TAMILNADU STATE APPELLATE AUTHORITY FOR ADVANCE RULING
(Constituted under Section 99 of Tamil Nadu Goods and Services Tax Act 2017)

A.R.Appeal No.05/2022 AAAR

Date: 05 .05.2023

BEFORE THE BENCH OF

Sh. Mandalika Srinivas, I.R.S., Principal Chief Commissioner of GST & Central Excise, Member, Appellate Authority for Advance Ruling, Tamil Nadu	Sh. Dheeraj Kumar, I.A.S., Principal Secretary/Commissioner of Commercial Taxes, Member, Appellate Authority for Advance Ruling, Tamil Nadu

Order-in-Appeal No. AAAR/ 02 /2023 (AR)

(Passed by Tamil Nadu State Appellate Authority for Advance Ruling under Section 101(1) of the Tamil Nadu Goods and Services Tax Act, 2017)

Preamble

1. In terms of Section 102 of the Central Goods & Services Tax Act 2017/Tamil Nadu Goods & Services Tax Act 2017("the Act", in Short), this Order may be amended by the Appellate authority so as to rectify any error apparent on the face of the record, if such error is noticed by the Appellate authority on its own accord, or is brought to its notice by the concerned officer, the jurisdictional officer or the applicant within a period of six months from the date of the Order. Provided that no rectification which has the effect of enhancing the tax liability or reducing the amount of admissible input tax credit shall be made, unless the appellant has been given an opportunity of being heard.

2. Under Section 103(1) of the Act, this Advance ruling pronounced by the Appellate Authority under Chapter XVII of the Act shall be binding only

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

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

3. Under Section 103 (2) of the Act, this advance ruling shall be binding unless the law, facts or circumstances supporting the said advance ruling have changed.

4. Under Section 104(1) of the Act, where the Appellate Authority finds that advance ruling pronounced by it under sub-section (1) of Section 101 has been obtained by the appellant by fraud or suppression of material facts or misrepresentation of facts, it may, by order, declare such ruling to be void ab-initio and thereupon all the provisions of this Act or the rules made thereunder shall apply to the appellant as if such advance ruling has never been made.

Name and address of the appellant	Kothari Sugars and Chemicals Limited, 115-117, Kothari Buildings, Mahathma Gandhi Road, Nungambakkam, Chennai, Tamil Nadu, 600 034.
GSTIN or User ID	33AABCK2495F1ZP
Advance Ruling Order against which appeal is filed	Order No.20 /AAR/2022 Dated: 31.05.2022 received by appellant on 28.06.2022

Date of filing appeal	26.07.2022
Represented by	Shri. Vikram Katriya, CA
Jurisdictional Authority-Centre	Chennai North Commissionerate
Jurisdictional Authority -State	Nungambakkam Assessment Circle
Whether payment of fees for filing appeal is discharged. If yes, the amount and challan details	Yes. Payment of Rs. 20000/- made vide Challan CIN IDIB22073300477179 dated 25.07.2022

At the outset, we would like to make it clear that the provisions of both the Central Goods and Service Tax Act and the Tamil Nadu Goods and Service Tax Act are in *pari materia* and have the same provisions in like matter and differ from each other only on few specific provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the Central Goods and Service Tax Act, 2017 would also mean a reference to the same provisions under the Tamil Nadu Goods and Service Tax Act, 2017.

The subject appeal was filed under Section 100 (1) of the Tamil Nadu Goods and Services Tax Act, 2017 / Central Goods and Services Tax Act, 2017 (hereinafter referred to 'the Act') by M/s Kothari Sugars and Chemicals Limited (hereinafter referred to as 'Appellant'). The Appellant is registered under the GST Act vide GSTIN 33AABCK2495F1ZP. The appeal was filed against the Order No.20/AAR/2022 dated 31.05.2022 passed by the Tamil Nadu State Authority for Advance ruling on the Application for Advance ruling filed by the Appellant.

2.1 The Appellant has stated to be engaged in the manufacture of sugar, molasses, denatured ethyl alcohol, and ethyl alcohol. They have stated that they have two manufacturing units located at Kattur and Sathamangalam, wherein around 300 workers have been employed. As per Section 46 of the Factories Act, 1948, where more than two hundred and fifty workers are ordinarily employed, a canteen have to be provided and maintained by the specified factory for the use of the workers. Accordingly, Appellant had set up canteen facility at both the units, for the benefit of its employees and workers. The Appellant had filed an application before the Hon'ble Authority for Advance Ruling, seeking clarification on the following questions:

> 'Whether recovery of nominal amount from the employees for making payment to the third-party service provider, providing food in canteen as mandated in the Factories Act, 1948, would attract tax under GST?'

3. The Original Authority had vide Order No. 20/AAR/2022 dated 31.05.2022 ruled as follows:

"Answered in the Affirmative for the reasons stated in Para 8"

""8.4 To sum up, in the case at hand, the applicant has established canteen facilities as mandated under Section 46 of the Factories Act, 1948 and supplies food at a nominal cost either directly or through third-party-vendor. The supply of food by the applicant is 'Supply of

Service' by the applicant to their employees as the same is not a part of the employment contract and the canteen facility is provided as mandated under Factories Act. The nominal cost, which is recovered from the salary as deferred payment is 'consideration' for the supply and GST is liable to be paid."

4. Aggrieved of the decision of AAR in the order no:20/AAR/2022 dt. 31.05.2022, M/s Kothari Sugars and Chemicals Limited preferred the subject appeal. The grounds of appeal, *inter alia*, were as follows:

- that perquisites forming part of employment contract were excluded from GST as per Circular No. 172/04/2022-GST; the employment appointment order shows the starting basic pay and it is also stated that "they will be eligible for only those benefits as applicable to others of the cadre";
- that under Section 17(2) of the Income Tax Act, 1961 provides an inclusive definition for the term "perquisites' wherein sub clause (viii) provides that the value of any other fringe benefit or amenity may be prescribed;
- that recovery of canteen cost from employees was a mere cost sharing arrangement between the employees and the Appellant as per Factories Act and does not amount to consideration; that the provision of canteen facility was not covered under the scope of supply; the provision of canteen facility was due to the mandate prescribed in the Factories Act, 1948;
- they furnished the following case laws in their support:
  (i) Bhimas hotels P Ltd [2017(3)GSTL 30 (A.P)]
  (ii) CCE V Rattan Melting & wire Industries [2008(231)ELT22(SC)]
  (iii) UOI Vs Arviva Ind (I) Ltd [2007 (209) ELT 5 (SC)]
  (iv) Jotun India P Ltd [2019-TIOL-312-AAR-GST]
  (v) Ranadey Micronutrients Vs CCE [1996(87)ELT 19 (SC)]
  (vi) Gujarat state Fertilizers & Chemicals ltd vs CCE [2016(45) STR 489 (SC)]
  (vii) Posco India Pune processing center private limited [2019 (21) G.S.T.L. 351 (A.A.R. - GST)].
  (viii) Glaxo smithkline pharmaceuticals ltd vs Commr. of ST Mumbai I [2014(360STR349(tri-Mum)]
  (ix) Ion trading india private limited [2020 (32) G.S.T.L. 608 (A.A.R.-GST-U.P.)]
  (x) Historic resort hotels Vs CCE Jaipur II [2018(9)GSTL 422]
  (xi) AAAR -Bharat Oman refineries ltd [2021-TIOL-36-AAAR-GST]
  (xii) AAR-Dakshina kannada Coop Milk Producers union ltd [2021 (55)GSTL (AAR-GST-KAR)]
  (xiii) AAR-Emcure Pharmaceuticals ltd [2022-TIOL-10-AAR-GST]
  (xiv) AAR-Dishman Carbogen amcis ltd [2022(62) GSTL 245(AAR-GST-Guj.)]
  (xv) AAAR- Amneal Pharmaceuticals pvt ltd [TS-569-AAAR(Guj)2021-GST]

Personal Hearing:

5. The Authorized Representative (AR) appeared for the personal hearing, along with Shri J.Janarthanan, AGM, Taxation, and reiterated the facts and grounds of appeal. They furnished additional submissions vide letter dated 24.08.2022 wherein the AR had submitted judgement copy of all the cases cited in the appeal memorandum. They have also filed additional submissions through e-mail dated 22-11-2022.

5.1 In response to the query, whether the catering service provider has been issuing any supply invoice directly to the employees of the company, AR stated that supplier of service was raising two separate monthly invoices in favour of the company/employer, but not to the employees of the company. Of the two invoices, one invoice was being issued to the extent of the value of the supply being recouped from the employees by the company/employer; and the other invoice to the extent of the balance amount which was borne by the company/employer.

5.2 Further, in response to the query whether the amount paid by the employees, although at subsidized rates, was/is being received by the vendor caterer or the employer, the AR submitted that it is received by the company/employer; but it is ultimately paid to the vendor caterer against the relevant invoice, received from the supplier of the service.

5.3 It was submitted that there is only a single service transaction in the said case and the aspect of recovery from employees is merely a passthrough activity and not a separate transaction. Hence the levy under GST should be applicable only on the element of service provided by the vendor caterer to the company.

5.4 In response to the query as to how the charges collected from the employees by the company towards canteen facility/food & beverages provided to the employees, would form part of salary/remuneration of the employees, the AR drew attention to various case laws and the rulings of AAR/AAAR of other states, cited in the additional submissions; and requested to adopt the ratio of the same; and decide the matter in their favour.

5.5 The AR/ Company's representative were offered three working days to submit further submissions, if any.

5.6 The AR has submitted further submissions as follows:

i. The appellant relied on ruling of the Gujarat Authority for Advance Ruling in the case of **M/S. ZYDUS LIFESCIENCES LTD. [2022-TIOL-118-AAR-GST]**, wherein it ruled in favor of the assesse on transport and canteen facilities extended by the assesse and the consequent recoveries made from them.

ii. Further, the Appellant also relied on the recent case of **HAZIRA LNG PVT LTD [FINAL ORDER No.A/11349/2022 DATED 02.11.2022]**, wherein it has been ruled that there would be no tax implications in case of mere cost sharing agreements.

iii. Accordingly, in the instant case where the Appellant recovers from the employees a portion of canteen charges on account cost sharing arrangement between the employees and the Appellant as per Factories Act and does not amount to consideration.

iv. Further, the Appellant further stated that that there are no two separate transactions and there is only one service transaction for provision of canteen services and hence the appellant / representative modified the record of PH by deleting the said para 4 of the record of PH. The above modification was made as per S.No.(viii) of the instruction provided in board Circular (Central Board of Indirect Taxes & Customs) Number F.No.390/MISC//2019-JC dated 27th April, 2020.

v. The AR prayed to consider the Appeal Memorandum already submitted and pass appropriate ruling and set aside the ruling of the AAR.

Discussion and Findings:

6. We have carefully considered all the material on record and the relevant provisions of Law. The Appellant is before this authority seeking to set aside/modify the ruling passed by the AAR and hold that recovery of nominal amount from the employees for making payment to the third-party service provider, providing food in canteen as mandated in the Factories Act, 1948 would not attract tax under GST.

7. The Appellant had set up a canteen facility at their two manufacturing units located at Kattur and Sathamangalam in Tamil Nadu, for the benefit of its employees and workers. The Appellant supplies food at a nominal cost, either directly or through third-party vendor. The ruling sought is, whether GST is liable to be paid on that part of the amount collected from their employees towards provision of food. It is pertinent to note that the subject matter is not with regard to that part of the cost of food/beverages borne by the employer (Appellant). The subject Appeal is only with regard to the levy of GST on the subsidized amount charged by Appellant / employer from their employees for the supply of food/beverages.

7.1 Thus, fundamentally, the subject issue pertains to the transaction between the Appellant/ employer and employees. i.e., with respect to the food/beverages being supplied by Appellant/ employer to employees for a consideration, although at subsidized rates; but not with regard to the transaction between the caterer (third party vendor/service supplier) and the Appellant/employer. This aspect is also evidenced by the fact that the employer pays the total consideration for the supply of food/beverages to the caterer/service supplier; and the Appellant/employer in turn supplies the above said food/beverages to their employees.

7.2 It is an undisputed fact that the money consideration charged, although at subsidized prices, for the supplying of food/beverages from their employees is being collected by the Appellant/employer but not by the caterer/third party service supplier.

7.3 Therefore, it is evident on record that there are two distinct and totally different transactions in the gamut of supply of food/beverages to the employees of the Appellant. They are:-

i) Supply of food/beverage by the caterer/service supplier to employer; and
ii) Supply of food/beverages by the Appellant/employer to their employees.

7.4 In respect of the first transaction, the caterer/ third party service supplier has been supplying food/beverage to the Appellant/employer for which the caterer/third party service supplier receives a consideration from the Appellant; on which admittedly the Appellant has been paying GST at the applicable rates.

7.5 Similarly, in the second transaction the Appellant/employer is supplying the service of providing food/beverages to their employees for which the Appellant is receiving consideration, although at the subsidized rate, from their employees.

7.6 It is not the case of the Appellant that they merely provide a place /shelter in their factory premises to facilitate the caterer/third party service supplier to provide food/beverages by the Appellant/employer to their employees; nor that the caterer/third party service supplier has been supplying the food/beverages to the employees of the Appellant for a consideration being charged directly by the caterer/third party service supplier.

7.7 The main contention of the Appellant was that the perquisites forming part of employment contract were excluded from GST as per the Circular no. 172/04/2022-GST dated 06.07.2022 of CBIC. The relevant extract of the said circular is reproduced hereunder for ease of reference:

S.No.	*Issue*	*Clarification*
5.	*Whether various perquisites provided by the employer to its employees in terms of contractual agreement entered into between the employer and the employee are liable for GST?*	*1. Schedule III to the CGST Act provides that "services by employee to the employer in the course of or in relation to his employment" will not be considered as supply of goods or services and hence GST is not applicable on services rendered by employee to employer provided they are in the course of or in relation to employment.* *2. Any perquisites provided by the employer to its employees in terms of contractual agreement entered into between the employer and the employee are in lieu of the services provided by employee to the employer in relation to his employment. It follows therefrom that perquisites provided by the employer to the employee in terms of contractual agreement entered into between the employer and the employee, will not be subjected to GST when the same are provided in terms of the contract between the employer and employee.*

7.8 As per the contents of the employment appointment orders issued to their employees, it is evident that, *inter alia*, there exists a clause stating that "*employees will be eligible for only those benefits as applicable to others of the same cadre*'. This is more of a generic clause featured in the appointment orders of most companies and by no stretch of imagination such expression among the terms of the employment can be construed to mean that the subsidized supply of the food/beverages was a contractual agreement entered into between the Appellant and their employees in both the factories.

7.9 In order to claim the benefit of non-levy of GST in terms of the above circular, the relevant Perquisites should have been expressly mentioned in the terms of agreement between the employer/Appellant and their employees. Even assuming that the terms of the agreement with the employees in this case cover the subject facility being offered by the Appellant, the benefit of the non-levy of GST could be extended only to the extent of the consideration being borne by the Appellant out of the total cost for supply of the food/Beverages, but not to the extent of the consideration being collected at the subsidized rates, by the Appellant from their employees.

7.10 The Appellant has relied upon the above mentioned Circular dated: 06.07.2022 and the ratio of 6 (six) decisions to strengthen their claim that the said Circulars were binding on the Department. But, the fact of the matter is that, since the Appellant had no explicit contractual agreement with regard to the canteen facility, the same cannot be equated to 'perquisites' mentioned in the said Circular. Hence, even as per the Circular cited by the Appellant, the canteen facility goes out of the purview of 'perquisites' as the canteen facility was not provided in terms of contract between the employer and employee.

7.11 Another contention of the Appellant is that the consideration of a part of the cost of food/Beverages being received by them from their employees is a mere cost sharing arrangement. They had further contented that provision of canteen facility was as mandated by Section 46 of Factories Act, 1948. The relevant portions of Section 46 of Factories Act, 1948 are reproduced hereunder for ease of reference:

"46. Canteens. — (1) The State Government may make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers.]

(2) Without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the date by which such canteen shall be provided;

(b) the standards in respect of construction, accommodation, furniture and other equipment of the canteen;

(c) the foodstuffs to be served therein and the charges which may be made therefor;

(d) the constitution of a managing committee for the canteen and representation of the workers in the management of the canteen;

[(dd) the items of expenditure in the running of the canteen which are not to be taken into account in fixing the cost of foodstuffs and which shall be borne by the employer;]

(e) the delegation to the Chief Inspector, subject to such conditions as may be prescribed, of the power to make rules under clause (c)."

7.12 From the above-mentioned Section 46 of Factories Act, 1948 although mandates to provide a canteen for use of workers in a factory, wherein more than two hundred and fifty workers were ordinarily employed, it does not provide for any provision for exemption from levy of any taxes. In fact, Tax in this case is leviable in terms of the provisions of the GST law, on the consideration (on the actuals, at subsidized rates) for supply of the food/beverages; and is not covered by any exemption, at all. Further, the said consideration for supply of food/beverages, although at the subsidized rates, is also do not qualify as the perquisite to extend the benefit of non-levy of GST in terms of the above cited Circular dated: 06.07.2022, as already narrated above. The appellant relied on the advance ruling given in the case of HAZIRA LNG PVT LTD [FINAL ORDER No.A/11349/2022 DATED 02.11.2022], wherein it has been ruled that there would be no tax implications in case of mere cost sharing agreements. The relevant portion of the judgment reads as follows:

"Cost sharing undertaken between associated enterprises on common function/service received from a third party service provider in respect of which each enterprise had to bear the allocated cost. Where the activities under taken under the cost sharing agreement do not amount to provision of Service in terms of the decision of Hon'ble Apex Court in case of Gujarat State Fertilizers & Chemicals Ltd.(supra), the demand of Service Tax on the activities under taken under the cost sharing agreement cannot be sustained. Held that cost sharing

scenario need not result in service where service is commonly received from a third party supplier."

In this case, the appellants does not enter into an agreement with employees for providing common service both to the appellants and employees by a third party caterer. But, here the third party caterer provides service to the appellant who in turn provides such service within the factory premises to the employees at the reduced subsidized price and thus, there is no question of sharing of cost between the appellant and employees. Further, the advance ruling would be applicable to the applicant who filed advance ruling application and factual matrix of each would differ from case to case and hence the ruling would not be applicable to this appellant. One more argument that this appellant made at the time of personal hearing is that, there is only one transactions from the third party caterers and the aspect of recovery from employees is merely a pass through and not a separate transactions. In that case, the appellant would not be a supplier of service and hence the appellant ought to have not applied for advance ruling under section 95(a) of the CGST Act,2017. Having applied for advance ruling, the appellants have come forward to seek advance ruling on the supply as a separate transactions from appellant to the employees.

7.13 The Appellant had also cited the judgement of the Hon'ble Supreme Court in the case of M/s. Gujarat State Fertilizers & Chemicals Ltd V CCE [2016 (45) STR 489(S.C)], regarding sharing of expenses. In the said case, it was about a joint venture between two PSUs Viz: Gujarat State Fertilizers & Chemicals Ltd (GSFCL) and Gujarat Alkalis and Chemicals Ltd (GACL) which together received certain services in common and the cost of services was shared by them; and the Apex court held that the amount paid by GACL to GSFCL towards their share of expenditure for the common services was only for reimbursement of the expenditure and there was no service received by GACL; hence service tax was not leviable. But, in the instant case the levy is with regard to the consideration received by the Appellant/employer from their employees towards the supply of the food/beverages. Thus, the facts of the said judgement in the case of GSFCL are totally different; and hence the ratio of the said case cannot be applied to this case.

7.14 Further, the Appellant had contended that the provision of canteen facility was not covered by the scope of supply. AAR had deliberated on this issue and had decided that supply of food is service. Also, the Appellant admits that no invoice was being raised by the caterer/third party service provider on individual employees towards the supply of food/beverage. As admitted by the Appellant, the third-party catering vendor, maintaining the canteen has been issuing two consolidated invoices to the Appellant every month, for the supply of food/Beverages by the said caterer/third party service provider to the Appellant. Although, the caterer/third party service provider has been raising one invoice to the extent of the value of the supply being recouped from the employees by the company; and the other invoice to the extent of the balance amount which was being borne by the Appellant, it is obviously at the instance of the Appellant and is for the ease of accounting the expenditure and the income at the subsidized rates; but has no relevance for the levy of GST on that part of the consideration, although at subsidized rates, being charged by the Appellant/employer from their employees for supply of the food/beverages.

7.15 The Schedule II to the CGST/SGST Act, 2017 describes the activities to be treated as supply of goods or supply of services. As per clause 6 of the Schedule, the following composite supply is declared as supply of service:

"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."

7.16 In the instant case, the Appellant had established the canteen in their premises and has been bearing a part of the cost for providing the food/beverages to their employees and a part of the cost is being collected from employees, as fixed by the Managing Committee of the Appellant. The supply of the food/beverages, although at subsidized rates, by the Appellant/employer to their employees is certainly an activity amounting to supply of service and attracts levy of GST on that part of the consideration being charged for such supply.

7.17 The Appellant had cited a judgement of Hon'ble High Court of Andhra Pradesh in the case of M/s Bhimas Hotels Private limited Vs Union Of India [2017(3)GSTL 30(AP)]. But, the case pertains to erstwhile Service Tax law, when Service tax and value added tax were two different laws. In fact, the Hon'ble High Court had, *inter alia*, held that food provided to the employees was taxed under VAT and same could not be subjected to Service Tax. The instant case pertains to GST regime and there is no issue of double taxation as was the case in the judgement cited supra. Hence, the facts of the case were different and the ratio of this judgement cannot be applied to the subject case.

7.18 The Appellant had also cited some AAR/AAAR rulings in their support. But, these citations are not binding; although have persuasive value. In light of the detailed discussion *supra*, we do not accept the ratio of various AAR/AAAR rulings cited by the Appellant, in their support.

8. In view of the foregoing facts, circumstances and provisions of the GST law, we hold that there is no case to deviate from the decision of the Authority for Advance Ruling of Tamil Nadu, vide AAR No.20/AAR/2022 dated 31.05.2022, on which the present appeal was filed.

9. Accordingly, we pass the following order:

RULING

We uphold the decision of the Authority for Advance Ruling of Tamil Nadu, vide AAR No.20/AAR/2022 dated 31.05.2022 and reject the subject appeal.

(DHEERAJ KUMAR)
Principal Secretary/
Commissioner of Commercial Tax
Tamil Nadu /Member AAAR

(MANDALIKA SRINIVAS)
Pr. Chief Commissioner of GST
& Central Excise, Chennai Zone/
Member AAAR

APPELLATE AUTHORITY FOR ADVANCE RULING

05 MAY 2023

GOODS AND SERVICE TAX
Chennai-5, Tamilnadu

To

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By RPAD

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