tax under this Act;

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;

(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation.--For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in

force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;

(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.

9. Levy and collection.--(1) Subject to the

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

(2) The central tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

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

(4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also he does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.

15. Value of taxable supply.--(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

(2) The value of supply shall include--

(a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;

(b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;

(c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;

(d) interest or late fee or penalty for delayed payment of any consideration for any supply; and

(e) subsidies directly linked to the price excluding subsidies provided by the Central Government and the State Governments.

*Explanation.--*For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.

(3) The value of the supply shall not include any discount which is given--

(a) before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply; and

(b) after the supply has been effected, if--

(i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and

(ii) input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.

(4) Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed.

(5) Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.

*Explanation.--*For the purposes of this Act,--

(a) persons shall be deemed to be related persons if--

(i) such persons are officers or directors of one another's businesses;

(ii) such persons are legally recognised partners in business;

(iii) such persons are employer and employee;

(iv) any person directly or indirectly owns, controls or holds twenty-five per cent or more of the outstanding voting stock or shares of both of them;

(v) one of them directly or indirectly controls the other;

(vi) both of them are directly or indirectly controlled by a third person;

(vii) together they directly or indirectly control a third person; or

(viii) they are members of the same family;

(b) the term "person" also includes legal persons;

(c) persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other, shall be deemed to be related.

16. The Supreme Court in the matter of *VKC Footsteps India Private Limited* (supra) has defined the constitutional scheme of GST. Mainly it demonstrates that the idea which permeates GST legislation globally is to impose a multi stage tax under which each point in a supply chain is potentially taxed. Suppliers are entitled to avail credit of tax paid at an anterior stage. As a result, GST fulfills the description of a tax which is based on value addition. The Supreme Court at paras 44, 45, 46 & 47 held thus :

44. The idea which permeates GST legislation globally is to impose a multi stage tax under which each point in a supply chain is potentially taxed. Suppliers are entitled to avail credit of tax

paid at an anterior stage. As a result, GST fulfills the description of a tax which is based on value addition. Value addition is intended to achieve fiscal neutrality and to obviate a cascading effect of taxation which traditional tax regimes were liable to perpetuate. In a sense therefore, the purpose of a tax on value addition is not dependent on the distribution or manufacturing model. The tax which is paid at an anterior stage of the supply chain is adjusted. The fundamental object is to achieve both neutrality and equivalence by the grant of seamless credit of the duties paid at an anterior stage of the supply chain.

45. The State VAT legislation in India represented a significant stage in the evolution of fiscal legislation based on the principle of value addition. In *All India Federation of Tax Practitioners v. Union of India*, this Court, speaking through a two judge Bench, noted the principle that VAT is a consumption tax as it is borne by the consumer. The Court observed that with its increasing importance in the economy, the service sector is “occupying the centre stage of the Indian economy”. As economists postulate, there is no distinction between consumption of goods and consumption of services both of which satisfy human wants and needs. The Court underscored that service tax is a destination-based consumption tax, not a charge on business but on the consumer of the service.

46. Though the erstwhile regime recognised the principle of value addition-based consumption taxes, there was an absence of a seamless flow of credit, particularly between Central and State levies. The background material antecedent to the adoption of the constitutional and legal structure underlying GST in the country indicates the importance which was ascribed to developing a tax regime which would achieve a continuous chain of set-off from the original producer and service provider’s point up to the retailer’s level in the supply chain and eliminate the burden of cascading tax effects. Thus, the first discussion paper on GST in India published by the Empowered Committee of State Finance Ministers on 10-11-2009 emphasised that :

“1.14 ... In the GST, both the cascading effects of CENVAT and service tax are removed with set-off, and a continuous chain of set-off from the original producer’s point and service provider’s point upto the retailer’s level is established which reduces the burden of all cascading effects. This is the essence of GST, and this is why GST is not simply VAT plus service tax but an improvement over the previous system of VAT and disjointed service tax.”

47. The Statement of Objects and Reasons appended to the Constitution (One-Hundred and Twenty-Second Amendment) Bill 2014 which eventually became the Constitution (One Hundred and First Amendment) Act 2016 postulates that GST shall replace a number of indirect taxes levied by the Union Government and the State Governments. The object was to introduce a goods and service tax which would fulfil two fiscal priorities namely, (1) removing the cascading effect of taxes; and (2) providing for a common national market for goods and services. An extract from the Statement of Objects and Reasons is set out below:

“Statement of Objects and Reasons.--The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax.”

17. The predominant object is for supply of goods and services,

except those which are kept out of the purview of the goods and services tax.

18. Indisputably, the petitioner is a Goods Transport Agency (GTA) in terms of GST. In so far as the service of GTA is concerned, if the services (of goods transportation) are provided by GTA to specified class of persons, the tax liability falls on such recipients under the reverse charge mechanism, In terms of Notification dated 28.06.2017, the following services are exempt from GST :

(a) by road except the services of -

- (i) a goods transportation agency;
- (ii) a courier agency;

(b) by inland waterways.

19. As per section 65B(26) of the Finance Act, 1994, “Goods Transport Agency” means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called. The “Goods Transport Agency” as is defined in clause 2(ze) of notification dated 28.06.2017 reads as follows :

“(ze) “goods transport agency” means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called;”

Therefore in the Service Tax regime, issuance of consignment note was integral and mandatory requirement before any road transporter could be brought within the ambit of GTA. Under the

GST law, the definition of Goods Transport Agency is provided in Clause (ze) of Notification dated 28.06.2017, as supra. Therefore, the issuance of consignment note is sine-qua-non for a supplier of service to be considered as a Goods Transport Agency. If such a consignment note is not issued by the transporter, the “service provider” will not come within the ambit of goods transport agency. If a consignment note is issued, it indicates that the lien on goods has been transferred (to the transporter) and the transporter becomes responsible for the goods till its safe delivery to the consignee. Therefore, it is only the service of such GTA, who assumes agency functions, that is being brought into the GST net. The individual truck/tempo operators who do not issue any consignment note are not covered within the meaning of the term GTA.

20. (a) The ‘Consignment Note’ is neither defined in the Act nor in the Notification dated 28.06.2017. The guidance is availed from explanation to Rule 4B of Service Tax Rules, 1994. In terms of the said rule, ‘consignment note’ means a document issued by a goods-transport-agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying

service tax whether consignor, consignee or the goods transport agency.

20(b) The use of phrase “in relation to” has extended the scope of the definition of GTA. It includes not only the actual transportation of goods but any intermediate/ancillary service provided in relation to such transportation, like loading or unloading, packing or unpacking temporary warehousing etc. If these services are not provided as independent activities but are the means for successful provision of GTA service, then they are also covered under GTA. Therefore, in respect of those who provide agency services in transport, the liability is cast on recipient in most of the cases or unless option to pay under forward charge has been exercised by the GTA.

20(c) In the case in hand, as per the proposed agreement/contract, the fuel (diesel) is not in the scope of the service of the petitioner. The agreement purports that the fuel would be free of cost basis for transportation of the goods and fuel would be filled by the service recipient for transportation.

21. The very definition and existence of the petitioner who is to provide transportation service, by plain and simple interpretation would point out the entire business and survival is premised and interdependent on the vehicles for transportation of goods. The obvious factor would be the vehicle cannot run

without fuel. Therefore, the design of the entire activity of GTA is based on supply of fuel to the respective vehicles. In absence of fuel, the the entire business activity would stand arrested to provide service. Therefore, the need of fuel is glued for survival of a GTA. If the GTA has stitched up to provide service by obtaining fuel on FOC basis by contract with recipient Company, this phenomenon would transcend the activity which reflects a broader shift in name of contract, therefore, the revenue has power to remove the lid to find out the object and purpose.

22. In the instant case, the scope of supply as defined in section 7 of the GST Act purports “all forms of supply of services” made or agreed to be made for consideration “in the course” or “furtherance of business”. The words used in Section 7(1)(a), “in course” or “furtherance of business” would point out about service to be provided by the transporter as a GTA. The contention of petitioner that the “consideration” is required to be confined as per the terms of agreement cannot be given a literal interpretation. Section 2(31) of the CGST 2017 mandates that “consideration” in relation to supply of goods or services includes - **(a)** any payment whether in money or otherwise made or to be made; **(b)** monetary value of any act or forbearance for the inducement of supply of goods or services. Reading of section 2(31) along with scope of supply as defined u/s 7(1)(a) makes it clear that the petitioner who

is a GTA wanted to transport the goods for recipient. The recipient is not a GTA or engaged in business of transport. Consequently it is the petitioner GTA “in course” or “furtherance of business” has agreed to supply the goods or service for consideration. When it is the primary business of the GTA, in order to allow running the vehicles by fuel, it is a potential combination. If that part of responsibility is delegated by way of an agreement to the recipient, in such a case, the recipient would step into the shoes of GTA as its component and would be playing central role in setting narratives.

23. The petitioner has relied on a decision of Supreme Court in *Union of India Vs. Inter Continental Consultants and Technocrats Pvt. Ltd. (2018) 4 SCC 669* and *CST Versus Bhayana Builders Pvt. Ltd (2018) 3 SCC 782* to submit that in service tax regime, the gross amount charged by the service provider, which is actually received, would be part of consideration to arrive at a gross amount charged by the service provider and it was further submitted that the tax is to be levied with reference to the value of service and the value of service which is actually rendered is to be ascertained. It was further stated that if certain goods or material is supplied by recipient free of cost and used for providing taxable service, only the gross amount charged by the service provider is to be examined. Much emphasis was placed on the wording “for such service provided”

and in the instant case, it is therefore stated that for such supply, the nexus between the amount charged and the service provided cannot be ignored. A careful reading of the aforesaid proposition would show that the nature of services rendered in the above cases were different. In the case of GTA, the centrality of the object revolves around the service provided by GTA which is fully based on supply of fuel. Section 7 of the Act explains that expression “supply” would include all forms of supply made or agreed to be made for consideration in furtherance of business by the supplier. So the nature of business would be the decisive factor and if such consideration is shifted by entering into agreement, it would be encroaching upon turf of G.T.A., and would only be a collective enthusiasm and that statutory liability cannot be evaded. As has been laid down by the Supreme Court in *CLP India Pvt. Ltd. Versus Gujarat Urja Vikas Nigam (2020) 5 SCC 185*, the parties by agreement cannot over-ride the statutory provisions in relation to matter of tariff.

24. Section 9 GST deals with levy and collection. The petitioner contended that section 9 of the CGST is a charging section and collection of revenue is confined to levy of GST on the value determined under Section 15 as may be notified. The word ‘supplier’ has been defined under Section 2 (105), which includes the person who provides the service. In the case on hand, the GTA is engaged in providing services of transportation of goods by road

for which free diesel would be supplied by the service recipient.

Section 7 Scope of supply read with Sec. 15(2)(b)

25. Section 15(2)(b) says that the value of supply shall include any amount that the supplier is liable to pay in relation to such supply but it has been incurred by recipient of supply and not included in the prices actually paid. This section imposes statutory obligation. The very existence of petitioner as GTA is for goods transport. Naturally, it would be the obligation for the GTA to run the vehicles and this factor needs a merited attention. The provision of Section 15(2)(b) has been tried to be by-passed by the agreement wherein the diesel was agreed to be supplied FOC by service recipient to the GTA. If we look into the facts by other angle, the expenses to fill the diesel in vehicle in furtherance of supply of service in normal condition was to be incurred by the GTA and it was his liability to fulfill such supply. However, in this issue, the expense of fuel has been agreed to be incurred by the recipient by agreement and value of diesel is excluded to evaluate the value of supply. The statutory provision of Section 15(2)(b) takes within its sweep to value, which is incurred by recipient. Therefore even by agreement in between the GTA and service recipient, this statutory liability cannot be sidelined and the merited attention of the statute sets a red line. Therefore, in the instant case, the value of service agreed to be provided necessarily will depend on the nature of service and the nature of business.

The petitioner who can survive to run the business of goods transport on fuel therefore cannot claim that the diesel is supplied by the service recipient free of cost, as such, it cannot be included as the fuel is an integral part used in providing the Transportation Service and is essential for GTA provider. Without fuel the entire business of GTA cannot survive. Therefore, fuel being an integral part cannot be bifurcated to overcome a tax liability.

26. Another submission is made that the model GST law proposed to include in Section 15(2)(b) of CGST Act *“the value, apportioned as appropriate, of such goods and/or services as are supplied directly or indirectly by the recipient of the supply free of charge or at reduced cost for use in connection with the supply of goods and/or services being valued”*. Therefore by such provision, free supply was included to be valued. However, in the final GST law, the provision of free supply by the service recipient was excluded. It is contended that the transaction value was an inclusive part in the proposed Model GST law under clause (b) Section 15(2) of the CGST Act. The provision to be added as per model GST Law in clause (b) of Section 15 (2) reads as under :

“(b) the value, apportioned as appropriate, of such goods and/or services as are supplied directly or indirectly by the recipient of the supply free of charge or at reduced cost for use in connection with the supply of goods and/or being valued....”

The submission that free supply by the service recipient has been

excluded as per final GST Law. Therefore, the legislative history in the draft GST Law is required to be seen. It is contended that there is a conscious omission by the Legislature to include value of free supply by recipient to evaluate the entire supply. The reference is made to case law reported in *(2022) 10 SCC 700 – Mohit Minerals Pvt. Ltd (supra)*.

27. However, when we examine the final GST Law, Section 15(2)(b) includes that any amount that the supplier is liable to pay in relation to such supply but has been incurred by the service recipient and not included in the prices paid or to be payable is to be taken into account to value the service answers this query. The Legislature has categorically enveloped such kind of supply within the ambit unless exempted by any provision. Therefore, the emphasis cannot be made at this stage while interpreting the provisions of Section 15(2)(b) of the GST Act, 2017 with the proposed GST Law specially taking into consideration the nature of business by GTA, the service provider.

28. Another submission is made by the petitioner that the purpose of advance ruling stands defeated and the section is arbitrary. Another submission of the petitioner is that Circular issued by the Government of India provides a free supply is not to be added to the valuation of the service provider and therefore the Circular issued u/s 168 of the CGST Act would prevail.

29. A perusal of the said circular No.47/21/2018-GST would show that it has been confined to specified subject material of moulds and dies of Car manufacturing, which are being supplied by the Original Equipment Manufacture (OEM) to a Component Manufacturer free of cost and the Circular purports that it would constitute the supplier as there is no consideration involved.

30. Again when we examine the nature of business of the petitioner, who is a GTA, the nucleus of survival of business shows that the business of petitioner entirely survives on transportation. Since the transportation inter-alia is an inter-dependent on supply of fuel, it would be a crucial component to run the business of GTA. If such integral part of survival of reins are held by service recipient, in such a case, it would be actually doing the substance addition of GTA survival. Therefore, the Circular dated 8th June 2018 on which the petitioner tried to rely upon would not be of any help especially considering the nature of business and the provisions of Section 7(1)(a) and 15(2)(b) of CGST Act.

31. The last submission which is made that since there is divergent opinion between the two appellate authorities under the GST AAAR against the finding of AAR, therefore, the petitioner has been left with no remedy and this section is arbitrary and defeats the very purpose of advance ruling. In this aspect, section 101 sub-section (3) of the CGST Act would be relevant which

purports that where the members of the Appellate Authority differ on any point or any points referred to in appeal or reference, it shall be deemed that no advance ruling would be issued in respect of question under appeal or reference. However, against such finding u/s 101(3) an appeal is provided u/s 101-B to the National Appellate Authority and the period of 30 days is provided. Till the petition was filed, no National Appellate Authority was notified. However, this Court cannot direct the State to legislate on the doctrine of separation of powers. In view of the observations made in foregoing paragraphs the initial order passed by the AAR on 04.01.2021 shall revive and it is observed that though the diesel was provided free of cost by the service recipient, it would nevertheless be added to the value for the purpose of GST.

32. In view of the foregoing discussion, no relief can be granted in favour of the petitioner. Accordingly, the petition is dismissed.

Sd/-

**(Goutam Bhaduri)
Judge**

Sd/-

**(Sachin Singh Rajput)
Judge**