



HARYANA AUTHORITY FOR ADVANCE RULING,
GOODS AND SERVICES TAX,
HARYANA VANIJYA BHAWAN, PLOT NO 1-3, SECTOR 5,
PANCHKULA-134151 (HARYANA)



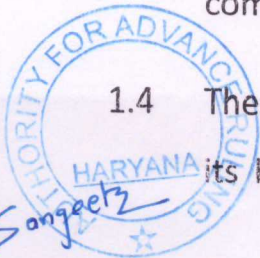
ADVANCE RULING NO.HAR/HAAR/R/2018-19/49
(In Application No.: 49/2018-19, dated 16.01.2019)

Name & Address of the Applicant	:	M/s BMW India Pvt. Ltd., 2 nd Floor, Oberoi Building No. 11, DLF Cyber City, NH-8, Gurugram (East), Haryana.
GSTIN of the Applicant	:	06AABCB7140C1Z9
Date of Application	:	16.01.2019
Clause(s) of Section 97(2) of CGST/HGST Act, 2017, under which the question(s) raised.	:	Clause(d)- admissibility of input tax credit of tax paid or deemed to have been paid.
Date of Personal Hearing	:	05.04.2019
Present for the Applicant	:	Sh. Pulak Saha (C.A)

Memo No.: 1029/AAR
Dated: 28/8/2020

1. Brief facts of the case:

- 1.1 BMW India Private Limited is a Company incorporated under the Companies Act, 2013. The Company has a manufacturing plant located at Chennai and a warehouse in Mumbai for after sales purposes.
- 1.2 BMW India organizes various events across the year for the purpose of marketing and sales promotion of its products such as motor cars, motor bikes bearing BMW brands (such as BMW, MINI etc.). Such events are organized throughout the country with an intention to increase the brand loyalty of its customers. These events also aid as a platform to undertake advertisement, sales promotional activities for its existing/potential customers.
- 1.3 The company incurs different type of expenses for organization of these events such as cost incurred for booking of space to host the event, expenses paid for hiring professional services of an event management company, purchase of printed material for the purpose of advertisement, purchase of billboard and hoarding for setting up across the event location, supply of BMW branded lifestyle accessories/ product miniatures on free of cost (FOC) basis to the attendees, distribution of prizes to the winners of competitions organized at the event etc.
- 1.4 These events are organized by the Company with an intention to increase its brand visibility, enhance loyalty for its existing customers and attract



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new potential customers. The company educates the attendees at the events with respect to the upcoming launches and schemes. During the course of these events, the potential customers are identified and are offered test drives of BMW cars, leading to follow ups and eventually resulting in sale of BMW cars, while the existing customers are provided with exchange offers etc. Further, the company representatives at these events also attend to enquiries raised by customers to provide a better understanding to the customers of the cars, offers schemes launched or proposed to be launched by the company.

1.5 At these events, the attendees are provided with following BMW branded lifestyles accessories on a free of cost basis:-

- a) Duffle bags;
- b) Golf balls;
- c) T-shirts;
- d) Caps;
- e) Diary;
- f) Key chain;
- g) Passport holder etc.

Such accessories are tailor made by way of embossing a BMW brand logo on the same.

1.6 The above expenditure incurred by the Company is recorded as sales promotion and marketing expense in the books of accounts.

2. Applicant's Legal stand:

2.1 Section 2(17) of Central Goods and Services Tax Act, 2017 ('the CGST Act') inclusively defines the term "**business**", in the following words:-

(17) "**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);

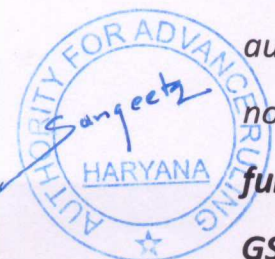


- (c) *any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;*
- (d) *supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;*
- (e) *provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;*
- (f) *admission, for a consideration, of persons to any premises;*
- (g) *services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;*
- (h) *services provided by a race club by way of totalisator or a licence to book maker in such club ; and*
- (i) *any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;*

2.2 Section 16 of the CGST Act provides for every registered person to avail credit of the input tax paid on any supply of goods or services, provided he uses the same in the course or furtherance of business.

2.3 Section 17(5) of the CGST Act, lays down the list of supplies in respect of which input tax credit is not allowed to a registered person.

2.4 Further, the applicant has contended that the government has released its FAQ's on meaning and scope of supply. The said FAQs provide that **"Business"** is defined under Section 2(17) include any trade, commerce, manufacture, profession, vocation, adventure or wager etc. whether or not undertaken for a pecuniary benefit. Business also includes any activity or transaction which is incidental or ancillary to the aforementioned listed activities. In addition, any activity undertaken by the Central Govt. or a State Govt. or any local authority in which they are engaged as public authority shall also be construed as business. From the above, it may be noted that **any activity undertaken included in the definition for furtherance or promoting of a business could constitute a supply under GST law.**



2.5 The question arises as to what constitutes a gift. Gift has not been defined in the GST law. In common parlance, gift is made without consideration, is voluntary in nature and is made occasionally. It cannot be demanded as a matter of right by the employee and the employee cannot move a court of law for obtaining a gift.

2.6 Section 2(xii) of the Gift-tax Act defined the term “**gift**” in the following words:

“(xii) “gift” means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money’s worth, and [includes the transfer or conversion of any property referred to in Section 4, deemed to be a gift under that section]”.

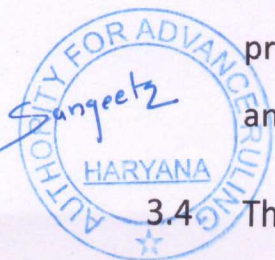
3. **Applicability of relevant legal provisions as per the applicant:**

3.1 Supply of goods/ accessories on FOC basis at ‘marketing events’ should qualify as being used in the course or furtherance of business.

3.2 The term “*in the course of furtherance of business*” has not been defined under the GST law. An inference can be drawn from the meaning in common parlance i.e. “*in course of business*” means activities undertaken in usual business practice such as manufacturing, trading etc. It refers to those transactions which are directly related to business without which business cannot be run, like cost of goods sold, direct expenses, capital goods, etc.

3.3 On the other hand, the term “*furtherance*” as understood in common parlance means the advancement of a scheme or interest, promotion, furthering, forwarding, improvement, development, betterment, stimulation. Thus, “*furtherance of business*” means the act of advancement/promotion of business for its sustained growth and profitability which includes expenses such as, marketing, advertisement and sales promotions, etc.

3.4 The Hon’ble High Court of Gujarat has in the case of Cinemax India Limited versus Union of India, discussed the taxability of renting of immovable



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property in the course or furtherance of business. Further, the Hon'ble Court elaborating on the meaning of the term 'furtherance' held that when a service recipient takes an immovable property on rent for business purpose, it is in the spirit of promotion, progress and advancement of business, thus there is a value addition and the activity is in the course of business.

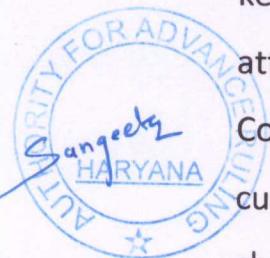
The meaning of 'furtherance', as per Black's Law Dictionary, is "act of furthering, help forward, promotion, advancement or progress".

Furtherance of business will, thus mean, act of furthering business, helping forward business, promotion of business, advancement of business or progress of business.

3.5 Thus, in common parlance, the term "in the course or furtherance of his business" should be best understood as any activity undertaken with an intent and for the purpose of value addition to one's business. Generally, following business test should be applied in order to determine if the supply is in the course or furtherance of business or not:-

- 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?

3.6 In the present case, the company organizes regular marketing events at various locations across the country. Such marketing events include Golf events, joy fest, XDrive experience, press events etc. The company provides certain accessories/ articles such as golf kits, bags, t-shirts, caps, diaries, keychains, passport holders etc. on Free of Cost (FoC) basis to the attendees at the event. The accessories supplied are embossed with the Company's logo for the purpose of enhancing brand loyalty in existing customers and attracting potential customers for BMW products showcased at the event.



3.7 These BMW events offer an excellent marketing tool for showcasing the BMW Loyalty Program. Such events are used by the Company as a platform to accumulate its existing/potential customers and educate them with respect to the upcoming launches and schemes.

4. **Applicant's view regarding Free of Cost (FoC) Supplies Vs Gift:**

- 4.1 The term 'gift' has not been defined under the CGST Act. However, an inference can be drawn from its meaning in common parlance i.e. *"gift is understood to be voluntary in nature and made without consideration; gifts are made occasionally and cannot be demanded as a matter of right."*
- 4.2 The Gift-tax Act defines the word gift 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."*
- 4.3 The applicant has also cited the observation of Hon'ble Supreme Court in the case Sonia Bhatia v. State of UP. Which read: A 'gift' is commonly defined as a voluntary transfer of property by one to another, without any consideration or compensation therefore. A 'gift' is a gratuity and an act of generosity and not only does not require a consideration, but there can be none; *if there is a consideration for the transaction it is not a gift.*
- 4.4 Thus, a gift is given by an act of generosity and is a transaction that does not only negate a consideration but there can be none for the same. In case there is a consideration for a transaction (in cash or in kind), it should not qualify as a gift. Evidently, for a transaction to qualify as a gift, it must meet the following parameters, namely:-

- a) It is made voluntarily
- b) It does not contain any element of a consideration/ reciprocity
- c) It is made without any consideration in return
- d) It is made occasionally.

4.5 Contrastingly, businesses operate with a profit motive and undertake FOC supplies to strengthen their customer base. Every business engages in supply of goods on FOC basis to its distributors, retailers, customers etc. in

exchange for a hidden element of consideration. Thus, the basic elements of a FOC supply can be listed as follows:

- a) It is made in timely intervals
- b) It is made with an intention to receive consideration (in cash or in kind)
- c) It is made in alignment with the Company's policies.

4.6 Thus, a clear distinction should be drawn between goods given as a gift and goods given on free of cost basis. As stated above, in the instant case, the Company organizes such marketing events with a sole intent of enhancing the loyalty of its existing customers and attracting potential customers which ultimately helps in increasing the sale of BMW products in India.

4.7 The applicant has relied upon an order of in light of the above, it is pertinent to highlight an order passed by the Hon'ble CESTAT, New Delhi in the case of **Shree Cement Ltd. Versus Commissioner of Central Excise & Service Tax, Jaipur-II** where the assessee, a manufacturer of clinker and cement availed input tax credit on event management service.

Thus, goods supplied by the Company during marketing events as prizes, memento's etc on free of cost basis, are for advertisement, sales and promotion of the Company's products and are not in the nature of a gift.

4.8 In view of the above discussion, the applicant contends that since the present case entails supply of goods/ accessories by the Company to its customers on free of cost basis during marketing and sales promotion events as an act in the course or furtherance of business and not as a gift and since these goods are used in the course or furtherance business, the Company should be eligible to avail credit of the input tax paid.

5. **Questions on which advance ruling is sought:**

- (a) Whether certain customized lifestyle goods procured by BMW India either from a third party local supplier or imported from outside India for supply of goods during promotion/marketing events organized by the Company will qualify as used in the course or



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furtherance of business in terms of the provisions of the Central Goods and Services Tax Act, 2017 ("CGST ACT")?

- (b) Whether the Company is eligible to avail input tax credit for such goods supplied under the marketing events in terms of the CGST Act, 2017?

6. **Discussion:**

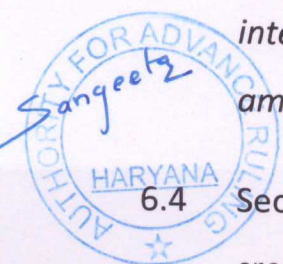
6.1 The applicant company i.e. BMW is a supplier of BMW cars and motor bikes. With an intention to increase the brand loyalty of its customer, the company organizes marketing and sales promotion events such as golf tournaments, Joyfest and x-Drive experience for test drive. These events are a tool for showcasing the BMW loyalty program and aid as an advertisement and sales promotion and marketing event. It has contended that these events are in the course of furtherance of business. At the events, the attendees are provided with the following BMW branded lifestyle accessories on a free of cost basis:-

- (a) Duffle bags;
- (b) Golf balls;
- (c) T-shirts;
- (d) Caps;
- (e) Diary;
- (f) Key chain;
- (g) Passport holder etc.

6.2 These accessories are tailor made by way of embossing BMW brand logo on the same. The expenditure incurred by the company is recorded as sales promotion and marketing expense.

6.3 Section 16(1) of the CGST Act provides that *"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"*.

6.4 Section 17 of the CGST Act deals with apportionment of credit and blocked credit and section 17(5) reads :



"Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following:

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples."

6.5 The applicant has claimed that the items distributed by it in the promotional events do not fall under the category of gifts. In support of its claim, the applicant has relied upon the definition of gift as contained in Gift Tax Act.

6.6 Section 2(59) of the CGST/SGST Act defines input as *"any goods other than capital goods used to intended to be used by a supplier in the course of furtherance of business."* section 2(62) defines input tax in relation to a registered person which means: *"the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him"*.

6.7 The term business is defined under section 2(17):

(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);

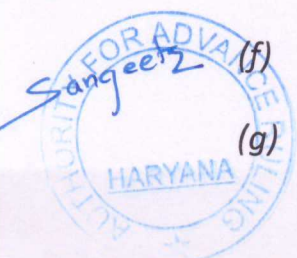
(c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

(d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;

(e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;

(f) admission, for a consideration, of persons to any premises;

(g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;



- (h) *services provided by a race club by way of totalisator or a licence to book maker in such club ; and*
- (i) *any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities.*

6.8 On the basis of these definitions, the applicant has drawn a clear distinction between goods given as gifts and goods given on free of cost basis. The applicant also draws a sharp contrast between gift which is transferred voluntarily and not as a result of contractual obligations and free of cost (FoC) supplies which are intended to strengthen the customer base. The applicant further holds that these free of cost supplies are made with an intention to receive consideration (in case or in kind) and has accordingly held that a clear distinction should be drawn between a gift and free cost of supply.

6.9 So, as per the applicant these marketing events are advertisement, sales and promotion activities organized to earn consideration in the form of reciprocity from customers and increase in sales and brand value of the company and these items provided in the promotional events are not in the nature of gifts.

6.10 Now, the issue arises as to what is consideration?

Consideration is defined under Section 2(31) of the CGST Act, **"consideration"** in relation to the supply of goods or services or both includes—

- (a) *any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;*

- (b) *the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not*



include any subsidy given by the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

6.11 A careful reading of this definition suggests that the consideration could be monetary as well as non-monetary. This payment can be in advance or after the supply has been made. This payment may be made by the recipient or by any other person. A consideration may be the monetary value of any act or forbearance i.e. the monetary value of doing something or refraining from doing something. But this payment made or to be made or any such act or forbearance must be in respect of or in response to or for the inducement of the supply of goods and services or both.

6.12 The applicant has contended that the goods supplied by it in the marketing events are intended to earn consideration in the form of reciprocity from customers and increase in sales and brand value of the company. It has further maintained that the customers invited at such events are the existing and potential customers. It is true that the existing BMW customers must have paid some consideration at the time of purchasing BMW motor cars/ motor bikes but this consideration was in a respect of the supply of motor cars or motor bikes. This consideration had not the remotest of the connection with the goods supplied on free of cost basis in the promotional events. As far as the supply of goods to the potential customers is concerned, the issue of consideration does not arise because the potential customers may not be actual customers/ buyers of the applicant company's motor cars and motor bikes. The company has itself maintained that these *free of cost supplies are made with an intention to earn consideration*. This statement itself reflects that there is no consideration involved at the time of making of these free of cost supplies. It is also important to refer to the proviso to the definition of consideration as provided under the CGST Act. It contains that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as



consideration for the said supply. It is not the case of the applicant that any part of the amount received or to be received from the existing customers or the potential customers, as the case may be, at the time of supply of taxable products by the applicant company is applied to the goods provided on free of cost basis in these promotional events.

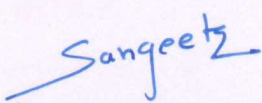
6.13 The types of supply mentioned under the GST Act are taxable supply, exempted supply and nil rated supply. There is no provision of supply on free of cost basis under the CGST/SGST Act. The supply of goods on free of cost basis might be a part of company's policy but certainly not in conformity with the provisions of the CGST/SGST Act and a company's policy cannot override the provisions of law. The items distributed in the promotional events are gifts and section 17(5)(h) bars credit of input tax with respect to gifts made by a registered person.


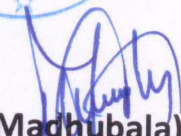
7. Ruling:

- 7.1 The goods procured by BMW India and supplied during promotion/marketing events qualify as being used in the course of furtherance of business in terms of CGST/ HGST Act, 2017.
- 7.2 The company is ineligible to avail Input Tax Credit for such goods supplied in the marketing events owing to the bar of clause (h) of sub-section (5) of section 17.

Ordered accordingly.
To be communicated.

10.04.2019
Panchkula.


(Sangeeta Karmakar)
Member CGST



(Madhubala)
Member SGST

Regd. AD/Speed Post

M/s BMW India Pvt. Ltd., 2nd Floor,
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Copy to:

1. Principal Commissioner of Central Goods & Service Tax, GST Bhawan, Plot No. 36-37, Sector-32, Gurugram, Haryana.
2. Deputy Excise and Taxation Commissioner (ST), Gurugram (East).

o/c