THE MAHARASHTRA APPELLATE AUTHORITY FOR ADVANCE RULING FOR GOODS AND SERVICES TAX

(constituted under Section 99 of the Maharashtra Goods and Services Tax Act, 2017)

ORDER NO. MAH/AAAR/SS-RJ/05/2019-20 **Date- 09.09.2019**

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri Rajiv Jalota , MEMBER

Name of the Appellant	Asstt. Commr. of SGST(D-819), Pune Division
Details of appeal	Appeal No. MAH/GST-AAAR-05/2019-20 dated 11.06.2019 against Advance Ruling No. GST-ARA-126/2018-19/B-29 dated 19.03.2019
Legal Name of the Respondent	Arihant Enterprises
GSTIN Number/User Id	27AAUFA0033D1ZT
Registered Address/Address provided while obtaining User Id/GSTIN	Flat No. 2, Ajit Building, Mahavir Park Society, Aundh, Pune Maharashtra-411007

PROCEEDINGS

(Under Section 101 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

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 provisions under the MGST Act.

The present appeal has been filed under Section 100 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 the Asstt. Commr. of SGST(D-819), Pune Division (herein after referred to as the "Appellant" or "the Department" interchangeably) against the Advance Ruling No. GST-ARA-126/2018-19/B-29 dated 19.03.2019.

Brief Facts of the case

A. M/s Arihant Enterprises is a partnership firm with GSTIN number 27AAUFA0033D1ZT and registered address at Flat No. 2, Ajit Building, Mahavir Park Society, Aundh, Pune Maharashtra-411007.They are inter-alia engaged in the business of reselling of Ice Cream from its Ice cream parlour situated in Aurangabad. They are supplied with the said goods from its sole manufacturer, M/s Kamaths Ourtimes Icecreams Pvt Ltd ("The Franchisor"). They exclusively deal in the Naturals brand Ice cream manufactured by "the franchisor". M/s Arihant Enterprises had made an application GST-ARA, Application No. 126 dated 25.02.2019 for advance ruling before the Maharashtra Authority for Advance Ruling, GST Bhavan, 8th floor, H-Wing, Mazgaon Mumbai-400010 on the issue of whether the supply of Ice Cream made by it from its retail outlet would be treated as supply of "goods" or supply of "service" or a " composite supply". In this context, after due consideration of various submissions made before it, The Hon'ble Maharashtra Authority For Advance Ruling issued an order of Advance Ruling bearing GST-ARA-126/2018-19/B-29 dated 19.03.2019, wherein, it is inter-alia held that the supply of ice cream by the applicant from its retail outlets would be treated as supply of "goods". Aggrieved by the said Order of the AAR, the present Appeal is being filed under Section 100 of the Act with the Appellate Authority for Advance Ruling seeking to quash the Advance Ruling Order ibid holding it void *ab-initio* in terms of Section 104 of the Act.

Grounds of Appeal

1. It has been brought to the notice of the Appellant by the Directorate General of Goods and Service Tax Intelligence (DGGI), Pune Zonal Unit, Pune vide its letter F.No. DGGI/PZU/Gr.'C'/AAR-Arihant/40/2019 dated 14th& 17thMay,2019 that the Applicant appears to have suppressed certain vital facts in the application made before the AAR about the investigations that had been initiated by the DGGI against M/s Kamaths Ourtimes Ice Creams Pvt Ltd or KOTI (the franchisor) and its various franchisees who deals in Naturals brand Ice Cream under the terms and conditions of an identical franchise agreement entered with its each franchisees and therefore , the Advance Ruling thus obtained by keeping the AAR in dark appears to be not a legal and correct

order and therefore it should be appealed against as the subject order of the AAR appears to be invalid ab initio.

2. It is stated by the DGGI that the Directorate General of Goods and Service Tax Intelligence (DGGI) is the apex intelligence organization working under the Central Board of Indirect Taxes & Customs, Department of Revenue, and Ministry of Finance is entrusted with detection and investigation of cases of Evasion of GST & it has jurisdiction all over India, that acting on a specific intelligence, the investigations of DGGI was initiated on 05.02.2019 by way of a simultaneous search operation at the premises of M/s KOTI and some of its franchisees located in Pune i.e. much before the date of application of the Applicant made on 25.02.2019 before the AAR, that the investigations were inter-alia involving the very same issue of classification of activities of franchisees for subjecting the same to the levy of GST, that during the course of search certain documents were seized from all the premises and the same are expected to be useful to establish GST evasion cases against each franchisee i.e. Natural Ice cream outlets, that one of the key persons from each premise was examined under Section 70 of the CGST Act, 2017 on the spot and his statement was recorded, that the investigations carried out so far appears to reveal that franchisees of M/s KOTI have evaded GST amounting more than Rs 40.00 Crs on two aspects (a) by way of misclassifying their activity as supply of goods under HSN 2105 instead of its correct classification as supply of service under SAC 9963 (b) Suppression of supplies made and GST evaded thereon, that accordingly, investigations to detect cases of evasion of GST by franchisees of M/s KOTI located all over India, including M/s Arihant Enterprises, Aurangabad having its registered office in Pune were in progress covering one by one.

3. That in the meantime, based on an application dated 25.02.2019 for Advance Ruling, made by M/s Arihant Enterprises, the Hon'ble Maharashtra Authority For Advance Ruling issued an order of Advance Ruling bearing GST-ARA-126/2018-19/B-29 dated 19.03.2019, wherein, it is inter-alia held that the supply of ice cream by the applicant from its retail outlets would be treated as supply of "goods". That since, the Directorate General of GST Intelligence, Pune Zonal Unit, Pune was not a party to the application filed before the Authority for Advance Ruling, it had no knowledge of these

proceedings and the order of advance ruling was also not endorsed to it. Thus, DGGI came to know about the subject Order of Advance Ruling only by routine searching on Maharashtra Authority for Advance Ruling website. Therefore, under these facts and circumstances, the DGGI requested the Appellant to file an appropriate Appeal against the subject Order of the AAR in the interest of justice so as to protect the interests of the revenue.

4. It appears that Under the terms and conditions of the franchise agreement and in the entire scheme of KOTI, the franchisor had the upper hand and final say in every aspects of business and the applicant had no reason to approach the Authority for Advance Ruling on the issue of classification of supply especially when there was not any dispute, which had cropped up either from the concerned State Tax Officer in this regard. It appears that M/s KOTI was in fact the brain behind the application made before the ARA, as investigations were already initiated against all the 11 number of franchisee outlets located in Mumbai, Delhi, Kolkata and Gurugram owned by M/s Kamaths Natural Retail Pvt Ltd which is a company under the same management and hence its Directors were interested in getting an advance ruling in their favour so that somehow they can escape from the clutches of the investigations of the DGGI.

5. During the course of ongoing investigations against franchisees of Naturals Ice cream, one Mr Virendra Nandkumar Mutha, one of the partners of M/s Ashirwad Enterprises, which is also a franchisee of KOTI, was summoned and his statement dated 10.05.2019 was recorded under Section 70 of the CGST Act,2017. Mr Virendra Mutha is admittedly a partner in the Applicant's firm M/s Arihant Enterprises as well. In fact, the residential address of Mr Mutha at Aundh, Pune is admittedly the registered office of M/s Arihant Enterprises as declared in their GST registration documents in the said statement Mr Mutha, in response to queries raised, it is inter-alia categorically confirmed by him that he was aware of the ongoing DGGI investigations at KOTI and its franchisees and with due oral discussions with Directors of KOTI, it was taken decision to file an application before the ARA through a common consultant Mr Chirag Mehta but the relevant details of these investigations initiated by DGGI was **not** incorporated in their application before the ARA. The relevant para of the statement is reproduced herein under for ready reference.

A para from Statement dated 10.05.2019 of Mr Virendra Mehta;

"On being asked about the application dated 25.02.2019 made by M/s Arihant Enterprises before Advance Ruling Authority, I undertake to produce the same by 13.05.2019. In the light of franchisee agreement with KOTI and with due consideration to its terms and conditions, classification of the product and taxation thereon is decided by KOTI, the franchisor, by way of supplying the spectrum software for billing to your firm, which is mandatorily to be used by each franchisee, under these circumstances on being asked as to how M/s Arihant Enterprises had filed an application for advance ruling on its own, I state that with due oral discussion with directors of KOTI , it was taken decision to file an application before Advance Ruling Authority through a common legal consultant, Mr.Chirag Mehta for taking an advance ruling as to whether serving of ice cream at parlour end is a supply of service classifiable under SAC 9963 or resale of goods (ice cream) under HSN 2105, since this issue of classification was already taken up by DGGSTI, Pune Zonal Unit by initiating inquiry against KOTI and some of its franchisees during February 2019. On being specifically asked I state that involvement of KOTI and the relevant facts of investigations initiated by the DGGSTI and details thereof was not incorporated in our application and hence the Advance Ruling authority was not aware of the same"

6. Under the terms and conditions of the franchise agreement with KOTI, (a representative sample franchise agreement with M/s Ashirwad Enterprises, Pune is enclosed for ready reference) the applicant is under obligation to use the billing software supplied by KOTI which contained inter alia classification of 'supply' made by the applicant and tax liability thereon to be discharged mandatorily by the applicant and the applicant cannot change this practice without the consent /approval of the franchiser.(a statement dated 26.04.2019 recorded under Section 70 of the CGST Act,2017, of Shri Imran Kachhi a representative of M/s Creative IT India Pvt Ltd , Mumbai who had supplied Spectrum software to KOTI and its all franchisees is enclosed for ready reference)Therefore, it appears that the applicant -M/s Arihant Enterprises is hand in glove with the franchisor -M/s KOTI . It is further submitted that, the taxpayers are required to declare before Authority of Advance Ruling, in para 17 of form GST ARA-01

that whether question raised in the application is already pending or decided in any proceedings in applicant's case under any provisions of the Act. The fact that the case has been booked against the taxpayer on this issue on 05.02.2019 i.e. well before making this application, which is under investigation, needs to be co-related with the declaration submitted by the taxpayer in form GST ARA-01. Whereas, the application filed by the applicant is not maintainable as per the provisions of Section 98 of the CGST Act, as proceedings are already initiated against them before the filing of their present application. Had it been known, the Authority for advance Ruling would have come to the conclusion that the applicant's application is liable for rejection as per proviso to Section 98(2) of the CGST Act and accordingly, would have rejected application being non-maintainable. It therefore appears that the present Advance Ruling has been obtained by way of suppressing the material facts from the Advance Ruling Authority.

7. It is also submitted that some of the major competitors in the field such as ice cream brands under trade names "Gelato", "Baskin Robbins", "Cafe Chokolade" etc have rightly classified their activity of serving of Ice Cream at parlour ends as 'supply of services' under HSN Code 996331 of the GST tariff of India and they have paid CGST@2.5% and SGST@2.5% or IGST @5% as the case may be, w.e.f. 15.11.2017 by following the amending Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017.

An explanation to Notification No. 46/2017-Central Tax (Rate) dated 14.11.2017 reads as under:

"For the removal of doubt, it is hereby clarified 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 restaurant, eating joints ***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, campuses 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 shall attract Central Tax @2.5% without any input tax credit under item (i) above and shall not be levied at the rate as specified under this entry".

8. The view of the department is that as per Notification 11/2017 Central Tax Rate dated 28.06.2017 as amended by Notification No.46/2017-Central Tax (Rate) dated 14.11.2017 supply by way of or as part of service or in any other manner whatsoever of goods, being food or any other article for human consumption shall attract Central Tax @ 2.5% without any Input Tax Credit. The view of the department is also supported by the fact that franchisees have put up the ice cream parlours as per approved design of franchisor and as approved and supervised by their architect with a view to attract customers by providing comfortable sitting, quality food. This is also to ensure unique and uniform consumer experience. They also cooked foods as ordered by customers in single scoop, double scoop in a cup or fresh waffle cone manufactured at the outlet, serving in the form of ice cream shakes' prepared from ice cream received or even ice cream is served with fruits topping etc. They also provide ice cream in carry home packs or even deliver through online aggregators such as Swiggy, Uber eats, Zomato etc. The unique franchise agreement has no provision to recover any franchise fees from franchisees, agreement is conditional and is meant to exercise full control over franchisees in various ways i.e. Franchisees cannot sell any other patent or proprietary goods from their outlets. Non observance of conditions would result in cancellation of the franchise. Thus, franchisees are the mere arms of the franchisor and in the facts and circumstances they supply services to franchisor and get their service charges in the form of margin on sale proceeds of ice cream as fixed by the franchisor. Thus, the franchisor reaches out to the actual customers through franchisees and ensure successful advertisement and sales promotion/marketing of Natural ice cream effected thereby. Thus, franchisees including M/s Arihant Enterprises have charged and recovered money in the name of GST @ 18 % instead of 5% without ITC benefits from their customers. Thus, it is a case of recovery of tax in excess from the customers but not being deposited in to government account which is not legal and is liable to be recovered

9. In view of above legal position, it appears that the activity of ice cream parlours of the franchisees of M/s KOTI are covered under the explanation to the said notification

which categorically classify the same as service under SAC 9963 and shall attract Central Tax @ 2.5% without any Input Tax Credit. Accordingly, the subject Order of Advance Ruling appears to be not just and proper as it can't sustain on merits.

10. As per Longman Dictionary -***what is ice cream parlour***: 'a restaurant that only sells ice cream'.

As per Wikipedia- ***Ice cream parlours*** are restaurants that sell ***ice cream.***

11. The ratio of the Advance Ruling No. KAR ADRG 21/2018 dated 21st August, 2018 given in the case of M/s Coffee Day Global Limited, 23/2, 6th Floor, Vittal Mallya Road, Bangalore-560001 appears worth consideration in the facts and circumstances of the subject case.

12. The ratio of Advance Ruling by Authority of Advance Ruling under GST Madhya Pradesh in the case of JABALPUR ENTERTAINMENT COMPLEXES P. LTD also appears worth consideration in the facts and circumstances of the subject case. Its Para 7.3 is reproduced under for ready reference:

*"**7.3** The first question reads, "Whether GST @ 5% can be charged on food, soft drinks and snacks sold in the Snack Bar & Food Court in terms of Notification No. 46/2017-Central Tax (Rate)?". On a careful consideration of the legal position under the GST law, we find that the Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017 further amended by Notification No. 46/2017-Central Tax (Rate) vide entry at Serial Number 7 and corresponding notifications issued under MPGST Act, 2017, squarely covers the services provided by the Applicant at item No. (i) which reads : '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 at any unit of accommodation of seven thousand five hundred Rupees and above per unit per day or equivalent.' and in respect of such services classifiable under SAC 9963, the rate of CGST and MPGST has been fixed @ 2.5% each subject to condition that no input tax charged on goods and services used in supplying the service has not been taken. As we gather from the submissions of the Applicant, they are not providing any accommodation facility for lodging and boarding and they are also not availing ITC of tax paid on goods & services used/utilized for providing services from the said Snack Bar. Further, on a different point of argument, we would also like to consider whether the impugned service would fall under the category of Outdoor Catering. The term 'Outdoor Catering' was defined under Section 65(76)(a) of the erstwhile Finance Act, 1994 as "Outdoor caterer means a caterer engaged in providing service in connection with catering at place other than his own but including a place provided by way of tenancy or otherwise by the person receiving such service". On considering the common parlance meaning of 'Outdoor Catering' and its above definition for Service Tax, we come to the conclusion that the supply of food, soft drinks and snacks sold in the Food Court or Snack Bar of the Applicant cannot by any stretch of imagination, be treated as a part of outdoor catering. In view of the facts and circumstances, we are of the view that the services provided by the Applicant in Snack Bar would be classifiable under SAC 9963 and chargeable to GST @ 5% (CGST @ 2.5% + SGST @ 2.5%), provided they fulfil the conditions laid down under Notification No. 46/2017-Central Tax (Rate) and corresponding notifications issued under MGST Act, 2017."

13. The subject case is not simply an act of resale of ice cream purchased from KOTI. The transactions between KOTI and M/s Arihant Enterprises are governed by the franchise agreement agreed between them. No franchise fees is charged separately. No sales promotion expenses, advertisement expenses, infra structure and business support etc provided to KOTI are reimbursed separately to Arihant Enterprises. Storage expenses, serving expenses etc are not reimbursed separately by KOTI. But all the activities of

Arihant Enterprises including billing, classification of goods/services, taxation etc are under strict watch, control and guidance of KOTI. To cover all these aspects, KOTI offers more than 90% margin over and above the ex-factory cost price of ice cream supplied to M/s Arihant Enterprises, as can be seen from the facts demonstrated below;

Naturals ice cream is supplied in **Bulk packaging of 1.50 kg** from KOTI:

Ice cream price at KOTI-Rs. 360/- per kg

There is a discount of 6% given and Transportation cost from Mumbai-Pune-Rs.6/-per kg which KOTI has included in Taxable value

Thus, Taxable value at factory end-**Rs.344.4per Kg** i.e. (360-21.6+6=344.4/-)

At franchisee ice cream parlour's end, sale value as fixed by the franchisor-Rs.65/-per scoop of 80gm inclusive of GST @18% i.e. its taxable value is Rs.55.08/-(65/118*100)

12 scoops per kg of 80 gm each is taken (as per one of the conditions of franchise agreement) then **taxable value per kg comes to 660.88/-** i.e. (12*55.08=660.88/-)

Therefore, gross margin offered to franchisees per kg is 660.88(-) 344.4/- =**317** or **92%** of cost price at KOTI.

It is evident from the franchise agreement that the franchisor had not collected any franchise fees from the applicant franchisee which appears to reveal that it was not limited to trademark, but inclusive of bunch of services.

14. The term "Franchise" is defined under Finance Act,1994 vide Section 65(47), it reads as follows:

"[(47) "franchise" means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved;..."

Thus, by definition, the franchise agreement grants only a representational right and not an exclusive right to sell/manufacture goods. Further, the provisions of the franchise agreements are only to the effect of giving the franchisee the non-exclusive right to use.

15. It therefore appears that the transaction between franchisor and applicant was actually not a real sale transaction but it is a transfer of Ice cream from factory of the franchisor to the retail ice cream parlours under the KOTI scheme of franchise agreement so as to sell/serve finally to unrelated buyers on behalf of KOTI. It is therefore pertinent to note that the various supply services offered by the franchisees to the franchisor and various fees payable by the franchisor to franchisee applicant thereon is adjusted along with the franchise fees not collected by the franchisor but hidden under the scheme of things, in the final sale price of Ice cream so fixed by the franchisor. The entire activities of franchisee applicant are therefore to be considered as supply of service. It therefore follows that the applicant's contention that its activity is merely a resale of Ice Cream / supply of goods and not a supply of service is incorrect and not acceptable and accordingly the subject order of ARA upholding the views of the applicant is liable to be rejected as it is not tenable.

16. The Appellant places reliance in this context on the observations made by the Honourable High Court of Delhi in the case of MC DONALDS INDIA PVT. LTD. Versus COMMR. OF TRADE & TAXES, NEW DELHI [217(5) G.S.T.L 120 DEL] with reference to the essence of franchise agreement is relevant in the facts and circumstances of the case and the relevant abstract reads as under;

"Sale - Composite contract - Franchise agreement for non-exclusive transfer of composite system of services - Not limited to trademark, but inclusive of bunch of services - Cannot be treated as goods and be subject to Value Added Tax (VAT) - Article 366(29A) of Constitution of India - Section 23(6) of Delhi Sales Tax Act, 1975 - Section 9 of Delhi Sales Tax on Right to Use Goods Act, 2002. [para 35]

Franchise - Definition of - Franchise agreement grants only a representational right and not an exclusive right to sell/manufacture goods - Provisions of franchise agreements are only to the effect of giving franchisee non-exclusive right to use any name, mark or other intellectual property right granted or to be granted therein, etc. - Section 65(47) of Finance Act, 1994. [para 38]"

17. As regards the delay in filing of the instant appeal, the Appellant filed miscellaneous application for the condonation of delay, wherein they submitted as under:

(i) that this condonation for delay application is before this Hon'ble Maharashtra Appellate Authority for Advance Ruling For Goods and Service Tax against the impugned Order No. GST-ARA-126/2018-19/B-29 dated 19.03.2019 passed by the Ld. Maharashtra Authority for Advance Ruling **received on 16.04.2019** and with an appeal for the restoration and recall of the above-mentioned appeal;

(ii) that the crucial facts of this case were brought to the notice of the Appellant by the Dy. Director, DGGI, Pune Zonal Unit vide letter dated 14/05/2019, andit took considerable amount of time to come to conclude that an Appeal is required to be filed by the Appellant. Also, due to the nuances to the newly rolled out GST law, there has been this delay in filing of the present appeal.

(iii) that based upon the totality of the circumstances mentioned above this Hon'ble Maharashtra Appellate Authority for Advance Ruling For Goods and Service Tax, Air India Building, Nariman Point, Mumbai-400 021 may be pleased to consider the prayer of the applicant in granting the condonation for delay of only 25 days in filing before this Hon'ble Maharashtra Appellate Authority for Advance Ruling For Goods and Service Tax. Air India Building, Nariman Point, Mumbai-400 021 for justice and equity.

(iv) that the facts and circumstances elucidated in the present appeal involve the question of "substantial justice", where gross delay of 25 days only, deserves to be condoned in the overall interest of justice. On the other hand, if condoning the delay being denied it would seriously undermine the cause of justice, resulting into miscarriage of justice for the appellant.

18. Thus, in view of the above grounds of appeal and the grounds mentioned in the application for the condonation of the delay in filing of the appeal under consideration, it was prayed by the Appellant:

(i) that the delay in filing of appeal may be condoned;

(ii) that the appeal may be allowed and the order of advance ruling Order No.GST-ARA-126/2018-19/B-29dated 19.03.2019 received by this office on 16.04.2019 may be set aside;

(iii) Any other order as deemed fit.

Respondent's submissions

19. The Respondent submitted that the present appeal filed by the Department is not maintainable, void and bad in law. Accordingly, they stated and submitted as under:

20. The Respondent is a partnership firm duly incorporated under the provisions of Indian Partnership Act, 1932 and have registered office at Flat No. 2, Ajit Building, Mahavir Park, Aundh, Pune -411007.

21. The respondent is, inter alia, engaged in the business of reselling Ice-creams in wholesale as well as retail sale packages. Accordingly, the respondent is dulyregistered under the provisions of Central Goods and Service Tax Act, 2017, bearing GSTIN 27AAUFA0033DIZT.

22. The respondent purchases the said goods from its sole manufacturer, M/s.Kamaths Ourtimes Ice-creams Private Limited ["KOTI" / "The franchisor"]. The respondent exclusively deals in the ice-cream manufactured by the franchisor. The respondent 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. These facts are not in dispute. In fact, the same have been admitted by the appellant in their appeal memo itself. The relevant extract from the "brief facts of the case" reads thus:

"They inter alia engaged in the business of reselling of Ice cream from its ice cream parlour situated at Aurangabad. They are supplied with the said goods from its sole manufacturer, M/S Kamaths Ourtimes Icecreams Pvt Limited ("The Franchisor")"

23. The Respondent made the supplies 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.

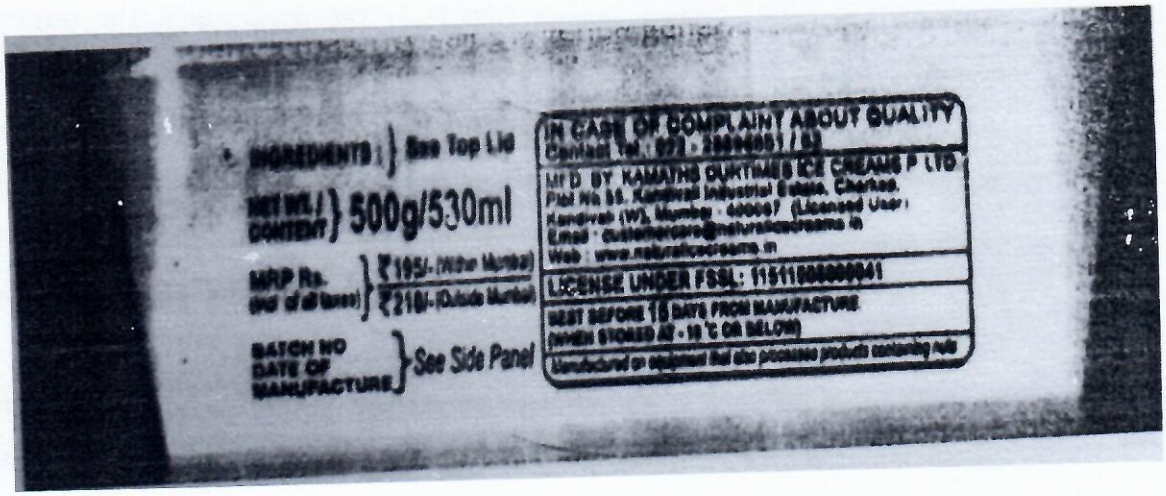
24. The Respondent has also enclosed copy of the Tax Audit report for the year 2017-18 (Assessment Year 2018-19) issued by a Chartered Accountant as required under section 44AB of the Income Tax Act, 1961, wherein they exhibited that the nature of

business in the Tax Audit report is stated as "retail sale of Food, beverages and Tobacco inspecialized stores" under code 09021 under the broad heading of Wholesale and Retail Trade.

25. In the subsequent paragraphs, each of the above revenue streams have been described in detail.

25.1 Sale of ice-creams in retail packs:

The respondent's majority sales revenue generates from this mode of selling. 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. A pictorial representation of the pack is reproduced here under:



25.2 Sale of ice-cream by way-of-scoops:

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 respondent 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 flavour 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 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 respondent as well as other franchisee owners of the franchisor.

26. In order to bring the clarity in the transaction, it is pertinent for us to explain the entire chain of events that takes place in the subject transaction:

(i) The respondent 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. 01/2017 -CT (Rate), dated 28.06.2017, as amended.

(ii) 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.

(iii) In order to keep the quality of ice-cream intact, the respondent is supposed to maintain the temperature of the refrigerator at certain degree. Accordingly, the ice-cream outlets of the respondent are installed with the Air Conditioners. This is similar to how most of the departmental stores like food land, reliance fresh or big bazaar sell their products.

(iv) The customer walks to the counter, goes through the price listavailable, selects the flavour and places the order before the cashier.

(v) 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.

(vi) The customer then moves to the delivery counter, hands over one copy of the Tax Invoice to the person 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

otherhand, if the customer has purchased a scoop of ice cream, the same is handed over to him in a cup or cone as per his desire.

(vii) 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. It may be noted that the ice creams are sold by the respondent over the counter. There is no serving of ice cream by the respondent.

27. The respondent was not sure about the applicability of the rate of GST on the said sale in as much as the industry was divided on the said issue. In order to avoid any controversy and litigation in future, the respondent has filed an application before the Advance Ruling Authority, Mumbai vide Application No. 126 on 25.02.2019.

28. The said application was filed for seeking advance ruling in following questions:

a) Whether supply of ice-cream by the respondent from its retail outlets would be treated as supply of "goods" or supply of "service" or a"composite supply" and subject to GST accordingly.

b) Whether the supply, not being a composite supply, would be treated as supply of service in terms of entry 6(b) of Schedule II, 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.

c) 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 IIto the CGST act, 2017, or should be taxable on the basis of nature of principal supply in accordance with Section 8 of the Act.

d) 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 respondentto 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-CentralTax is a conditional entry.

29. Vide Order no. GST-ARA-126/2018-19/B-29 dated 19.03.2019, the Advance Ruling Authority has held that the supply of ice-cream by the respondent from its retail outlets would be treated as supplyof 'goods' and accordingly, would attract GST@18%.

30. Being aggrieved by the AAR Order, the appellant i.e. department has filed the present appeal before the Appellate authority for Advance Ruling for GST.

31. The respondent submits that the above appeal is liable to be rejected on the following amongst other grounds which are urged herewith without prejudice to one another:

31.1 At the outset, the respondent submits that the impugned order, in so far as it is in favour of the respondent, is correct in law and hence, needs to be upheld. The Advance Ruling Authority ('ARA') has passed a detailed and cogent order. The said order does not suffer from any infirmity or illegality. Therefore, the present appeal, being devoid of any merit, is liable to be rejected.

32.1 **The present appeal is time barred:**

The impugned order is dated 19.03.2019. The appellant-department has stated that it has received the impugned order on 16.04.2019. However, no proof of the receipt of the said AAR Order has been enclosed by the appellant-department in its appeal. Further, the appellant-department has filed the present appeal along with application of condonation of delay for seeking condonation of twenty-five (25) days in filing the present appeal. The reason stated by the appellant-department for the said delaywas that the crucial facts of this case were brought to the notice of the appellant-department by the Deputy Director, DGGI, Pune Zonal Unit vide letter dated14.05.2019 and accordingly, the department has taken considerable time to decidewhether the appeal is required to be filed or not. The appellant-departmentfurther stated that due to the nuances to the newly rolled out GST law also caused a delay in filing the present appeal.

32.2 The respondent submits that the above reasoning of the appellant-department is vague and absurd for the reasons stated infra.

(i) First, Section 100 of the CCST Act, 2017 speaks about the filing of appeal toAppellate Authority formed under section 99 of the CGST, 2017.

"99. Appellate Authority for Advance Ruling —

Subject to the provisions of this Chapter, for the purposes of this Act, theAppellate Authority for Advance Ruling constituted under the provisions of aState Goods and Services Tax Act or a Union Territory Goods and Services Tax Act shall be deemed to be the Appellate Authority in respect of that State or Union territory.

100. Appeal to Appellate Authority-

The concerned officer, the jurisdictional officer or an applicant aggrieved by any advance ruling pronounced under sub-section (4) of section 98, may appeal to the Appellate Authority.

(1)*Every appeal under this section shall be filed within a period of thirty days from the date on which the ruling sought to be appealed against is communicated to the concerned officer, the jurisdictional officer and the applicant:*

Provided that the Appellate Authority may, if it is satisfied that theappellant was prevented by a sufficient cause from presenting the appeal within the said period of thirty days, allow it to be presented within a further period not exceeding thirty days.

(2)*Every appeal under this section shall be in such form, accompanied by such fee and verified in such manner as may be prescribed.*

(ii) On perusal of the above provisions, it is clear that an appeal against the advance ruling pronounced under section 98 of the Act shall lie before the appellate authority. The same should be filed within a period of thirty (30) days from the date of communication of the same to the concerned officer, jurisdictional officer and the applicant as the case may be. If the appellant has not filed the appeal within the said period of thirty (30) days, then on furnishing the 'sufficient cause' which has prevented

him to file the appeal within the said prescribed period, allows the same to be filed within a further period of thirty (30) days.

(iii) From the above, it is clear that sufficient cause need to be shown to the court in order to persuade the court to exercise their judicial discretion. Liberal construction of the expression 'sufficient cause' is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the appellant-department, to whom want of bona fide is imputable. There can be instances where the Court should condone the delay; equally there would be cases where the Court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect 'sufficient cause' as understood in law. The expression 'sufficient cause' implies the presence of legal and adequate reasons. The words 'sufficient' means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plenitude which, when done, suffices to accomplishthe purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated. The party should show that besides acting bona fide, it had taken all possible steps within its power and control and had approached the Court without any unnecessary delay. The test is whether or not a cause is sufficient to see whether it could have been avoided by the party by the exercise of due care and attention.

(iv) Delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the appellant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record should be rejected unless sufficient cause is shown for condonation of delay. It is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner.

(v) As regards the merits of the application in hand, except for a vague averment that the considerable amount of time has been taken to conclude or arrive at a decision that there is a need to file an appeal, there is no other justifiable reason stated in the one-page application.The application does not contain correct andtrue facts. Thus, want of bona fides is imputable to the appellant. There is no reason or sufficient cause shown as to what steps were taken during this period and why immediate steps were not taken by the appellant. The cumulative effect of all these circumstances is that the appellant-department has miserably failed in showing any 'sufficient cause' for condonation of delay.

(vi) Second, it is well settled that law of limitation undoubtedly binds everybody including the government. The respondent relied upon the decision of the apex court in the case of Office of the Chief Post Master General vs. Living Media India Pvt. Ltd., 2012 (277) ELT 289 wherein it is held that the claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The relevant para is extracted hereunder:

12. *It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.*

13. *In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending forseveral months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay.*

(vii) Third, the Goods and Services Tax has been introduced with effect from01.07.2017. Now, we are standing in the year 2019 and still the department is learning the nuances of the newly rolled out GST law as stated in their application of condonation of delay. Such statements by the appellant-department are merely an eye wash. This clearly shows the appellant department lackadaisical and lethargic attitude towards the adherence of the laws even in the matters of their own interest. Such conduct should not be allowed to be precipitated and must be met with severe consequences.

(viii)Fourth, even otherwise, the reason stated for the delay that they were communicating with the DGCEI is also hard to believe. There is no explanation as to how and why DGCEI got involved in the present ruling. DGCEI is an investigating authority. It is not known as to how and why DGCEI is to communicate with the Authority for Advance Ruling or the department. It is alsonot known as to how and why DGCEI is interested in pursuing and directing the department to file an appeal. This is judicial intervention and must be taken note of by this Hon'ble Appellate Authority. The same cannot be ground or reason to condone the present delay. The very reason itself shows that the

department wassatisfied with the ruling and never intended to file any appeal. Thus, the present appeal is a motivated one, it lacks bonafide and hence, must be dismissed.

32.3 **The present appeal is not maintainable**

(i) At para A & B of the present appeal, whereinthe appellant-department contendsthat the respondent has suppressed certain vital facts in the application made before the ARA about the Investigations that had been initiated by the DGGI against M/S Kamath Our times Ice-creams ("the franchisor") and its various franchisees, and that during the course of search, certain documents were seized from all the premises and the same are expected to be useful to establish GST evasion cases against each franchisee and hence being aggrieved by the impugned order they have filed the present appeal under section 100 of the act before the Appellate Authority for advance ruling seeking to quash the advance ruling order holding it void ab-initio in terms of section 104 of the act, theRespondent submits that the above mentioned contention of the appellant-department is without any logic, basis and reasoning. It is wholly perverse. It is malafide.

(ii) At the outset, the respondent submitted that the department referred to letter F. No.DGI/PZU/Gr'C'/AAR -Arihant/40/2019 dated 14.05.2019 and 17.05.2019 written by the DGGI to the appellant. Copies of the said letters have not been provided to the respondent. if the same have been referred to in the grounds of appeal, copies of the same should have been enclosed. failure to do so, vitiates the proceedings. It is not known what are the contents of the said letters and whyand how the DGGI is directing the department to file the present appeal. What interest has the DGGI got in the present appeal? Under which provision of law and under which authority, the DGGI is communicating with the appellant. Under which capacity, the DGGI (being an investigating body) is influencing the decision-making process. The present appeal is motivated and lacks bonafide. Hence, on this count alone, the present appeal is liable to be rejected.

(iii) Apart from the above, it is pertinent to look into Section 104 of the act which reads as under:

104. Advance ruling too be void in certain circumstances —

(1) Where the Authority or the Appellate Authority finds that advance ruling pronounced by it under sub-section (4) of section 98 or under sub-section (1) of section 101 has been obtained by the applicant or 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 applicant or the appellant as if such advance ruling had never been made:

Provided that no order shall be passed under this sub-section unless an opportunity of being heard has been given to the applicant or the appellant.

Explanation.—-The period beginning with the date of such advance ruling and ending with the date of order under this subsection shall be excluded while computing the period specified in subsections (2) and (10) of section 73 or sub-sections (2) and (10) of section 74.

(2) A copy of the order made under sub-section (1) shall be sent to the applicant, the concerned officer and the jurisdictional officer.

On plain perusal of the above section, it can be seen thatthis provision empowers the respective authorities viz. Authority for Advance ruling who passed the order on the application for advance ruling and Appellate Authority who passes an appellate order on such ruling wherein an advance ruling has been challenged by way of appeal, to Suomoto recall the orders passed, if at any stage it is found that the same has been obtained by means of fraud, suppression of material facts or misrepresentation of facts.

(iv) In other words, the said provision is self contained. If the applicant in the application is guilty of fraud, suppression of material facts or misrepresentation of facts, the authority for Advance ruling can recall its own order. The same cannot be a ground of appeal. If the appellant was of the view that the ruling has been

obtained by fraud, suppression of material facts or misrepresentation of facts, the Authority for Advance ruling could have itself recalled the said order, if the said facts were brought to its notice. The same cannot be a ground of appeal or ground of challenge in the appeal before the Appellate authority. Hence, the present appeal is totally misconceived and mis-directed. The appeal cannot be maintained on such a ground.

(v) If such appeals are allowed to be entertained on a ground that the applicant is guilty of fraud, suppression of material facts or misrepresentation of facts, then the provisions of section 104 would become redundant or otiose. There would be no meaning of section 104 as every such point can be raised in appeal. Such an interpretation would be absurd and hence, needs to be avoided.

(vi) The legislature is a perfect legislative body. It is presumed to know all the laws when it enacts any particular legislation. In Union of India VS.Hansoli Devi reported at (2002) 7 SCC 273, the Hon'ble Supreme Court has observed that the legislature never wastes it words or say anything in vain and a construction whichattributes redundancy to legislation will not be accepted except for compelling reasons.

(vii) In Sultana Begum Vs. Prem Chand Jain reported at (1997) SCC 373, at page 381, the Hon'ble Apex Court has held as under:

"……..

15. On a conspectus of the case-law indicated above, the following principles are clearly discernible:

(1)It is the duty of the courts to avoid the head-on clash between two sections of the act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them.

(2)*The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them.*

(3)*It has to be borne in mind by all the courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of "harmonious construction".*

(4)*The courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious-construction,*

(5)*To harmoniseis nottodestroyanystatutoryprovisions or to render it otiose.*

.... (underlining supplied)

(viii)Similarly, in CIT V/s Hindustan Bulk Carriers reported at (2003) 3 SCC 57, at page 73, the Hon'ble Supreme Court has held as under:

14. A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim ut res magisvaleatquam pereat i.e. a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. [See Broom's Legal Maxims (10th Edn.), p. 361, Craies on Statutes (7th Edn.), p. 95 and Maxwell on Statutes (11th Edn.),p. 221.]

16. The courtswill have toreject the construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the-language used. (See Salmon v. Duncombe 7 AC at p. 634, Curtis v. Stovin8 referred to in S. Teja Singh case5.)

(ix) Thus, it is evident that section 100 of the Act has to be read together and in lightof section 104 of the Act. It is well settled that every clause of the statute shouldbe construed with reference to the context and other clauses of the Act, so as, asfar as possible to make a consistent enactment of the whole of the statute. A bare mechanical interpretation of words and application of a legislative intent is devoid

of concept and purpose will reduce the most of the remedial and beneficent legislation to futility. To be literal in meaning is to see the skin and miss the soul words, phrases and rules occurring in a statute are to be read together and not inan isolated manner. The legislation never intends to give one from one hand andtake away from other hand. Hence, the present appeal is not maintainable anddeserves to be dismissed, in lamina.

(x)There is yet another reason which supports the above submission of the respondent. The above provision section 104 would be applicable only in case where the applicant (assessee) is the appellant. The appellate authority wouldpass an order on the appeal of the appellant (assessee). Such an order can berecalled if the appellant (assessee) is guilty of fraud, suppression of material factsor misrepresentation of facts, It cannot be gainsaid that the revenue would beguilty of fraud, suppression of material facts or misrepresentation of facts.

(xi) If the DGGI was so convincing, they could have convinced the Authority for Advance ruling to recall its order and hold that the same is void, by moving an appropriate application before it, in terms of section 104 of the act ibid.Having failed to do so, the present appeal is a back door entry. It should not be permitted to be entertained. Hence, the present appeal is liable to be dismissed at the threshold.

32.4 <u>Without prejudice, the respondent submits that there is no proceedings pending against the respondent, and hence, proviso to section 98(2) is not applicable.</u>

(i) At Para C of the present appeal, wherein the appellant contends that since the DGGI was not a party to the application filed by the respondent (applicant) and came to know about the said order passed by the Authority for Advance Ruling on routine searching of the website of the Advance ruling. This submission is incorrect, false and wishful.

(ii) First, there is no evidence produced on record by the appellant in support of the above submission. It is a false claim. Second, in any case, there is no requirement, in law, of an investigating authority to be party to an application filed for advance ruling. The respondent is the state and not the investigating authority. If any such

verification ought to have been carried out, it was for the state tax department. In fact, the facts stated in the application have been accepted by the appellant department.

(iii) At Para D of the present appeal, the appellant-department contends that the as per the conditions of the franchise agreement between the M/S Kamath Our Times Ice-creams ("the franchisor") and the respondent, the franchisor has the upper hand and final say in every aspects of business. It is further alleged that the investigations were already initiated against all the 11 franchisee outlets located in Mumbai, Delhi, Kolkata and Gurugram owned by the franchisor. Hence, it is alleged that the management of the franchisor was interested in getting an advance ruling to escape the clutches of investigation by DGGI.

(iv) The above ground is nothing short of a movie story, far from reality. At the outset, it is an admitted factual position that no summons was issued to the present applicant. It is an admitted factual position that no search was carried out at the premises of the present applicant. It is an admitted factual position that no inquiry/investigation was conducted against the present applicant by the DGGI. Hence, it does not lie in the mouth of the appellant, at the behest of the DGGI, to submit that an inquiry was pending against the applicant.

(v) The proviso to Section 98 (2) of the said act can be applied only when any cases or proceedings are pending in the name of the applicant, in the present appeal, it is "the respondent". The movie story that the investigations were initiated against the franchisor and hence, the respondent has no reason to approach the advance ruling authority for advance ruling, is without any basis. Such contention of the appellant-department is vague and absurd. It needs to be stated only to be rejected.

(vi) Even otherwise, it is immaterial, in law as well as in the facts and circumstances of the present case, whether there is any proceeding pending in the name of the franchisor or other franchisees. As per law, the provisions of Chapter XVII would be applicable only qua "the applicant". The term "applicant" has been defined statutorily under section 95(c) of the Act as any person registered or desirous of

obtaining registration under this Act. The ruling and other provisions would be applicable and enforceable only qua such an applicant. Hence, reference to investigation pending against the franchisor or other persons or the tax being paid by the competitors is wholly irrelevant to the issue at hand and clearly an attempt to mislead and misguide this Appellate authority. Hence, the appeal is liable to be rejected on this count alone.

(vii) Apart from the above, the respondent submits that:

(a)First, there is no evidence produced on record that the franchisor intended to get an advance ruling in their favour. There is no basis of an allegation that the application was filed at the behest of the franchisor;

(b)Second, assuming whilst denying, how did the franchisor know that the ruling would be in their "favour". The appellant department is casting illegal and unsubstantiated aspirations against the Authority itself. Were the outcome of the application been against the applicant, would the appellant department, at the behest of the DGGI, make such allegations;

(c) Third, the appellant department is so naive. The order passed by the authority for advance ruling only binds the applicant and the Revenue qua the applicant in terms of section 103 of the Act. It does not tie the hands of the DGGI to proceed with their investigations against the franchisors and other franchisees. It is evident that the present appeal is an outcome of personal vendetta of the DGGI against the franchisor.

(viii) At Para-E of the present appeal, the appellant-department relies upon the statement of one Mr.Virendra Nandkumar Mutha, one of the partners of M/S Ashirwad Enterprises, which is one of the franchisees of M/s. Kamath Our Times Ice creams. Mr.Virendra Nandkumar Mutha is a partner in the respondent's firm as well. According to the appeal, it is categorically confirmed by him that he was aware of the ongoing DGGI investigations at KOTI and its franchisees and with due oral discussions with Directors of KOTI, it was taken a decision to file an application before the ARA through a common consultant Mr.Chirag Mehta. But the relevant details of these investigations were not incorporated in their application before the

ARA. This submission is extreme and based on surmises. Here itself, at the outset, it may be pointed out that taking names of consultants is bad in taste. Consultants are advisors. They act on instructions of the client (assessee). The department should not stoop to such levels. In fact, it is only the department that is capable of making such frivolous allegations, without any basis, let alone evidence.

(ix) The statement of Shri. VirendraNand Kumar has been recorded on 10.05.2019. The same has been recorded after the impugned order came to be passed. Hence, the said statement has been recorded, under duress, force, coercion and threat, in order to support the DGGI's version. A copy of the said statement has not been provided to Shri VirendraNand Kumar. No opportunity of allowing the maker thereof to retract the said statement has been granted. The said statement has not been tested on oath. No cross examination of shri VirendraNand Kumar has been granted. Hence, as such, no reliance can be placed on the said statement.

(x) In Basudev Garg Vs. Commissioner of Customs – 2013 (294) ELT 353 (Del.), the Division Bench of Delhi High Court has held that the statement against the assessee cannot be used without giving them opportunity of cross examination. A statement needs to be tested on oath before being led in as evidence. In absence of the same, such statement cannot be relied upon.

(xi) To similar effect is judgment of the Hon'ble Punjab and Haryana High Court in the case of Jindal Drugs Private Limited v/s Union of India 2016 (340) ELT 67 (P&H).

(xii) Without prejudice to the above, reliance placed on the above statement is wholly irrelevant and out of context. The said statement does not prove that the proceedings were pending against the "applicant" — respondent. There is no legal or statutory bar against making an application for advance ruling if there is no proceeding pending against the assessee applicant. The said ruling would be binding on the applicant and not on Shri. VirendraNand Kumar or even M/s. Ashirwad Enterprises. The Revenue is free to proceed, as per law, against the said Shri. VirendraNand Kumar or even M/s Ashirwad Enterprises.

(xiii) The connection sought to be drawn by the DGCI, which is typical of them, between the applicant and the franchisor as well as the Partner of the applicant

being a partner in another partnership firm is nothing short of a show cause notice investigation. The DGGI is free to undertake any such investigation, in law. However, with greatest respect, it cannot be a ground of appeal. The DCGI seems to be overlooking the fact that a person can be a partner in 20 firms, at the same time, as per the provisions of the Indian Partnership Act, 1932. To suggest that all such firms are connected and/or related is absurd. The contention of the appellant department is hinging on such extreme assumptions. There is no merit in such a contention. Hence, the present appeal is liable to be rejected.

(xiv) It is evident from the present appeal that the DGGI cannot digest the fact that their investigation was incorrect, in law and on merits, against the franchisor and/or other franchisees. Hence, the present appeal is to satisfy their fake ego and nothing else.

(xv) At Para-F of the present appeal, the appellant-department contends that had it been known to the ARA about the ongoing investigations at the premises of the franchisor or other 11 franchisees, the ARA would have come to the conclusion that the respondent application is liable for rejection as per proviso to Section 98(2) of the said act and accordingly, would rejected application being non maintainable.

(xvi) The above submission is purely presumptive in nature. Had the above been the case, the ARA would still have proceeded to decide the application, on merits, in as much as there was no proceeding pending against the applicant. The proviso to section 98(2) would not be applicable in the facts of the present case.

(xvii) At Para G of the present appeal, the appellant-department contends that some of the major competitors in the field such as ice-creams brands under trade names "Gelato", "Baskin Robbins", "Café Chokolade" etc. have rightly classified their activity of serving of Ice-cream at parlour end as ' supply of services' under the HSN code 996331 of the GST tariff of India and they have paid CGST @2.5% and SGST @ 2.5% or the IGST @ 5%, as the case may be, w.e.f. 15.11.2017 by following amending Notification No. 46/2017-C.T. (Rate) dated 14.11.2017.

(xviii) The respondent submits that the above grounds taken by the appellant-department are absurd and incongruous. What is being done by other suppliers is not a basis to decide the present appeal. The present appeal needs to be decided on the facts of the present case. It is not known as to what is the activity being undertaken by the so called "competitors" and the tax treatment being undertaken by them. There is no evidence of the same produced on record by the department. No notice has been issued to the said competitors. Hence, a bald statement cannot be accepted. Therefore, the present appeal is liable to be rejected on this count alone.

(xix) Even assuming whilst denying, as contended by the appellant-department, there is no basis for the appellant to submit that the respondent should follow what their competitors are doing. If such be the case, then there is no need to constitute authorities like Advance Ruling Authority to seek for rulings where the assessee is in doubt. The entire chapter WII would be rendered futile and redundant.

(xx) Thus, the respondent submits that they have not suppressed any fact from the authority for advance ruling. In fact, the appellant-department is trying to mislead this Honourable Appellate Authority by drawing attention to issues which are totally alien to the case at hand. Instead of discharging the burden cast upon them, the appellant-department is making toothless and irrelevant allegations.

32.5 Without prejudice, the respondent submits that they have filed an application under Right to information Act, 2005 seeking information. To utter shock of the respondent, it has come to its knowledge that the Assistant Commissioner of State Tax has agreed with the correctness of the impugned order and concluded it as correct and lawful. However, inspite of follow up the application has not been disposed of by the Department. It has been informed to us that the response to the application should be expected by 19-08-2019. Hence, the present appeal is not maintainable on this count as well.

Submissions on merits

33. At Para-H and Para I of the present appeal, the appellant department contends that the franchisees (respondent) have set up ice cream parlours as per approved design of the franchisor. They also cooked foods as ordered by the customer in single scoop, double scoop, or waffle cone manufactured at their outlet, served in the form of ice cream shakes or even served with fruit toppings etc. They also provide ice cream in carry home packs or even deliver through online aggregators such as Swiggy, Uber Eats, Zomato etc. The appellant department refers to dictionary meanings of the term "ice cream parlour" to contend that ice cream parlours are 'restaurants'.

34. Before adverting to the submissions made by the appellant department on merits and providing a response thereto, it is submitted that the above ground of appeal is frivolous and cannot be raised by the department. There is no dispute on facts. The facts as stated in the application are accepted by the department in their response/report filed before the Authority for Advance ruling. Hence, it is clear that the above factual position has been typed by the DGGI officials and provided to the appellant department. The appellant department never disputed facts. An appeal is not provided under Chapter XVII to dispute the factual position. If that be the case, the appellant department should have stated so in the report itself. The entire report of the department is in agreement with the facts stated in the application and the submissions of the applicant (respondent herein). It is a complete summersault, now, in the present appeal. The department needs to be reminded that it is not a case of assessment proceedings. It appears that the appellant department has donned the cap of an assessing officer while drafting the grounds of appeal, which is, part from being bad in law, not permissible. An appeal can be urged on the questions decided by the authority and not to argue on facts. This case is a classic case of abuse of the process of law. Hence, the present appeal must be rejected on this count alone.

35. In any event, the respondent submits that the factual position stated in the above paragraph 33 is incorrect. The factual position, which has been narrated above in the statement of facts, is true and correct. The appellant has also accepted the same in its own appeal the "brief facts of the case". Hence, the above ground is self-contradictory. Therefore, the appeal needs to be rejected.

36. Without prejudice, the respondent does not "cook" anything. It appears that the appellant department does not know the meaning of cooking. It is the appellant department that it is "cooking" up stories. It is a figment of imagination of the DGGI, without any evidence. Therespondent submits that the ice-creams so procured from the franchisor are directly being sold to the final consumers at the outlet. No processing is being done on the same. It is sold in the same manner. If Due to the inherent nature of the goods, the same have to be supplied in cups or cones. The cups or cones are mere carriers or containers. The predominant nature of the transaction is that of supply of goods. The form of delivery of the goods would not alter the nature of the transaction.

37. Similarly, if the goods are being delivered, either directly or through aggregators, to the customer's premises, it would not be converted into a service. If this outlandish, rather childish, argument of the appellant department were to be accepted as correct, then delivery of chocolate by the local grocery store to the premises of the customer would also be a service. In other words, anything delivered, whether car or hair pin or aeroplane, to the premises of the customer would be a service. We need not discuss this argument any further.

38. Likewise, the reliance placed on the fact that the store of the franchisee is designed as per the design provided or under the supervision of the franchisor is wholly irrelevant to the issue at hand. Whether goods are being supplied or service is being supplied would depend on the activity undertaken and not the design of the store or place where it is supplied, The wildness of imagination ofthe appellant department, to get the advance ruling over turned by hook or by crook, amazes the respondent.

39. The reliance placed on definitions of "ice cream parlour" is out of context. It is the activity which is question and not the place from where the activity is undertaken. In any case, it is submitted that above reliance is inaccurate inasmuch as the sources namely "Longman dictionary" and "Wikipedia" are not reliable one and can be modified, amended or changed at anybody's end. Therefore, such resources cannot be relied upon and should not be even considered at first instance itself.

40. There could be no objection to this fact that the transaction under consideration involves transfer of property in movable goods. The respondent submits that, in the instant case, the customer approaches the respondent to buy Ice-cream. The customer accordingly, places the order from the price listand 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 respondent from the franchisor is supplied as it is to the customer. No processing is done thereon, no customization is done. The respondent sells the said final products to the customer at agreed rates, as mentioned on price list. No extra money is charged from the customers. These facts have been admitted by the appellant department.

41. 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 respondent. There is no contract for provision of any service customers of the respondent are free to consume the ice-creams inside and outside the outlet. The customer could also carry the other desired location. There are no restrictions as regard to place of consumption.

42. 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 ofrespondent do not even offer seating facility. Several others offer a few, and those too are generally occupied by senior citizens and mothers who areaccompanied by their toddlers. Few stores have two or three tables kept outside the store, which customers may occupy after they make their purchases. Accordingly, the respondent submits that the transaction is nothing but a supply i.e. ice-cream.

43. While dealing with the review petition in the matter of Northern India Caterers Vs. 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 the substance of the transaction, evidenced by its dominant object, is g 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 whenmaking an assessment under the relevant sales lax law and to determine upon those facts whether a sale of the food supplied is intended."

44. 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 courtstresses 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.

45. 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 decidendi 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 eligible 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.

46. 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."

47. The respondent submits that, in as far as sale of retail packs are concerned, the only activity 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 activity is merely a transaction of supply of goods to the customers.

48. Further, the respondent submits that in respect of sale of ice-cream in scoops, the Ice-cream is supplied by the franchisor in wholesale containers. The same is then retailed in small scopes and cones over the counter-The respondent dos not serve the ice cream at its store. Thus, there is clearly transfer of title in goods i.e. ice-creams to the customers in cone and cup.

49. To substantiate the above interpretation, the respondent also place reliance on 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. 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 ownerof 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 foodstuff 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 services is merely incidental, then the transaction may amount to sale. But, if on the other hand, there is a transaction in which services is coupled with the 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)

50. A similar view has been presented by the Hon'ble Madras High Court in the matter of Sangu Chakra Hotels Private Limited vs. State of Tamil Nadu reported in [1985] 60STC 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 ordinarytransaction 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 ofarticles 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."

51. On the basis of the above arguments, the respondent submits that, by all means of imagination, the transaction undertaken by the respondent is that of the supply of goods and thus would be chargeable to the levy of GST accordingly.

52. The respondent further submits that, prior to the introduction of GST thecompany was registered under the Maharashtra Value Added Tax Act, 2002 (MVAT Act) as resellers and were discharging VAT @ 13.5%. Copy of ourregistration 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. 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 said License/certificate is enclosed here with. 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 registrationcertificate describes the nature of business of the store as "Sale of Ice-creams".Copy of this License/ registration Certificate is enclosed here with. This fact is undisputed even in the present appeal. The appellant department cannot go beyond such statutory recognitions. Hence, the present appeal is liable to be rejected.

The transaction is of transfer of title in goods and not of composite supply. Notification No. 11/2017-C.T. (Rate) dated 28.06.2017 to the extent it treats even sale simpliciter of goods being food as service is beyond Para 6(b) of Schedule II of the CGST Act, 2017

53. Section 7(1A) of the CGST Act provides that the whether a supply is a supply of goods or supply of service has to be determined in accordance with Schedule II of the CGST Act. The said section is reproduced as under:

"(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."

54. Para 1(a) of the Schedule II states that any transfer of title in goods is a supply of goods. Para 6(b) of the Schedule II states that the composite supply namely supplies, by way of or as a part of or in any other manner whatsoever, of goods, being food shall be treated as a supply of service. The relevant paras of Schedule II are extracted as under:

SCHEDULE II

ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICE

"1. Transfer

(a) any transfer oftitle in goods is a supply ofgoods;

.....

6. Composite supply

Thefollowing composite supplies shall be treated as supply of services, namely :—

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

55. For a supply of food article to be covered within the ambit of para 6(b) and thus a supply of service, it should first be a composite supply. Composite supply is a supply comprising of two or more taxable supplies of goods or service. In case where there is only one supply namely, transfer of title in goods, the same cannot be covered under para 6(b) of Schedule II.

56. Further, the supply of foods shall be by way of or as a part of any service or in any manner whatsoever. 'By way of any service' means that the transaction is purely of service to satisfy the human need and there is no sale of goods involved. For instance, service of food in a restaurant where the customer can only have the food and cannot take it away. 'As a part of any service' means that there is a transfer of title in goods but that that transaction is a part of a composite transaction of goods and service. For instance, supply of food to a customer staying in a hotel.

57. Lastly, the words 'in any other manner whatsoever' will mean that the supply of food can be in any other manner but there should be some element of service involved in the transaction. The aforesaid words occur in the entry with the words by way of or a part of any service. It is a settled principle of interpretation to construe words in an Act of Parliament with reference to words found in immediate connection with them. As per the rule of noscitur a sociis, the meaning of the word is to be judged from the company it keeps. Wheretwo or more words, which are susceptible of analogous meaning, are coupled together they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general.

58. Thus, a transaction of supply of foods would be covered within the ambit of Para 6(b) of Schedule II only if there is some element of service involved and if it is a composite supply. Further, the service element has to be seen at the time of making of supply. It is well understood that the nature of supply has to be determined at the time of supply; what happens prior to making of supply and what happens after making of supply is wholly irrelevant.

59. In the case of sale of tubs (retail packs) there is no element of service involved. The tubs are received from the manufacturer and supplied as such to the customer. Further, even in case of sale of ice cream in scoop or in melted form, the activity undertaken, if any, is prior to the supply of ice cream. The activity is only e component which goes into the making of the product, i.e., the ice cream in cup/scoop or in melted form — but it is only a component and nothing more. The transaction between the respondent and the customer is only of transfer of title in the ice cream in cup/scoop or in melted form. The activity/service involved if any is only prior to the making of supply and not at the time of making of supply.

60. 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.

61. It is submitted that the aforesaid notification, to the extent it treats even the sale simpliciter of food article (take away) as a service is beyond the scope of Para 6(b) of Schedule II of the CGST Act. The present case of the respondent is covered by Para 1(a) of Schedule II of the CGST Act.

Without prejudice the premise of the respondent is not restaurant, eating house, mess or canteen. Thus, notification no. 11/2017-C.T. (Rate) dated 28.06.2017 is not applicable in the present case.

62. 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.

63. The above notification prescribed the rate of CST to be charged on the supply of service. At the outset the respondent reiterates that since the activity undertaken by the respondent is that of supply of goods, the said notification is not applicable in the instant case. Even otherwise, 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.

64. 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 ofCambridge defines the same - as a place where meals are prepared and served to customers. 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 asa place in a factory, office, etc. where food and meals are sold, often at a lower than usual price. Apparently, the term eating joints has not received any formal recognition. However, the term -"Joint" has been informally defined by OxfordDictionary 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 low prices. Accordingly, the term eating joints must be construed. Further, Black's LawDictionary defines the term eating house as - Any place where food orrefreshments of any kind, not including spirits, wines, ale, beer, or other malt liquors, are provided for casual visitors, and sold for consumption therein.

65. On perusal of all the above definitions, what could commonly be drawn is that allthe said terms refer to an establishment where the people meat in order to eat ordrink 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 VIS Board of Revenue (CT.) 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 VIS 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. ThePunjab & 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."

66. Accordingly, the term "Restaurant, Eating Joints", "Mess" or "Canteen" has to be interpreted and understood on the common analogous sense i.e. a placewhere the consumer is served food at the tables to be consumed therein. However, in the instant case, the outlets of the respondent do not serve the ice-creams to their customers on the table. Rather the same has to be collected bythe customer themselves from the counter. Further, on the cost of re-iteration, the respondent does not provide any sitting facility to the customers as well. Thus,a clear distinction can be drawn between the respondent's outlet and the terms mentioned under the aforesaid notification. Accordingly, the respondentsubmits that the said notification is not applicable over the transaction under consideration.

67. Ongoing 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 respondent submits that the activity of

supply of ice creams from the outlet is purely a contract for supply of goods and the CST must be levied accordingly. Hence, the present appeal is liable to be rejected.

Without prejudice, Sl. No. 22 of the Notification No. 01/2017-C.T.(Rate) dated 28.06.2017 (HSN Code 2105-Ice cream) is more specific and the supplies made by the respondent will be covered by the said entry.

68. For the sake of argument, without admitting, even if it is assumed that the Sl. No.7 of Notification No. 11/2017-CT (Rate) dated 28.06.2017 (relating to the supply offood by restaurant, eating joint, etc.) is also attracted in the present case, thenalso Sl. No. 22 of Notification No. 01/2017-CT (Rate) dated 28.06.2017 (relating to supply of ice cream) is more specific and the said entry will apply in the presentcase.

69. In the matter of classification, it is settled principle of law that in case of competing entries, the entry which is more specific shall apply. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Bhubaneshwar v. Champdany Industries Ltd. 2009 (241) ELT 0481 (SC)wherein the court held that when the goods are covered by a specific entry, the same cannot be classified under general/residuary entry.

70. Further, in the case of Moorco (India) Ltd. v. Collector of Customs, Madras 1994(074) ELT 0005 (SC), the Hon'ble Supreme Court held as under:

The specific heading of the classification has to be preferredover general heading. *The clause contemplates goods which may be satisfying more than one description. Or it may be satisfying specific and general description. Ineither situation the classification which is the most specific has to be preferred over one which is not specific or is generalinnature.* ***In other words, between the two competing entries the one most nearer to the description should be preferred.*** *Where the class of goods manufactured by an assessee falls say in more than one heading one of which may be specific, other more specific, third most specific and fourth general. The rule requires the authorities to classify the goods in the heading which satisfies most specific description."*

... emphasis supplied

71. In the present case, Sl. No. 22 of Notification No. 01/2017-CT (Rate) dated28.06.2017 which specifies the rate of tax for supply of ice cream is more specific than the supply of food article under Sl. No. 7 of Notification No. 1112017-CT (Rate) dated 28.06.2017. Hence, the present transaction will be classifiable as a supply of ice cream and the appeal filed by the appellant -department being devoid of any merit is liable to be dismissed.

Under the erstwhile regime,in the case of respondent. the Asst. Commissioner of GST has held that therespondent isnot a restaurant. The said order has been accepted by the department and notchallenged. The department now cannot take contrary stand.

72. The respondent was issued a show cause cum demand notice SCN No.03/ST/AC/Urban/2017 dated 10th October 2017 alleging that the transaction of the respondent is covered by "restaurant service".

73. The Assistant Commissioner of Goods and Services Tax, Aurangabad, adjudicated the showcause notice dropped the notice and held that the respondent is not a restaurant. The said order has been accepted by the department as no appeal has been filed against the same. The said fact has also been noted by the Authority for Advance Ruling. Further, the Hon'ble Authority for Advance Ruling, Maharashtra has specifically referred to this order in its Ruling.

74. In such facts and circumstances of the case, the department cannot take contrary stand and again agitate the same issue by filling the appeal on frivolous grounds.

75. At Para L of the present appeal, the department contends that the franchise agreement between the respondent and the franchisor is not a real saletransaction but a transfer of the factory of the franchisor to the retail outlet. The transactions between KOTI and the respondent are governed by the franchise agreement agreed between them. No franchisee fees ischarged separately. Nosales promotion expenses, advertisement expenses, infrastructure and business support etc. provided to the franchisor, the franchisor are reimbursed separately to respondent. Storage expenses, serving expenses etc. are not reimbursed separately by the franchisor. But all the activities of

respondent including billing, classification of goods/services, taxation etc. are under strict watch, control and guidance of the franchisor. Therefore, the entire activities of respondent are thereforebe considered as supply of services.

76. At the outset, it is submitted that the said submission and the costing (as depicted) involved is wholly beyond the understanding of the respondent. The said submission is not germane to the issue at hand. It is not a subject matter of the ruling itself. It is not one of the questions proposed or answered by the Authority. Hence, as such, the said argument is frivolous, to say the least. The appellant department needs to be reminded that this is an appeal and not a show cause notice.

77. Second, in any case, the above argument is wholly based on surmises and conjectures. It is presumptive in nature and without any basis. There is no evidence led in by the appellant department in support of the said argument.

78. Third, in any event, the respondent submits that the franchise agreement is at arm's length. The Income Tax department has accepted the sale price of the goods by the franchisor to the franchisee.

79. Fourth, if the argument of the Department were to be accepted as correct, even then there is no element of service. The relationship between the franchisor and the franchisee is not the subject matter of the appeal. The supply made by the respondent to the end customer is the subject matter at hand. That supply is a supply of ice-cream only, and hence supply of goods. Such contentions are raised only with intent to mislead this appellate authority.

80. At para J & K of the present appeal, the appellant department relied upon the decision in the advance ruling no. KAR/ADRG/21/2018 dated 21.08.2018 in the case of M/s. Coffee Day Global Limited and Authority of Advance Ruling under GST Madhya Pradesh in the case of Jabalpur Entertainment Complexes (P) Ltd. The reliance placed on the said ruling is incorrect. First, each and every case should be decided on their own facts and circumstances. The said rulings turned on their own facts. The facts of the present case are different and distinguishable from the facts in those cases. Hence, as such, no reliance can be placed on the said rulings. Second in any case, advance ruling cannot

be cited as precedent. It has no precedential value. It is binding only on the parties thereto. See Zee Telefilms for STR.

81. At Para-M of the present appeal, the appellant-department relied upon the decision of the Honourable High Court of Delhi in the case of Mc Donald's India Pvt. Ltd. vs. Commissioner of Trade & Taxes, New Delhi, 217 (5) CSSTL 120with reference to the essence of the franchise agreement. The respondent submits that the reliance upon the above said case is misplaced and out of context. The question posed therein was totally different. That was a case relating to"franchisee" service as defined under the Finance Act. The same cannot be applied in the facts of the present case.

82. In view of the above submissions, there is no merit in the present appeal. The present appeal is an abuse of the process of law and hence, the present appeal is liable to be rejected and the impugned order should be upheld.

83. The respondents reiterate the submissions made in the application filed before the Advance ruling authority. The same are not being repeated for the sake of brevity. The same must be treated as part and parcel of the present cross objection.

Personal Hearing

84. A personal Hearing in the matter was conducted on 14.08.2019, which was attended by Shri Suhas Kaware, Asstt. Commissioner, State Tax from the appellant side, and by Shri V. Sridharan, Advocate from the respondent side. The representatives of both the Appellant as well as the Respondent reiterated their written submissions. Prior to this hearing, one letter dated 29.07.2019 was filed by the Deputy Director, PZU, wherein it was requested to grant an opportunity to present their side in the capacity of the concerned officer, as they had initiated investigation against the Respondent's franchisor, namely M/s. KOTI and its 11 other franchisees located in Mumbai, Delhi, Kolkata, Gurugram on 05.02.2019, which was before the date of filing of the advance ruling application i.e. 25.02.2019. They, inter alia, contended that the Respondent was not eligible to file the Advance Ruling application as the proceedings against its

franchisor i.e. M/s. KOTI and some of its franchisees had already been initiated on the same issue as that of the questions raised in the advance ruling application, i.e. the **'classification of the activities'** carried out by the franchisees. They also, inter alia, interpreted the term 'Concerned Officer', which has been mentioned separately and deliberately besides the term 'Jurisdictional Officer' in the provisions related to the advance ruling under the CGST Act, 2017, arguing that since the term 'Concerned Officer' is not defied anywhere in the GST Act, the same, if interpreted, should be construed as the officer separate from the Jurisdictional officer. Thus, they presented themselves as the concerned officer, as they were dealing with the investigation against the franchisor of the Respondent and other franchisees of the said franchisor, which eventually also include the Respondent in the present appeal. Thus, DGGI prayed for the grant of the opportunity to present their version in the instant case for the sake of the justice and to safeguard the interest of revenue by putting forth various facts and evidences, which would help the authority in judiciously deciding the present appeal.

In view of the abovementioned plea made by the DGGI, in the capacity of the concerned officer mentioned in the advance ruling provisions of the CGST Act, 2017, we granted the DGGI officials the permission to be present in the abovementioned personal hearing, conducted on 14.08.2019, alongside the Appellant. This hearing was attended by Shri Prasad D. Gorase, Dy. Director, DGGI, Pune Zonal Unit, who vehemently opposed the filing the advance ruling application by the Respondent, arguing that they were not entitled to file this advance ruling application, as the investigation against the franchisor of the Respondent i.e. M/s. KOTI and its 11 other franchisees located in Mumbai, Delhi, Kolkata and Gurugram, owned by M/s Kamaths Natural Retail Pvt Ltd, which is a company under the same management, had already been started on 05.02.219, which was much prior to the date of filing of the advance ruling application, i.e. 25.02.2019.

After cogitating on the allegation made by the officials of the DGGI, PZU, we directed them to file the affidavit in this regard. In pursuance to this direction, they filed an affidavit before us on 16.08.2019, which is being reproduced herein under:

Submissions made in the affidavit filed by DGGI, PZU in the capacity of the concerned officer:

85. That Naturals brand Ice-cream is manufactured by M/s. Kamaths Ourtimes Ice creams Pvt Ltd, (in short KOTI), Kandivali Industrial area, Charkop, Kandivali, Mumbai and some of its Directors have formed one more company under the name M/S Kamaths Natural Retail Pvt Ltd (in short KNRPL) which owns around 12 Naturals ice cream parlours in Mumbai, Delhi, Kolkata and Gurgaon. Both, KOTI and KNRPI, do their business operation from a common office cum factory premises, at Kandivali. Naturals ice cream is served from around 133 exclusive Naturals outlets across India and the business model runs on an identical franchise agreement entered between KOTI (franchisor) and owners of different Naturals outlets (franchisees). The annual turnover of ice cream manufactured and sold by KOTI to its franchisees. was roughly Rs. 200 Cr.

86. The Directorate General of GST intelligence (in short Pune Zonal Unit, Pune is the apex intelligence agency under Ministry of Finance. Department of Revenue which has been invested with powers to detect and investigate eases of GST evasion throughout the territory of India under the Central GST Act, 2017, irrespective of the fact that whether the tax payer is under the control and administration of Centre or State authorities vide Notification No. 14/2017 Central Tax dated 01.07.2017.

87. An intelligence was received by DGGI on 07.01.2019 that GST amounting Rs. 40.00 Cr approx. is being evaded by the franchisees of Naturals ice cream numbering around 133 across India by way of deliberately misclassification of their activity of supply of ice cream from Naturals outlets to ultimate customers under HSN 2105, as supply of goods and whereby charged and recovered GST @18% by availing ITC and whereas, their activity should have been classified as supply of service under SAC 996331 attracting GST @5% without ITC benefits vide Notification No. 11/2017Centreal Tax (Rate) dated 28.06.2017 as amended by Notification No. 46/2017 Central Tax (Rate) dated 14.11.2017. Acting on the basis of this intelligence, initially the DGGI officers conducted a simultaneous search operation at Mumbai and Pune on 05.02.2019 and thereby covered the premises of KOTI the franchisor, as well as some of its franchisees. The search resulted in seizure of certain vital documents useful for further investigations under various Panchanamas drawn at KOTI, Mumbai and other premises

on 05.02.2019. These documents include a list of Naturals franchisees along with their GSTINs, copy of all franchise agreements entered by KOTI, copy of the application for Advance Ruling seeking classification of supplies made by franchisees of KOTI which was never filed by KOTI and soft data of ice cream sales effected by KOTI to all of its 133 franchisees across India during the GST era.

88. On the day of search at KOTI i.e. on 05.02.2019, DGGI officers recorded statement under Section 70 of the CGST Act,2017 of one of the Directors of KOTI viz, Mr Girish Pai, who is also authorized signatory of M/S KNRPL.

89. Further, on 11.02.2019, statement of Mr Shrinivas R. Kamath, a whole time Director in KOTI as well as KNRPL was recorded under Section 70 of the CGST Act, 2017.

90. That during follow-up action around 20 Naturals outlets belonging to various franchisees existed in and around Pune city, Aurangabad, Ahmednagar, Kolhapurand Goa were covered for investigation by DGGI, Pune based on the subject intelligence under the mode of search/inspection/summons, as the case may be, and their information including the present respondent M/s.Arihant Enterprises.

91. that during investigation, itwas gathered that M/s. Creative IT India Pvt. Ltd. located at Airoli, Navi Mumbai are the supplier of Spectrum Software to KOTI and its franchisees. A statement dated 26.04.2019 of Sr. Manager (Accounts andFinance) of M/s. Creative IT India Pvt. Ltd. was recorded under Section 70 of central GST Act, 2017, where under it has been inter-alia confirmed the present Respondent is under obligation to use the billing software supplied by KOTI through M/s Creative IT India Pvt. Ltd. which contained inter alia classification of 'supply' of ice cream made by the respondent and GST rate to be applied. It was further confirmed that the classification and GST rate cannot be changed by any of the franchisees including the present respondent and in fact all the franchisees have to follow the dictates of thefranchisor.

92. In the meantime. the present respondent Arihant Enterprises made an application dated 25.02.2019 before Maharashtra Advance Ruling Authority Mumbai on the issue of whether the supply of Ice Cream made by it from its retail outlet would be treated as supply of "goods" or supply of "service" or a "composite supply". In this context- after due consideration of various submissions made before it, The Hon'ble Maharashtra Authority For Ruling issued an order of Advance Ruling bearing GST-ARA-126201S-19B-29 dated 19.03.2019, wherein, it is inter-alia held that the supply of ice

cream by the applicant from its retail outlets would be treated as supply of —goods". Aggrieved by the said Order of the AAR, the present Appeal was filed seeking justice in the matter.

93. that DGGI, Pune Zonal Unit was not aware of the Application made by the present Respondent before the AAR as it was not made as party either in the capacity ofjurisdictional officer nor in the capacity of concerned officer. The respondent unit was under administration control of State Tax department and accordingly, the State Tax officer who has been treated in the application as the jurisdictional officer / concerned officer, made submission before the AAR. The investigations already initiated by DGGI against KOTI and all of its franchisees much before the date of filing of the Application by the present Respondent were not known to State Tax department and hence Assistant Commissioner, State Tax did not make any mention of the same in his submission made before AAR.

94. that the investigation was commenced much earlier than the date of application made by present respondent on 25.02.2019 before the AAR and whereas, the subject advance ruling order of the AAR is also on the exact same issue of classification of supply by the franchisees of KOTI, wherein the activity has been held by the AAR as supply of goods. The application filed by the applicant is not maintainable as per the provisions of Section 98(2) Of the CGST Act, as proceedings are already initiated against them before the filing of their present application. Had it been known, the Authority for advance Ruling would not have admitted the application for Advance Ruling. The present Advance Ruling has been obtained by way of suppressing the material facts from the Advance Ruling Authority. Under these circumstances DGGI, Pune requested the present appellant, Assistant Commissioner, State Tax, Pune (D-819) to file an appropriate appeal to safeguard the Govt Revenue.

95. that, during the course of investigations two statements of Mr Virendra Mutha, a common Partner of the present respondent and one more franchisee unit viz, M/S Ashirwad Enterprises were recorded on 10.05.2019 and 02.07.2019 under Section 70 of the CGST Act, 2017. In the said statements Mr Virendra Mutha, inter-alia admitted that he was aware of the ongoing investigations of DGGI against KOTI and its franchisees and with due oral discussions with Directors of KOTI, the decision was taken to file an application before the AAR through a common consultant Mr Chirag

Mehta but the relevant facts about DGGI investigations was not incorporated in their application made before Advance Ruling Authority and thus the material facts were suppressed from the Advance Ruling authority.

96. that, it is admitted by Mr Mutha that at times they have melted ice cream received in Tubs of 0.5 kg (approximate 25% of receipts), meant of retail sale, but they scooped and served. It is noted that this act of the respondent is in contradiction to his submission before Authority for Advance Ruling that they do 70% of ice cream resale in Tubs with MRP as received and therefore misled the AAR to that extent.

97. that it is evident from the terms and conditions of the franchise agreement that in the entire scheme of KOTI, the franchisor had the upper hand and final say in every aspects of business and the applicant had no reason to approach the Authority for Advance Ruling on the issue of classification of supply especially when there was no any dispute had cropped up even from the concerned State Tax Officer in this regard. It appears that KOTI had its own role behind the application made before the ARA, as investigations were already initiated against all the 12 number of franchisee outlets located in Mumbai, Delhi, Kolkata and Gurugram owned and controlled by the Directors of KOTI and hence they were interested in getting an advance ruling in their favour so as to attempt an escape from the clutches of the investigations of the DGGI.

98. That the application filed by the present respondent is not maintainable as per the provisions of Section 98(2) of the CGST Act, as proceedings were already initiated on 05.02.2019 against KOTI and all of its franchisees i.e. much before the filing of their application before the Advance ruling Authority on 25.02.2019. Most respectfully submitted herewith that the reason a report from the Concerned officer or Jurisdictional Officer as required under Section 98, CGST Act, 2017 is called for containing comments as to "whether any proceedings are pending against the applicant is because, he is the custodian of such records and documents including registers which contain the details of taxpayers against whom proceedings are being contemplated or in process. The proceeding under CGST Act, 2017 were approved on 15.01.2019 by the Additional Director General, DGGI, Pune Zonal Unit which includes the present respondent. The Assistant Commissioner, State Tax who is the Applicant and the present Appellant did not know this fact and hence it cannot be expected from him to furnish such details during the pendency of the Application before the Authority

for Advance Ruling. On the other hand, KOTI and its Directors were very well aware about the ongoing investigations against all of their franchisees which include the present Respondent as well. Thus, it is submitted that this is clearly an attempt by KOTI through one of its franchisees, in this case the present Respondent, to undermine and derail the ongoing investigation. The present respondent and M/S KOTI, who are the hands behind this legal tangle, should not be allowed to misuse a process of law which is a tool for business facilitation, to undermine the present investigation which is going on across the country. Therefore, the impugned Advance Ruling had been obtained by way of suppressing the material facts from the Advance Ruling Authority and hence the impugned Order of the AAR, is liable to be quashed ibid holding it void ab-initio in terms of Section 104 of the Act.

99. Further, the respondents have clearly misunderstood the provisions of Advance Ruling under Ch XVII of CGST Act, 2017. Provisions of section 104 are not self contained. In fact Section 102 of CGST Act, 2017 has provided both the Advance Ruling Authority and Appellate Authority for Advance Ruling with powers to rectify the errors apparent on the face of the records, which they can do suo-motu or when pointed by concerned officer, jurisdictional officer or the applicant or the appellant Thus, only in cases of errors being apparent on the face of the records, errors can be rectified by Authorities. In cases of such orders which are obtained by fraud, suppression, misstatement the orders need to be declared void for which the Authorities have powers. The respondents are trying to force certain word of his own into the Act to interpret the same for its own benefit. Due to the special nature of circumstances of the present case it became incumbent on the undersigned to point out the facts of the case and pray for intervention.

Without prejudice to above, the present Appeal has its own merits, which are detailed herein under:

100. that the composite supply is defined in clause (30) of Section 2 of the CGST Act, 2017, which is reproduced herein under:

(30) "composite supply" means a supply made a taxable person to a recipient consisting oftwo 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 ofbusiness, one ofwhich is a principal

Illustration. — Where goods are packed and transported with insurance, the supply ofgoods. packing materials, transport and insurance is a composite supply and supply ofgoods is a principal supply;

101. When investigating officers examined the premises of franchisees and recorded in statements as to obligations of Franchisees about maintenance of premises of Ice cream parlour outlets, they were not merely roving enquiries. Evidences collected prove that the activity undertaken is indeed a "Composite Supply" within the meaning of Section 2 (30) of CGST Act, 2017. The franchisor has made it obligatory on the franchisees in general and Respondents in particular to maintain prescribed standards like design of sitting place, ambient temperature, illumination, hygiene of premises, attire & hygiene of serving staff so as to ensure that the customer gets a unique experience while consuming the food items. The Franchise is awarded to only those individuals or entities who KOTI thinks can maintain these minimum prescribed standards. These facts can be verified with the statements of one of the Directors of KOTI. This can clearly be juxtaposed with the way a so called super market or departmental storekeeps and sells the retails ice-creams from their deep freezers. It is thus to emphasise that ice cream parlours are not merely reselling shops but they are eating places as enunciated in Service Accounting Code 996331.

An explanation inserted under item (ix), vide Notification No. 46/2017- Central Tax (Rate) dated 14.11.2017 reads as under:

"For the removal of doubt, it is hereby clarified that, supply, by way ofor as part of any service or in any manner whatsoever, of goods, beingfood or any other articles for human consumption or drink, where such supply or service is for cash, deferred payment or other valuable consideration, provided by restaurant, eating joints 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, campuses

or other commercial places meant for residential or lodging purposes having declared tariff of any unit of accommodation of seven thousand five hundred rupees per unit per day or equivalent shallattract Central Tax @2.5% without any input tax credit under item (i) above and shall not be levied at the rate as specified under this entry '

It is to be noted in the above explanation that after the words "provided by restaurant, eating joints" there is a word "including mess, canteen". The word "including" in this context suggest that the list given is not exhaustive as there is an intention of the legislature to widen the scope to include many other similar things. This view will also get support from the amending Notification No. 13/2018-C.T. (Rate) dated 26.07.2018, which further amends the original Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. The amended notification inserts Explanation I to serial no.7 column 3 item (i) reads as under: -

"Explanation I. - This item includes such supply at a canteen, mess, cafeteria or dining space of an institution such as a school, college, hospital, industrial unit, office, by such institution or by based on a contractual arrangement with such institution for such supply, provided that such supply is not event based or occasional.

102. Choosing these set of words the legislature has created an entirely new position of law. Due to the merger of earlier indirect taxation laws into GST Act by way of Constitutional Amendments the Legislature got itself equipped with wider set of powers.In a clear departure from the earlier definition of "Restaurant Service" contained in Section 65(105)(zzzzv) of the Finance Act, 1994, as well as Declared Service as per Section 66 E, Finance Act, 1994 (as and when amended) which essentially had a very limited scope to tax such services which were confined to meaning of Restaurant Service. The legislative intent in GST regime has been to treat all these similarly placed entities engaged in the food business and levy a 5% GST cn them without any ITC. When the legislative intent is very clear and unambiguous, the Principle of Noscitur a sociis cannot be applied. Noscitur a sociis cannot prevailin case where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It can also be applied where the meaning of the words of wider meaning import is doubtful; but, where the object of

the Legislature in using wider words is clear and free from ambiguity, the rule of construction cannot be applied.

103. Thus, ratio of a case adjudicated in Aurangabad Commissionerate for Service Tax demand on alleged evasion of service Tax on Restaurant Services, which was dropped by the Adjudicating Authority, cannot be applied in the present case as the legal provisions have gone substantial change in the present Indirect taxation regime.

104. that the Hon'ble Apex Court in its judgment in the case of Commercial Taxation Officer, Udaipur Vs. Rajasthan Taxchem Ltd, it has been observed - "The word 'includes' gives a wider meaning to the words or phrases in the Statute. The word 'includes' is usually used in the interpretation clause in order to enlarge themeaning of the words in the Statute. When the word 'include' is used in words or phrases. it must be construed as comprehending such things as they, according to their nature and impact but also those things which the interpretation clause declares they shall include"

105. that Hon'ble Apex Court in its yet another landmark judgement in the case of Ramala Sahkari Chini Mills Ltd v. Commissioner of C.Ex., Meerut-I, it has been held that

"15. Therefore, it is trite that generally the word "include " should be given a wide interpretation as by employing the said word, the legislature intends to bring in, by legal fiction, something within the accepted connotation of the substantive part. (Also see: C.I.T., Andhra Pradesh v. M/S. Taj Mahal Hotel, Secunderabad - (1971) 3 SCC 550, Indian Drugs Pharmaceuticals Ltd. Ors, Vs. Employees' State Insurance Corporation &Ors. - (1997) 9 SCC 71, T.N. Kalyana Mandapam Assn. Vs. Union Of India &Ors. - (2004) 5 SCC 632 =2004 (167) E.L.T. 3 (SC.) = 2006 (3) STR.260 (S.C.), It is also well settled that in order to determine whether the word "includes " has that enlarging effect, regard must be had to the context in which the said word appears. (See: The SouthGujarat Roofing Tiles Manufacturers Association Anr. Vs. The State of Gujarat &Anr. - (1976) 4 SCC 601, R.D. Goyal&Anr v. Reliance Industries Ltd. (2003) 1 SCC 81, and Philips Medical Systems (Cleveland) Inc. Vs. Indian MRI Diagnostic and Research Limited &Anr. - (2008) 10 SCC 227.

106. Thus, as already stated above, having regard to the language ofRule 2(g) of the 2002 Rules, and the analysis of the afore noted decisions, it appears that by employing the

phrase "and includes ", legislature did not intend to impart a restricted meaning to the definition of "inputs " and therefore, the interpretation ofthe said term in Maruti Suzuki Limited (supra), my require reconsideration by a Larger Bench."

107. Thus, the legislative intent in the present case is to include all such places where food forhuman consumption is supplied for consumption on or away from the premises other than those mentioned in the explanation. As defined in Longman Dictionary or Wikipedia, Ice cream parlours like cafeteria, mess or canteen, in Naturals parlours customer select their flavor, purchase across counter and self-serve for enjoy Naturals ice cream parlours supply ice cream in cups, fresh waffle cones in single scoop or double scoop and in tubs or take away boxes. At times, they serve with fruit topping or even in a glass ice cream shakes prepared out of ice cream as per customer demand. They also provide some sitting arrangements for all age people. Parlours keep waste boxes to put the cups after eating ice cream and sue paper for customers need, Natural ice cream parlours are fully air conditioned andaesthetically designed to achieve unique consumer satisfaction. Therefore, Naturals ice cream parlours should satisfy all the conditions specified in the explanation to Notification and accordingly its activity of supply of ice cream for human consumption should get classified as supply of service under SAC 9963 of GST Tariff which attracts GST @5% without ITC.

108. that the subject case is not simply an act of resale of ice cream purchased from KOTI. The transactions between KOTI and the present respondent are governed by the franchise agreement agreed between them. No franchise fees are charged separately. No sales promotion expenses, advertisement expenses, infra structure and business support etc provided to KOTI are reimbursed separately to the respondent. Storage expenses, serving expenses, etc. are not reimbursed separately by KOTI. But all the activities of the present respondent including billing, classification of goods/services, taxation etc. are under strict watch, control and guidance of KOTI. To cover all these aspects, KOTI offers more than 90% margin over and above the ex-factory cost price of ice cream supplied to the present respondent, as can be seen from the facts demonstrated below;

- Naturals ice cream is supplied in Bulk packaging of 1.50 kg from KOTI: Ice cream price at KOTI-Rs. 360/- per kg

- There is a discount of 6% given and Transportation cost from MumbaiPune-Rs.6/-per kg which KOTI has included in Taxable value
- Thus, Taxable value at factory end - Rs.344.4 per Kg i.e. (360-21.6+6=344.4/-)

- At franchisee/ ice cream parlour's end, sale value as fixed by the franchisor- Rs.65/- per scoop of 80gm inclusive of GST @18% i.e. its taxable value is Rs. 55.08/- (65/118*100)
- 12 scoops per kg of 80 gm each is taken (as per one of the conditions of franchise agreement) then taxable value per kg comes to 660.88/- i.e. (12*55.08=660.88/-)
- Therefore, gross margin offered to franchisees per kg is 660.88(-) 344.4/=317 or 92% of cost price at KOTI when the ice creams are scooped.

- On the other hand, when ice cream is sold as Family pack}, then the profit margin is 27% only.

109. that analysis GSTR-3B filed from time to time and in respect of the present respondent for the period July-17 to Feb-19 and as furnished by him during the investigation, reveals as under:-

Table I (In Rs.)

Sr. No.	Period	Taxable Turnover of Ice cream sold by the respondent as per GSTR -3B	Tax paid @18% with ITC		Sale Value including Taxes
			Through ITC	Through Cash	
1	2	3	4	5	6(3+4+5)

1	July 17 to March 18	15544167	2219822	578128	18342117
2	April 18 to Feb 19	20618890	3077179	634223	24330292
	Total	3,61,63,057	52,97,001	12,12,351	4,26,72,409

110. If GST @ 5% without ITC as applicable to SAC 9963 is made applicable to the respondent's turnover as contended in the present appeal for the period July-17 to Feb-19, the tax liability and loss of revenue to the GST department works out as under:-

Table-II **(fig. in Rs.)**

Period	Sale Value including Taxes as per GSTR 3B	Taxable value of the Respondent when GST rate is 5 % without ITC	Tax payable @ 5 % by cash	Tax paid in cash by the Respondent	Difference /Loss of Revenue to the Department	ITC to be disallowed /GST amount collected but not paid to the Government by the respondent	Estimated loss of revenue
1	2	3	4	5	6	7	8= (6+7)

July 17 to Feb 19	42672409	40640390	2032020	1212351	819669	5297001	6116670

111.Thus, from the above it may be seen that by opting to classify the supply as goods of HSN 2105 and to pay GST @ 18%, the respondent has paid less amount of GST in cash amounting Rs. 8,19,669/-. It can also be seen that the respondent has charged and recovered GST from the ultimate customers but stand not deposited to the govt, works out to Rs.61,16,670/-.

112. that some of the major competitors in the field such as branded ice Cream under trade names "Gelato", "Baskin Robbins", "Cafe Chokolade" etc. have classified their activity of serving of Ice Cream at parlour ends as 'supply of services' under SAC 996331 of the GST tariff of India and they have paid GST@ 5% without ITCw.e.f. 15..1.2017 by following the amending Notification NO. 46/2011-Central Tax (Rate) dated 14.11.2017.

113. that sample photographs of a representative Natural Ice cream located in Pune city is being submitted for perusal as well the photographs taken of Arihant Enterprises. From the photo it is evident outlet has sitting arrangement so as to sit and enjoy Naturals ice creams which comprises sufficient chairs and round tables. The outlet also displays Naturals Brand logo and other advertisements about the various flavoured Naturals ice cream served at the parlour. This factual position disproves the claim of the respondent and confirms that it has the qualities of a restaurant, eating joint, mess, canteen, cafeteria etc. referred to in the Notifications No. 11/2017 central Tax (Rate) dated 28.06.2017 as amended from time to time prescribes GST rate of 5% without ITC.

114. that the Naturals ice cream parlours including that of the present respondent keeps menu card which declares that they serve ice cream in fresh waffle cones, or in cups of different flavours of single scoop, double scoop etc. Further it is also evident from the

same that they serve ice cream shakes of mango, sitaphal, chikoo chocolate, kesarpista etc. Kind attention is invited in this context that KOTI supplies ice cream in two packages i.e. 500 gm. Tub for retail sale and 1500 gms. bulk packs for serving scooped ice cream. Therefore, preparation of ice cream shakes from the melted ice cream tubs with addition of water/ ice using food processors/ mixers and then serving the same to customers cannot by any stretch of imagination be termed merely as resale of ice creams comparable to resale of pack biscuits or oil from the grocery shop. This argument adopted by the respondents is not only incorrect but amounts to telling lies. Using this argument itself the respondents got a favourable judgement from the Advance Ruling authority. Thus, it is clear that the respondents have gotten an order form the Advance Ruling Authority by suppression and misrepresentation of facts.

115. Secondly, Shri. Mutha in his statement recorded under Section 70, CSGT Act, 2011 has said that they are deploying Air conditioners to keep the deep freezers containing ice creams cooler. The respondents in their submission to the Hon'ble Appellate Authority have reiterated that they are using Air conditioners to keep the ice creams cool. This kind of bizarre submission is not only beyond common sense but childish, misdirecting and laughable. Going by his logic alt the food items including street side fish marts must use air conditioners to keep the items cool. It doesn't take an engineer to distinguish between the use of an air conditioner and a refrigerator. Thus.they have misrepresented earlier and now also they are trying to misguide the Authority and undermine the investigation.

116. That the respondents have advanced this argument that by choosing to pay higher tax @18% they are paying more taxes to the government exchequer. It is most respectfully submitted that investigations have revealed that most of the franchisees end up paying very low and in some cases NIL taxes in cash, whereas they collect the from the customers in cash at 18%. KOTI and its franchisees including the present respondents are found to be violating the law including suppressed sales which is being investigated in the present investigation.

117. That the reliance has been placed on the following judgments delivered in department's favour:

a. Advance Ruling No. KAR ADRG 21/2018 dated 21st August, 2018 in the case of M/s Coffee Day Global Ltd.

b. Advance Ruling in the case of case of Jabalpur Entertainment Complexes P. Ltd.

118. That in view of the above positions, the DGGI, PZU in the capacity of the concerned officer prayed as under:

a) That the impugned order of the AAR is liable to be quashed being non maintainable ab-initio and the same may thus be set aside on merits,

b) To allow the present Appeal,

c) That strictures be passed against the respondents for suppressing and misrepresenting to the Authority for Advance Ruling and attempting to abuse the law.

d) Any other order as deemed fit.

Respondent's reply to the abovementioned affidavit filed by DGGI, PZU:

119. The present appeal has been filed by be Appellant against the Order No. GST-ARA-126/2018-19/B-29 dated 19.03.2019of the Authority for Advance Ruling holdingthat the supply of ice cream by the Respondent-applicant from its retail outlets be treated as supply of "goods".

120. the Dy. Director, DGGI, PZU ('DGGI Officer') has filed an affidavit dated 6.08.2019 before this Hon'ble Appellate Authority.

121. The Respondent submits that the affidavit filed by DGGI Officer and present appeal is incorrect on facts as well as on law and thus liable to be dismissed onthe following grounds which are urged without prejudice to one another:

No proceeding is pending against the Respondent:

122. The provision of Section 98(2) of the CGST Act, 2017 states that the Authority for Advance Ruling shall call for records from the applicant and the concerned officer and after hearing them either admit or reject the application. The proviso to Section 98(2)

states that the Authority shall not admit the application where the question raised in the application is already pending in any proceeding in the case of an 'applicant'. The relevant extract of the section is as under:

"98.(2) The Authority may, after examining the application and the records called for and after hearing the applicant or his authorised representative and the concerned officer or his authorised representative, by order, either admit or reject the application:

Provided that the Authority shall not admit the application where the question raised in the application is ***already pending or decided in any proceedings in the case of applicant****under any of the provisions of this Act:"*

... emphasis supplied

123. In the present case, there is no proceeding pending against the applicant-respondent, i.e., M/s. Arihant Enterprises. The DGGI Officer has submitted in its affidavit that investigations were initiated against the Franchisor (KOTI) and some of its franchisee on 05.02.2019 before the filling of the application by the applicant-respondent and thus the application is not maintainable. Further, it has been submitted by DCGI Officer that the approval for initiation of the proceeding against all the franchisee including the applicant-respondent was received on 15.01.2019.

124. However, despite all the averments made by the DGGI Officer in his affidavit, he has failed to submit any evidence of any proceeding initiated against theapplicant-respondent. He has merely stated that the investigations were initiated against the Franchisor (KOTI) and some of its franchisees. Further, even if approval has been obtained for initiation of investigation of all franchisee, it is an admitted fact that no summons has been issued or no inquiry has been initiated against the applicant-respondent till date.

125. Per contra, the DGGI Officer has in his affidavit at para 14, and the appellant inhis appeal at para D, stated that the applicant-respondent had no reason to approach the Authority for Advance Ruling especially when no dispute hadcropped up even from the concerned State Tax Officer.

126. Thus, no proceeding is pending against the applicant-respondent and the claim of the DGGI officer and the appellant is entirely baseless and without substance. **Appeal can**

only be filed by an aggrieved person. The Authority for Advance Rulinghas upheld the claim of the jurisdictional office and thus the jurisdictional officer cannot be an aggrieved person.

127. Section 100(1) of the CGST Act provides for appeal against the order of the Authority for Advance Ruling. The section states that the concerned officer, jurisdictional officer or the applicant aggrieved by the order of the Authority for Advance Ruling may appeal to the Appellate Authority. The relevant extract of the said section is as under:

100. (1) ***The concerned officer, jurisdictional officer or the applicant aggrieved*** *by any advance ruling pronounced under sub-section (4) of section 98, may appeal to the Appellate Authority.*

....emphasis supplied

128. The term 'concerned officer' or 'jurisdictional officer' have not been defined under the CGST Act. It is submitted that the advance ruling may be obtained by a registered person or an unregistered person. Thus, in case of registered person, the jurisdictional officer will be the person under whose jurisdiction the applicant is registered whereas in case of an unregistered person, the relevant officer would be the concerned officer, i.e., the officer who would be the jurisdictional officer, had the applicant been registered under the provisions of the Act.

129. In the present case, the applicant-respondent is registered under the Act. The Assistant Commissioner, State Tax, Pune, who is the jurisdictional officer of the applicant-respondent, has made the submission before the Authority for Advance Ruling that the supply of ice cream from the retail outlets of the applicant-respondent is a supply of "goods". The Authority for Advance Ruling has accepted the submission of the jurisdictional officer. Having made the above submission which has been accepted by the Authority, the jurisdiction officer cannot be an aggrieved person.

130. The present appeal has been filed on the direction of the DGGI. It is submitted that the section provides for appeal in case the jurisdictional officer is aggrieved. The DGCI Officer has in his affidavit submitted that Notification No. 14/2017Central Tax dated 01.07.2017 give power to DGGI to investigate and detect cases of GST evasion irrespective of whether the assessee is under the control and administration of Centre

or State authorities. Further, it has been stated that DGGI was not made party to the Advance Ruling either in the capacity of jurisdictional officer or concerned officer.

131. It is submitted that Notification No. 14/2017-Central Tax dated 01.07.2017 issued under the CGST Act provides that DGGI will have same power as are exercisable by the Central Tax Officer of the corresponding rank.

132. However, the notification does not provide that DGGI will be jurisdictional officer of all assessee whether under the administration of Centre or State authority. The applicant-respondent is under the Jurisdiction of Assistant Commissioner, State Tax, Pune. Thus, DGGI is not jurisdictional/concerned officer of the applicant-respondent and has no locus standi to compel the jurisdictional officer to file an appeal contrary to his own submission before the Authority for Advance Ruling. The jurisdictional officer is not aggrieved and thus the appeal is not maintainable.

133. **The Authoritywhich has passed the order may rectify error apparent on record or declare theruling void ifobtainedbyreason offraud or suppression. No appeal lies in such cases. Even otherwise, there is no fraud or suppression in the present case.**

134. Section 102 of the CGST Act provides for rectification of any error apparent on the face of the record by the Authority which has passed the order. The relevant extract of the section is as under:

*"**102. The Autority or the Appellte Autority may amend any order passed by it** under section 98 or section 101, so as to **rectifyanyerror apparentonthe faceoftherecord**, if such error is noticed by the Authority or the Appellate Authority on its own accord, or is brought to its notice by the concerned officer, the jurisdictional officer, the applicant or the appellant 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 applicant or the appellant has been given an opportunity of being heard. "

... emphasis supplied

135. Section 104 of the CGST Act provides the where the Authority or the Appellate Authority finds that the ruling pronounced by it has been obtained by fraud, suppression of material facts or misrepresentation of facts, then such Authority or the Appellate Authority has passed the order may declare it to be voidab-initio. The relevant abstract the section is as under:

"104. Advance ruling to be void in certain circumstances -

(1) Where the Authority or the Appellate Authority finds that advance ruling pronounced by it under sub-section (4) of section 98 or under sub section(1) of section 101 has been obtained by the applicant or the appellant of fraud or suppression of material facts or misrepresentation of facts, it may, by order, declaresuch ruling to be void ab-initio and thereupon all the of provisions of this act or the rules made thereunder shall apply to the applicant or the appellant as if suchadvance ruling had never been made:

Provided that no order sahll be passed under this sub-section unless an opportunity of being heard has been given to the applicant or the appellant

... emphasis supplied

136. On plain perusal of the above sections, it can be seen that this provisionempowers the respective authorities viz. Autority for Advance Ruling who passed the order on the application for advance ruling and Appellate Authority passes an appellate order on such ruling whereinthe advance rulinghas been challenged by way of appeal, to rectify error apparent on the face of the record, or to suo-moto recall the orders passed, if at any stage it is found that thesame has been obained by means of fraud, suppression of material facts or misrepresentation of facts.

137. However, appeal does not lie against the order of Authority forAdvance Ruling under section 102 or 104 of CGST Act. The submissions of the DGGI Officer thatthe appeal lies in the present case is contrary to theabove provisions of theCGST Act.

138. In para 13 of the affidavit filed by DGGI Officer it has been stated that the applicant respondent has melted the ice cream from tubs and scooped thesame. It is submitted that the fact that the ice cream is melted and sold in scoops was disclosed by the

applicant-respondent at para 7 and 8 of the Advance Ruling application. Thus, the DCGI Officer has wrongly alleged that the applicant-respondent has suppressed the facts.

The present case involves transferof title in ice cream over the counter. There is no element of service. The transaction is of supply of goods classifiable under HSN code 2015

139. Section 7(1A) of the CGST Act provides that the whether a supply is a supply of goods or supply of service has to be determined in accordance with Schedule II of the CGST Act. The said section is reproduced as under.

"7. (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 ofgoods or supply of services as referred to in Schedule II. "

140. Para 1(a) of the Schedule II states that any transfer of title in goods is a supply of goods. Para 6(b) of the Schedule II states that the composite supply namely supply, by way of or as a part of or in any other manner whatsoever, of goods, being food shall be treated as a supply of service. The relevant paras of Schedule II are extracted as under:

SCHEDULE II

ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

"1. Transfer

(a) any transfer oftitle in goods is a supply ofgoods;

.....

6. Composite supply

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

.....

(b) supply, by way of or as a part of any service or in any other manner whatsoever, ofgoods, beingfood 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 of other valuable consideration. "

141. For a supply of food article to be covered within the ambit of para 6(b), it should first be a composite supply. Composite supply is a supply comprising of two or more taxable supplies of goods or service. In case where there is only one supply namely, transfer of title in goods, the same cannot be covered under para 6(b) of Schedule II.

142. Further, the supply of foods shall be by way of or as a part of any service or in any other manner whatsoever. 'By way of any service' means that the transaction is purely of service to satisfy the human need and there is no sale of goods involved. For instance, service of food in a restaurant where the customer can only have the food and cannot take it away. 'As a part of any service' means that there is a transfer of title in goods but that that transaction is a part of a composite transaction of goods and service. For instance, supply of food to a customer staying in a hotel.

143. Further, the words 'in any other manner whatsoever' will mean that the supply of food can be in any other manner but there should be some element of service involved in the transaction. The aforesaid words occur in the entry with the words by way of or a part of any service. It is a settled principle of interpretation to construe words in an Act of Parliament with reference to words found in immediate connection with them. As per the rule of noscitur a sociis, the meaning of the word is to be judged from the company it keeps. Where two or more words, which are susceptible of analogous meaning, are coupled together they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general.

144. Thus, a transaction of supply of foods would be covered within the ambit of Para 6(b) of Schedule II only if there is some element of service involved and if it is a composite supply. Further, the service element has to be seen at 6me of making of supply. It is well understood that the nature of supply has to be determined at the time of supply; what happens prior to making of supply and what happens after making of supply is wholly irrelevant. There is no service involved at the time of making of supply and thus the transaction is covered by Para 1(a) of Schedule II of the CGST Act and thus a supply of goods.

145. 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 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.

146. While dealing with the review petition in the matter of Northern India Caterers Vs. 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 tax law and to determine upon those facts whether a sale of the food supplied is intended. "

147. Further, 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 opined as under:

"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, Itis in no

way different from the service involved in 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. "

...emphasis supplied

148. Similar view has been taken by the Hon'ble high court of Andhra Pradesh in the case of Durga Bhavan and Ors. [1981] 47 STC 104 (AP) and by the Hon'ble Rajasthan High Court in the case of Govind Ram and ors. Vs. State of Rajasthan and ors. reported as AIR 1982 Raj 265.

149. On the basis of the above arguments, the respondent submits that in the case of sale of tubs (retail packs) there is no element of service involved. The tubs are received from the manufacturer and supplied as such to the customer. Further, even in case of sale of ice cream in scoop or in melted form, the activity undertaken, if any, is prior to the supply of ice cream. The activity is only a component which goes into the making of the product, i.e., the ice cream in cup/scoop or in melted form — but it is only a component and nothing more. The transaction between the respondent and the customer is only of transfer of title in the ice cream in cup/scoop or in melted form. The activity/service involved if any is only prior to the making of supply and not at the time of making of supply. In this regard, reliance is placed on the decision of Hon'ble Supreme Court in the case of Hindustan Shipyard Ltd v. State of Andhra Pradesh 2000 6 SCC 579.

150. 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.

151. The above notification prescribes rate of supply of service provided by restaurant, eating house, etc. The act or the notification does not define the such terms. It is settled principle of construction that entries in schedule prescribing rate of tax should be construed in sense that people conversant with subject-matter of statute, attribute to it. Consider a case where an ordinary person intends to go out with his family to a restaurant, whether he will go to the ice cream retail outlet as operated by the applicant-respondent? Certainly not. Thus, an ice cream retail outlet cannot be considered as a restaurant.

152. Further, the DGGI Officer has submitted in the affidavit that the Notification uses the term 'includes' which is used to widen the scope of the entry for restaurant service. In this regard, it is submitted that the aforesaid notification, to the extent it treats even the sale simpliciter of food article (take away) as a service, merely on the basis of the place from such sale is made, is beyond the scope of Para 6(b) of Schedule II of the CGST Act.

153. Thus, the present case of the applicant-respondent is covered by Para I(a) of Schedule II of the CGST Act and HSN code 2105 leviable to tax at the rate of 18% with input tax credit.

Evenfrom thepoint of view of revenue, the applicant-respondent is paying approx. 5% of the taxable turnover approx. 5% of the taxable turnover in cash.

154. The DCGI Officer has in his affidavit at para 24 given a working of tax paid by the applicant-respondent in cash. The working has been done for the period July 2017 to February 2019. It has been stated that tax payable @ 5 % by cash comes to Rs. 20,32,020/- whereas the actual cash payment is Rs.12,12,351/-.

155. However, in the Statement of Mr.Virendra Nand kumar Mutha, it has been stated that the amount of tax payable over and above the amount declared in returns comes to Rs. 8,93,678/- for the period July 2017 to March 2019. A detailed working of the same is annexed herewith. The said amount has also been paid by the applicant-Respondent in case. The challans for the payment are also annexed herewith.

156. It is submitted that the DGGI officer has only taken the amount shown in the return and ignored the amount of tax payable (which has been paid) as stated in the statement recorded by themselves. If the amount as stated in the statement is also taken into account, then the total tax paid in cash comes to Rs. 20,20,888/- which is more or less equal to 5% of the taxable value. Further, the addition of the amount of Input Tax Credit to the Estimated Loss of Revenue is clearly erroneous and perverse as once tax has been paid at 18%, the applicant-respondent is validly entitled to input tax credit. The department cannot approbate and reprobate by collecting the tax at 18% and also denying input tax credit.

157. Thus, in the tax position adopted by the applicant-respondent, there is no implication even from the angle of revenue. Needless to say, this aspect has no bearing on the interpretation of the provisions of the CGST Act.

158. In view of the foregoing, the Respondent prayed that the present appeal be dismissed and uphold the impugnedOrderGST-ARA-126/2018-19/B-29 dated 19.03.2019 passed by the Authority for Advance Ruling, Mumbai.

Personal Hearing held on 22.08.2019

159. The second Personal Hearing in the case was held on 22.08.2019, pursuant to the filing of the affidavit by the DGGI Officer as the concerned officer in the present case. In this hearing, Shri Prasad D. Gorase, Dy. Director, DGGI, PZU appeared alongside the Appellant, being represented by Shri Suhas Kaware, Asst. Commissioner, State Tax, who reiterated the submission made in the aforesaid affidavit. The Respondent was represented by Shri Sridharan, Advocate, who also reiterated the written submissions made in the reply to the affidavit filed by the DGGI, countering vehemently the allegation made against the Respondent, by the DGGI, PZU.

Discussion and findings

160. The jurisdictional officer has made a prayer for condonation of delay as the advance ruling was received by the officer on 16.4.2019 and the appeal is filed on 11.6.2019. It is stated that the facts crucial to the case were brought to the notice of the jurisdictional officer by the Dy Director through letter dt 14.5.2019 and therefore the appeal could not be filed before 30 days of the communication of the order. As per

proviso to Section 100(2) the Appellate Authority, if satisfied that the appellant had sufficient cause for late filing, can condone the delay if it is presented within a further period not exceeding thirty days. We are satisfied that the appellant had sufficient cause in filing the application late and therefore we condone the delay.

161. The appeal has been filed by the department on the following points.

1) It was brought to the notice of the appellant by the DGGI, Pune Zone Unit, Pune vide letters dt 14th and 17th May, 2019 that Arihant Enterprises (hereinafter referred to as the applicant-respondent) has suppressed vital facts in the application made before the Authority for Advance Ruling (hereinafter referred to as AAR) about the investigations that had been initiated by the DGGI (Director General of GST Intelligence-hereinafter referred to as DGGI) u/s 67 of the CGST Act, 2017 against M/s Kamaths Ourtimes Ice creams Pvt Ltd (hereinafter referred to as KOTI-also the franchisor of the applicant -respondent) and its various franchisees who deal in Natural Ice creams under the terms and conditions of an identical franchise agreement entered with its each franchisees and the Advance Ruling thus obtained by keeping the AAR in the dark appears to be not a legal and correct order and therefore it should be appealed against as the subject order of the AAR appears to be invalid *ab initio*.

2) The DGGI ,on an intelligence received by them on 7.01.2019, initiated the investigations on 5.2.2019 by way of search operations at the premises of M/s KOTI and some of its franchisees located at Pune much before the date of application of the applicant made on 25.2.2019 before the AAR and the investigations involved the very same issue of classification of activities of franchisees. Statement u/s 70 of the CGST Act was recorded of the key persons and the investigations appear to reveal that GST of more than Rs 40 crores has been evaded by 1) misclassification of the activity as supply of goods under HSN 2105 instead of correct classification as supply of service under SAC 9963 2) Suppression of supplies made and GST evaded thereon.

3) In the meantime, based on the application dt 25.2.2019 for Advance Ruling made by M/s Arihant Enterprises, the AAR issued an order dt GST-ARA-126/2018/B-29 dt 19.3.2019 holding that the supply of ice cream from its retail outlets would be treated as supply of goods. The DGGI not being a party to the proceedings, were

not aware of the application and had no knowledge of the proceedings and the order of advance ruling was not endorsed to it.

4) Statement u/s 70 of CGST Act was recorded as Mr.Virendra kumar Nandakumar Mutha (Partner, Arihant Enterprises) on 10.05.2019 and in the statement he admitted that he was aware of the ongoing investigation of DGJI against KOTI and it franchises and with due discussions with the directors of KOTI, the decision was taken to file on application before the AAR, but the relevant facts about the investigation, was not incorporated in the application

5) In the entire scheme agreement of KOTI had the upper hand and had its own role behind the application as investigation was already initiated against all the Franchises outlets. The applicant has no reason to approach the Authority of Advance Ruling on the issue of classification of supply especially when there was no immediate dispute about the issue.

6) The application is not maintainable as per the provisions of Section 98(2) as proceedings were already initiated on 05.02.2019 against KOTI and all of its franchises which was much before the filing of the application before the AAR 25.02.2019. The proceeding under CGST Act was approved on 15.02.2019. KOTI and its directors were aware of the ongoing investigations against all of their Franchises which included the applicant

7) The order is obtained by fraud suppression needs to be declared void.

162. We have gone through the facts of the case. The relevant sections are as follows:

98(2) *The Authority may, after examining the application and the records called for and after hearing the applicant or his authorised representative and the concerned officer or his authorised representative, by order, either admit or reject the application :*

Provided that the Authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act:

Provided further that no application shall be rejected under this subsection unless an opportunity of hearing has been given to the applicant:

Provided also that where the application is rejected, the reasons for such rejection shall be specified in the order.

104. *(1) Where the Authority or the Appellate Authority finds that advance ruling pronounced by it under sub-section (4) of section 98 or under sub-section (1) of section 101 has been obtained by the applicant or 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 applicant or the appellant as if such advance ruling had never been made :*

Provided that no order shall be passed under this sub-section unless an opportunity of being heard has been given to the applicant or the appellant.

Explanation: The period beginning with the date of such advance ruling and ending with the date of order under this sub-section shall be excluded while computing the period specified in sub-sections (2) and (10) of section 73 or sub-sections (2) and (10) of section 74.

163. Sec. 98(2) provides that the application shall not be admitted where the question raised is already pending under any of the provisions of this act. The term 'any of the provisions of this act' includes investigations proceeding under section 67. It is clear from the record submitted by the DGGI that proceedings was pending against KOTI (Kamat Ourtimes Ice-cream Ltd). and the issue taken up in the proceedings related to the classification of the activities **'ice-cream sold from the natural outlets'** – whether the supplier of goods would be charged at the rate of 18 % under HSN 2105 by availing ITC or whether the activity should be classified as supply of service under SAC – 996331 at the rate of 5 % without ITC.

164. There is no dispute that there is an agreement between Kamath Ourtimes Ice Creams Pvt Ltd and the applicant-respondent dt 1.10.2011 which is termed as a 'Franchise Agreement'. As per the agreement, Kamath has allowed the applicant-respondent to operate a Natural Ice cream shop, under the trademark owned by KOTI under a uniform system (which includes a special technique for packaging, displaying, merchandising and marketing the food products) of KOTI under certain Standards also set by KOTI. The applicant -respondent has a specific location assigned to it and it

cannot relocate its shop as per the terms of agreement. The shop interior is also as per the designs set by KOTI with KOTI's architect. The exterior and interior signage must conform to the standards of KOTI. The advertising standards are also set by KOTI. Clause 11 of the agreement requires applicant-respondent to strictly comply with the system set by KOTI. Also, as per the statement of Mr Imran Kacchhi (Sr. Manager accounts of M/s Creative IT India) the menu/flavours of ice cream, pricing, taxes applicable, HSN codes of items is updated at the Head office of M/s KOTI only and outlets do not have provision to change them. It also makes it clear that the applicant-respondent is under obligation to use the billing software supplied by KOTI through M/s Creative IT India Pvt Ltd. Thus, the franchisee operates under the tight control of the franchisor and it may be safely reasonable to assume that the taxation followed by applicant-respondent is also controlled by KOTI. Against this background, it cannot be a mere coincidence that the applicant-respondent made an application for advance ruling on 25.2.2019 immediately following the initiation of proceedings against KOTI on 5.2.2019. Having seen the sort of control exercised on the operations of the applicant-respondent by KOTI, it also is apparent that applicant-respondent was aware of the DGGI proceedings against KOTI and therefore it filed an application and moreover, kept the fact away from the advance ruling authority. This amounts to nothing but suppression of facts and therefore the advance ruling is void as it is obtained by suppressing the vital fact that proceedings were initiated by DGGI against KOTI and were pending as on the date of filing of advance ruling application. The statement of Mr Narendra Mutha (partner of Arihant Enterprises) given on 10.5.2019 which brings out the above is reproduced below"-

.." On being asked about the application dated 25.2.2019 made by Arihant Enterprises before Advance Ruling Authority, I undertake to produce the same by 13.05.2019. In the light of franchisee agreement with KOTI and with due consideration to its terms and conditions, classification of the product and taxation thereon is decided by KOTI, the franchisor , by way of supplying the spectrum software for billing to your firm , which is mandatorily to be used by each franchisee, under these circumstances on being asked as to how Arihant Enterprises has filed an application for advance ruling authority on its own, I state that with due oral discussion with directors of KOTI, it was taken decision to file an application before the Advance Ruling Authority through a

common legal consultant, Mr Chirag Mehta for taking an advance ruling as to whether serving of ice cream at parlour end is a supply of service classifiable under Sac 9963 for resale of goods (ice cream) under HSN 2105, since this issue of classification was already taken up by DGGSTI , Pune Zonal Unit by initiating inquiry against KOTI and some of its franchisees during February 2019. On being specifically asked I state that involvement of KOTI and the relevant facts of investigations initiated by the DGGSTI and details thereof was not incorporated in our application and hence the Advance Ruling authority was not aware of the same.''

165. Thus, it is seen from the above facts of the case that investigations proceedings were approved on 15.01.2019 and the search was conducted on 5.2.2019. The statement of the Director of KOTI u/s 70 was recorded on 5.2.2019, and the statement of M/s Srinivas Kamath (Wholetime Director of KOTI) was recorded on 11.2.2019. The application for advance ruling was filed on 25.2.2019 by the applicant respondent at the behest of KOTI. It becomes clear from the above that there was a deliberate intention on the part of KOTI as well as its applicant-respondent to obtain a decision clandestinely without revealing the issue of investigation being initiated against KOTI on the very same issue that was raised before the ARA.

166. On behalf of Arihant Enterprises, it was argued that the appeal can only be filed by an aggrieved person. The Asst Commr., State Tax, Pune who is the jurisdictional officer of the applicant-respondent had made the submission before the authority for advance ruling that the supply of ice cream from the retail outlets of the applicant-respondent is a supply of goods and the ARA accepted the submission of the jurisdictional officer. They have further submitted that the present appeal has been filed on the direction of the DGGI and they cannot compel the jurisdictional officer to file appeal.

167. We do not agree with the above. As per Section 104, power have been given to the Appellate Authority to declare an order u/s.98(4) to be void *ab-initio* in case it is obtained by fraud or suppression of material facts or misrepresentation of facts. The Jurisdictional Officer in the present case might have given a stand which was confirmed by the Advance Ruling Authority and also agreeable to the Applicant-respondent. However, later on it was made known to the Jurisdictional Officer that the proceedings were pending on the same issue against KOTI and later on against

the applicant-respondent himself. This amounts to deliberately keeping away knowledge from the Jurisdictional Officer and if he was made aware of the fact by the applicant-respondent that investigations were pending on the same issue against the franchisee and the applicant-respondent was also aware of the proceedings then the jurisdictional officer would have surely brought it to the notice of the ARA. Therefore, the Jurisdictional Officer later on has a valid reason to be aggrieved by the order of the ARA and therefore there is no incongruity in him in filing an appeal before the Appellate Authority. There is also no reason to assume that he is compelled to file an appeal by the DGGI.

168. The applicant-respondent has also argued that on the date of filing of the Application i.e. 25.02.2019, investigation proceedings initiated by DGGI were not pending against the applicant-respondent but were against KOTI who is the franchisee and therefore it cannot be said that the proviso to section 98 comes in the picture. We do not agree with the said contention of the applicant-respondent. Though technically proceedings were not pending against the applicant-respondent on the date of filing of Advance Ruling Application, it is clear and apparent from the deposition of Mr. Narendra Mutha Partner of M/s. Arihant Enterprises that it was decided by KOTI to file an application before the ARA on the same issue of classification of Ice-cream sold through the parlour which was taken up by DGGI. This is not an apparent coincidence as made out to be by the applicant-respondent. This reflects the deliberate intent on the part of franchisor and the franchisee to subvert the investigation proceedings and also a purposeful objective to hide facts which are critical to the AAR and the provisions relating to the AAR. It is trite law that when one comes for justice one should come with clean hands. This is not the case here. The applicant-respondent has attempted to show the technical errors in filing of the appeal but when the facts of the case are seen it is very clear that there is a premeditated and a conscious action on the part of the applicant-respondent to undermine the process of the Advance Ruling and an attempt to use it to satisfy their own ends. We therefore hold that the order of the AAR is void *ab-initio* as it was vitiated by the process of suppression of material facts. Our above view is fortified by the Hon. Supreme Court decision in the case of **S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs &Ors.**[(1993) Supp. 3 SCR 422]–

The Supreme Court in the case stated that it is the settled proposition of law ***that a judgment or decree obtained by playing fraud on the court is a nullity and non-est in the eyes of law.*** Such a judgment/decree — by the first court or by the highest court — has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings. The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to the Court with a true case and prove it by true evidence and opined that *"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands."* There are also a plethora of judgements which have time and again held that misrepresentation or suppression of facts can vitiate the most solemn court proceedings.

169. In view of the extensive deliberation, as held above, we pass an order as follows-

ORDER

170. For the reasons recorded in the text part, the instant appeal is allowed. The order passed by the ARA is declared void ab-initio as it was vitiated by the process of suppression of material facts.

(Rajiv Jalota)
Member

(Sungita Sharma)
Member

Copy to- 1. The Appellant

2. The AAR, Maharashtra

3. The Pr. Chief Commissioner, CGST and C.Ex., Mumbai Zone

4. The Commissioner of State Tax, Maharashtra

5. The Jurisdictional Officer

7. The Web Manager, WWW.GSTCOUNCIL.GOV.IN

8. Office copy