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/10/2019-20 Date- 22.10.2019

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri Rajiv Jalota, MEMBER

GSTIN Number	27AAACH2736F1ZU
Legal Name of Appellant	Sanofi India Limited
Registered Address	CST No. 117B, Sanofi House Saki Vihar Road, Land T Business Park, Powai, Mumbai- 400 072.
Details of appeal	Appeal No. MAH/GST-AAAR-10/2019-20 dated 24.07.2019 against Advance Ruling No. GST-ARA-115/2018-19/B-43 dated 24.04.2019
Jurisdictional Officer	Deputy/Asstt. Commissioner, Division-VIII, CGST, Mumbai East

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 Sanofi India Limited (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-115/2018-19/B-43 dated 24.04.2019

BRIEF FACTS OF THE CASE

A. Sanofi India Limited (hereinafter referred to as the "Appellant"), in India is engaged in business of sale of pharmaceutical goods and services. The Appellant has its head office in Mumbai and manufacturing unit at Goa and Ankleshwar. The Appellant also gets its products manufactured through third party manufacturers who manufacture goods on contract manufacturing basis. Further, the Appellant provides taxable services and is registered under GST.

B. The Appellant in regular course of business, incurs various marketing and distribution expenses. The said expenses are incurred with a view to promote their brand/products and enhance its sales. Under various schemes, the Appellant distributes different products among its trade channels as promotional items or brand reminders. Further, the Appellant also offers various promotional schemes such as "Shubh Labh Trade Loyalty Program", etc.

C. In case of brand reminders, products like pens, notepad, key chains etc. are distributed to the distributors with their name embossed on it. The brand embossed on these products serve as an advertisement tool and is a brand reminder. Such products act as reminder of the association with the brand Sanofi so as to promote products of the Appellant.

D. In case of "Shubh Labh Trade Loyalty Program", the distributors/wholesalers get rewards based on the reward points earned on the basis of quantity of goods sold by them.

For example: - Combiflam Tablet purchased in minimum quantity of 01 shipper/case or 14,040 tablets will be eligible for 01 reward coupon. On activation of one (01) Combiflam coupon, wholesaler will be credited with FIFTEEN (15) reward points and confirmed via text/SMS to registered mobile number. Further, as per the scheme catalogue the wholesalers who have earned 35000 points will be eligible for Singapore Trip For 2 Persons; 6 Days/5 Nights, the wholesalers who have earned 24000 points will be eligible for claiming Raymond Weil 2760-St3-50001 Watch -For Men, etc.

E. In the above example, when the wholesaler opts for Raymond watch, the watch is purchased by the Appellant and provided to the wholesaler as per the agreed terms of the promotional scheme. The invoice for the said watch is raised in the name of the Appellant and accordingly, input tax credit ('ITC') of the GST paid on the watch is claimed by the Appellant.

F. In light of the aforesaid business model, the Appellant preferred an application No. GST-ARA, Application No. 115 dated 28.01.2019 for Advance Ruling under Section 97 of Central Goods and Services Tax Act, 2017 ("CGST Act") and Maharashtra Goods and Services Tax Act, 2017 ("SGST Act") before the Maharashtra Authority of Advance Ruling (hereinafter referred to as the "Authority") on the question of law as to whether input tax credit is available of the GST paid on expenses incurred towards promotional schemes of "Shubh Labh Loyalty Program" or goods given as brand reminders.

G. However, brushing aside the submissions of the Appellant, the Authority passed the order bearing number GST-ARA-115/2018-19/B-43/Mumbai dated 24.04.2019 (herein after referred to as the "Impugned Order") and answered the Questions raised by the Appellant in the following manner, inter-alia, ruling thus:

"Question 1: Whether input tax credit is available of the GST paid on expenses incurred towards promotional schemes of "Shubh Labh Loyalty Program"?

Answer: Answered in Negative.

Question 2: Whether input tax credit is available of the GST paid on expenses incurred towards promotional schemes goods given as brand reminders?

Answer: Answered in Negative."

H. Being aggrieved by the said impugned order, the Appellant is filing this instant appeal on various grounds, which are taken without prejudice to each other.

Grounds of the Appeal

1. At the outset, the Appellant submits that the ruling of the Authority is inconsistent with the spirit of the GST Law and without authority of law, and/or otherwise untenable and unsustainable in law and is liable to be set aside, on the following amongst other grounds, which are taken without prejudice to one another.

2. ITC SHOULD BE ALLOWED OF THE GST PAID ON PROCUREMENT OF PROMOTIONAL PRODUCTS WHICH ARE GIVEN TO WHOLESALERS AS BRAND REMINDERS.

2.1 It is submitted that the Authority has erred in holding that since Section 17 (5) of the CGST Act deals with Blocked credits and begins with a non obstante clause, the Appellant can be denied the ITC even if Section 16 (1) allows ITC considering the fact that the goods given by Appellant are not gift.

2.2 **As per Section 16(1) of the said Act –**

"Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person".

Thus, credit is available of input tax paid on goods which are used for furtherance of business.

2.3 However, as per **Section 17(5)(h) of the CGST Act, 2017**, *"input tax credit shall not be available in respect of the following, namely: goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples."*

As per the above provision, credit is not available of goods which are given as gift and free samples.

2.4 As mentioned above, in case of brand reminders, products like pens, notepad, key chains etc. are distributed to the distributors and dealers. The said products are embossed with Sanofi brand. The brand embossed on these product serves

as an advertisement tool and is a brand reminder. Such goods act as reminder of the association with the brand Sanofi so as to promote sales.

2.5 It is submitted that as per the provisions of the CGST Act as highlighted above, every registered person is entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business.

2.6 It is submitted that in the instant case of the Appellant, the brand reminders are provided to the wholesalers in furtherance of business so as to promote brand Sanofi and its products. Thus, ITC should be allowed of the GST paid on procurement of such products which are given to wholesalers as brand reminders. However, Section 17(5) of the CGST Act covers gifts for the purpose of ineligible credit.

2.7 It is submitted that the aforesaid submissions formed the part of the application filed before the Authority, in the additional submissions dated 20.02.2019 and also the oral submissions. However, the Authority failed in not considering the submissions of the Applicant. The impugned order should be quashed and set aside on this count alone.

3. A CONTRACTUAL OBLIGATION IS CREATED BETWEEN THE APPELLANT AND THE DISTRIBUTOR/WHOLESALER WHICH WOULD ENABLE EITHER PARTY TO TAKE RECOURSE TO A CIVIL SUIT OR ACTION FOR SPECIFIC PERFORMANCE OF CONTRACT ON FAILURE TO ADHERE TO THE TERMS AND CONDITIONS

3.1 It is submitted that the Authority erred in holding that Appellant have not submitted any contract/agreement in support of the contention that there is a contractual obligation between the distributor/wholesaler and the Appellant.

3.2 It is submitted that the Authority has erred in stating the aforesaid in as much as the said statement is factually incorrect. The Impugned Order proceeds on a flawed finding that the Appellant have not submitted any contract/agreement in support of the contention that there is a contractual obligation between the distributor/wholesaler and the Appellant.

3.3 The Appellant in their Additional submissions had produced, before the Authority, a PPT, which would establish that, in light of the terms and conditions which the distributor/wholesaler accept, a contractual obligation is created between the Applicants and the distributor/wholesaler which would enable either party to a take recourse to a civil suit or action for specific performance of contract on failure to adhere to the terms and conditions.

3.4 It is submitted that the Appellant in Paragraph 3 (k) and Paragraph 3 (l) of the said additional submissions dated 18.04.2019 demonstrated the aforesaid contentions, which is clearly brushed aside by the Authority while passing the Impugned order. For the ease of reference, the Paragraph 3 (k) and Paragraph 3 (l) of the said additional submissions dated 18.04.2019 is reproduced herein below:

"k. The Applicants are emphasizing on this to establish that the acceptance of terms and conditions on the website/app creates a contractual obligation between the distributor/wholesaler and the Applicants herein.

l. In fact, the Applicants would like to submit that in light of the terms and conditions which the distributor/wholesaler accept and a contractual obligation is created between the Applicants and the distributor/wholesaler which would enable either party to a take recourse to a civil suit or action for specific performance of contract on failure to adhere to the terms and conditions. A copy of the Power Point presentation explaining the functioning of the Application is attached herewith."

3.5 It is submitted that the recent decision of the Maharashtra Authority for Advance Ruling in the case of Biostadt India Limited dated 20 December 2018 would not have any bearings in the present application for the following reasons: -

3.5.1 In the judgment of Biostadt India Limited, the AAR held that the Applicant therein failed to submit any documentation to prove that there was a contractual obligation. (in the present facts, the Applicants have reproduced in their application the entire terms and conditions, which the

distributor/wholesaler has to accept as a pre-requisite before redeeming their points)

3.5.2 In the judgment of Biostadt India Limited there were only gold coins on offer on purchase of certain quantity of seeds (in the present facts, the choice lies with the distributor/wholesaler to redeem the points garnered by him against articles of his choice).

3.5.3 The transaction between the Applicants and the distributor/wholesaler is not a barter as envisaged under Section 7 of the CGST Act. The transaction of buying medicines by the distributor/wholesaler is a pure sale transaction, in which the medicines are supplied against payment of money. A barter would involve trading of goods against goods or goods against services or various other permutations and combinations. However, the present transaction by any stretch of imagination cannot be called a barter and is a pure sale arrangement. As pleaded earlier, the act of giving points which can be redeemed later against articles is nothing but discounts in the line of "buy more, save more" on which input tax credit is available.

3.5.4 It would defeat the very purpose of Section 16(1) of the CGST Act if it is held that where the goods are procured with levy of input tax and are supplied without tax being paid on such output supplies, the scheme of the CGST Act, provides for no input tax, except export. In fact, Section 16(1) specifically provides that ITC would be available on inputs if they are used or intended to be used in furtherance of business. Any interpretation to the contrary would render Section 16(1) of the CGST Act otiose.

3.5.5 Further the circular dated 7 March 2019 referred below in regard to treatment of sales promotion schemes was not considered in the said ruling as order was issued prior to issuance of circular.

4. THE PROMOTIONAL GOODS, GIVEN TO DISTRIBUTORS/WHOLESALERS WHO SATISFY CERTAIN CONDITIONS IS NOT ASSURANCE OF GIVING AWAY GIFTS ON THOSE CONDITIONS BEING ACHIEVED BY THE CUSTOMERS.

4.1 It is submitted that the Authority erred in holding that the Promotional goods, given to distributors/wholesalers who satisfy certain conditions is nothing but assurance of giving away gifts on those conditions being achieved by the customers.

4.2 It is submitted that in case of "Shubh Labh Loyalty program", as mentioned above, the distributors/wholesaler get promotional items based on the reward points earned on the basis of goods sold by them. Thus, they have earned such reward points on the basis of the target achieved by them.

4.3 In the example provided above, the wholesaler who has earned 24000 points will be eligible for claiming Raymond Weil 2760-St3-50001 Watch -For Men. The said points are earned on the basis of quantity of the Sanofi products sold by the wholesaler. Thus, the rewards in the form of watch given to the wholesaler is on achieving a particular target as per the scheme and is not in the nature of gift. In fact, the wholesaler has earned the said watch on the basis of Buy more earn more which is similar to trade circular no. 92/11/2019-GST dated 7 March 2019.

4.4 Based on the above, it can be concluded that in case of the "Shubh Labh Scheme", the watch given to the wholesaler is not a gift as the watch is given under the contractual obligation under the scheme. It is the consideration for achieving a particular sales target and hence, input tax credit on purchase of the said watch should be available to Sanofi.

5. THE INTENTION OF THE LEGISLATURE WAS NEVER FOR NON-GRANTING/ DENIAL OF SET OFF.

5.1 It is submitted that the Authority erred in holding that under the GST laws, the intention for non-granting/ denial of set-off is envisaged in situations where there is no tax on output supply. In cases where the goods are procured with levy

of input tax and are supplied without tax being paid on such output supplies, the scheme of the GST Act provides no input tax credit, except export.

5.3 It is submitted that the Authority draws the above inference from the provision of Section 16 (4) of the CGST Act. The primary scheme of GST is the free flow of credit. The intention of the legislature was never for non-granting/ denial of set off.

5.4 It is submitted that the heading of the Section 16 of the Central Goods and Services Tax Act, 2017 reads as Eligibility and conditions for taking input tax credit and the provision of clause (1) of section 16 ibid. reads thus:

1) *"Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person."*

Clause 2 of the same section imposes the conditions. The said clause starts with a non-obstante clause and amongst the other conditions it also lays that no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply.

5.5 It is submitted that relying on Schedule - I to the CGST Act, 2017 which deals with activities to be treated as supply even if made without consideration and Entry Number 2 to Schedule I (2), read with Section 17 (5) (h), the Authority erroneously holds that any goods disposed of, by way of gift are not eligible for ITC and that even if supply is in course or furtherance of business between related or distinct persons, it shall be considered as supply.

6. CIRCULAR BEARING NO. 92/11/2019-GST DATED 7 MARCH 2019

6.1 It is submitted that the Authority failed in correctly applying the clarification of the Circular dated 7 March 2019 as the Applicant has not provided any discount on the transaction made to the Customer.

6.2 It is submitted that the Circular bearing No. 92/11/2019-GST dated 7 March 2019 for clarifying various doubts related to treatment of sales promotion schemes under GST has been issued by the Principal Commissioner GST.

6.3 It is submitted that under the said Circular Part 'C' deals with 'Buy more, save more' offers. It has been clarified in the Circular that discounts offered by the Suppliers to Customers (including staggered discount under 'Buy more, save more' scheme and post supply/volume discounts established before or at the time of supply) shall be excluded to determine the value of supply provided they satisfy the parameters laid down in sub-section (3) of Section 15 of the said Act, including the reversal of ITC by the recipient of the supply as is attributable to the discount on the basis of document(s) issued by supplier.

6.4 It is submitted that it is clarified in the Circular, that the supplier is entitled to avail the ITC for such input, input services and capital goods used in relation to the supply of goods or services or both on such discounts.

6.5 It is pertinent to note that the Appellant in the additional submissions dated 18.04.2019 elaborately relied upon the Circular dated 7 March 2019. However, the Authority fails in considering the same while passing the impugned order. The Impugned order is liable to be quashed or set aside on this count alone.

7. NOMENCLATURE SHOULD NOT DECIDE THE CONTRACT BUT THE SPIRIT AND THE INTENTION OF THE PARTIES SHOULD BE LOOKED INTO:

7.1 It is submitted that the Authority erred in relying on the nomenclature of the catalogue where "gift" is mentioned to hold that the Applicants intend to take contrary view.

7.2 It is submitted that mere mention in the catalogue as a "gift" will not have any bearing as there is a plethora of jurisprudence which holds that the nomenclature should not decide the contract but the spirit and the intention of the parties should be looked into.

7.3 It is submitted that Hon'ble Apex Court in the matter of Super Poly Fabriks Ltd. versus Commissioner of C. Ex., Punjab 2008 (10) S.T.R. 545 (S.C.) held that the purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Reproduced here in below is the relevant paragraph of the said judgment for ready reference:

"There cannot be any doubt whatsoever that a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive."

7.4 It is submitted that in Assam Small Scale Ind. Dev. Corp. Ltd. and Ors. v. J.D. Pharmaceuticals and Anr. [2005 (8) SCALE 298 = (2005) 13 SCC 19], on the decisiveness of the nomenclature of the agreement entered into between the state corporation and small-scale industrial unit, opined:

"The expressions 'principal' and 'agent' used in a document are not decisive. The nature of transaction is required to be determined on the basis of the substance there and not by the nomenclature used. Documents are to be construed having regard to the contexts thereof wherefor 'labels' may not be of much relevance."

8.1 It is submitted that as per the provisions of the CGST Act as highlighted above, every registered person is entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business.

8.2 In the present case, the brand reminders are provided to the wholesalers in furtherance of business so as to promote Sanofi brand and its products. Thus, ITC should be allowed of the GST paid on procurement of such products which are given to wholesalers as brand reminders. However, Section 17(5) of the CGST Act covers gifts for the purpose of ineligible credit.

9. TO CONSTITUTE A 'GIFT' THE PROPERTY SHOULD BE TRANSFERRED VOLUNTARILY AND NOT AS A RESULT OF A CONTRACTUAL OBLIGATION:

9.1 It is submitted that on a plain reading of the aforesaid provisions it can reasonably be concluded that ITC has to be reversed with respect to any goods disposed of by way of gift or free samples. However, it is important that the ambit and scope of "gifts" is understood properly.

9.2 It is submitted that 'Gift' has not been defined under the CGST Act. Hence, reference will have to be made to other statutes and the jurisprudence available on the same. Gift, as per the Gift-Tax Act (18 of 1858) has been defined to mean transfer by one person to another of any existing movable or immovable property voluntarily and without consideration in money or money's worth. Further reference can be made to the definition of gift in Corpus Juris Secundum, Volume 38, referred with approval by the Honorable Supreme Court in the case of Sonia Bhatia v. State of UP [1981 (3) TMI 250- Supreme Court], wherein 'gift' has been held to be a voluntary transfer of property by one to another, without any consideration or compensation therefor. A 'gift' is a gratuity and an act of generosity and does not require a consideration; if there is a consideration for the transaction, it is not a gift. In the same case, it was also held that a gift is a transfer which does not contain any element of consideration in any shape and form – Love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by law.

9.3 It is submitted that borrowing the jurisprudential guidance from the observation of the Hon'ble Supreme Court in the matter of Shakuntala & Ors. Vs. The State of Haryana reported in 1979 3 (SCC) 226 is of much avail. The relevant paragraph of the said judgment is reproduced herein below for ready reference:

"It is therefore one of the essential requirements of a gift that it should be made by the donor "without consideration". The word "consideration" has not been defined in the Transfer of Property Act, but we have no doubt that it has been used in that Act in the same sense as in the Indian Contract Act and excludes natural love and affection. If it were to be otherwise, a transfer would really amount to a sale within the meaning of Section 54 of the Transfer of Property Act, or to an exchange within the meaning of Section 118 for each party will have the rights and be subject to the liabilities of a seller as to what he gives and have the rights and be subject to the liabilities of a buyer as to that which he takes. It is not necessary for us to examine the other modes of transfer, for they have no bearing on the nature of the controversy before us. It would thus appear that it is of the essence of a gift as defined in the Transfer of Property Act that it should be without "consideration" of the nature defined in Section 2(d) of the Contract Act."

9.4 The Australian High Court in the case of Commissioner of Taxation (Cth) Vs. McPhail [1968] 41 ALJR 346 held that to constitute a 'gift' the property should be transferred voluntarily and not as a result of a contractual obligation. In this case a person agreed to give a donation to a school in return of school charging less fees for the education of the child of said person. Hence, the Court held that such donation cannot be termed as 'gift' as it was made under a contractual obligation wherein school was required to charge lower fees against the donation made.

9.5 It is submitted that in light of the above, it is concluded that to constitute a "gift" following elements are required to be satisfied: -

a. Supply must be made without any contractual obligation. If any supply is made under a contractual obligation it cannot be termed as a 'gift'.

b. Supply must be made without any consideration in money or money's worth. Hence, supplies made out of love and affection or such other non-legal considerations can only be termed as 'gifts'.

9.6 Thus, the Authority has failed to consider and differentiate, the judgments of Sonia Bhatia (supra) and McPhail (supra) relied upon by the Appellant to prove that the transaction of the Applicants is not in the nature of a gift but is a contractually binding one.

9.7 It is submitted that it is indeed imperative, at this stage, to analyze the concept of promotion. The Appellant submits that the products distributed to its wholesalers are for promoting their brand and are in furtherance of business and thus, ITC of the GST paid on such products should be available.

9.8 The Oxford dictionary has defined the term "promotion" as an activity that supports or encourages a cause, venture or aim, the publicizing of a product, organization, or venture so as to increase sales or public awareness. Further, the term "furtherance" is defined as the advancement of a scheme or interest. In context of the term "furtherance of business" it means advancement of business of the company.

9.9 The meaning of supply made in course or furtherance of business given in the FAQ on GST released by CBEC says - No definition or test as to whether the activity is in the course of furtherance of business has been specified under the CGST Act. However, the following business test is normally applied to arrive at a conclusion whether a supply has been made in the course or furtherance of business:

a. Is the activity, a serious undertaking earnestly pursued?

b. Is the activity, pursued with reasonable or recognizable continuity?

c. Is the activity, conducted in a regular manner based on sound and recognized business principles?

d. Is the activity, predominantly concerned with the making of taxable supply for consideration/ profit motive?

9.10 It is pertinent to note that, if promotional items are considered as gift and the ITC on the same is disallowed, this will have a huge impact across the businesses because in order to promote sales or to create goodwill, the companies carry out various promotional schemes including distributing goods for brand promotion.

9.11 It is submitted that the act of giving free supplies is similar to the promotional and advertising activities undertaken by every business which are the basic ingredients and inevitable. Moreover, when a business makes a free supply, the cost which the business has incurred is always taken into account by him in fixing the price of the rest of supplies. Thus, the business is not for bearing any loss on distribution of such goods to the wholesalers. Albeit-indirectly, the exchequer will get GST even on the value of the free supplies and there is no revenue loss as such to the government as well.

9.12 If business promotion and advertisement expenses are not specifically excluded and are considered as 'in the course or furtherance of business' then in view of the Appellant same treatment is available for free supplies. It is noteworthy that expenses, incurred for pamphlets, hoardings, banners, etc., are in the nature of the marketing and promotions and therefore in course or furtherance of business. Thus, the ITC of the GST paid on goods distributed as brand reminders should be available.

10. PRODUCTS GIVEN AS BRAND REMINDERS SHOULD BE TREATED AS INCURRING BUSINESS EXPENSES

10.1 The Authority has failed to deal with the contention of the Appellant that the products given as brand reminders should be treated as incurring business expenses and in no way is a permanent disposal or transfer of business assets.

10.2 It is submitted that entry (1) of Schedule I to the Central Goods and Services Tax Act, 2017 ('CGST Act'). The said entry in Schedule I to the CGST Act reads the following:

"ACTIVITIES TO BE TREATED AS SUPPLY EVEN IF MADE WITHOUT CONSIDERATION

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

.....

10.3 It is submitted that in accordance with the aforesaid entry, a view can be taken that since the input tax credit has been availed on acquisition of such products, giving away the same for free to its customers is nothing but permanent transfer or disposal of the business assets.

10.4 In this regard, it is submitted that the products like pens, notepad, key chains, etc. given as brand reminders cannot be termed as "business assets". The term business asset is defined in general term as a piece of property or equipment purchased exclusively or primarily for business use. There are many different categories of assets including current and non-current, short-term and long-term, operating and capitalized, and tangible and intangible. Business assets are itemized and valued on the balance sheet, which can be found in the company's annual report. The products such as pens, key chains, etc. are purchased and embossed with company logo so as to distribute to its customers for promotion purpose which can be said as incurring business expenses. The same can in no way be said to be permanent disposal or transfer of business assets.

10.5 Reference herein can be made to the decision of the Hon'ble first tier tax tribunal in United Kingdom in the case of Marks & Spencer PLC, wherein under an offer M&S was providing "free wine for dine" in 10 pounds. The Tribunal held that when a 'commercial common sense approach' is adopted, the term 'free' was being used in a marketing sense, but the economic and commercial reality of the offer was that M&S was offering a package of four items for 10 pounds, so the price must be allocated across all four items for VAT purposes. In the example given above, the reward in the form of watch given to the wholesaler is on achieving a particular target as per the scheme and is not without any consideration. Thus, no GST should be levied on the said transaction.

11. ERSTWHILE REGIME: NO RESTRICTION ON VAT CREDIT ON PURCHASES FOR PROMOTION OF BUSINESS OR INPUTS, CAPITAL GOODS OR INPUT SERVICES USED FOR FURTHERANCE OF BUSINESS

11.1 It is submitted that the Authority failed to deal with the contention of the Applicants that under the erstwhile regime, more specifically under Rule 52 of the MVAT Rules, 2005 and Rule 2(a), (k) (l) of the Cenvat Credit Rules, 2004, there was no restriction on VAT credit on purchases for promotion of business or inputs, capital goods or input services used for furtherance of business. In this regard, we wish to highlight relevant extracts of the Maharashtra VAT Rule, 2005 and Cenvat Credit Rules, 2004:

(a) Rule 52. Claim and grant of set-off in respect of purchases made in the periods commencing on or after the appointed day

(1) In assessing the amount of tax payable in respect of any period starting on or after the appointed day, by a registered dealer (hereinafter, in this rule, referred to as "the claimant dealer") the Commissioner shall subject to the provisions of rules 53, 54, 55 and 55B in respect of the purchases of goods made by the claimant dealer on or after the appointed day, grant him a set-off of the aggregate of the following sums, that is to say,-

(a) the sum collected separately from the claimant dealer by the other registered dealer by way of tax on the purchases made by the claimant dealer from the said registered dealer of goods being capital assets and goods the purchases of which are debited to the profit and loss account or, as the case may be, the trading account,

(b) tax paid in respect of any entry made after the appointed day under the Maharashtra Tax on the Entry of Motor Vehicles into Local Areas Act, 1987, and

(c) the tax paid in respect of any entry made after the appointed day under the Maharashtra Tax on the Entry of Goods into Local Areas Act, 2003.

(d) the purchase tax paid by the claimant dealer under this Act.

(2) The set-off under this rule shall not be granted in regard to any quantum of tax if set-off under rule 51 has been claimed in respect of the same quantum of tax or if set-off has been claimed in respect of the said quantum under any earlier law.

....

(b) Rule 2 (a) "capital goods" means: -

(A) the following goods, namely: -

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.05 grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;

(ii) pollution control equipment;

(iii) components, spares and accessories of the goods specified at (i) and (ii);

(iv) moulds and dies, jigs and fixtures;

(v) refractories and refractory materials;

(vi) tubes and pipes and fittings thereof; and

(vii) storage tank, used-

1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

2) for providing output service;

(B) motor vehicle registered in the name of provider of output service for providing taxable service as specified in sub-clauses (f), (n), (o), (zr), (zzp), (zzt) and (zzw) of clause (105) of section 65 of the Finance Act;

(c) Rule 2 (k) "input" means-

i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final

products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;

Explanation 1.- The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2.- Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer; but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods;

(d) Rule 2 (l) "input service" means any service, -

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share

registry, and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal;

11.2 It is submitted that based on above, the applicant contends even in the erstwhile regime, there was no such restriction on availment of VAT credit on purchases made for promotion of business. Further, even under Service Tax Law, the Cenvat credit was available on purchase of inputs, input services or capital goods which were used for furtherance of business. Thus, the input tax credit of the GST paid on purchase of such promotional items should also be available under the GST regime since the same are for furtherance of business.

12. TRANSACTION BETWEEN THE APPLICANTS AND THE DISTRIBUTOR/WHOLESALER IS NOT A BARTER AS ENVISAGED UNDER SECTION 7 OF THE CGST ACT

12.1 It is submitted that the Authority has failed to appreciate that the transaction between the Applicants and the distributor/wholesaler is not a barter as envisaged under Section 7 of the CGST Act. The transaction of buying medicines by the distributor/wholesaler is a pure sale transaction, in which the medicines are supplied against payment of money.

12.2 It is submitted that the Authority has failed to appreciate, that a barter would involve trading of goods against goods or goods against services or various other permutations and combinations.

Additional Submissions dated 14.10.2019

13.1 The appellants also rely on the definition of Business as set out in section 2 (17) of the CGST which lays down that Business includes

"(a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

(b) any activity or transaction in connection with or incidental or ancillary to subclause (a);

(c) any activity or transaction in the nature of subclause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

....

13.2 Active promotion of the goods manufactured by the appellants by the activity of giving various items in the trade for brand recollection, as also incentivizing their dealers in promotion of the sales of the medicines by way of the "shubh Labh scheme" would be covered under the "business", and hence under the expression "in the course or furtherance of business".

13.3 That the phrase "in the course or furtherance of business" has been interpreted by the Hon'ble Gujarat High Court in the case of *Cinemax India Ltd. V. Union of India reported at [2011 (24) STR 3]* as follows, which squarely covers the aforesaid activities: –

The meaning of 'furtherance', as per Black's Law Dictionary, 6th Edition, 11th reprint, 1997, is "act of furthering, help forward, promotion, advancement or progress". Furtherance of business will, thus mean, act of furthering business, helping forward business, promotion of business, advancement of business or progress of business. Therefore, if a service provider is renting the property in the course of or for furtherance of business or commerce, it will amount to an activity in favor of service recipient for helping forward business, promotion of business, advancement of business and

progress of business. It automatically generates value addition and comes within the meaning of 'service tax' as defined under Sec. 65(105) (zzzz)."

13.4 In **Philips India Ltd. v. Commissioner of Customs and Excise - 1997 (91) E.L.T. 540]** the Hon'ble Supreme Court held that where the cost of advertisements was borne half and half by the manufacturer and dealer, no deduction is permissible because the advertisement may benefit in equal degree, the manufacturer and dealer. The Hon'ble Court further held in that legitimate business consideration must be kept in mind in adjudicating such matters under Central Excise."

13.5 Thus, the trade promotion activities under scrutiny in the appeal are clearly brand promotion and increasing the volume of sales, and squarely covered by activities relating to business i.e. promotion of the same.

13.6 The Hon'ble Supreme Court in the case of **Philips India Ltd. V. Collector of Central Excise, Pune reported at [1997 (91) ELT 540 (S.C.)]** has held that the Tax Department should keep commercial realities in mind in a situation where the discount offered was sought to be truncated on the ground that the dealers were asked to do advertisement and after sales services. The Hon'ble Supreme Court held that such activities benefit both the dealers by maximizing sales as also the manufacturers and the discount could not be curtailed. Relevant portion of the judgement reads as follows: –

"It seems to us clear that the advertisement which the dealer was required to make at its own cost benefited in equal degree the

appellant and the dealer and that for this reason the cost of such advertisement was borne half and half by the appellant and the dealer. Making a deduction out of the trade discount on this account was, therefore, uncalled for.

As to the after sales service that the dealer was required under the agreement to provide, it did of course enhance in the eyes of intending purchasers the value of the appellant's product, but such enhancement of value enured not only for the benefit of the appellant; it also enured for the benefit of the dealer for, by reason thereof, the dealer got to sell more and earn a larger profit. The guarantee attached to the appellant's products specified that they could be repaired during the guarantee period by the appellant's dealers anywhere in the country. Thus, though one dealer might have to repair goods sold by another dealer and incur costs in that regard, he also had the benefit of having the goods he sold reparable throughout the country. The provision as to after sales service, therefore, benefited not only the appellant; it was a provision of mutual benefit to the appellant and the dealer.

We think that in adjudicating matters such as this, the Excise authorities would do well to keep in mind legitimate business considerations."

13.7 That the lower authority has reasoned that the rewards scheme/ "shubh Labh scheme" mentions the word "gift" and consequently would attract the exclusion clause for claiming credit under section 17 (5) (h). As demonstrated from the meaning of the word "gift", the rewards scheme is not a gift simplicitor but the rewards are given only when the dealer is able to achieve certain volumes of sales as per the agreement between the dealer and the appellants. Hence the "label" given of "gift" in the agreement cannot be simply applied but the actual nature of transaction has to be considered, namely that the dealer has to increase the volume of sales to earn the reward. Hence there is no gift. Reliance is placed on the Hon'ble Supreme Court decision in the case of **Moped India Limited V. Assistant Collector of C. Ex., Nellore and Others reported at [1986 (23) ELT 8 (S.C.)],** relevant portion of which reads as follows: –

"That takes us to the second question, namely, whether the Division Bench was right in taking the view that the commission of Rs. 110/-, Rs. 145/-and Rs. 165/- per moped in respect of different varieties of mopeds sold to the dealers could not be said to be trade discount. Mr. Nariman, Learned Counsel appearing on behalf of the appellants, contended that this Commission allowed to the dealers was clearly trade discount and was, therefore, liable to be deducted in determining the excisable value of the mopeds by reasons of sub-section (b) (ii) of Section 4 of the Act. Now it is true that this amount allowed to the dealers has been referred to in the agreement as commission but the level (SIC) [label] given by the parties cannot be determinative because it is, for the court to decide whether the amount is trade discount or not,

whatever be the name given to it. If we look at the terms of the agreement, it is clear that the agreement was between the appellants and the dealers on principal to principal basis. The clauses of the agreement which we have set out above clearly show beyond doubt that under the agreement, the mopeds were sold by the appellants to the dealers and the dealers did not act as agents of the appellants for the purpose of effecting sales on behalf of the appellants. It is clear from clause 5 (a) of the agreement that the bills in respect of the mopeds delivered to the dealers were to be sent by the appellants through their bankers and it was the responsibility of the dealers to retire the bills for the purpose of taking delivery of the mopeds. Clause 5 (b) of the agreement laid an obligation on the dealers to insure the mopeds against all risks, pilferage, non-delivery and SRCC including breakage from the time the mopeds left the factory or stockyard of the appellants until they arrived at the premises of the dealer and this again would show that the dealers acted as principal to principal in purchasing the mopeds from the appellants. The dealers were also liable under Clause 6 of the agreement to maintain adequate organization for sale and service of the mopeds, including show rooms, service stations, repair shops, spare parts, salesmen etc. and the mechanics were also to be trained at the cost of the dealers. The relationship between the appellants and the dealers was clearly on principal to principal basis and in the circumstances, it is difficult to see how the amount of Rs. 110/-, 145/- and 165/- allowed to the dealers in respect of different varieties of mopeds could be regarded as anything other than trade discount. The appellants charged to the dealers the price of the mopeds sold to them less the

amount of Rs. 110/-, Rs. 145/- and Rs. 165/-in respect of different varieties of mopeds. These amounts allowed to the dealers were clearly trade discount liable to be deducted from the price charged to the dealers for the purpose of arriving at the excisable value of the mopeds".

13.8 Reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Collector of Customs V. K Mohan & Co. Exports reported at 1989 (43) E.L.T 811 (S.C.)** wherein it has been clearly held that the onus of showing that an assessee falls in the exclusion clause of the benefit of an exemption is squarely on the Department. Relevant portion of the judgement reads as follows: –

"There is no dispute before us that the goods in question are articles made of plastics. This being so, the assessee is entitled to the exemption conferred by the notification unless the goods answer the description of one or other of the specific items set out in the table. ***The onus of showing this is clearly on the Revenue.*** *(emphasis added)"*

13.9 Appellants have already submitted that the cost of the brand recollect items like pens, writing pads, paperweights et cetera et cetera which all promote the brand name/proprietary products of the appellants, and have the same embossed on these products, are all included in the price of the medicines being sold to the dealers. Similarly, all the items and the expenditure incurred for the rewards scheme are all built into the price of the medicines sold to the dealers. As held by the Hon'ble High Court of Tripura in the case **of Bharti Telemedia Ltd. V. The State of Tripura reported at 2015 -VIL- 227- TRI** there is nothing free in commercial transactions, as follows: –

"True is that the petitioner companies have not sold the STBs to the customers. There can however be no manner of doubt that the right to use these goods i.e. the STBs has been transferred to the customers. In today's world, nothing is given free of cost. The Cost of the STB is obviously included in the activation charges and/or monthly subscription. Under the TVAT Act, even where payment of the goods is made by way of deferred payment the goods can be subjected to tax. The main issue is whether the contract can be easily divided and the value of the goods can be ascertained with exactitude."

13.10 The lower authority has also reasoned that there is a barter when under the rewards scheme various goods et cetera/expense borne holidays are given as incentives, and in return the service of increased sales is provided by the dealers. Such a reasoning is totally wrong and incorrect and in fact Circular number 105/24/2019 – GST dated 28/6/2019 had been issued by the Central Board of Indirect Taxes and Customs, New Delhi, with same reasoning was issued. In this circular when additional discount was granted by the supplier to its purchaser for its purchaser to make increased sales to 3rd parties, the circular deemed the additional discount as a consideration for the increased service of sales by the purchasing dealer with the requirement of payment of GST which the original supplier could take as credit. Further that such discount would be added to the ultimate price to the third-party purchaser, as the price of the supply made to him by the purchasing dealer, from the original supplier. The circular was withdrawn appreciating that there are no multiple transactions in the same transaction for which the discount is offered, and there are no further supplies as

contemplated in the circular. Copy of the circular dated 28/6/2019 and its withdrawal are enclosed collectively as **Annexure "1"**to these submissions. Similarly, there is only one transaction of supply to the dealers by the appellants and in the same transaction the reward schemes operate to incentivize the dealers. In other words, there is no concept of there being a barter et cetera as sought to be made out by the lower authority's order. Reliance is placed on the decision of the Hon'ble CESTAT in the case of **Sharyu Motors V. Commissioner of Service Tax, Mumbai reported at 2016 (43) STR 158 (Tri- Mumbai)** wherein it was held that there is no separate business auxiliary service rendered when due to enhanced achievement of sales targets, incentive amounts are received. Such incentive amounts only amount to trade discount, and there is no further service element involved, there being only one transaction. Relevant portion of the decision reads as follows: –

"As regards the Service Tax liability under the category of Business Auxiliary Services for the amount received and for achieving the target under Target Incentive Scheme, we find that the appellant had been given targets for specific quantum of sale by the manufacturers of the cars. As per the agreement, on achievement of such target and in excess of it, appellant was to receive some amount as an incentive. It is the case of the Revenue that such amount is taxable under Business Auxiliary Services, we find no substance in the arguments raised by the learned AR as well as the reasoning given by the adjudicating authority. The said amounts are incentive received for achieving the target of sales cannot be treated as Business Auxiliary Services, as incentive are only as trade discount which are extended to the appellant for

achieving the targets. We find that this view has been taken by the Tribunal in the case of Sai Service Station (supra). With respect, we reproduce the relevant Paragraphs: -

In respect of the incentive on account of sales/target incentive, incentive on sale of vehicles and incentive on sale of spare parts for promoting and marketing the products of MUL, the contention is that these incentives are in the form of trade discount. The assessee respondent is the authorized dealer of car manufactured by MUL and are getting certain incentives in respect of sale target set out by the manufacturer. These targets are as per the circular issued by MUL. Hence these cannot be treated as business auxiliary service.

In respect of sales/target incentive, the Revenue wants to tax this activity under the category of business auxiliary service. We have gone through the circular issued by MUL which provides certain incentives in respect of cars sold by the assessee-respondent. These incentives are in the form of trade discount. In these circumstances, we find no infirmity in the adjudication order whereby the adjudicating authority dropped the demand. Hence, the appeal filed by the Revenue has no merit.

13.11 The humble submission of the appellants is that in the circular dated 7/3/2019 it had been clarified by the Central Board of Indirect Taxes and Customs that wherever there is "Buy one get one free offer", it has to be treated as supplying two goods for the price of one. Similarly, in the appellants case the rewards scheme under the "shubh- labh scheme" has to be taken that the rewards are supply against the price already paid for the medicines sold to the dealers. Just

like under buy one get one free offer, ITC is not to be denied, similarly the appellants should not be denied the ITC. Further, the very same circular clarifies in regard to "Buy more, save more offers", that ITC should not be denied, even though in all these cases lesser consideration is being realized and certain portion of the supply can be thought of to be without consideration. Yet the clarification holds that such incentives to increase sales should not result in loss of ITC. In regard to secondary discount also which are not known prior to removal of the goods, the circular held that ITC should not be withheld even though a lesser price/consideration for the supply is being realized since the logic is that the consideration already realized is a consideration for the supply including the discounted supply/incentive supplies. Thus, it is reiterated that in the appellant's case also there is no supply without consideration but the original consideration is the consideration for the brand promotion items as also for the items given under the "shubh labh scheme".

13.12 That the lower authority has recorded the arguments made by the learned Departmental representative before them, contending that the supplies have been made free of cost and are non-taxable under section 9 read with section 2 (78) and merits to be treated as an exempt supply under section 2 (47), and that the credit should be disallowed in terms of section 17 (2). However, the Lower authority in the impugned order has not gone by these contentions or by these provisions. It is well settled that an order passed has to be judged on the basis of the reasons given therein without any new reasons not forming a part of the lower authority's order. Reliance is placed in the case of **Gem Sanitary**

Appliances P Ltd. V. Chief Commissioner of Income Tax reported at [2012] 19 taxmann.com 69 following the Hon'ble Supreme Court decision in the case of **Mohinder Singh Gill reported at [1978] 1 SCC 405**, holding as follows: –

"We are not inclined to accept the said contention of the respondents for two reasons. Firstly, this is not mentioned in the impugned order passed by the Chief Commissioner of Income Tax dated 07.04.2008. The impugned order has to be read and can be defended on the ground and reasons stated therein Mohinder Singh Gill V. Chief Election Commissioner [1978 (1) SCC 405]".

13.13 Without prejudice to this ratio which may kindly be applied by this Hon'ble Forum, the Learned Departmental Representative before this Hon'ble Appellate authority also relied on these provisions claiming that these provisions would disentitle the credit, the Appellants submit that such reliance is misplaced and erroneous for the following reasons.

13.14 Section 7 gives the Scope of "supply". As can be seen section 7 (1) lays down that the expression "supply" under clause (a) covers all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration.

13.15 Appellants submit that the consideration already received from the dealers would cover the items given under the rewards scheme or the brand recall products. This is on the same reasoning as "buy one get one free" scheme et cetera for which full ITC was held to be eligible.

13.16 As per the Department there is no consideration for the brand recall items or the items under the rewards scheme, which is denied. Just like in the case of **M and S decision reported at [2018 UKFTT 238 (TC)]** where the wine which was canvassed as being free by M and S, along with the meal of 3 courses for £ 10 , the free supply of wine was rejected holding that £ 10 included in it the price of the wine canvassed as free; similarly in the appellant's case the consideration paid by the dealer includes that for the brand recall items as also the rewards scheme items. Hence the question of treating the brand recall items or the rewards scheme items as being non-taxable/exempt items to deny the ITC cannot arise at all.

13.17 Appellants submit that free supplies have also been made without any conditions, and ITC has not been availed in the following situations: -

The appellants do reverse the input tax credit wherever it is required by law. For example: Recently in the appellants office they had kept combiflam cream free samples at their reception which can be taken by employees or any visitor to their office. The Appellants have reversed the input tax credit in relation to the same as the free samples given are pure gift in this case and not in furtherance of business.

Similarly, the Appellants gives its products to doctors as free samples for which it does reverse the input tax credit.

14 In light of these facts, the Appellants humbly submit that they should be entitled to ITC on GST paid on expenses incurred towards promotional schemes of "Shubh Labh Loyalty Programme" and goods given as brand reminders.

Respondent's Submissions

15. The Respondent in the present appeal matter maintained their earlier stands, which they had taken before the Advance Ruling Authority while contending to the applicant's interpretation of the subject issues i.e. the admissibility of ITC of the expenses incurred by the applicant for the procurement of the various promotional goods/services for distribution to its wholesalers under the 'Shubh Labh Trade Loyalty Programme', and for procurement of the various articles for further distribution to the distributors/Doctors as brand reminders. The above said submissions of the Jurisdictional Officer, who is the respondent in the present appeal, is being reproduced herein under:

15.1 The Applicants has filed the subject application for advance ruling on the following questions:

Whether input tax credit is available on the GST paid on expenses incurred towards promotional schemes of "Shubh Labh Loyalty Program".

Comments -No, it is observed that applicant and its group entities are a supplier of Pharmaceutical goods and services. Under "Shub Labh Trade Loyalty Program, the applicant claims that they offer free Singapore Trip or Raymond Weil Watch as the case may be to their wholesalers on selling a pre-determined quantity of their pharma product and the said pre-determined quantity is accounted for by

way of reward points. In this way, there is not dispute about the fact that applicant do not charge any price or value for the said free supply in terms of free Singapore Trip or Raymond Weil Watch as the case may be. Therefore, the said free supply is not taxable and chargeable to any GST in terms of Section 9 of the CGST Act, 2017. The said supply merit as "exempt supply' in terms of provisions of Section 2(47) read with Section 2(78) and therefore, any ITC is not available on the same in terms of inter-alia provisions of Section 17(2) of the CGST Act, 2017. Further provisions of Section 17(5)(h) specifically disallow availment and usage of any credit on goods disposed of by way of 'gift' not withstanding anything whatsoever in sub section (1) of Section 16. Therefore, the question of availment of ITC, on the basis that subject gift were used in furtherance of their business, does not arise.

15.2 The applicant's reliance on provisions of Schedule-I is totally misplaced because it is not their case that subject gift are covered by Schedule-I of the CGST Act, 2017. It may be seen that Schedule-I is applicable to only specified suppliers and the subject gifts by the applicant are not covered by the provisions of Schedule-I. Therefore, the applicant has no occasion to take ITC on the basis of Schedule-I which is irrelevant in their case. Applicant themselves agreed that the subject supply cannot be construed as permanent transfer or disposal of the business assets.

15.3 There is no substance in the applicant's contention that Watch given under their "Subh Labh Loyalty" Scheme does not merit as Gift because there is no dispute about the fact that even watches have been given free of cost. The applicant

themselves have quoted the judgement of Hon'ble Supreme Court in case of Sonia Bhatia Vs. State of UP [1981(3) TMI 250 - Supreme Court), wherein Hon'ble Supreme Court has held that a, " 'gift' is a gratuity and an act of generosity and does not require a consideration, if there is a consideration for one transaction, it is not 'gift' ". The applicant is not signing any formal contract under "Shubh Labh Loyalty Program", hence there is no contractual obligation under which goods are supplied.

15.4 In the instant case, under "Shubh Labh Loyalty Program", gifts like watch or reward points are given as incentive and there is no extra commercial consideration and hence since there is no commercial value assigned to the transaction it is to be construed to be Gift.

15.5 The applicant themselves have submitted that for anything to be considered as gift, there should not be any contractual obligation or involvement of consideration. In the instant case the applicant give free goods to wholesalers without any involvement of consideration nor is there any written contractual agreement between the company and the wholesaler. Hence, the same is to be considered as Gift. The loyalty program is given voluntarily by the Company and there is no consideration involved in the transaction. Hence, it falls in the definition of Gift.

15.6 In any case, the notice is not eligible for ITC in terms of provisions of section 9(1) read with Section 17(2), Section 2(47) and section 2(78), because, there is no dispute that the applicant has made the subject supplies without any consideration on which they have paid any GST. Therefore, the value of subject

free supply does not merit inclusions in value in terms of Section 15. Further, the subject supply merit as exempt supplies under Section 2 (47) and hence, the ITC is not available to applicant in terms of Section 17(2). Therefore, it may be seen that ITC is not available even without application of the provisions of Section 17(5)(h).

15.7 The applicant has contended that subject free supplies have been made in pursuance of their business. However, the fact remains that the same have been made free of cost and therefore, the same are non-taxable under Section 9 read with Section 2(78) and merits exempted supply under Section 2(47). Further, there is no provisions under Section 15 to include the cost of such free supplies in the value of taxable free samples in terms of Section 15. There cannot be any dispute that the said supplies are exempted, hence credit is not allowed in terms of Section 17(2). Further, gifts have to be disallowed in terms of Section 17(5)(h) notwithstanding the fact that the subject supply has been used in course of furtherance of business in terms of Section 16(1). The provisions of Section 17(5)(h) are applicable notwithstanding the provisions of Section 16(1). Therefore, the applicant is not eligible for the ITC.

15.8 Further, the applicant has not provided any enclosures to their application including Annexure-I containing a catalogue of "Subh Labh Loyalty Program". Therefore, the department reserves the rights to be provided with all the documents and file additional reply.

15.9 Whether input tax credit is available of the GST paid on expenses incurred towards promotional goods given as brand reminders?

Comments: No, it is observed that applicant and its group entities are a supplier of Pharmaceutical goods and services. Under promotional goods given as brand reminders, the applicant distributes the products like pens, notepad, key chains etc. to the distributors and doctors. The said products are embossed with Sanofi brand. In this way, there is not dispute about the fact that applicant do not charge any price or value for the said free supply in terms of free pens, notepad, key chains etc. as the case may be. Therefore, the said free supply is not taxable and chargeable to any GST in terms of Section 9 of the CGST Act, 2017. The said supply merits as 'exempt supply' in terms of provisions of Section 2(47) read with Section 2(78) and therefore, any ITC is not available on the same in terms of inter-alia provisions of Section 17(2) of the CGST Act, 2017. Further provisions of Section 17(5)(h) specifically disallow availment and usage of any credit on goods disposed of by way of 'gift' not withstanding anything whatsoever in sub section (1) of Section (16). Therefore, the question of availment of ITC, on the basis that subject gift were used in furtherance of their business, does not arise.

15.10 The applicant's reliance on provisions of Schedule-I is totally misplaced because it is not their case that subject gift are covered by Schedule-I of the CGST Act, 2017. It may be seen that Schedule-I is applicable to only specified suppliers and the subject gifts by the applicant are not covered by the provisions of Schedule-I. Therefore, the applicant has no occasion to take ITC on the basis of Schedule-I which is irrelevant in their case.

15.11 Applicant themselves agreed that the subject supply cannot be construed as permanent transfer or disposal of the business assets.

15.12 There is no substance in the applicant's contention that pens, notepad, key chains etc. given under their promotional scheme goods given as brand reminders does not merit as Gift because there is no dispute about the fact that even pens, notepad, key chains etc. has been given free of cost. The applicant themselves have quoted the judgement of Hon'ble Supreme Court in case of Sonia Bhatia Vs. State of UP (1981(3) TMI 250 - Supreme Court], wherein Hon'ble Supreme Court has held that a" gift is a gratuity and an act of generosity and does not require a consideration, if there is a consideration for one transaction, it is not gift.

15.13 The applicant is not signing any formal contract under promotional goods given as brand reminders, hence there is no contractual obligation under which goods are supplied.

15.14 In the instant case under promotional goods given as brand reminders, products like pens, notepad, key chains etc. are distributed to the distributors and doctors. The said products are embossed with Sanofi brand are given as incentive and there is no extra commercial consideration and hence, since there is no commercial value assigned to the transaction, it is to be construed to be Gift.

15.15 Also, it is seen that there is no contractual obligation involved in this situation, as it is completely up to the distributors and doctors whether he will prescribe the medicines of the company or not. Doctors are not under any legal obligation to do so. As the consideration is not directly linked with the gift provided to doctor, it is to be considered as gift.

15.16 The applicant themselves have submitted that for anything to be considered as gift, there should not be any contractual obligation or involvement of consideration. In the instant case the applicant give free goods to distributors and doctors without any involvement of consideration nor is there any written contractual agreement between the company and the distributors and doctors. Hence, the same is to be considered as Gift.

15.17 The goods given as brand reminders are given voluntarily by the Company and there is no consideration involved in the transaction. Hence it falls in the definition of Gift. Also, it is seen that there is no contractual obligation involved in this situation, as it is completely up to the doctors whether he will prescribe the medicines of the company or not. Doctors are not under any legal obligation to do so. As the consideration is not directly linked with the gift provided to doctors, it is to be considered as gift.

15.18 In any case, the applicant is not eligible for ITC in terms of provisions of section 9(1) read with Section 17(2), Section 2(47) and section 2(78), because, there is no dispute that the applicant has made the subject supplies without any consideration on which they have paid any GST. Therefore, the value of subject free supply does not merit inclusions in value in terms of Section 15. Further, the subject supplies merit as exempt supplies of Section 2(47) and hence, the ITC is not available to applicant in terms of Section 17(2). Therefore, it may be seen that ITC is not available even without application of the provisions of Section 17(5)(h).

15.19 The applicant has contended that subject free supplies have been made in pursuance of their business. However, the fact remains that the same have been made free of cost and therefore, the same are nontaxable under Section 9 read with Section 2(78) and merits exempted supply under Section 2(47). Further, there is no provisions under Section 15 to include the cost of such free supplies in the value of taxable free samples in terms Section 15. There cannot be any dispute that the said supplies are exempted, hence credit is not allowed in terms of Section 17(2). Further, gifts have to be disallowed in terms of Section 17(5)(h) notwithstanding the fact that the subject supply has been used in course of furtherance of business in terms of Section 16(1). The provisions of Section 17(5)(h) are applicable notwithstanding the provisions of Section 16(1). Therefore, the applicant is not eligible for the ITC.

15.20 Further, the applicant has not provided any enclosures to their application including Annexure-III containing the sample invoices for procurement of such products distributed as brand reminders. Therefore, the department reserves the rights to be provided with all the documents and file additional reply.

PERSONAL HEARING

16. Personal Hearing in the instant matter, conducted on 04.10.2019, was attended by Shri A.R. Madhav Rao, Advocate, on behalf the Appellant. He reiterated the written submissions, filed earlier before us. They, also, filed one additional submission dated 14.10.2019 in the matter, which have been reproduced herein above. Shri Kartikeya Dubey, the jurisdictional officer in the present appeal matter, also attended the above said hearing, wherein he reiterated the earlier submissions, which were filed before the Advance Ruling Authority. The

Submissions filed by the Jurisdictional Officer before the Advance Ruling Authority has also been reproduced herein above.

Discussions and Findings

17. Heard both the sides. We have also perused the impugned Advance Ruling, wherein the authority ruled that ITC in respect of the expenses incurred by the Appellant, for the procurement of the promotional goods/articles or services for distribution to the wholesalers as a part of the 'Shubh Labh Trade Loyalty Program', and for the procurement of the goods embossed with the brand Sanofi, for distribution to the distributors/doctors as brand reminders, will not be allowed, attributing to the reasons that the said supply of the promotional goods/services as part of the 'Shubh Labh Trade Loyalty Program', and the supply of the goods to its distributors or doctors as brand reminders are without any legal consideration and contractual obligation, and therefore the same would reasonably be construed as gift, and accordingly the ITC in respect of the expenses incurred on the procurement of the said supply of goods or services will not be allowed to the Appellant in accordance with the provision of section17(5)(h) of the CGST Act, 2017.

18. On perusal of the above said impugned Advance Ruling order as well as all the written submissions, and the facts of the case, placed before us, the moot issues, to be decided, are as under:

(a) Whether the promotional schemes goods, or services as specified in the catalogue floated by the Appellant, which are provided to the eligible wholesalers under the Appellant's scheme of the "Shubh Labh Trade Loyalty Program", can be construed as inputs or input services, as envisaged under section 2(59) and section 2(60) of the CGST Act, 2017;

(b) Whether the promotional goods e.g. pen, notepad, key chain, etc., embossed with the brand 'Sanofi', which are given free of cost by the Appellant to its distributors or doctors as brand reminders can be construed as inputs, as envisaged under section 2(59) of the CGST Act, 2017;

(c) Whether the above said provision of the promotional schemes goods, as specified in the catalogue floated by the Appellant, which are provided to the eligible wholesalers under the Appellant's scheme of the Shubh Labh Trade Loyalty Programme, can be construed as exempt supply under the provision of section 2(47) read with section 2(78) of the CGST Act, 2017;

(d) Whether the promotional goods e.g. pen, notepad, key chain, etc., embossed with the brand 'Sanofi', which are given free of cost by the Appellant to its distributors or doctors as brand reminders can be construed as exempt supply under the provision of section 2(47) read with section 2(78) of the CGST Act, 2017;

(e) Whether the above said supply of the promotional schemes goods, or services to the eligible wholesalers under the Appellant's scheme of the Shubh Labh Trade Loyalty Program can be construed as gift for the determination of the applicability of section 17(5)(h) of the CGST Act, 2017;

(f) Whether the promotional goods e.g. pen, notepad, key chain, etc., embossed with the brand 'Sanofi', which are given free of cost by the Appellant to its distributors or doctors as brand reminders can be construed as gift for the determination of the applicability of section 17(5)(h) of the CGST Act, 2017.

19. Now, we will examine the abovementioned issues in seriatim. The first moot issue is whether the promotional schemes goods, or services as specified in the catalogue floated by the Appellant, which are provided to the eligible wholesalers under the Appellant's scheme of the Shubh Labh Trade Loyalty Program, can be construed as inputs or input services, as envisaged under section 2(59) and section 2(60) of the CGST Act, 2017.

20. To decide upon this issue, we first refer to the above said provisions of section 2(59) and section 2(60) of the CGST Act, 2017, which are being reproduced herein under:

2(59) "input" means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business;

2(60) "input services" means any service used or intended to be used by a supplier in the course or furtherance of business;

Now, In the instant case, it is observed from the analysis of the promotional scheme, namely 'Shubh Labh Trade Loyalty Program', floated by the Appellant, that the subject goods or services, which are certainly not the capital goods for the Appellant's pharmaceutical business, are being given to only such eligible wholesalers, who have garnered adequate reward points required to claim various goods and services, after achieving specific targets specified in the "Shubh Labh Trade Loyalty Program's" module floated by the Appellant. Thus, from the above transactions, it is clearly revealed that the said "Shubh Labh Trade Loyalty Program" module' floated by the Appellant is primarily designed for increase in the sale of pharmaceutical products manufactured by them by floating this lucrative schemes for their wholesalers, so that they put in extra effort in selling the Sanofi Pharmaceutical products for achieving the sales target and getting the proportionate reward points, which, in turn, would fetch them their desired goods and services, specified in the catalogue floated under "Shubh Labh Trade Loyalty Program". Thus, it is established beyond doubt that this entire model of the promotional scheme, namely "Shubh Labh Trade Loyalty Program" floated by the Appellant, is designed with the sole purpose of the furtherance of their business and is thus purely driven by the commercial intentions. In other words, the goods and services procured by the Appellant from the third party under the "Shubh Labh Trade Loyalty Program" are clearly being used or intended to be used by the Appellant in the course or furtherance of their business. Thus, the conditions stipulated for "input" and "input services" under section 2(59) and section 2(60) ibid. respectively, have been squarely fulfilled and the said goods and services can verily be construed as **inputs and input services**, as the case may be.

21. Now, we will examine the next moot issue i.e. issue(b), which is whether the promotional goods e.g. pen, notepad, key chain, etc., embossed with the brand 'Sanofi', which are given free of cost by the Appellant to its distributors or

doctors as brand reminders can be construed as inputs, as envisaged under section 2(59) of the CGST Act, 2017.

22. To decide this issue, we will first examine the nature and purpose of the above transactions undertaken by the Appellant, wherein they are providing to their distributors or doctors the promotional goods e.g. pens, note pads, key chains etc. which are embossed with the brand 'Sanofi' as the brand reminders with the sole objective of using them as advertisement tools to promote their brands so as to increase their sales and business. On perusal of the submissions made by the Appellant in this regard, we agree with the Appellant's contention that these goods, provided free of cost to their distributors or doctors in their trade channels, are actually being used as an advertisement tools for the promotion of their brand 'Sanofi' as all such goods i.e. pens, notepads, key chains, etc. are embossed with the brand 'Sanofi', thus making them as potential advertisement tools for their brand, which in turns would help in furtherance of their business.

Since, these subject goods, used by the Appellant as brand reminders, helps in the furtherance of business, it can reasonably be concluded that the same are inputs for the Appellant in terms of the provision of section 2(59) of the CGST Act, 2017.

23. Now, we will dissect the issue no. (c), which is whether the above said provision of the promotional schemes goods, or services, as specified in the catalogue floated by the Appellant, to the eligible wholesalers under the Appellant's scheme of the "Shubh Labh Trade Loyalty Program", can be construed as exempt supply under the provision of section 2(47) read with section 2(74) of the CGST Act, 2017. To decide this issue, we will first examine as to whether the impugned transaction i.e. provision of the goods or services by the Appellant to the wholesalers under the "Shubh Labh Trade Loyalty Program" is at first place supply or not in the context of the Appellant's business. It is not disputed that Appellant is in the business of the pharmaceutical products, wherein various pharmaceutical products are manufactured either by its own, or with the help of the third-party manufacturers. Therefore, it is clear that the Appellant is certainly not in the business of the supply of the subject goods or services as specified in

the catalogue of the "Shubh Labh Trade Loyalty Program" floated by the Appellant. Further, it has been established in para 20 above that the subject goods and services, being provided by the Appellant to the eligible wholesalers under the "Shubh Labh Trade Loyalty Program" are nothing but inputs or input services, as the case may be, which help in the furtherance of their business. Hence, the same **cannot** be termed as **output supply** at the same time.

Thus, in light of the above findings, the question of these subject goods and services specified under "Shubh Labh Trade Loyalty Program", being in the nature of exempt supply provided under section 2(47) or even non-taxable supply provided under section 2(78) of the CGST Act, 2017, or otherwise do not arise.

24. Now, similarly we can conclude in respect of the issue (d), which is whether the promotional goods e.g. pen, notepad, key chain, etc., embossed with the brand 'Sanofi', which are given free of cost by the Appellant to its distributors or doctors as brand reminders can be construed as exempt supply under the provision of section 2(47) read with section 2(78) of the CGST Act, 2017. Since, it has been established in para 22 above that the subject goods being provided free of cost by the Appellant to its distributors or doctors as brand reminders are nothing but inputs. Hence, the same **cannot** be termed as **output supply** at the same time.

Thus, in light of the above findings, the question of the provision of these subject goods embossed with the brand 'Sanofi', being in the nature of exempt supply under section 2(47) or even non-taxable supply provided under section 2(78) of the CGST Act, 2017, or otherwise do not arise.

25. Now, we will proceed to discuss the issue no. (e), which is whether the above said supply of the promotional schemes goods, or services to the eligible wholesalers under the Appellant's scheme of the "Shubh Labh Trade Loyalty" Programme can be construed as gift for the determination of the applicability of section 17(5)(h) of the CGST Act, 2017. On this very issue, the AAR has ruled that the promotional schemes goods, or services to the eligible wholesalers under the Appellant's

scheme of the "Shubh Labh Trade Loyalty" Programme are nothing but gifts, relying on the Hon'ble Supreme Court Judgment in the case of Sonia Bhatia v. State of UP [1981 (3) TMI 250- Supreme Court] cited by the Appellant itself, wherein 'gift' has been held to ***be a voluntary transfer of property by one to another, without any consideration or compensation therefor. A 'gift' is a gratuity and an act of generosity and does not require a consideration; if there is a consideration for the transaction, it is not a gift***. In the same case, ***it was also held that a gift is a transfer which does not contain any element of consideration in any shape and form – Love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by law.***

26. The Advance Ruling Authority has based its ruling on the premise that the Appellant is voluntarily transferring the subject goods and services to the wholesalers under the "Shubh Labh Trade Loyalty Program" because there is no formal written agreement between the Appellant and the wholesalers. The Advance Ruling Authority has not considered the Appellant's submissions that there are terms and conditions, which are prescribed on its website or app, which needs to be agreed upon by the participating wholesalers to get the benefit of the 'Shubh Labh Trade Loyalty Program' subject to the conditions prescribed for claiming the reward points and its redemption thereafter as per the catalogue prescribed by the Appellant under the said subject scheme. However, it is opined that the above premise of the AAR in this regard is misplaced and erroneous, as it has been well settled by the various judicial pronouncements that it is not mandatory for any person or entity to have the written agreement with another person or entity to carry out any transaction. In this regard, we can draw inference from the Hon'ble Supreme Court judgment in the case of the Brij Mohan and others versus Sugra Begum and others (1990), wherein it was inter-alia held as under:

".....We agree with the contention of the Learned counsel for the appellants to the extent that there is no requirement of law that an

agreement or contract of sale of immovable property should only be in writing....."

Thus, it is conspicuous from the above supreme court judgment that written agreement or contract is not compulsory for effecting any transaction or deeds. Even the oral agreement can have the requisite legal validity and force if the same can be established adequately under the circumstances leading to the respective events. In the present case, however, there is a provision of digital agreement, being entered between the Appellant and the participating wholesalers, wherein the said participating wholesalers are allowed to be part of this subject scheme only after accepting the terms and conditions of the Shubh Labh Trade Loyalty Program.

27. Thus, from the above, it can be clearly made out that the promotional goods and services being given by the Appellant to the eligible participants are not voluntary, but the same is subject to the compliance of the terms and conditions of the scheme under question. Thus, the findings of the AAR to the extent that the subject goods and services given by the Appellant to the wholesalers under the Shubh Labh Trade Loyalty Program are voluntary is erroneous, and hence not tenable.

28. As regards the AAR findings that there is no consideration, whatsoever, involved in the transaction related to the supply of the promotional goods and services as per the "Shubh Labh Trade Loyalty Program" by the Appellant to the wholesalers, it is observed that though there is no direct consideration in the monetary terms, received by the Appellant from the beneficiary Wholesalers against providing the promotional goods and services under the Subject scheme, but it is conspicuous from the subject scheme that the subject transaction i.e. provision of the promotional goods and services under the subject scheme is the consequence or the outcome of the antecedent, which is the purchase of the Appellant's pharmaceutical products by the wholesalers in order to claim more and more rewards points under the Shubh Labh Trade Loyalty Program, leading to the increase in the sales volume of the Appellant's products, which in turn

result in the increased income/consideration. Thus, it is clearly seen that there is an involvement of the consideration, although indirect, in the impugned transactions carried out under the Shubh Labh Trade Loyalty Program, whereas the Hon'ble Supreme Court judgment, relied upon the AAR had explicitly held as under:

".....A 'gift' is a gratuity and an act of generosity and does not require a consideration; if there is a consideration for the transaction, it is not a gift ....."

Further, it is manifest that the Appellant's act of providing the promotional goods and services under the subject scheme is certainly not an act of generosity, as the Appellant is not giving these goods and services to each and every wholesalers, but only to such participating wholesalers, who have achieved their sales targets and accumulated adequate reward points to fetch such promotional goods and services in terms of the catalogue prescribed by the Appellant. There is presence of the pure commercial intention of the Appellant in the said scheme i.e. to increase their business and sales.

29. In view of the above discussions, it is clearly established that the provision of the promotional goods and services by the Appellant to the eligible wholesalers under the Shubh Labh Trade Loyalty Program is not gift, as the same does not satisfy the essential ingredients of the gift as envisaged by the above cited Hon'ble Supreme Court Judgment. Accordingly, the provision of the section 17(5)(h) of the CGST Act, 2017, which proposes to disallow the ITC on the goods disposed by way of gift, will not be applicable in the transaction under question.

30. Now, we will examine the final issue (f), which is whether the promotional goods e.g. pen, notepad, key chain, etc., embossed with the brand 'Sanofi', which are given free of cost by the Appellant to its distributors or doctors as brand reminders can be construed as gift for the determination of the applicability of section 17(5)(h) of the CGST Act, 2017.

31. The Advance Ruling Authority, on this above issue, has ruled that the goods e.g. pen, notepad, key chain, etc., embossed with the brand 'Sanofi', which are given

free of cost by the Appellant to its distributors or doctors as brand reminders are in the nature of gifts, as these goods have been transferred in the absence any contractual obligation between the Appellant and its wholesalers, and without any commercial consideration, thereby satisfying the parameters of a gift, which have been laid out by the Hon'ble Supreme Court in the case of the Sonia Bhatia v. State of UP [1981 (3) TMI 250- Supreme Court].

32. As regards the above AAR observation, it is stated that the AAR has completely ignored the advertising potential of the such goods given by the Appellant to its distributors or doctors as brand reminder, thereby holding the subject goods duly embossed with brand Sanofi as any other general goods, which may not have been embossed. This is certainly not the case here. The goods embossed with the Sanofi is clearly distinct from the goods which are not embossed as such. Further, it has already been established in para 22 above that the subject goods, given free of cost to the distributors or doctors as brand reminders are nothing but inputs for the Appellant in terms of the provision of section 2(59) of the CGST Act, 2017, as the same fulfill the advertisement need of the Appellant and its products. Hence, it can reasonably be concluded that these goods are given to the distributors or doctors with a purpose or motive, which is clearly commercial in nature i.e. The appellant is providing these goods to the distributors or doctors with an implicit commercial motive related to the growth in the sale of their products with the aid of their distributors and doctors. Thus, it can be deduced that the act of the Appellant, wherein they supply the subject goods to their distributors or doctors, is anything but generous, and there is certainly an element of the commercial consideration involved into this. Therefore, the provision of the subject goods cannot be held to be gift, as interpreted by the above cited Supreme Court Judgment. Accordingly, the provision of the section 17(5)(h) of the CGST Act, 2017, which proposes to disallow the ITC on the goods disposed by way of gift, will not be applicable in the transaction under question.

33. Thus, in view of the above deliberations, the following order is passed:

ORDER

The questions raised by the Appellant are being answered as under:

"Question 1: Whether input tax credit is available of the GST paid on expenses incurred towards promotional schemes of Shubh Labh Loyalty Program?

Answer: Answered in positive.

Question 2: Whether input tax credit is available of the GST paid on expenses incurred towards promotional schemes goods given as brand reminders?

Answer: Answered in positive."

(SUNGITA SHARMA)
MEMBER

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/10/2019-20 Date- 22.10.2019

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri Rajiv Jalota, MEMBER

GSTIN Number	27AAACH2736F1ZU
Legal Name of Appellant	Sanofi India Limited
Registered Address	CST No. 117B, Sanofi House Saki Vihar Road, Land T Business Park, Powai, Mumbai- 400 072.
Details of appeal	Appeal No. MAH/GST-AAAR-10/2019-20 dated 24.07.2019 against Advance Ruling No. GST-ARA-115/2018-19/B-43 dated 24.04.2019
Jurisdictional Officer	Deputy/Asstt. Commissioner, Division-VIII, CGST, Mumbai East

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 Sanofi India Limited (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-115/2018-19/B-43 dated 24.04.2019

BRIEF FACTS OF THE CASE

A. Sanofi India Limited (hereinafter referred to as the "Appellant"), in India is engaged in business of sale of pharmaceutical goods and services. The Appellant has its head office in Mumbai and manufacturing unit at Goa and Ankleshwar. The Appellant also gets its products manufactured through third party manufacturers who manufacture goods on contract manufacturing basis. Further, the Appellant provides taxable services and is registered under GST.

B. The Appellant in regular course of business, incurs various marketing and distribution expenses. The said expenses are incurred with a view to promote their brand/products and enhance its sales. Under various schemes, the Appellant distributes different products among its trade channels as promotional items or brand reminders. Further, the Appellant also offers various promotional schemes such as "Shubh Labh Trade Loyalty Program", etc.

C. In case of brand reminders, products like pens, notepad, key chains etc. are distributed to the distributors with their name embossed on it. The brand embossed on these products serve as an advertisement tool and is a brand reminder. Such products act as reminder of the association with the brand Sanofi so as to promote products of the Appellant.

D. In case of "Shubh Labh Trade Loyalty Program", the distributors/wholesalers get rewards based on the reward points earned on the basis of quantity of goods sold by them.

   For example: - Combiflam Tablet purchased in minimum quantity of 01 shipper/case or 14,040 tablets will be eligible for 01 reward coupon. On activation of one (01) Combiflam coupon, wholesaler will be credited with FIFTEEN (15) reward points and confirmed via text/SMS to registered mobile number. Further, as per the scheme catalogue the wholesalers who have earned 35000 points will be eligible for Singapore Trip For 2 Persons; 6 Days/5 Nights, the wholesalers who have earned 24000 points will be eligible for claiming Raymond Weil 2760-St3-50001 Watch - For Men, etc.

E. In the above example, when the wholesaler opts for Raymond watch, the watch is purchased by the Appellant and provided to the wholesaler as per the agreed terms of

the promotional scheme. The invoice for the said watch is raised in the name of the Appellant and accordingly, input tax credit ('ITC') of the GST paid on the watch is claimed by the Appellant.

F. In light of the aforesaid business model, the Appellant preferred an application No. GST-ARA, Application No. 115 dated 28.01.2019 for Advance Ruling under Section 97 of Central Goods and Services Tax Act, 2017 ("CGST Act") and Maharashtra Goods and Services Tax Act, 2017 ("SGST Act") before the Maharashtra Authority of Advance Ruling (hereinafter referred to as the "Authority") on the question of law as to whether input tax credit is available of the GST paid on expenses incurred towards promotional schemes of "Shubh Labh Loyalty Program" or goods given as brand reminders.

G. However, brushing aside the submissions of the Appellant, the Authority passed the order bearing number GST-ARA-115/2018-19/B-43/Mumbai dated 24.04.2019 (herein after referred to as the "Impugned Order") and answered the Questions raised by the Appellant in the following manner, inter-alia, ruling thus:

"Question 1: Whether input tax credit is available of the GST paid on expenses incurred towards promotional schemes of "Shubh Labh Loyalty Program"?

Answer: Answered in Negative.

Question 2: Whether input tax credit is available of the GST paid on expenses incurred towards promotional schemes goods given as brand reminders?

Answer: Answered in Negative."

H. Being aggrieved by the said impugned order, the Appellant is filing this instant appeal on various grounds, which are taken without prejudice to each other.

Grounds of the Appeal

1. At the outset, the Appellant submits that the ruling of the Authority is inconsistent with the spirit of the GST Law and without authority of law, and/or otherwise

untenable and unsustainable in law and is liable to be set aside, on the following amongst other grounds, which are taken without prejudice to one another.

2. ITC SHOULD BE ALLOWED OF THE GST PAID ON PROCUREMENT OF PROMOTIONAL PRODUCTS WHICH ARE GIVEN TO WHOLESALERS AS BRAND REMINDERS.

2.1 It is submitted that the Authority has erred in holding that since Section 17 (5) of the CGST Act deals with Blocked credits and begins with a non obstante clause, the Appellant can be denied the ITC even if Section 16 (1) allows ITC considering the fact that the goods given by Appellant are not gift.

2.2 **As per Section 16(1) of the said Act** –

"*Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person*".

Thus, credit is available of input tax paid on goods which are used for furtherance of business.

2.3 However, as per **Section 17(5)(h) of the CGST Act, 2017**, "*input tax credit shall not be available in respect of the following, namely: goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples.*"

As per the above provision, credit is not available of goods which are given as gift and free samples.

2.4 As mentioned above, in case of brand reminders, products like pens, notepad, key chains etc. are distributed to the distributors and dealers. The said products are embossed with Sanofi brand. The brand embossed on these product serves as an advertisement tool and is a brand reminder. Such goods act as reminder of the association with the brand Sanofi so as to promote sales.

2.5 It is submitted that as per the provisions of the CGST Act as highlighted above, every registered person is entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business.

2.6 It is submitted that in the instant case of the Appellant, the brand reminders are provided to the wholesalers in furtherance of business so as to promote brand Sanofi and its products. Thus, ITC should be allowed of the GST paid on procurement of such products which are given to wholesalers as brand reminders. However, Section 17(5) of the CGST Act covers gifts for the purpose of ineligible credit.

2.7 It is submitted that the aforesaid submissions formed the part of the application filed before the Authority, in the additional submissions dated 20.02.2019 and also the oral submissions. However, the Authority failed in not considering the submissions of the Applicant. The impugned order should be quashed and set aside on this count alone.

3. A CONTRACTUAL OBLIGATION IS CREATED BETWEEN THE APPELLANT AND THE DISTRIBUTOR/WHOLESALER WHICH WOULD ENABLE EITHER PARTY TO TAKE RECOURSE TO A CIVIL SUIT OR ACTION FOR SPECIFIC PERFORMANCE OF CONTRACT ON FAILURE TO ADHERE TO THE TERMS AND CONDITIONS

3.1 It is submitted that the Authority erred in holding that Appellant have not submitted any contract/agreement in support of the contention that there is a contractual obligation between the distributor/wholesaler and the Appellant.

3.2 It is submitted that the Authority has erred in stating the aforesaid in as much as the said statement is factually incorrect. The Impugned Order proceeds on a flawed finding that the Appellant have not submitted any contract/agreement in support of the contention that there is a contractual obligation between the distributor/wholesaler and the Appellant.

3.3 The Appellant in their Additional submissions had produced, before the Authority, a PPT, which would establish that, in light of the terms and conditions which the distributor/wholesaler accept, a contractual obligation is created between the Applicants and the distributor/wholesaler which would enable either party to a take recourse to a civil suit or action for specific performance of contract on failure to adhere to the terms and conditions.

3.4 It is submitted that the Appellant in Paragraph 3 (k) and Paragraph 3 (l) of the said additional submissions dated 18.04.2019 demonstrated the aforesaid contentions, which is clearly brushed aside by the Authority while passing the Impugned order.

For the ease of reference, the Paragraph 3 (k) and Paragraph 3 (l) of the said additional submissions dated 18.04.2019 is reproduced herein below:

"k. The Applicants are emphasizing on this to establish that the acceptance of terms and conditions on the website/app creates a contractual obligation between the distributor/wholesaler and the Applicants herein.

l. In fact, the Applicants would like to submit that in light of the terms and conditions which the distributor/wholesaler accept and a contractual obligation is created between the Applicants and the distributor/wholesaler which would enable either party to a take recourse to a civil suit or action for specific performance of contract on failure to adhere to the terms and conditions. A copy of the Power Point presentation explaining the functioning of the Application is attached herewith."

3.5 It is submitted that the recent decision of the Maharashtra Authority for Advance Ruling in the case of Biostadt India Limited dated 20 December 2018 would not have any bearings in the present application for the following reasons: -

3.5.1 In the judgment of Biostadt India Limited, the AAR held that the Applicant therein failed to submit any documentation to prove that there was a contractual obligation. (in the present facts, the Applicants have reproduced in their application the entire terms and conditions, which the distributor/wholesaler has to accept as a pre-requisite before redeeming their points)

3.5.2 In the judgment of Biostadt India Limited there were only gold coins on offer on purchase of certain quantity of seeds (in the present facts, the choice lies with the distributor/wholesaler to redeem the points garnered by him against articles of his choice).

3.5.3 The transaction between the Applicants and the distributor/wholesaler is not a barter as envisaged under Section 7 of the CGST Act. The transaction of buying medicines by the distributor/wholesaler is a pure sale transaction, in which the medicines are supplied against payment of money. A barter would involve trading of goods against goods or goods against services or various other permutations and combinations. However, the present transaction by any stretch of imagination cannot be called a barter and is a pure sale arrangement. As pleaded earlier, the act of giving points

which can be redeemed later against articles is nothing but discounts in the line of "buy more, save more" on which input tax credit is available.

3.5.4 It would defeat the very purpose of Section 16(1) of the CGST Act if it is held that where the goods are procured with levy of input tax and are supplied without tax being paid on such output supplies, the scheme of the CGST Act, provides for no input tax, except export. In fact, Section 16(1) specifically provides that ITC would be available on inputs if they are used or intended to be used in furtherance of business. Any interpretation to the contrary would render Section 16(1) of the CGST Act otiose.

3.5.5 Further the circular dated 7 March 2019 referred below in regard to treatment of sales promotion schemes was not considered in the said ruling as order was issued prior to issuance of circular.

4. <u>THE PROMOTIONAL GOODS, GIVEN TO DISTRIBUTORS/WHOLESALERS WHO SATISFY CERTAIN CONDITIONS IS NOT ASSURANCE OF GIVING AWAY GIFTS ON THOSE CONDITIONS BEING ACHIEVED BY THE CUSTOMERS.</u>

4.1 It is submitted that the Authority erred in holding that the Promotional goods, given to distributors/wholesalers who satisfy certain conditions is nothing but assurance of giving away gifts on those conditions being achieved by the customers.

4.2 It is submitted that in case of "Shubh Labh Loyalty program", as mentioned above, the distributors/wholesaler get promotional items based on the reward points earned on the basis of goods sold by them. Thus, they have earned such reward points on the basis of the target achieved by them.

4.3 In the example provided above, the wholesaler who has earned 24000 points will be eligible for claiming Raymond Weil 2760-St3-50001 Watch -For Men. The said points are earned on the basis of quantity of the Sanofi products sold by the wholesaler. Thus, the rewards in the form of watch given to the wholesaler is on achieving a particular target as per the scheme and is not in the nature of gift. In fact, the wholesaler has earned the said watch on the basis of Buy more earn more which is similar to trade circular no. 92/11/2019-GST dated 7 March 2019.

4.4 Based on the above, it can be concluded that in case of the "Shubh Labh Scheme", the watch given to the wholesaler is not a gift as the watch is given under the contractual obligation under the scheme. It is the consideration for achieving a particular sales target and hence, input tax credit on purchase of the said watch should be available to Sanofi.

5. THE INTENTION OF THE LEGISLATURE WAS NEVER FOR NON-GRANTING/ DENIAL OF SET OFF.

5.1 It is submitted that the Authority erred in holding that under the GST laws, the intention for non-granting/ denial of set-off is envisaged in situations where there is no tax on output supply. In cases where the goods are procured with levy of input tax and are supplied without tax being paid on such output supplies, the scheme of the GST Act provides no input tax credit, except export.

5.3 It is submitted that the Authority draws the above inference from the provision of Section 16 (4) of the CGST Act. The primary scheme of GST is the free flow of credit. The intention of the legislature was never for non-granting/ denial of set off.

5.4 It is submitted that the heading of the Section 16 of the Central Goods and Services Tax Act, 2017 reads as Eligibility and conditions for taking input tax credit and the provision of clause (1) of section 16 ibid. reads thus:

1) *"Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person."*

Clause 2 of the same section imposes the conditions. The said clause starts with a non-obstante clause and amongst the other conditions it also lays that no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply.

5.5 It is submitted that relying on Schedule - I to the CGST Act, 2017 which deals with activities to be treated as supply even if made without consideration and Entry

Number 2 to Schedule I (2), read with Section 17 (5) (h), the Authority erroneously holds that any goods disposed of, by way of gift are not eligible for ITC and that even if supply is in course or furtherance of business between related or distinct persons, it shall be considered as supply.

6. CIRCULAR BEARING NO. 92/11/2019-GST DATED 7 MARCH 2019

6.1 It is submitted that the Authority failed in correctly applying the clarification of the Circular dated 7 March 2019 as the Applicant has not provided any discount on the transaction made to the Customer.

6.2 It is submitted that the Circular bearing No. 92/11/2019-GST dated 7 March 2019 for clarifying various doubts related to treatment of sales promotion schemes under GST has been issued by the Principal Commissioner GST.

6.3 It is submitted that under the said Circular Part 'C' deals with 'Buy more, save more' offers. It has been clarified in the Circular that discounts offered by the Suppliers to Customers (including staggered discount under 'Buy more, save more' scheme and post supply/volume discounts established before or at the time of supply) shall be excluded to determine the value of supply provided they satisfy the parameters laid down in sub-section (3) of Section 15 of the said Act, including the reversal of ITC by the recipient of the supply as is attributable to the discount on the basis of document(s) issued by supplier.

6.4 It is submitted that it is clarified in the Circular, that the supplier is entitled to avail the ITC for such input, input services and capital goods used in relation to the supply of goods or services or both on such discounts.

6.5 It is pertinent to note that the Appellant in the additional submissions dated 18.04.2019 elaborately relied upon the Circular dated 7 March 2019. However, the Authority fails in considering the same while passing the impugned order. The Impugned order is liable to be quashed or set aside on this count alone.

7. NOMENCLATURE SHOULD NOT DECIDE THE CONTRACT BUT THE SPIRIT AND THE INTENTION OF THE PARTIES SHOULD BE LOOKED INTO:

7.1 It is submitted that the Authority erred in relying on the nomenclature of the catalogue where "gift" is mentioned to hold that the Applicants intend to take contrary view.

7.2 It is submitted that mere mention in the catalogue as a "gift" will not have any bearing as there is a plethora of jurisprudence which holds that the nomenclature should not decide the contract but the spirit and the intention of the parties should be looked into.

7.3 It is submitted that Hon'ble Apex Court in the matter of Super Poly Fabriks Ltd. versus Commissioner of C. Ex., Punjab 2008 (10) S.T.R. 545 (S.C.) held that the purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Reproduced here in below is the relevant paragraph of the said judgment for ready reference:

"There cannot be any doubt whatsoever that a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive."

7.4 It is submitted that in Assam Small Scale Ind. Dev. Corp. Ltd. and Ors. v. J.D. Pharmaceuticals and Anr. [2005 (8) SCALE 298 = (2005) 13 SCC 19], on the decisiveness of the nomenclature of the agreement entered into between the state corporation and small scale industrial unit, opined:

"The expressions 'principal' and 'agent' used in a document are not decisive. The nature of transaction is required to be determined on the basis of the substance there and not by the nomenclature used. Documents are to be construed having regard to the contexts thereof wherefor 'labels' may not be of much relevance."

8.1 It is submitted that as per the provisions of the CGST Act as highlighted above, every registered person is entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business.

8.2 In the present case, the brand reminders are provided to the wholesalers in furtherance of business so as to promote Sanofi brand and its products. Thus, ITC should be allowed of the GST paid on procurement of such products which are given to wholesalers as brand reminders. However, Section 17(5) of the CGST Act covers gifts for the purpose of ineligible credit.

9. TO CONSTITUTE A 'GIFT' THE PROPERTY SHOULD BE TRANSFERRED VOLUNTARILY AND NOT AS A RESULT OF A CONTRACTUAL OBLIGATION:

9.1 It is submitted that on a plain reading of the aforesaid provisions it can reasonably be concluded that ITC has to be reversed with respect to any goods disposed of by way of gift or free samples. However, it is important that the ambit and scope of "gifts" is understood properly.

9.2 It is submitted that 'Gift' has not been defined under the CGST Act. Hence, reference will have to be made to other statutes and the jurisprudence available on the same. Gift, as per the Gift-Tax Act (18 of 1858) has been defined to mean transfer by one person to another of any existing movable or immovable property voluntarily and without consideration in money or money's worth. Further reference can be made to the definition of gift in Corpus Juris Secundum, Volume 38, referred with approval by the Honorable Supreme Court in the case of Sonia Bhatia v. State of UP [1981 (3) TMI 250- Supreme Court], wherein 'gift' has been held to be a voluntary transfer of property by one to another, without any consideration or compensation therefor. A 'gift' is a gratuity and an act of generosity and does not require a consideration; if there is a consideration for the transaction, it is not a gift. In the same case, it was also held that a gift is a transfer which does not contain any element of consideration in any shape and form – Love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by law.

9.3 It is submitted that borrowing the jurisprudential guidance from the observation of the Hon'ble Supreme Court in the matter of Shakuntala & Ors. Vs. The State of Haryana reported in 1979 3 (SCC) 226 is of much avail. The relevant paragraph of the said judgment is reproduced herein below for ready reference:

"It is therefore one of the essential requirements of a gift that it should be made by the donor "without consideration". The word "consideration" has not been defined in the Transfer of Property Act, but we have no doubt that it has been used in that Act in the same sense as in the Indian Contract Act and excludes natural love and affection. If it were to be otherwise, a transfer would really amount to a sale within the meaning of Section 54 of the Transfer of Property Act, or to an exchange within the meaning of Section 118 for each party will have the rights and be subject to the liabilities of a seller as to what he gives and have the rights and be subject to the liabilities of a buyer as to that which he takes. It is not necessary for us to examine the other modes of transfer, for they have no bearing on the nature of the controversy before us. It would thus appear that it is of the essence of a gift as defined in the Transfer of Property Act that it should be without "consideration" of the nature defined in Section 2(d) of the Contract Act."

9.4 The Australian High Court in the case of Commissioner of Taxation (Cth) Vs. McPhail [1968] 41 ALJR 346 held that to constitute a 'gift' the property should be transferred voluntarily and not as a result of a contractual obligation. In this case a person agreed to give a donation to a school in return of school charging less fees for the education of the child of said person. Hence, the Court held that such donation cannot be termed as 'gift' as it was made under a contractual obligation wherein school was required to charge lower fees against the donation made.

9.5 It is submitted that in light of the above, it is concluded that to constitute a "gift" following elements are required to be satisfied: -

a. Supply must be made without any contractual obligation. If any supply is made under a contractual obligation it cannot be termed as a 'gift'.

b. Supply must be made without any consideration in money or money's worth. Hence, supplies made out of love and affection or such other non- legal considerations can only be termed as 'gifts'.

9.6 Thus, the Authority has failed to consider and differentiate, the judgments of Sonia Bhatia (supra) and McPhail (supra) relied upon by the Appellant to prove that the transaction of the Applicants is not in the nature of a gift but is a contractually binding one.

9.7 It is submitted that it is indeed imperative, at this stage, to analyze the concept of promotion. The Appellant submits that the products distributed to its wholesalers are for promoting their brand and are in furtherance of business and thus, ITC of the GST paid on such products should be available.

9.8 The Oxford dictionary has defined the term "promotion" as an activity that supports or encourages a cause, venture or aim, the publicizing of a product, organization, or venture so as to increase sales or public awareness. Further, the term "furtherance" is defined as the advancement of a scheme or interest. In context of the term "furtherance of business" it means advancement of business of the company.

9.9 The meaning of supply made in course or furtherance of business given in the FAQ on GST released by CBEC says - No definition or test as to whether the activity is in the course of furtherance of business has been specified under the CGST Act. However, the following business test is normally applied to arrive at a conclusion whether a supply has been made in the course or furtherance of business:

a. Is the activity, a serious undertaking earnestly pursued?

b. Is the activity, pursued with reasonable or recognizable continuity?

c. Is the activity, conducted in a regular manner based on sound and recognized business principles?

d. Is the activity, predominantly concerned with the making of taxable supply for consideration/ profit motive?

9.10 It is pertinent to note that, if promotional items are considered as gift and the ITC on the same is disallowed, this will have a huge impact across the businesses because in order to promote sales or to create goodwill, the companies carry out various promotional schemes including distributing goods for brand promotion.

9.11 It is submitted that the act of giving free supplies is similar to the promotional and advertising activities undertaken by every business which are the basic ingredients and inevitable. Moreover, when a business makes a free supply, the cost which the business has incurred is always taken into account by him in fixing the price of the rest of supplies. Thus, the business is not for bearing any loss on distribution of such goods to the wholesalers. Albeit-indirectly, the exchequer will get GST even on the value of the free supplies and there is no revenue loss as such to the government as well.

9.12 If business promotion and advertisement expenses are not specifically excluded and are considered as 'in the course or furtherance of business' then in view of the Appellant same treatment is available for free supplies. It is noteworthy that expenses, incurred for pamphlets, hoardings, banners, etc., are in the nature of the marketing and promotions and therefore in course or furtherance of business. Thus, the ITC of the GST paid on goods distributed as brand reminders should be available.

10. PRODUCTS GIVEN AS BRAND REMINDERS SHOULD BE TREATED AS INCURRING BUSINESS EXPENSES

10.1 The Authority has failed to deal with the contention of the Appellant that the products given as brand reminders should be treated as incurring business expenses and in no way is a permanent disposal or transfer of business assets.

10.2 It is submitted that entry (1) of Schedule I to the Central Goods and Services Tax Act, 2017 ('CGST Act'). The said entry in Schedule I to the CGST Act reads the following:

"ACTIVITIES TO BE TREATED AS SUPPLY EVEN IF MADE WITHOUT CONSIDERATION

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

.....

10.3 It is submitted that in accordance with the aforesaid entry, a view can be taken that since the input tax credit has been availed on acquisition of such products, giving away the same for free to its customers is nothing but permanent transfer or disposal of the business assets.

10.4 In this regard, it is submitted that the products like pens, notepad, key chains, etc. given as brand reminders cannot be termed as "business assets". The term business asset is defined in general term as a piece of property or equipment purchased exclusively or primarily for business use. There are many different categories of assets including current and non-current, short-term and long-term, operating and capitalized, and tangible and intangible. Business assets are itemized and valued on the balance sheet, which can be found in the company's annual report. The products such as pens, key chains, etc. are purchased and embossed with company logo so as

to distribute to its customers for promotion purpose which can be said as incurring business expenses. The same can in no way be said to be permanent disposal or transfer of business assets.

10.5 Reference herein can be made to the decision of the Hon'ble first tier tax tribunal in United Kingdom in the case of Marks & Spencer PLC, wherein under an offer M&S was providing "free wine for dine" in 10 pounds. The Tribunal held that when a 'commercial common sense approach' is adopted, the term 'free' was being used in a marketing sense, but the economic and commercial reality of the offer was that M&S was offering a package of four items for 10 pounds, so the price must be allocated across all four items for VAT purposes. In the example given above, the reward in the form of watch given to the wholesaler is on achieving a particular target as per the scheme and is not without any consideration. Thus, no GST should be levied on the said transaction.

11. ERSTWHILE REGIME: NO RESTRICTION ON VAT CREDIT ON PURCHASES FOR PROMOTION OF BUSINESS OR INPUTS, CAPITAL GOODS OR INPUT SERVICES USED FOR FURTHERANCE OF BUSINESS

11.1 It is submitted that the Authority failed to deal with the contention of the Applicants that under the erstwhile regime, more specifically under Rule 52 of the MVAT Rules, 2005 and Rule 2(a), (k) (l) of the Cenvat Credit Rules, 2004, there was no restriction on VAT credit on purchases for promotion of business or inputs, capital goods or input services used for furtherance of business. In this regard, we wish to highlight relevant extracts of the Maharashtra VAT Rule, 2005 and Cenvat Credit Rules, 2004:

(a) Rule 52. Claim and grant of set-off in respect of purchases made in the periods commencing on or after the appointed day

(1) In assessing the amount of tax payable in respect of any period starting on or after the appointed day, by a registered dealer (hereinafter, in this rule, referred to as "the claimant dealer") the Commissioner shall subject to the provisions of rules 53, 54, 55 and 55B in respect of the purchases of goods made by the claimant dealer on or after the appointed day, grant him a set-off of the aggregate of the following sums, that is to say,-

(a) the sum collected separately from the claimant dealer by the other registered dealer by way of tax on the purchases made by the claimant dealer from the said registered dealer of goods being capital assets and goods the purchases of which are debited to the profit and loss account or, as the case may be, the trading account,

(b) tax paid in respect of any entry made after the appointed day under the Maharashtra Tax on the Entry of Motor Vehicles into Local Areas Act, 1987, and

(c) the tax paid in respect of any entry made after the appointed day under the Maharashtra Tax on the Entry of Goods into Local Areas Act, 2003.

(d) the purchase tax paid by the claimant dealer under this Act.

(2) The set-off under this rule shall not be granted in regard to any quantum of tax if set-off under rule 51 has been claimed in respect of the same quantum of tax or if set-off has been claimed in respect of the said quantum under any earlier law.

....

(b) Rule 2 (a) "capital goods" means: -

(A) the following goods, namely: -

(i) all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.05 grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;

(ii) pollution control equipment;

(iii) components, spares and accessories of the goods specified at (i) and (ii);

(iv) moulds and dies, jigs and fixtures;

(v) refractories and refractory materials;

(vi) tubes and pipes and fittings thereof; and

(vii) storage tank, used-

1) in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office; or

2) for providing output service;

(B) motor vehicle registered in the name of provider of output service for providing taxable service as specified in sub-clauses (f), (n), (o), (zr), (zzp), (zzt) and (zzw) of clause (105) of section 65 of the Finance Act;

(c) Rule 2 (k) "input" means-

i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;

Explanation 1.- The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2.- Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer; but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods;

(d) Rule 2 (l) "input service" means any service, -

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to

the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal;

11.2 It is submitted that based on above, the applicant contends even in the erstwhile regime, there was no such restriction on availment of VAT credit on purchases made for promotion of business. Further, even under Service Tax Law, the Cenvat credit was available on purchase of inputs, input services or capital goods which were used for furtherance of business. Thus, the input tax credit of the GST paid on purchase of such promotional items should also be available under the GST regime since the same are for furtherance of business.

12. TRANSACTION BETWEEN THE APPLICANTS AND THE DISTRIBUTOR/WHOLESALER IS NOT A BARTER AS ENVISAGED UNDER SECTION 7 OF THE CGST ACT

12.1 It is submitted that the Authority has failed to appreciate that the transaction between the Applicants and the distributor/wholesaler is not a barter as envisaged under Section 7 of the CGST Act. The transaction of buying medicines by the distributor/wholesaler is a pure sale transaction, in which the medicines are supplied against payment of money.

12.2 It is submitted that the Authority has failed to appreciate, that a barter would involve trading of goods against goods or goods against services or various other permutations and combinations.

Additional Submissions dated 14.10.2019

13.1 The appellants also rely on the definition of Business as set out in section 2 (17) of the CGST which lays down that Business includes

"(a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

(b) any activity or transaction in connection with or incidental or ancillary to sub clause (a);

(c) any activity or transaction in the nature of sub clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

....

13.2 Active promotion of the goods manufactured by the appellants by the activity of giving various items in the trade for brand recollection, as also incentivizing their dealers in promotion of the sales of the medicines by way of the "shubh Labh scheme" would be covered under the "business", and hence under the expression "in the course or furtherance of business".

13.3 That the phrase "in the course or furtherance of business" has been interpreted by the Hon'ble Gujarat High Court in the case of *Cinemax India Ltd. V. Union of India reported at [2011 (24) STR 3]* as follows, which squarely covers the aforesaid activities: –

The meaning of 'furtherance', as per Black's Law Dictionary, 6th Edition, 11th reprint, 1997, is "act of furthering, help forward, promotion, advancement or progress". Furtherance of business will, thus mean, act of furthering business, helping forward business, promotion of business, advancement of business or progress of business. Therefore, if a service provider is renting the property in the course of or for furtherance of business or commerce, it will amount to an activity in favor of service recipient for helping forward business, promotion of

business, advancement of business and progress of business. It automatically generates value addition and comes within the meaning of 'service tax' as defined under Sec. 65(105) (zzzz)."

13.4 In **Philips India Ltd. v. Commissioner of Customs and Excise - 1997 (91) E.L.T. 540]** the Hon'ble Supreme Court held that where the cost of advertisements was borne half and half by the manufacturer and dealer, no deduction is permissible because the advertisement may benefit in equal degree, the manufacturer and dealer. The Hon'ble Court further held in that legitimate business consideration must be kept in mind in adjudicating such matters under Central Excise."

13.5 Thus, the trade promotion activities under scrutiny in the appeal are clearly brand promotion and increasing the volume of sales, and squarely covered by activities relating to business i.e. promotion of the same.

13.6 The Hon'ble Supreme Court in the case of **Philips India Ltd. V. Collector of Central Excise, Pune reported at [1997 (91) ELT 540 (S.C.)]** has held that the Tax Department should keep commercial realities in mind in a situation where the discount offered was sought to be truncated on the ground that the dealers were asked to do advertisement and after sales services. The Hon'ble Supreme Court held that such activities benefit both the dealers by maximizing sales as also the manufacturers and the discount could not be curtailed. Relevant portion of the judgement reads as follows: –

"It seems to us clear that the advertisement which the dealer was required to make at its own cost benefited in equal degree the appellant and the dealer and that for this reason the cost of such advertisement was borne half and half by the appellant and the dealer. Making a

deduction out of the trade discount on this account was, therefore, uncalled for.

As to the after sales service that the dealer was required under the agreement to provide, it did of course enhance in the eyes of intending purchasers the value of the appellant's product, but such enhancement of value enured not only for the benefit of the appellant; it also enured for the benefit of the dealer for, by reason thereof, the dealer got to sell more and earn a larger profit. The guarantee attached to the appellant's products specified that they could be repaired during the guarantee period by the appellant's dealers anywhere in the country. Thus, though one dealer might have to repair goods sold by another dealer and incur costs in that regard, he also had the benefit of having the goods he sold reparable throughout the country. The provision as to after sales service, therefore, benefited not only the appellant; it was a provision of mutual benefit to the appellant and the dealer.

We think that in adjudicating matters such as this, the Excise authorities would do well to keep in mind legitimate business considerations."

13.7 That the lower authority has reasoned that the rewards scheme/ "shubh Labh scheme" mentions the word "gift" and consequently would attract the exclusion clause for claiming credit under section 17 (5) (h). As demonstrated from the meaning of the word "gift", the rewards scheme is not a gift simplicitor but the rewards are given only when the dealer is able to achieve certain volumes of sales as per the agreement between the dealer and the appellants. Hence the "label" given of "gift" in the

agreement cannot be simply applied but the actual nature of transaction has to be considered, namely that the dealer has to increase the volume of sales to earn the reward. Hence there is no gift. Reliance is placed on the Hon'ble Supreme Court decision in the case of **Moped India Limited V. Assistant Collector of C. Ex., Nellore and Others reported at [1986 (23) ELT 8 (S.C.)]**, relevant portion of which reads as follows: –

"That takes us to the second question, namely, whether the Division Bench was right in taking the view that the commission of Rs. 110/-, Rs. 145/-and Rs. 165/- per moped in respect of different varieties of mopeds sold to the dealers could not be said to be trade discount. Mr. Nariman, Learned Counsel appearing on behalf of the appellants, contended that this Commission allowed to the dealers was clearly trade discount and was, therefore, liable to be deducted in determining the excisable value of the mopeds by reasons of sub-section (b) (ii) of Section 4 of the Act. Now it is true that this amount allowed to the dealers has been referred to in the agreement as commission but the level (SIC) [label] given by the parties cannot be determinative because it is, for the court to decide whether the amount is trade discount or not, whatever be the name given to it. If we look at the terms of the agreement, it is clear that the agreement was between the appellants and the dealers on principal to principal basis. The clauses of the agreement which we have set out above clearly show beyond doubt that under the agreement, the mopeds were sold by the appellants to the dealers and the dealers did not act as agents of the appellants for the purpose of effecting sales on behalf of the appellants. It is clear from clause 5 (a) of the agreement that the bills in respect of the mopeds delivered to the dealers were to be sent by the appellants through their bankers and it was the responsibility of the dealers to retire the bills for the purpose

of taking delivery of the mopeds. Clause 5 (b) of the agreement laid an obligation on the dealers to insure the mopeds against all risks, pilferage, non-delivery and SRCC including breakage from the time the mopeds left the factory or stockyard of the appellants until they arrived at the premises of the dealer and this again would show that the dealers acted as principal to principal in purchasing the mopeds from the appellants. The dealers were also liable under Clause 6 of the agreement to maintain adequate organization for sale and service of the mopeds, including show rooms, service stations, repair shops, spare parts, salesmen etc. and the mechanics were also to be trained at the cost of the dealers. The relationship between the appellants and the dealers was clearly on principal to principal basis and in the circumstances, it is difficult to see how the amount of Rs. 110/-, 145/- and 165/- allowed to the dealers in respect of different varieties of mopeds could be regarded as anything other than trade discount. The appellants charged to the dealers the price of the mopeds sold to them less the amount of Rs. 110/-, Rs. 145/- and Rs. 165/-in respect of different varieties of mopeds. These amounts allowed to the dealers were clearly trade discount liable to be deducted from the price charged to the dealers for the purpose of arriving at the excisable value of the mopeds".

13.8 Reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Collector of Customs V. K Mohan & Co. Exports reported at 1989 (43) E.L.T 811 (S.C.)** wherein it has been clearly held that the onus of showing that an assessee falls in the exclusion clause of the benefit of an exemption is squarely on the Department. Relevant portion of the judgement reads as follows: –

"There is no dispute before us that the goods in question are articles made of plastics. This being so, the assessee is entitled to the exemption conferred by the notification unless the goods answer the description of one or other of the specific items set out in the table. ***The onus of showing this is clearly on the Revenue.*** *(emphasis added)"*

13.9 Appellants have already submitted that the cost of the brand recollect items like pens, writing pads, paperweights et cetera et cetera which all promote the brand name/proprietary products of the appellants, and have the same embossed on these products, are all included in the price of the medicines being sold to the dealers. Similarly, all the items and the expenditure incurred for the rewards scheme are all built into the price of the medicines sold to the dealers. As held by the Hon'ble High Court of Tripura in the case **of Bharti Telemedia Ltd. V. The State of Tripura reported at 2015 -VIL- 227- TRI** there is nothing free in commercial transactions, as follows: –

"True is that the petitioner companies have not sold the STBs to the customers. There can however be no manner of doubt that the right to use these goods i.e. the STBs has been transferred to the customers. In today's world, nothing is given free of cost. The Cost of the STB is obviously included in the activation charges and/or monthly subscription. Under the TVAT Act, even where payment of the goods is made by way of deferred payment the goods can be subjected to tax. The main issue is whether the contract can be easily divided and the value of the goods can be ascertained with exactitude."

13.10 The lower authority has also reasoned that there is a barter when under the rewards scheme various goods et cetera/expense borne holidays are given as incentives, and

in return the service of increased sales is provided by the dealers. Such a reasoning is totally wrong and incorrect and in fact Circular number 105/24/2019 – GST dated 28/6/2019 had been issued by the Central Board of Indirect Taxes and Customs, New Delhi, with same reasoning was issued. In this circular when additional discount was granted by the supplier to its purchaser for its purchaser to make increased sales to 3rd parties, the circular deemed the additional discount as a consideration for the increased service of sales by the purchasing dealer with the requirement of payment of GST which the original supplier could take as credit. Further that such discount would be added to the ultimate price to the third-party purchaser, as the price of the supply made to him by the purchasing dealer, from the original supplier. The circular was withdrawn appreciating that there are no multiple transactions in the same transaction for which the discount is offered, and there are no further supplies as contemplated in the circular. Copy of the circular dated 28/6/2019 and its withdrawal are enclosed collectively as **Annexure "1"**to these submissions. Similarly, there is only one transaction of supply to the dealers by the appellants and in the same transaction the reward schemes operate to incentivize the dealers. In other words, there is no concept of there being a barter et cetera as sought to be made out by the lower authority's order. Reliance is placed on the decision of the Hon'ble CESTAT in the case of **Sharyu Motors V. Commissioner of Service Tax, Mumbai reported at 2016 (43) STR 158 (Tri- Mumbai)** wherein it was held that there is no separate business auxiliary service rendered when due to enhanced achievement of sales targets, incentive amounts are received. Such incentive amounts only amount to trade discount, and there is no further service element involved, there being only one transaction. Relevant portion of the decision reads as follows: –

"As regards the Service Tax liability under the category of Business Auxiliary Services for the amount received and for achieving the target under Target Incentive Scheme, we find that the appellant had been given targets for specific quantum of sale by the manufacturers of the cars. As per the agreement, on achievement of such target and in excess of it, appellant was to receive some amount as an incentive. It is the case of the Revenue that such amount is taxable under Business Auxiliary Services, we find no substance in the arguments raised by the learned AR as well as the reasoning given by the adjudicating authority. The said amounts are incentive received for achieving the target of sales cannot be treated as Business Auxiliary Services, as incentive are only as trade discount which are extended to the appellant for achieving the targets. We find that this view has been taken by the Tribunal in the case of Sai Service Station (supra). With respect, we reproduce the relevant Paragraphs: -

In respect of the incentive on account of sales/target incentive, incentive on sale of vehicles and incentive on sale of spare parts for promoting and marketing the products of MUL, the contention is that these incentives are in the form of trade discount. The assessee respondent is the authorized dealer of car manufactured by MUL and are getting certain incentives in respect of sale target set out by the manufacturer. These targets are as per the circular issued by MUL. Hence these cannot be treated as business auxiliary service.

In respect of sales/target incentive, the Revenue wants to tax this activity under the category of business auxiliary service. We have gone through the circular issued by MUL which provides certain incentives in respect of cars sold by the assessee-respondent. These incentives are in the form of trade discount. In these circumstances, we find no infirmity in the adjudication order whereby the

adjudicating authority dropped the demand. Hence, the appeal filed by the Revenue has no merit.

13.11 The humble submission of the appellants is that in the circular dated 7/3/2019 it had been clarified by the Central Board of Indirect Taxes and Customs that wherever there is "Buy one get one free offer", it has to be treated as supplying two goods for the price of one. Similarly, in the appellants case the rewards scheme under the "shubh labh scheme" has to be taken that the rewards are supply against the price already paid for the medicines sold to the dealers. Just like under buy one get one free offer, ITC is not to be denied, similarly the appellants should not be denied the ITC. Further, the very same circular clarifies in regard to "Buy more, save more offers", that ITC should not be denied, even though in all these cases lesser consideration is being realized and certain portion of the supply can be thought of to be without consideration. Yet the clarification holds that such incentives to increase sales should not result in loss of ITC. In regard to secondary discount also which are not known prior to removal of the goods, the circular held that ITC should not be withheld even though a lesser price/consideration for the supply is being realized since the logic is that the consideration already realized is a consideration for the supply including the discounted supply/incentive supplies. Thus, it is reiterated that in the appellant's case also there is no supply without consideration but the original consideration is the consideration for the brand promotion items as also for the items given under the "shubh labh scheme".

13.12 That the lower authority has recorded the arguments made by the learned Departmental representative before them, contending that the supplies have been made free of cost and are non-taxable under section 9 read with section 2 (78) and

merits to be treated as an exempt supply under section 2 (47), and that the credit should be disallowed in terms of section 17 (2). However, the Lower authority in the impugned order has not gone by these contentions or by these provisions. It is well settled that an order passed has to be judged on the basis of the reasons given therein without any new reasons not forming a part of the lower authority's order. Reliance is placed in the case of **Gem Sanitary Appliances P Ltd. V. Chief Commissioner of Income Tax reported at [2012] 19 taxmann.com 69** following the Hon'ble Supreme Court decision in the case of **Mohinder Singh Gill reported at [1978] 1 SCC 405**, holding as follows: –

"We are not inclined to accept the said contention of the respondents for two reasons. Firstly, this is not mentioned in the impugned order passed by the Chief Commissioner of Income Tax dated 07.04.2008. The impugned order has to be read and can be defended on the ground and reasons stated therein Mohinder Singh Gill V. Chief Election Commissioner [1978 (1) SCC 405]".

13.13 Without prejudice to this ratio which may kindly be applied by this Hon'ble Forum, the Learned Departmental Representative before this Hon'ble Appellate authority also relied on these provisions claiming that these provisions would disentitle the credit, the Appellants submit that such reliance is misplaced and erroneous for the following reasons.

13.14 Section 7 gives the Scope of "supply". As can be seen section 7 (1) lays down that the expression "supply" under clause (a) covers all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration.

13.15 Appellants submit that the consideration already received from the dealers would cover the items given under the rewards scheme or the brand recall products. This is on the same reasoning as "buy one get one free" scheme et cetera for which full ITC was held to be eligible.

13.16 As per the Department there is no consideration for the brand recall items or the items under the rewards scheme, which is denied. Just like in the case of **M and S decision reported at [2018 UKFTT 238 (TC)]** where the wine which was canvassed as being free by M and S, along with the meal of 3 courses for £ 10 , the free supply of wine was rejected holding that £ 10 included in it the price of the wine canvassed as free; similarly in the appellant's case the consideration paid by the dealer includes that for the brand recall items as also the rewards scheme items. Hence the question of treating the brand recall items or the rewards scheme items as being non-taxable/exempt items to deny the ITC cannot arise at all.

13.17 Appellants submit that free supplies have also been made without any conditions, and ITC has not been availed in the following situations: -

The appellants do reverse the input tax credit wherever it is required by law. For example: Recently in the appellants office they had kept combiflam cream free samples at their reception which can be taken by employees or any visitor to their office. The Appellants have reversed the input tax credit in relation to the same as the free samples given are pure gift in this case and not in furtherance of business.

Similarly, the Appellants gives its products to doctors as free samples for which it does reverse the input tax credit.

14 In light of these facts, the Appellants humbly submit that they should be entitled to ITC on GST paid on expenses incurred towards promotional schemes of "Shubh Labh Loyalty Programme" and goods given as brand reminders.

Respondent's Submissions

15. The Respondent in the present appeal matter maintained their earlier stands, which they had taken before the Advance Ruling Authority while contending to the applicant's interpretation of the subject issues i.e. the admissibility of ITC of the expenses incurred by the applicant for the procurement of the various promotional goods/services for distribution to its wholesalers under the 'Shubh Labh Trade Loyalty Programme', and for procurement of the various articles for further distribution to the distributors/Doctors as brand reminders. The above said submissions of the Jurisdictional Officer, who is the respondent in the present appeal, is being reproduced herein under:

15.1 The Applicants has filed the subject application for advance ruling on the following questions:

Whether input tax credit is available on the GST paid on expenses incurred towards promotional schemes of "Shubh Labh Loyalty Program".

Comments -No, it is observed that applicant and its group entities are a supplier of Pharmaceutical goods and services. Under "Shubh Labh Trade Loyalty Program, the applicant claims that they offer free Singapore Trip or Raymond Weil Watch as the case may be to their wholesalers on selling a pre-determined quantity of their pharma product and the said pre-determined quantity is accounted for by way of reward points. In this way, there is not dispute about the fact that applicant do not charge any price or value for the said free supply in terms of free Singapore Trip or Raymond

Weil Watch as the case may be. Therefore, the said free supply is not taxable and chargeable to any GST in terms of Section 9 of the CGST Act, 2017. The said supply merit as "exempt supply' in terms of provisions of Section 2(47) read with Section 2(78) and therefore, any ITC is not available on the same in terms of inter-alia provisions of Section 17(2) of the CGST Act, 2017. Further provisions of Section 17(5)(h) specifically disallow availment and usage of any credit on goods disposed of by way of 'gift' not withstanding anything whatsoever in sub section (1) of Section 16. Therefore, the question of availment of ITC, on the basis that subject gift were used in furtherance of their business, does not arise.

15.2 The applicant's reliance on provisions of Schedule-I is totally misplaced because it is not their case that subject gift are covered by Schedule-I of the CGST Act, 2017. It may be seen that Schedule-I is applicable to only specified suppliers and the subject gifts by the applicant are not covered by the provisions of Schedule-I. Therefore, the applicant has no occasion to take ITC on the basis of Schedule-I which is irrelevant in their case. Applicant themselves agreed that the subject supply cannot be construed as permanent transfer or disposal of the business assets.

15.3 There is no substance in the applicant's contention that Watch given under their "Shubh Labh Loyalty" Scheme does not merit as Gift because there is no dispute about the fact that even watches have been given free of cost. The applicant themselves have quoted the judgement of Hon'ble Supreme Court in case of Sonia Bhatia Vs. State of UP [1981(3) TMI 250 - Supreme Court), wherein Hon'ble Supreme Court has held that a, " 'gift' is a gratuity and an act of generosity and does not require a consideration, if there is a consideration for one transaction, it is not

'gift' ". The applicant is not signing any formal contract under "Shubh Labh Loyalty Program", hence there is no contractual obligation under which goods are supplied.

15.4 In the instant case, under "Shubh Labh Loyalty Program", gifts like watch or reward points are given as incentive and there is no extra commercial consideration and hence since there is no commercial value assigned to the transaction it is to be construed to be Gift.

15.5 The applicant themselves have submitted that for anything to be considered as gift, there should not be any contractual obligation or involvement of consideration. In the instant case the applicant give free goods to wholesalers without any involvement of consideration nor is there any written contractual agreement between the company and the wholesaler. Hence, the same is to be considered as Gift. The loyalty program is given voluntarily by the Company and there is no consideration involved in the transaction. Hence, it falls in the definition of Gift.

15.6 In any case, the notice is not eligible for ITC in terms of provisions of section 9(1) read with Section 17(2), Section 2(47) and section 2(78), because, there is no dispute that the applicant has made the subject supplies without any consideration on which they have paid any GST. Therefore, the value of subject free supply does not merit inclusions in value in terms of Section 15. Further, the subject supply merit as exempt supplies under Section 2 (47) and hence, the ITC is not available to applicant in terms of Section 17(2). Therefore, it may be seen that ITC is not available even without application of the provisions of Section 17(5)(h).

15.7 The applicant has contended that subject free supplies have been made in pursuance of their business. However, the fact remains that the same have been made free of cost and therefore, the same are non-taxable under Section 9 read with Section 2(78) and

merits exempted supply under Section 2(47). Further, there is no provisions under Section 15 to include the cost of such free supplies in the value of taxable free samples in terms of Section 15. There cannot be any dispute that the said supplies are exempted, hence credit is not allowed in terms of Section 17(2). Further, gifts have to be disallowed in terms of Section 17(5)(h) notwithstanding the fact that the subject supply has been used in course of furtherance of business in terms of Section 16(1). The provisions of Section 17(5)(h) are applicable notwithstanding the provisions of Section 16(1). Therefore, the applicant is not eligible for the ITC.

15.8 Further, the applicant has not provided any enclosures to their application including Annexure-I containing a catalogue of "Subh Labh Loyalty Program". Therefore, the department reserves the rights to be provided with all the documents and file additional reply.

15.9 Whether input tax credit is available of the GST paid on expenses incurred towards promotional goods given as brand reminders?

Comments: No, it is observed that applicant and its group entities are a supplier of Pharmaceutical goods and services. Under promotional goods given as brand reminders, the applicant distributes the products like pens, notepad, key chains etc. to the distributors and doctors. The said products are embossed with Sanofi brand. In this way, there is not dispute about the fact that applicant do not charge any price or value for the said free supply in terms of free pens, notepad, key chains etc. as the case may be. Therefore, the said free supply is not taxable and chargeable to any GST in terms of Section 9 of the CGST Act, 2017. The said supply merits as 'exempt supply' in terms of provisions of Section 2(47) read with Section 2(78) and therefore, any ITC is not available on the same in terms of inter-alia provisions of Section 17(2)

of the CGST Act, 2017. Further provisions of Section 17(5)(h) specifically disallow availment and usage of any credit on goods disposed of by way of 'gift' not withstanding anything whatsoever in sub section (1) of Section (16). Therefore, the question of availment of ITC, on the basis that subject gift were used in furtherance of their business, does not arise.

15.10 The applicant's reliance on provisions of Schedule-I is totally misplaced because it is not their case that subject gift are covered by Schedule-I of the CGST Act, 2017. It may be seen that Schedule-I is applicable to only specified suppliers and the subject gifts by the applicant are not covered by the provisions of Schedule-I. Therefore, the applicant has no occasion to take ITC on the basis of Schedule-I which is irrelevant in their case.

15.11 Applicant themselves agreed that the subject supply cannot be construed as permanent transfer or disposal of the business assets.

15.12 There is no substance in the applicant's contention that pens, notepad, key chains etc. given under their promotional scheme goods given as brand reminders does not merit as Gift because there is no dispute about the fact that even pens, notepad, key chains etc. has been given free of cost. The applicant themselves have quoted the judgement of Hon'ble Supreme Court in case of Sonia Bhatia Vs. State of UP (1981(3) TMI 250 - Supreme Court], wherein Hon'ble Supreme Court has held that a" gift is a gratuity and an act of generosity and does not require a consideration, if there is a consideration for one transaction, it is not gift.

15.13 The applicant is not signing any formal contract under promotional goods given as brand reminders, hence there is no contractual obligation under which goods are supplied.

15.14 In the instant case under promotional goods given as brand reminders, products like pens, notepad, key chains etc. are distributed to the distributors and doctors. The said products are embossed with Sanofi brand are given as incentive and there is no extra commercial consideration and hence, since there is no commercial value assigned to the transaction, it is to be construed to be Gift.

15.15 Also, it is seen that there is no contractual obligation involved in this situation, as it is completely up to the distributors and doctors whether he will prescribe the medicines of the company or not. Doctors are not under any legal obligation to do so. As the consideration is not directly linked with the gift provided to doctor, it is to be considered as gift.

15.16 The applicant themselves have submitted that for anything to be considered as gift, there should not be any contractual obligation or involvement of consideration. In the instant case the applicant give free goods to distributors and doctors without any involvement of consideration nor is there any written contractual agreement between the company and the distributors and doctors. Hence, the same is to be considered as Gift.

15.17 The goods given as brand reminders are given voluntarily by the Company and there is no consideration involved in the transaction. Hence it falls in the definition of Gift. Also, it is seen that there is no contractual obligation involved in this situation, as it is completely up to the doctors whether he will prescribe the medicines of the company or not. Doctors are not under any legal obligation to do so. As the consideration is not directly linked with the gift provided to doctors, it is to be considered as gift.

15.18 In any case, the applicant is not eligible for ITC in terms of provisions of section 9(1) read with Section 17(2), Section 2(47) and section 2(78), because, there is no dispute that the applicant has made the subject supplies without any consideration on which they have paid any GST. Therefore, the value of subject free supply does not merit inclusions in value in terms of Section 15. Further, the subject supplies merit as exempt supplies of Section 2(47) and hence, the ITC is not available to applicant in terms of Section 17(2). Therefore, it may be seen that ITC is not available even without application of the provisions of Section 17(5)(h).

15.19 The applicant has contended that subject free supplies have been made in pursuance of their business. However, the fact remains that the same have been made free of cost and therefore, the same are nontaxable under Section 9 read with Section 2(78) and merits exempted supply under Section 2(47). Further, there is no provisions under Section 15 to include the cost of such free supplies in the value of taxable free samples in terms Section 15. There cannot be any dispute that the said supplies are exempted, hence credit is not allowed in terms of Section 17(2). Further, gifts have to be disallowed in terms of Section 17(5)(h) notwithstanding the fact that the subject supply has been used in course of furtherance of business in terms of Section 16(1). The provisions of Section 17(5) (h) are applicable notwithstanding the provisions of Section 16(1). Therefore, the applicant is not eligible for the ITC.

15.20 Further, the applicant has not provided any enclosures to their application including Annexure-III containing the sample invoices for procurement of such products distributed as brand reminders. Therefore, the department reserves the rights to be provided with all the documents and file additional reply.

PERSONAL HEARING

16. A Personal Hearing in the instant matter, conducted on 04.10.2019, was attended by Shri A.R. Madhav Rao, Advocate, on behalf the Appellant. He reiterated the written submissions, filed earlier before us. They, also, filed one additional submission dated 14.10.2019 in the matter, which have been reproduced herein above. Shri Kartikeya Dubey, the jurisdictional officer in the present appeal matter, also attended the above said hearing, wherein he reiterated the earlier submissions, which were filed before the Advance Ruling Authority. The Submissions filed by the Jurisdictional Officer before the Advance Ruling Authority has also been reproduced herein above.

DISCUSSION AND FINDINGS

17. I have heard both the sides. I have also perused the impugned Advance Ruling, wherein the authority ruled that ITC in respect of the expenses incurred by the Appellant, for the procurement of the promotional goods/articles or services for distribution to the wholesalers as a part of the 'Shubh Labh Trade Loyalty Program', and for the procurement of the goods embossed with the brand Sanofi, for distribution to the distributors/doctors as brand reminders, will not be allowed, on the basis that the said supply of the promotional goods/services as part of the 'Shubh Labh Trade Loyalty Program', and the supply of the goods to its distributors or doctors as brand reminders are without any legal consideration and contractual obligation, and therefore the same would reasonably be construed as gift, and accordingly the ITC in respect of the expenses incurred on the procurement of the said supply of goods or services will not be allowed to the appellant in accordance with the provision of section17(5)(h) of the CGST Act, 2017.

18. On perusal of the above said impugned Advance Ruling order as well as all the written submissions, and the facts of the case, placed before us, the moot issues, to be decided, are as under:

1. Whether input tax credit is available on the GST paid on expenses incurred towards promotional schemes of Shubh Labh Loyalty program?

2. Whether input tax credit is available of the GST paid on expenses incurred towards promotional schemes goods given as brand reminders?

19. The present application is in respect of a sales promotion scheme known as 'Shubh Labh Loyalty Program 2018 for their wholesalers/distributors and promotional products which has been floated by them for their doctors. In the first case, their distributor/wholesaler

customers who purchased certain products over and above a certain quantity would be entitled to get reward points. In the second scenario, appellant is giving brand reminder products like pens, notepads, key chains to the distributors or doctors , which serve as an advertisement tool. The brand reminders are distributed to the distributors or doctors with their name embossed on it to promote the brand for sales. The products mentioned in the catalogue are procured from different suppliers and the appellant has raised the question whether ITC can be claimed by them on the procurement of the said products services given on the above said promotional basis. Thus, the appellant offers various promotional schemes and following schemes are the subject matter of the present application namely:

1) Shubh labh trade Loyalty programe
2) Brand reminder products

20. The AAR has held that the promotional schemes goods, or services to the eligible wholesalers under the Appellant's scheme of the "Shubh Labh Trade Loyalty" Program are nothing but gifts and therefore there will be no ITC as per provisions of Section 17 (5)(h) of the CGST Act. It is ruled by the AAR that there is an inherent contradiction on the part of the appellant where they have made two contradictory statements-

1) The promotional items are not gifts as they are supplied as a contractual obligation e.g watch is given under the contractual obligation under the scheme with an intention to increase the sale of the company , serve as an advertisement tool and brand reminders to promote sale.

2) Although the above is true , and there is contractual obligation, at the same time it is not a supply in the nature of barter i.e supply of promotional goods against supply of services such as increased sale, advertisement of products and sales promotions.

The AAR has therefore gone further and held that the promotional goods and services are given as 'gifts' and therefore no ITC will be available.

In the grounds of appeal, the appellant has made the following submission:-

1) The ITC should be allowed on the procurement of promotional products and the credit is available as the goods are used for the furtherance of business
2) A contractual obligation is created between the appellant and the distributor /wholesaler

3) The products given away as promotional items is not a gift as the watch is given under the contractual obligation of the scheme
4) To constitute a gift the property should be transferred voluntarily and not as a result of a contractual obligation
5) Transaction between the appellants and the distributor/wholesaler is not a barter as envisaged under Section 7 of the CGST Act.

21. In this submission also, it is noted that the contention of the appellant suffers from an inherent contradiction in that, on one hand they contend that the giving away of the goods is not a barter as there is no separate service rendered by the recipient in such transactions and on the other hand they say that the goods are not given as gifts as the goods are given as a part of the contractual obligation. The appellant has also cited the CESTAT judgments in the case of Sharayu Motors (2016 (43) STR 158) and Sai Services Station (2014 (35) STR 625) wherein it is held that amount received for achieving the target under the Target Incentive Schemes, which the revenue sought to tax under the category of Business Auxiliary Services, cannot be treated as Business Auxiliary Services as incentive are only as trade discount for achieving the targets. In these judgments it is held that there is no separate service rendered by recipient. Thus, from the above judgements it can be safely assumed that the supplier has not received any consideration against free supply of goods and services under "Shubh Labh Loyalty" scheme. If the appellant is not receiving any consideration from the recipients then it is very clear from the provision of the CGST Act that where there is no consideration then the goods are given away as gifts and the appellant would not be eligible for the ITC under section 17 (5) (h) of the CGST Act.

It is clear that the appellant is trying to argue both ways-.

1. That there is no consideration and therefore there is no barter.
2. It is not a gift as there is contractual obligation

22. Let me examine the first line of the argument in detail. The appellant has argued that there is no barter and no supply of goods, i.e. provision of the goods or services by the Appellant to the wholesalers under the "Shubh Labh Trade Loyalty Program" is not supply in the context of the appellant's business. It is not disputed that appellant is in the business of the pharmaceutical products, wherein various pharmaceutical products are manufactured either by its own, or with the help of the third-party manufacturers. Therefore, it is clear that the appellant is certainly not in the business of the supply of the subject goods or services as specified in the catalogue of the "Shubh Labh Trade Loyalty Program" floated by the

Appellant. But these subject goods and services, are being provided by the Appellant to the eligible wholesalers under the "Shubh Labh Trade Loyalty Program". Even though these goods are nothing but inputs or input services, these goods or services are supplied to wholesalers as incentives for which as per the appellant no consideration in monetary terms is received. In any business, all inward supplies are input goods or input services only and supply of which would definitely be output supply so the only question that needs to decided is whether it is supply in terms of section 7 of the GST Act. As submitted by the learned advocate of the applicant these articles or services are supplied on account of achieving targets and increasing the turnover of the applicant. Therefore, can it be said that consideration in the form of increased turnover is received by the appellant? However, the appellant has submitted that such a reasoning is totally wrong and incorrect and relied on the CESTAT judgment in the case of **Sharayu Motors V. Commissioner of Service Tax, Mumbai reported at 2016 (43) STR 158 (Tri- Mumbai)** wherein it was held that there is no separate business auxiliary service rendered when due to enhanced achievement of sales targets, incentive amounts are received. Such incentive amounts only amount to trade discount, and there is no further service element involved, there being only one transaction. The relevant portion of the decision reads as follows: –

> *"As regards the Service Tax liability under the category of Business Auxiliary Services for the amount received and for achieving the target under Target Incentive Scheme, we find that the appellant had been given targets for specific quantum of sale by the manufacturers of the cars. As per the agreement, on achievement of such target and in excess of it, appellant was to receive some amount as an incentive. It is the case of the Revenue that such amount is taxable under Business Auxiliary Services, we find no substance in the arguments raised by the learned AR as well as the reasoning given by the adjudicating authority. The said amounts are incentive received for achieving the target of sales cannot be treated as Business Auxiliary Services, as incentive are only as trade discount which are extended to the appellant for achieving the targets. We find that this view has been taken by the Tribunal in the case of Sai Service Station (supra). With respect, we reproduce the relevant Paragraphs: -*
>
> *In respect of the incentive on account of sales/target incentive, incentive on sale of vehicles and incentive on sale of spare parts for promoting and marketing the products of MUL, the contention is that these incentives are in the form of trade discount. The assessee respondent is the authorized dealer of car manufactured by MUL and are getting certain incentives in respect of sale target set out by the manufacturer. These targets are as per the circular issued by MUL. Hence these cannot be treated as business auxiliary service.*

23. In the above judgment it is categorically held that there is no service provided by recipient hence it can be said that there is no consideration received by supplier, hence no supply. Thus, in light of above findings, goods and services supplied under "Shubh Labh Trade Loyalty Program", are not covered under the definition of supply under section 7 of the GST Act. Now, similarly in respect of the issue whether the promotional goods e.g. pen, notepad, key chain, etc., embossed with the brand 'Sanofi', which are given free of cost by the Appellant to its distributors or doctors as brand reminders can be construed as no supply as there is no consideration.

24. Thus, once it is established that the subject goods/services are being provided free of cost by the appellant to its distributors or doctors as brand reminders, and there is no contractual obligation against supply of such brand promotional goods, then the only conclusion that can be drawn is that these are given as gifts by the appellant to the distributors/wholesalers. These goods are distributed free as goodwill gesture. No consideration in whatever form is received by the applicant and hence it is nothing but in the nature of gift. Thus, if the contention of the appellant is accepted that there is no consideration against the free supply of goods and services, it will amount to gift as relied by the appellant on the Supreme Court Judgment in the case of Sonia Bhatia v. State of U.P. (Civil Appeal no 775 of 1981 dt 17.3.81) wherein 'gift' has been held to ***be a voluntary transfer of property by one to another, without any consideration or compensation therefor. A 'gift' is a gratuity and an act of generosity and does not require a consideration; if there is a consideration for the transaction, it is not a gift.*** In the same case, ***it was also held that a gift is a transfer which does not contain any element of consideration in any shape and form – Love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by law.***

No doubt, the goods embossed with Sanofi distributed free has advertising potential and it is in the furtherance of the business. But it is also to noted that Section 17(5(h) starts with a *non obstante* clause where it overrides section 16 (1) of the CGST Act.The legislature has denied input tax credit on such goods. These goods are inputs but distributed as free gifts. Therefore ITC is not available as per section 17(5)(h).

(Rajiv Jalota)
MEMBER

ORDER

- The member (SGST) has upheld the order of the AAR.
- The Member (CGST) has set aside the order of the AAR in favour of the appellant.

25. Therefore, as per Section 101 (3) of the CGST Act, it shall be deemed that no advance ruling can be issued in respect of the question under the appeal.

Copy to the:

1. **Appellant;**
2. **Respondent;**
3. **AAR, Maharashtra;**
4. **Pr. Chief Commissioner, CGST and C. Ex., Mumbai Zone;**
5. **Commissioner of State Tax, Maharashtra;**
6. **Web Manager, WWW.GSTCOUNCIL.GOV.IN;**