

MAHARASHTRA AUTHORITY FOR ADVANCE RULING

GST Bhavan, 8th floor, H-Wing, Mazgaon, Mumbai - 400010.

(Constituted under section 96 of the Maharashtra Goods and Services Tax Act, 2017)

BEFORE THE BENCH OF

(1) Shri B. Timothy, Addl. Commissioner of Central Tax, (Member)

(2) Shri B. V. Borhade, Joint Commissioner of State Tax, (Member)

GSTIN Number, if any/ User-id		27AAUFA0033D1ZT
Legal Name of Applicant		ARIHANT ENTERPRISES
Registered Address/Address provided while obtaining user id		Flat no. 2, Ajit Building, Mahavir park Society, Aundh, Pune, Maharashtra-411007
Details of application		GST-ARA, Application No. 126 Dated 25.02.2019
Concerned officer		Asstt. Commr. of S.T.((D-819) Pune Division, Pune
Nature of activity(s) (proposed / present) in respect of which advance ruling sought		
A	Category	Retail Business
B	Description (in brief)	The applicant is, inter alia, engaged in the business of reselling Ice-creams in wholesale as well as retail sale packages. The applicant purchases the said goods from its sole manufacturer, M/s Kamaths Ourtimes Icecreams Private Limited ("The franchisor"). The applicant sells the Ice -creams to their customers "as it is" without any further processing/ alteration/structural or chemical change. " <u>As it is</u> " means in its exact form as it is acquired from the franchisor.
Issue/s on which advance ruling required		(i) classification of goods and/or services or both
Question(s) on which advance ruling is required		As reproduced in para 01 of the Proceedings below.



PROCEEDINGS

(Under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

The present application has been filed under section 97 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by ARIHANT ENTERPRISES, the applicant, seeking an advance ruling in respect of the following questions.

- 1 Whether supply of ice-cream by the applicant from its retail outlets would be treated as supply of "goods" or supply of "service" or a "composite supply" and subject to GST accordingly?
- 2 Whether the supply, not being a composite supply, would be treated as supply of service in terms of entry 6(b) of Schedule 11 attached to the CGST Act, 2017 and leviable to CGST @ 2.5% in terms of Notification No. 11/2017 as amended by Notification No.46/2017-Central Tax (Rate) (serial no. (i) entry no. 7) of the notification?

3. *In case the supply is held to be "composite supply", whether the taxability of the same should be treated as supply of service in terms of entry 6(b) of the Schedule II of the CGST act, 2017 or should be taxable on the basis of nature of principal supply in accordance with Section 8 of the Act?*
4. *In case the supply is held to be a supply of service in terms of entry 6(b) of Schedule II to the CGST Act, 2017, would it be mandatory for the applicant to collect and pay CGST @ 2.5% inspite of the fact that entry 7(i) of Notification No. 11/2017 as amended by Notification No.46/2017-Central Tax is a conditional entry?*

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the MGST Act. Further to the earlier, henceforth for the purposes of this Advance Ruling, a reference to such a similar provision under the CGST Act / MGST Act would be mentioned as being under the "GST Act".

02. FACTS AND CONTENTION - AS PER THE APPLICANT

The submissions, as reproduced verbatim, could be seen thus-
Statement of the relevant facts having a bearing on the question(s) on which the advance ruling is required

May it please Your Lordships,

The Humble Applicant most respectfully begs to submit the relevant facts relating to the activity proposed to be undertaken on which the advance ruling is required, as under:

1. M/s Arihant Enterprises ("the applicant") is a partnership firm duly incorporated under the provisions of Indian Partnership Act, 1932 and having its registered office at Flat No. 2, Ajit Building, Mahavir Park, Aundh, Pune 411007.
2. The applicant is, inter alia, engaged in the business of reselling Ice-creams in wholesale as well as retail sale packages. Accordingly, the applicant is duly registered under the provisions of Central Goods and Service Tax Act, 2017 bearing GST identification No. (GSTIN) 27AAUFA0033D1ZT. A copy of the said registration certificate is enclosed herewith as Annexure 4.
3. The applicant purchases the said goods from its sole manufacturer, M/s Kamaths Ourtimes Icecreams Private Limited ("The franchisor"). The applicant exclusively deals in the ice-cream manufactured by the franchisor. The applicant sells the Ice-creams to their customers "as it is" without any further processing/alteration/structural or chemical change. "As it is" means in its exact form as it is acquired from the franchisor.
4. The supplies are made by the applicant from its retail store situated in Aurangabad. The only source of revenue generation by the store is by way of selling ice-creams by means of namely, 1) retail packs; and 2) by way of Ice cream scoops. A copy of the audited balance sheet for the financial year 2017 2018 showing sale of ice cream as the only source of revenue from business operations is enclosed herewith as Annexure 5.
5. A copy of the Tax Audit report for the year 2017-18 (Assessment Year 2018-19) issued by a Chartered Accountant as required under section 44AB of the Income Tax Act, 1961 is also enclosed here with as Annexure-6. The nature of business in the Tax Audit report is stated as "retail sale of Food, beverages and Tobacco in specialized stores" under code 09021 under the broad heading of Wholesale and Retail Trade.
6. In the subsequent paragraphs each of the above revenue streams have been described in detail..

Sale of ice-creams in retail packs

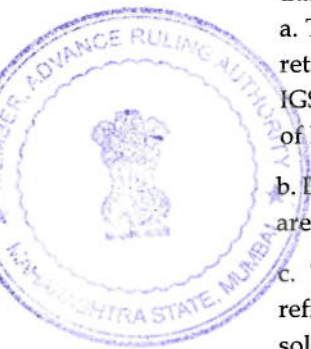
7. This mode accumulates the majority sales revenue of the applicant. The ice cream is sold as 500 grams retail packs. The sales mainly consist of sale of party packs or popularly known as "Tubs". These are packed in plastic containers bearing the details of product including maximum retail price (MRP) of the product. The details of the product are printed on the packs in accordance with the provisions of the Legal Metrology Act, 2009.

Sale of ice-cream by way of scoops

8. Under this method, the ice-cream scoops are sold to the customers who wish to consume Ice-creams on a take away basis. The franchisor supplies Ice-creams to the applicant in a wholesale pack to sell the same in scoops. These wholesale packs are emptied in steel containers at the outlet. Thereafter the ice-creams are sold over the counter and supplied in scoops in paper cups, regular cones or waffle cones. Further, at times the customer prefers more than one flavor of ice cream in different combinations commonly known as "Double Scoop" or "Triple Scoop". Accordingly, the ice creams are supplied in large cones or cups. In some cases, the ice cream is melted (semi liquid form) and sold in paper cups/ paper glasses to the customer based on their demand. In such cases, only the form changes. Sometimes, the ice cream is topped with fruits, again based on demand from the customer, The Price is charged on per Scoop basis. These prices are fixed and consistent at all the outlets of the applicant as well as other franchisee owners of the franchisor.
9. In order to bring the clarity in the transaction, it is pertinent for us to explain the entire chain of event that takes place in the subject transaction:
- The applicant purchases the ice creams from the franchisor. The franchisor supplies the same in retail and the whole sale pack of ice creams under a Tax Invoice and collects GST (CGST + SGST or IGST depending on the place of supply]. It quotes HSN code 2105 and charges GST @ 18% in terms of Notification No. 0.1/2017 -CT (Rate), dated 28.06.2017, as amended.
 - Due to the inherent nature of the product, the packages received from the manufacturer/franchisor are stored in a refrigerator located inside the retail store.
 - Typically for better performance and life of the refrigerator the temperature around the refrigerator needs to be maintained. Hence, the area of the store where the Ice-creams are stored and sold across the counter are Air Conditioned. This is similar to how most of the departmental stores like food land, reliance fresh or big bazaar sell their products,
 - The customer walks to the counter, goes through the menu available, selects the flavors and places the order to the cashier.
 - Once the order is placed, the customer pays the price for the order placed by him; the cashier prints two copies of the Tax Invoice and hands over the same to the customer..
 - The customer then moves to the delivery counter, hands over one copy of the Tax Invoice to the at the counter. In case the customer has purchased a retail pack the same is handed over to him/her against the copy of the Tax Invoice. On the other hand if the customer has purchased a scoop of ice cream, the same is handed over to him in a cup/ cone as per his desire. Likewise, the customer can also call the outlet and place the order, which gets hand delivered in retail pack to the customer's location.
 - Thereafter, the ice cream is handed over to the customer. He either waits within or outside the store or takes it away as the case may be. Within the store/shop, there are a few tables/chairs/benches for customers to sit, while waiting.

Statement containing the applicant's interpretation of law and/or facts, as the case may be, in respect of the question(s) on which advance ruling is required:

1. At the outset, the applicant submits that the ice-creams so procured from the franchisor are directly being sold to the final consumers through the applicant's outlet. No processing is being incurred on the same. The predominant nature of the transaction is that of supply of goods.



Accordingly, in the view of the applicant, the transaction under consideration must be treated as the one of supply of goods and thus must be taxable accordingly,

Supply under GST

- 2.1 As is being promoted, Goods and Services Tax (GST) is touted to be the single biggest tax reform to take place post independence. GST is applicable on supply of all goods and services in India.
- 2.2 Chapter III of the Central Goods and Service Tax Act, 2017 ("CGST Act") provides for levy and collection of GST. Section 7 of the CGST Act provides for the scope of supply. It is, inter alia, provided that "supply" includes:
- (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;
 - (b) import of services for a consideration whether or not in the course or furtherance of business;
 - (c) the activities specified in Schedule 1, made or agreed to be made without a consideration; and
 - (d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.
- 2.3 Section 9 is the charging section. It provides for levy of tax called the CGST on all intra-state supplies of goods or services or both and at such rates, 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.
- 2.4 Section 2(52) of the CGST act, 2017 defines goods as:
"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"
- 2.5 Section 2(101) of CGST Act, 2017 defines "Service" as:
"anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged"
- 2.6 Apparently, the definition of Service is residuary in nature. In other words what are not goods are services. Further, Section 2(30) of the CGST act, 2017 defines Composite Supply as follows:
(30) "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;
- illustration.- Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;*
- 2.7 Now, the most prominent question to be answered in this regard is whether the supply of Ice Cream in retail package and in scoops by the applicant at the outlets would be termed as supply of goods or supply of service or a composite supply.
- 2.8 At the outset, on the basis of the business model and the factual matrix as discussed above, the applicant submits that the said supply should, in all pith and substance of the matter, be termed as "supply of goods". Reasons to support the said interpretation follow:

Transfer of property

- 3.1 There could be no objection to this fact that the transaction under consideration involves transfer of property in movable goods. The applicant submits that, in the instant case, the customer approaches the applicant to buy Ice-cream. The customer accordingly, places the order from the menu and the same is delivered to them. In case of retail pack, the box is supplied as it is. However, in case of scoop, the flavor of choice is sold as per the customer preference i.e. in cup or cone. In either of the cases, the ice-cream received by the applicant from the franchisor is supplied as it is to the customer. No processing is done thereon, no customization is done. The applicants

sells the said final products to the customer at agreed rates, as mentioned on menu cards. No extra money is charged from the customers. These facts are not in dispute.

- 3.2 The intention of the parties and the understanding of the parties is that the same is a sale. The customer intends and accordingly, agrees to purchase the abovementioned final products from the applicant. There is no contract for provision of any service. The customers of the applicant are free to consume the ice-creams inside and outside the outlet. The customer could also carry the same home or any other desired location. There are no restrictions as regard to the place of consumption.
- 3.3 This contention is supported by the fact that none of the outlet provides the facility of serving/ dining to the customer. Every customer, irrespective of age or sex is required to collect the same from the delivery counter. Several outlets of the applicant do not even offer seating facility. Several others offer a few, and those too are generally occupied by senior citizens and mothers who are accompanied by their toddlers. Few stores have two or three tables kept outside the stores which customers may occupy after they make their purchases, Accordingly, the applicant submits that the transaction is nothing but a supply of goods i.e. ice-cream.
- 3.4 While dealing with the review petition in the matter of **Northern India Caterers v. Lt. Governor of Delhi AIR 1980 SC 674**, the apex court rejected the review petition, and clarified their earlier decision in the aforesaid case by making the following observations:-

"Where food is supplied in an eating-house or restaurant, and it is established upon the facts that the substance of the transaction, evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be eligible to sales tax. In every case it will be for the taxing authority to ascertain the facts when making an assessment under the relevant sales law and to determine upon those facts whether a sale of the food supplied is intended."

- 3.5 Here, it is also pertinent to note that in **Northern India Caterers [1979] 1 SCR 557** while deciding as to whether the meals served to casual visitors in the restaurant of hotels would constitute a sale, the Apex court stresses on the fact that there is no transaction of sale as the property does not pass to the customer and the customer has no right to take away the goods. The supply of goods is only a part of the service contract. The Supreme Court observed that when meals were served to casual visitors in the restaurant the service must be regarded as providing for the satisfaction of a human need and could not be regarded as constituting a sale of food when all that the visitors were entitled to do was to eat the food served to them and were not entitled to remove or carry away uneaten food. Supporting consideration included the circumstance that the furniture and furnishing, linen, crockery and cutlery were provided, and there was also music, dancing and perhaps a floor show.

- 3.6 To similar effect is another decision of Apex court in the matter of **State of Himachal Pradesh v. Associated Hotels of India (1972] 2 SCR 937**. The *ratio decedendi* of the above judgment is that what is to be adjudged in each case is as to whether the dominant intention in a given transaction was of sale and purchase of eatables or drinks. Interpreting the above judgments Hon'ble high court of Andhra Pradesh in the matter of **Durga Bhavan and Ors. (1981] 47 STC 104 (AP)** have summarized the *ratio decedendi* of the judgments and observed:

"13. To summarise the position at the end of the three decisions of the Supreme Court discussed earlier appears to be as follows:

- 1. If there is no right to carry away the food there would be no sale in favour of the customer.*
- 2. Even if there is a right to carry away if in essence the transaction is a transaction of service and not a transaction of sale it would not be exigible to tax.*
- 3. If, however, where the customer has a right to take away the food if the dominant object is the sale of food and the rendering of service is merely incidental, then the transaction would be a transaction of sale and not a service contract.*

4. The question whether the dominant object was the sale of food or rendering of service would depend upon the facts and circumstances of each case which has to be decided by the assessing authority in the light of the evidence before it.

3.7 Basis the above discussion the High court held that:

"14. we may observe that sales across the counter will obviously be transactions of sale. It may be that in doing so some services are rendered by packing the food-stuffs, etc., but this part of the service is so infinitesimal and insignificant that the transaction would nevertheless be one of sale. Even in a case where a customer is asked to sit down in a chair or a more comfortable seat while the food-stuff is packed and handed over to him, still we consider that the transaction would be one of sale."

3.8 The applicant submits that, in as far as sale of retail packs are concerned, the only service element involved therein is that of picking the plastic container from the shelf and delivering the same to the customer. Here, it would be crucial to note that this is exactly the way goods, including Ice-creams, are sold at a typical banya shop, super market or a departmental store. Clearly, the element of service, if any, is insignificant and thus the activity is merely a transaction of supply of goods to the customers.

3.9 Further, the applicant submits that in respect of sale of ice-cream in scoops, the raw material viz. Ice-cream is supplied by the franchisor in wholesale containers. The same is then customized at the request of the customer and served as per their desire. The applicant submits that, here, the material cost is more than the labour cost. Hence, the involvement of skill is much less compared to the involvement of materials. Therefore, the activity is a transfer of goods i.e. ice-creams to the customers in cone and cup. The applicant would again reiterate that the service element contained in the entire supply is minimal or consequential.

3,10 To substantiate the above interpretation, the applicant also place reliance on the decision of the Rajasthan High Court in the matter of Govind Ram and ors. Vs. State of Rajasthan and ors reported as AIR 1982 Raj 265 wherein the Hon'ble High court has held that :

"5. In cases of sales of foodstuffs or eatables made across the counter", they are obviously transactions of sale, even though some service may be rendered in packing the food-stuffs, yet it may be so insignificant or incidental that the transaction would essentially be one of sale. Similarly, if food stuffs or drinks are supplied to customers outside the hotel or restaurant, then also the transactions may amount to sale. In case where the owner of the hotel or restaurant or the eating house charges separate amount by way of service charge for the service rendered by him besides the cost of the food-stuff supplied to the customer, then it would obviously appear that the transaction of sale of foodstuffs and service rendered by the hotelier or the owner of the restaurant have been separately charged. Moreover, it would also be a question of fact as to whether the customer has a right to take away the foodstuffs and in that case the assessing authority will have to decide as to whether the transaction would amount to sale or not. If the dominant object is the sale of eatables and drinks and rendering of service is merely incidental then the transaction may, amount to sale. But if, on the other hand, there is a transaction in which service is coupled with supply of foodstuffs and supply of foodstuffs is part of and incidental to the service, then the transaction may not amount to sale"

....(emphasis supplied)

3.12 A similar view has been presented the Hon'ble Madras High Court in the matter of **Sangu Chakra Hotels Private Limited vs, State of Tamil Nadu** reported in [1985] 60 STC 125 wherein the Hon'ble bench opined that:

"12. It is common knowledge that in the case of a restaurant simpliciter, a person may either go to a restaurant merely for the purpose of buying articles of food and taking them home in a parcel, or he may go to the restaurant with the avowed object of ordering out articles of food for the purpose of consumption in the restaurant itself. The question as to whether any service is involved or not, if at all it arises, it will arise only in the second class of cases. In the first category of cases where articles of food are sold across the counter it is a sale, pure and simple, like any other commodity in any other shop with no element of service involved. If at all any service is involved, it is in no way different from the service involved in an ordinary transaction of sale of any other goods which are sold across the counter. It is difficult to see how such a transaction which is purely of sale and purchase of articles of food can be

outside the taxing power of the State Legislature having regard to entry 54 of List II of the Seventh Schedule to the Constitution."

- 3.13 On the basis of the above arguments, the applicant submits that with all stretch of imagination, the transaction undertaken by the applicant is that of the supply of goods and thus would be chargeable to the levy of GST-accordingly.

Composite Supply or Not?

- 4.1 Assuming, whilst denying, that the transaction is a composite supply, applicant submits that the transaction would still be treated as the one of supply of goods.

The reasons for the same are enumerated hereunder,

- 4.2 The term composite supply has been defined under Section 2(30) of the CGST act. As per the definition, following are the essential characteristic of a composite supply made taxable person to the recipient:

- (i) consists of two or more taxable supplies of goods or services or both, or
- (ii) any combination thereof, such Supplies are naturally bundled and supplied in conjunction with each other in the ordinary course of business,
- (iii) one of which is a principal supply;

- 4.3. In order to eliminate any confusion the above definition has been accompanied with an illustration. The same reads as follows:

"Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply"

- 4.4 Further, Section 8 of the CGST Act provides as follows:

The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:

- (a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and
- (b)

- 4.5 *First*, on the basis of the above discussion, the applicant submits that the only supply involved in the above transaction is that of supply of goods i.e. ice cream, No significant service element is involved in the instant transaction. Even if it is assumed that there is some portion of provision of service involved, the same is incidental to the principal supply.

- 4.6 *Second*, on a conjoint reading of the above provisions, what could be gathered is that every composite supply, provided the same adheres to the definition of the same; acquires the nature and characteristic of principal supply involved in the transaction and the GST must be levied accordingly. In other words, what determines the nature of supply is whether the principal supply is that of supply of goods or a supply of services.

- 4.7 Principal Supply has been defined under Section 2(90) of the CGST act. Accordingly the principal supply means

"the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary"

- 4.8. It is evident from the subject transaction that the predominant element involved is that of sale of Ice-cream, in the present case, the consumer intends to buy and the applicant intends to sell ice cream. Thus, it is clear that there is only one activity which has taken place predominantly i.e. buying and selling of ice-creams. The applicant does not intend to provide any sort of service to their consumers. Selling the scoop of ice-cream into the cups and cones, as desired by the consumer, is merely an ancillary or incidental supply. The same could not be treated as a predominant nature

of the transaction. Thus, apparently, the predominant nature of the transaction is that of supply of goods.

- 4.9 Accordingly, even if the transaction is being considered as a composite transaction the same would derive the nature of the predominant supply. As discussed in the foregoing paras, the predominant nature is that of supply of Ice-cream i.e. supply of goods and thus the nature of the above transaction would be that of Supply of Goods and must be taxed accordingly.

Without prejudice, the same is not covered under Entry 6(b) of Schedule II

- 5.1 Schedule II of the CGST Act lays down a deeming fiction prescribing certain activities to be treated as supply of goods or supply of services. In this regard, Sr.No. 6(b) of the said schedule 11 may be relevant in the subject matter. The same reads as;

"6. Composite supply

The following composite supplies shall be treated as a supply of services, namely:

(a); and

(b) *supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration."*

- 5.2 On a plain language of the above provision, apparently, what could be gathered is that the same is applicable only in the case of composite supplies. However, as it has been repeated in the present application, the supply undertaken by the applicant is supply of goods and not a composite supply. Thus, the applicant submits that the above provision has no applicability over the transaction under consideration undertaken by them.

5.3 However, assuming, whilst denying, that the activity under consideration is a composite supply, the applicant submits that even then the same could not be made applied on the captioned transaction.

5.4 First, it is well settled that the intention of the legislature has to be gathered from the language used in the statute which means that attention should be paid to what has been said as also to what has not been said. It is well settled that it is not the duty of the court either to enlarge the scope of legislation or the intention of the legislature, when the language of the provision is plain. The court cannot add words to a statute or read words into it which are not there. Hence, it is the bounden duty and obligation to interpret the statute "as it is". It is contrary to all rules of construction to read words into a statute which the legislature in its wisdom has deliberately not incorporated. In *Union of India & Another Vis Deoki Nandan Aggarwal, 1992 Supp (1) SCC 323*, a three-Judge Bench of the Supreme court held that it is not the duty of the court either to enlarge the scope of legislation or the intention of the legislature, when the language of the provision is plain. The court cannot rewrite the legislation for the reason that it had no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. In *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. V's Custodian of Vested Forests, Palghat & Another 1990 (Supp) SCC 785*, the Apex court observed that in seeking legislative intention judges not only listen to the voice of the legislature but also listen attentively to what the legislature does not say. Similar view has been taken, recently, in *CIT VIS Tara Agencies 2007 (214) ELT 491 (SC)*.

- 5.5 Here, it is pertinent to note that under the aforesaid entry the supply has to be made "by way of" or "as a part of" a service. The Cambridge English Dictionary defines the term "by way of" as a type of. The Collins dictionary define the phrase as a way, method, mode, or means of. Hence, any supply of food or any other article of human consumption which has not been provided "by way of" or "as a part of a service is not covered under the said entry. Admittedly, in the instant case, the supply has not been made by way of any service. The applicant's only intent is to sell the

ice-creams. Here again the applicant submits that it is the pre-dominant intention of the supplier and the recipient of supply which must be the decisive factor in order to determine the nature of the supply.

5.6 The Legislature has consciously used the words "by way of". Had the intention of the Legislature been to cover all supplies of food or articles of human consumption under the said entry, the Parliament could have used the expression "supply of...." However, it has chosen not to do so. The meaning of the word of used in an item in a fiscal statute must be considered having regard to the intention of the maker thereof. The court shall, for the said purpose, put itself in the chair of the legislature. It would presume the legislation' to be reasonable. The legislature is a perfect legislative body. It is presumed to know all the laws and existing scenarios when it enacts any particular legislation. Hence, the said expressions have to be given their due meaning. Judgment of the Supreme Court in the case of **Mauri Yeast India Private Limited Vis CCE 2008 (225) ELT 321 (SC)** refers.

5.7 Further the transaction under consideration seems to be more appropriately covered by the entry no. 1(a) of the Schedule II of the CGST act. The entry reads thus:

1. *Transfer*

(a) *any transfer of the title in goods is a supply of goods;*

5.8 Accordingly, clearly the transaction under consideration is that of supply of goods even for the purpose of deeming fiction. Accordingly the supply of ice-cream at the applicant's outlet could not be covered under the aforesaid entry.

5.9 *Second*, the applicant further submits that the activity undertaken could also not be covered under the entry within the meaning of the terms "*in any other manner whatsoever*". Here this is pertinent to note that the said term has been preceded by the phrase "*supply by way of or as a part of*". It is well settled that, in such a situation, the said term has to be read *ejusdem generis* with the preceding terms. The expression "*ejus-dem-generis*" - 'of the same kind or nature' - signifies a principle of construction whereby words in a statute which are otherwise wide but are associated in the text with more limited words are, by implication, given a restricted operation and are limited to matters of the same class or genus as preceding them. If a list or string or family of genus-describing terms is followed by *wider* or residuary or sweeping-up words, then the verbal context and the linguistic implications of the preceding words limit the scope of such words. The principle underlying this approach to statutory construction is that the subsequent general words were only intended to guard against some accidental omission in the objects of the kind mentioned earlier and were not intended to extent to objects of a wholly different kind. This is a presumption and operates unless there is some contrary indication. See: **Sidhdheshwari Cottom Mills (P) Ltd. v. UOI1989 (39) ELT 498 (SC)**.

5.10 In '**Statutory Interpretation**' **Rupert Cross**, at Page 116, says: "..... The draftsman must be taken to have inserted the general words in case something which ought to have been included among the specifically enumerated items had been omitted.....". **Francis Bennion** in his **Statutory Construction**, at Page 830, observed thus: "For the *ejus-dem-generis* principle to apply there must be a sufficient indication of a category that can properly be described as a class or genus, even though not specified as such in the enactment. Furthermore the genus must be narrower than the words it is said to regulate. The nature of the genus is gathered by implication from the express words which suggest it....."

5.11 Thus, it becomes clear that the preceding words in the statutory provision which, under this particular rule of construction, control and limit the meaning of the subsequent words must represent a genus or a family which admits of a number of species or members.

5.12 in light of the above discussion, the meaning of the term "*in any other manner whatsoever*" has to be derived drawing reference from the meaning of *by way of or as a part of service*". The provision

of service is the predominant nature of the supply covered under the said entry. Thus the applicant submit that no supply wherein the provision of service is not the predominant feature could be included under the said entry. Thus the applicant submits that the activity undertaken by them could not be said to be covered under the said entry.

- 6.1 Further, it is well settled that a deeming provision is a legal fiction and an admission of the non-existence of the fact deemed. The apex court vide *Ajaib Singh V. Sirhind Coop. Marketing-cum-processing Service Society Ltd. & Ors.*, (1999) 6 SCC 82 held that it is the exclusive prerogative of the Legislature to create a legal fiction meaning thereby to enact a deeming provision for the purpose of assuming the existence of a fact which does not really exist. Even if a legal fiction is created by the Legislature, the court has to ascertain for what purpose the fiction is created, and it must be limited to the purpose indicated by the context and cannot be given a larger effect. More so, what can be deemed to exist under a legal fiction are merely facts and no legal consequences which do not flow from the law as it stands. It is a settled legal proposition that in absence of any statutory provision, the provision cannot be construed as to provide for a fiction in such an eventuality. More so, creating a fiction by judicial interpretation may amount to legislation, a field exclusively within the domain of the legislature.
- 6.2 Accordingly, assuming whilst denying, that the transaction under consideration is a composite supply, the applicant submits that since the activity under consideration could not be covered under the provision of aforesaid entry, the taxability of the same has to be derived from the general rule as set out under Section 8 of the CGST Act. Section 8 of the CGST Act provides as follows:

The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:--

- (a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and
(b)

- 6.3 Thus the taxability of the same could be derived on the basis of nature of principal supply. In the instant the principal supply is that of sale of ice-cream i.e. goods. Accordingly; the entire transaction has to be treated as supply of goods. Accordingly the same must be taxable.

Registration under other Acts

- 7.1 The applicant further submits that, prior to the introduction of GST the company was registered under the Maharashtra Value Added Tax Act, 2002 (MVAT Act) as **resellers and were discharging VAT @ 13.5%**. Copy of our registration certificate is enclosed here with. Further, the company is also registered under the GST Law as a reseller and has provided "Ice creams" as the goods that it deals in. The GST registration certificate has been enclosed as **Annexure-7**.
- 7.2 It is mandatory for resellers of food and food service providers to obtain a license under the Food Safety and Standards Act, 2006. Our firm is registered under the said act as a "Retailer". Copy of the license issued under the above Act is enclosed here with as **Annexure-8**.
- 7.3 Further, each of the stores are registered under the Maharashtra Shops and Establishment Act, 1948 and holds a registration certificate issued by the Municipal Corporation. The registration certificate describes the nature of business of the store as "Sale of Ice-creams". A copy of the registration certificate is enclosed here with for your perusal and records as **Annexure 9**.

Without prejudice to the above submission, the said notification prescribing the rate of GST on the supply is not a mandatory notification

- 8.1 Notification no. 11/2017-CT (Rate) dated 28.06.2017, as amended from time to time, provides that Supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or drink, where such supply or service is for cash, deferred payment or other valuable consideration, provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any

other article for human consumption or drink is supplied, other than those located in the premises of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having declared tariff of any unit of accommodation of seven thousand five hundred rupees and above per unit per day or equivalent is chargeable to GST at the rate of 2.5%. The same is applicable on the condition that the input tax charged on goods and services used in supplying the service has not been taken.

8.2 The above notification prescribed the rate of GST to be charged on the supply of service. At the outset the applicant reiterates that since the activity undertaken by the applicant is that of supply of goods, the said notification is not applicable in the instant. Be that as it may, assuming whilst denying, that the activity under consideration is that of supply of service the applicant submit that the said notification is of conditional nature. Accordingly, in case where the conditions are not fulfilled, the applicant is not eligible to avail the benefit of the same.

8.3 *First*, It is well settled principle of law that a notification that prescribes conditions to be fulfilled in order to comply with the same, the same becomes optional, in nature. In other words, it is upon the assessee to comply with the condition and avail the benefit of the notification or to not to comply. In *Kalpvrksh Charitable trust vs, Union of India* reported in 2017 (350) E.L.T. 371 (Bom.), the Bombay High Court held that:

"A conditional exemption is available and can be availed of on tendering proof of satisfaction of the terms and conditions thereof, else the exemption cannot be availed of."

8.4 In the instant, the notification prescribes the condition that the assessee is not entitled to avail the input tax credit of supply of goods or services utilized to provide the output supply. Accordingly, the applicant submits in case the assessee wish to avail the input tax credit the said supply would be chargeable to tax at the rate of 18% under general category.

8.5 *Second*, the supply must be provided by a restaurant, eating joint including mess, canteen. The terms "Restaurant", "Eating Joints", "Mess" or "Canteen" have not been defined under the act. Further Section 2(120) provides that words and expressions used and not defined in this Act but defined in the Integrated Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act shall have the same meaning as assigned to them in those Acts. However, the said terms have not been defined under the above acts. Hence, one will have to look at the ordinary meaning of the said terms as understood in common parlance.

8.6 Oxford Dictionary defines the term "Restaurant" as - *a place where people pay to sit and eat meals that are cooked and served on the premises*. University of Cambridge defines the same - *as a place where meals are prepared and served to customers*.

8.7 Similarly, the term Canteen is defined under Oxford Dictionary as - *a restaurant provided by an organization such as a college, factory, or company for its students or staff*. On similar lines the University of Cambridge defines the term as- *a place in a factory, office, etc. where food and meals are sold, often at a lower than usual price*.

8.8 Apparently the term eating joints has not received any formal recognition. However, the term "Joint" has been informally defined by Oxford Dictionary as - *An establishment of a specified kind, especially one where people meet for eating; drinking, or entertainment*. The University of Cambridge defines the term Jointas - *a bar or restaurant that serves food and drink at lowprices*. Accordingly the term eating joints must be construed. Further, Black's Law Dictionary defines the term eating house as - *Any place where food or refreshments of any kind, not including spirits, wines, ale, beer, or other malt liquors, are provided for casual visitors, and sold for consumption therein*.

8.9 On perusal of all the above definitions, what could commonly be drawn is that all the said terms refer to an establishment where the people meet in order to eat or drink at the same premises. It is well-known rule of construction that words in such entries had to be construed with reference to the words found in immediate connection with them. When two or more words which were



capable of being understood in an analogous manner were coupled together, they had to be understood in the common analogous sense and not in the general sense. This rule of *noscitur a sociis* was applied by the Madras High Court in **Boak Roberts and Co. (India) Limited V/s Board of Revenue (C.T.) reported at Madras 1942 STC 370**. Reference may also be invited to the judgment of the Hon'ble Punjab and Haryana High Court in the case of **Assessing Authority V/s Amir Chand Om Parkash reported at 33 STC 120**, wherein the High Court considered whether 'dhoop' and 'aggarbatti' fell within the ambit of the said Entry No. 16. It held that they did not for two reasons. The first of the two reasons is no longer valid by reason of a subsequent amendment, but the second reason is still valid. The Punjab & Haryana High Court said:

"So far as dhoop and aggarbatti are concerned, there is another way of looking at the matter. The entry (i.e., Entry No. 16) is "cosmetics, perfumery and toilet goods" The context in which the word "perfumery" occurs shows that what is meant by all the three general items "cosmetics, perfumery and toilet goods" are articles which are used for personal hygiene or pleasure. The items which are excepted from this entry are "toothpaste, tooth powder, soap and kum-kum." This exception also points to the same conclusion, viz., that only those articles of luxury, which are used for personal hygiene and pleasure were intended to be included in this entry. So the word "perfumery" in this context would not include dhoop and aggarbatti, which are never used for personal hygiene or pleasure, but are primarily used for religious ceremonies."

- 8.10 Accordingly, the term "Restaurant", "Eating Joints", "Mess" or "Canteen" has to be interpreted and understood on the common analogous sense i.e. a place where the consumer is served food at the tables to be consumed therein. However, in the instant case, the outlets of the applicant do not serve the ice-creams to their customers on the table. Rather the same has to be collected by the customer themselves from the counter. Further, on the cost of re-iteration, the applicant does not provide any sitting facility to the customers as well. Thus, a clear distinction can be drawn between the applicant's outlet and the terms mentioned under the aforesaid notification. Accordingly, the applicant submits that the said notification is not applicable over the transaction under consideration. On going through the above facts it is very clear that the dominant intention of the buyer and the seller is to sell the product and the service (if any) is purely ancillary to the sale of the product. At this juncture the applicant submits that the activity of supply of ice creams from the outlet is purely a contract for supply of goods and the GST must be levied accordingly.

Additional submissions on 15.03.2019

At the out we thank both the members for having given us a patient hearing on 13.03.2019. In course of proceedings we have been requested us to submit the following additional details:

1. Photographs of the retail store from where the ice-creams are sold. The photographs of the retail outlet operated by us at Auarangabad are enclosed here with for your perusal and records.
2. Franchise agreement entered with the Franchisor M/s. Kamaths Ourtimes Icecreams Private Limited.
Our firm has entered into a franchisee agreement with M/s. Kamaths Ourtimes Icecreams Private Limited. Copy of the franchise agreement is enclosed here with.
3. Gist of Licenses under which the retail outlet is operated
Details of licenses held by our firm for the retail outlet and the issuing authority are tabulated here under. Copies of these licenses have already been provided along with our application per book. However, for the ease of reference the same have been once again enclosed here with.

03. **CONTENTION - AS PER THE CONCERNED OFFICER**

The submission, as reproduced verbatim, could be seen thus-

SUBMISSION OF REPORT

Here the question asked is whether the sale of goods (ice cream) will be under the ambit of services. I would like to reply in negative, because as per section 2(102) of CGST ACT it is clearly mentioned that services would amount to **anything other than goods**. Now the goods are to be defined in a manner which

has physical appearance, which can be seen, touched and transferred or given from one person to another or for self consumption. Here in this AAR the sale of ice cream is purely a sale of goods (ICE CREAM).

Secondly the question of whether an ice cream parlour be termed as restaurant? I would like to highlight that the definition of restaurant is self explanatory. The restaurant is a place where people gather, sit and as per menu card order for beverage or dish which they desire to eat or drink or even carry as a parcel. Moreover the food is served fresh by the waiter or waitress, it is manufactured on day to day basis. Here food manufactured in a restaurant is served on the same day while ice cream can be sold on next day also.

Thirdly the licence issued by the sales tax department, FDA (FOOD) is of retailer/reseller. Here it is to be considered that the restaurant dealers are registered as a manufacture or manufacturer/reseller. The part of service is incidental and not composite in case of ice cream parlour. Had it been a mall where goods are self collected from the rack and billed at the billing section. The major portion involved is sale of goods and not service unlike consultation. Hence liable under VAT/GST/MGST/CGST.

Fourthly as per service tax act itself goods sold from cold storage are not liable to restaurant services. Hence in my opinion the applicant is replied in affirmative that ice cream parlour is not a restaurant nor restaurant service. The service part is incidental and not the prime function.

04. HEARING

The Preliminary hearing in the matter was held on 13.03.2019, Sh. Bharat B. Raichandani, Advocate, along with Sh. Chirag Mehta, C.A. and Shri Hemant Regmi, Manager appeared and requested for admission of application as per contentions made in their application. He is informed to submit photos of the premises. They have however made a request to finalize the matter at this stage as he has to say nothing more. Jurisdictional Officer was not present but submitted written submissions. The applicant has submitted photos of his premises on 15.03.2019.

05. OBSERVATIONS

We have gone through the facts of the case, submissions made by the applicant as well as the department and the documents on record. The main issue before us is whether the supply of ice-cream by the applicant from its retail outlets would be treated as supply of "goods" or supply of "service" or a "composite supply".

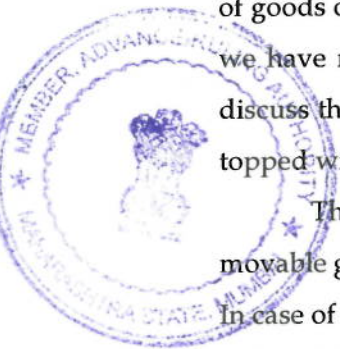
The applicant has submitted that they purchase ice creams from their franchisor viz. M/s Kamaths Ourtimes Icecreams Private Limited, and resell the same in wholesale as well as retail sale packages. They exclusively deal in the ice-cream manufactured by the franchisor and sell the same to their customers as it is without any further processing/alteration/structural or chemical change. Their sale of ice creams is by way of 1) retail packs; and 2) by way of Ice cream scoops. In case of sales by way of retail packs which constitutes about 75% of their total sale, they sell ice creams in tubs of 500 gms at the MRP printed on the tubs by the manufacturer/franchisor. In the case of sales by way of scoops the applicant has submitted that the ice-cream scoops are sold to the customers who wish to consume Ice-creams on a take away basis. In this case the franchisor supplies Ice-creams to the applicant in a wholesale pack to sell the same in scoops. These wholesale packs are emptied in steel containers at the applicant's outlet and then the ice-creams are sold over the counter and supplied in scoops in paper cups, regular cones or waffle cones. At times as per customer preference more than one flavor of ice

cream in different combinations commonly known as "Double Scoop" or "Triple Scoop" are also supplied in large cones or cups. In some cases, the ice cream is melted (semi liquid form) and sold in paper cups/ paper glasses to the customer based on their demand. Sometimes, the ice cream is topped with fruits, again based on demand from the customer, The Price is charged on per Scoop basis. These prices are fixed and consistent at all the outlets of the applicant as well as other franchisee owners of the franchisor. The applicant has also submitted that the franchisor quotes HSN code 2105 and charges GST @ 18% in terms of Notification No. 01/2017 -CT (Rate), dated 28.06.2017, as amended.

To answer the main question raised by the applicant we refer to the various pertinent definitions as per the GST Laws. We have no doubt that the ice creams sold by the applicant are covered under the definition of 'goods' as defined under Section 2(52) of the CGST act, 2017. We also have no doubt that there is a supply in this case as defined under Section 7 of the CGST act, 2017. Section 2(101) of CGST Act, 2017 defines "Service" as "*anything other than goods, for which a separate consideration is charged*".

The only thing that is required to be addressed in this case is whether there is a supply of goods or services or both. In the case of sale of ice creams in tubs of 500 gms and at the MRP, we have no doubt that the same is sale of goods with no service being involved. Hence we discuss the other scenario where the ice creams are sold in scoops, cones, etc or sold after being topped with fruits.

The applicant has submitted that their entire transaction involves transfer of property in movable goods. The customer places the order from the menu and the same is delivered to them. In case of scoop, the flavor of choice is sold as per the customer preference i.e. in cup or cone. In either of the cases, the ice-cream received by the applicant from the franchisor is supplied as it is to the customer and is sold at agreed rates, as mentioned on menu cards. No extra money is charged from the customers who are free to consume the ice-creams inside or outside the outlet. No facility of serving/ dining is provided by the applicant. Only a few outlets of the applicant offer seating facility. However as informed by the applicant, same is predominantly made for the convenience of old persons or persons with disability, ladies and children and not for rendering any service of a kind like a restaurant, eating house, joint, etc. We find that the dominant object even in the case of ice cream in scoops as in the subject case, is a sale of goods. This transaction of selling ice cream received in bulk and selling them in scoops is akin to sales made by grocery shops in the case of sale of edible oil wherein the grocer sells such oil in various lesser quantities after receiving the same in bulk quantity of 20 litres, etc in tins/cans. The decision of the Rajasthan High Court in the matter of Govind Ram and ors. Vs. State of Rajasthan and ors cited by the applicant appears to be applicable to the subject case in as much as there is a sale of goods i.e. ice cream which is made across the counter to the customers by the



applicant. This is precisely where the applicant's outlets differ from the conventional restaurants. In restaurants, generally the customers go with the intention of ordering articles of foods for the purpose of consuming the same there only, which are then prepared and served by waiters, etc to the customers. Here the ice creams are sold in the same form as received by them and at agreed rates not exceeding the MRP and in most of the case the said ice creams appear to be consumed outside the premises of the applicant. Even if we consider the said transaction as a composite supply as per Section 2(30) of the CGST Act we find that the principal supply in the subject case is a sale of goods i.e. ice creams, being the predominant element of the transaction.

We find that in the subject case there is a transfer of title in ice creams from the applicant to their customers and therefore as per entry no. 1(a) of the Schedule II of the CGST Act, the subject transaction is nothing but a supply of goods. Even the jurisdictional officer has agreed that in the subject case there is a sale of goods.

Further we also find that the applicant was served with a Show cause Notice No. 3/ST/AC/Urban/2017 dated 10.10.2017 alleging that the applicant was running a business of ice cream parlour and evading tax on services provided under the category 'Restaurant Services'. This Show cause Notice was subsequently set aside by the Asstt. Commr. of Goods and Services Tax, Aurangabad, Urban Division vide Order No. VGN(30)70/DSCN-Arihant/17-18/19 Aurangabad dated 07.05.2018 with the following observation:

"On the basis of discussions in para 7 to 10 in the 'Discussions and Findings' part, I conclude that the notice is not a restaurant but a dealer/re-seller of ice-cream and there is no element of service involved in the activity of the notice."

In view of the above discussions we agree with the jurisdictional officer and hold that in the instant case the transaction is to be considered as a sale/supply of goods.

05. In view of the extensive deliberations as held hereinabove, we pass an order as follows :

ORDER

(Under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

NO.GST-ARA- 126/2018-19/B- 29 Mumbai, dt. 19/3/2019

For reasons as discussed in the body of the order, the questions are answered thus -

Question :- 1 Whether supply of ice-cream by the applicant from its retail outlets would be treated as supply of "goods" or supply of "service" or a "composite supply" and subject to GST accordingly?

Answer :- The supply of ice-cream by the applicant from its retail outlets would be treated as supply of "goods"

Question :- 2 Whether the supply, not being a composite supply, would be treated as supply of service in terms of entry 6(b) of Schedule 11 attached to the CGST Act, 2017 and leviable to CGST @ 2.5% in terms of Notification No. 11/2017 as amended by Notification No.46/2017-Central Tax (Rate) (serial no. (i) entry no. 7) of the notification?

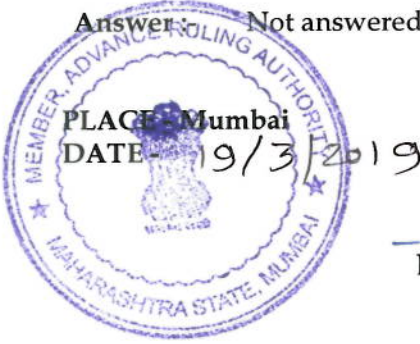
Answer :- Answered in the negative.

Question :- 3. In case the supply is held to be "composite supply", whether the taxability of the same should be treated as supply of service in terms of entry 6(b) of the Schedule II of the CGST act, 2017 or should be taxable on the basis of nature of principal supply in accordance with Section 8 of the Act?

Answer :- Not answered in view of answer to Question No. 1 above.

Question :- 4. In case the supply is held to be a supply of service in terms of entry 6(b) of Schedule II to the CGST Act, 2017, would it be mandatory for the applicant to collect and pay CGST @ 2.5% inspite of the fact that entry 7(i) of Notification No. 11/2017 as amended by Notification No.46/2017-Central Tax is a conditional entry?

Answer :- Not answered in view of answer to Question No. 1 above.



sd
B. TIMOTHY
(MEMBER)

sd
B. V. BORHADE
(MEMBER)

CERTIFIED TRUE COPY

Copy to:-

1. The applicant
2. The concerned Central / State officer
3. The Commissioner of State Tax, Maharashtra State, Mumbai
4. The Jurisdictional Commissioner of Central Tax. Churchgate Mumbai
5. Joint commissioner of State tax , Mahavikas for Website.

[Signature]
MEMBER
ADVANCE RULING AUTHORITY
MAHARASHTRA STATE, MUMBAI

Note :- An Appeal against this advance ruling order shall be made before The Maharashtra Appellate Authority for Advance Ruling for Goods and Services Tax, 15th floor, Air India building, Nariman Point, Mumbai - 400021.