TAMILNADU STATE APPELLATE AUTHORITY FOR ADVANCE RULING

(Constituted under Section 99 of Tamil Nadu Goods and Services Tax Act 2017)

A.R.Appeal No. 16/2021 AAAR

Date: 23.02.2022

BEFORE THE BENCH OF

1. Thiru M.V.S.CHOUDARY, MEMBER (CENTRE)

2. Thiru. K.PHANINDRA REDDY, MEMBER (STATE)

ORDER-in-Appeal No. AAAR/04/2022 (AR)

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

Preamble

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

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

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

(b). On the concerned officer or the jurisdictional officer in respect of the appellant.

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

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

Name and address of the appellant	GRB DAIRY FOODS PVT.LTD, No.10 Sidco Shed Sipcot Industrial Complex, Hosur, Krishnagiri District, Tamil Nadu- 635126
GSTIN or User ID	33AACCG0136G1Z8
Advance Ruling Order against which appeal is filed	Order No.36 /ARA/2021 dated: 30 .09.2021
Date of filing appeal	17.11.2021
Represented by	S.Sridharan, VP Sales & Marketing, G.Viswanathan, C.A
Jurisdictional Authority-Centre	Centre: Salem Commissionerate
Jurisdictional Authority -State	The Assistant Commissioner (ST) Hosur North-I Assessment Circle
Whether payment of fees for filing appeal is discharged. If yes, the amount and challan details	Yes. Payment of Rs. 20000/- made vide Challan No.SBIN21113300058742 dated 13.11.2021

At the outset, we would like to make it clear that the provisions of both the Central Goods and Service Tax Act and the Tamil Nadu Goods and Service Tax Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the Central Goods and Service Tax Act would also mean a reference to the same provisions under the Tamil Nadu Goods and Service Tax Act.

The subject appeal has been filed under Section 100 (1) of the Tamilnadu Goods & Services Tax Act, 2017/Central Goods & Services Tax Act 2017 by M/s. GRB DAIRY FOODS PVT.LTD, (herein after referred as the Appellant), having their registered office at No.10 Sidco Shed Sipcot Industrial Complex, Hosur, Krishnagiri District, Tamil Nadu- 635126. The appellant are registered under GST with GSTIN 33AACCG0136G1Z8. They are engaged in the business of manufacture and supply of ghee and other products. Their factory premises at Tamil Nadu and Karnataka are having separate GST registration in both the States. The product groups of the appellant are classified into ghee, masalas, instant mixes and sweets.

The products supplied by them are taxable under the Act and none of the products are either "Exempted" or "Nil rated". They sell their products through various retail stores across the country and obtain substantial revenue from Export Sales too. With the objective of expanding the market share, the appellant stated that they had launched a sales promotional offer to enhance sales of its products; the sales promotional offer was named as 'Buy n Fly' scheme. This scheme was valid from 8th April 2019 to 8th July 2019; This appeal is filed against the Order No. 36/ARA/2021 dated 30.09.2021 passed by the Tamil Nadu State Authority for Advance ruling on the application for advance ruling filed by them.

2. The appellant has stated that as per the scheme the retailers have to purchase the eligible products from the distributor, sub-stockiest and they shall be eligible for the rewards under the scheme once the targets specified therein are achieved. This is a scheme aimed at promoting second leg sales in supply chain i.e. from super-stockiest to retailer which in turn would increase the over-all sales of the company and also the market share. This scheme was made known to retailers/supply chain in advance to ensure that the benefits of promotional activities accrues to the company. It is not a mandatory scheme for all the retail outlets rather it is left to the discretion of the retailers to participate in the scheme. As per the scheme, retail-outlets shall make efforts to maximize the sales of appellant's products which in turn leads to increase in purchase of products by them from sub-stockiest. The retail outlets have an obligation to increase the sales of the products covered by the scheme as much as possible and once the purchase of products by retail outlets exceeds the specified limit under the scheme they automatically become eligible to the rewards/product. Broadly the obligations of the retail outlets under the 'Buy n Fly' scheme are as follows:

1. To promote the sales of appellant's products which in turn leads to more purchase of products by retail outlets from sub-stockiest.
2. The retail outlet is required to maintain proper accounts/documents which indicates the purchases made by them and also sales effected by them under the scheme.
3. The rewards/product specified under the scheme do not accrue to the retailers automatically and/or they cannot claim the same as a matter of right under the scheme.

4. They cannot participate in any other sales promotion scheme(s)/marketing scheme(s) of any other third party/vendor during the tenure of the 'Buy n Fly' scheme i.e. 8th April to 8th July 2019.

The terms and conditions of the 'Buy n Fly' scheme as contained in the brochure are as follows:

- The scheme is valid from 8th April 2019 to 8th July 2019
- The total purchases have to be of minimum slab or above during the period.
- The rewards cannot be substituted with money.
- The bills cannot be tweaked or altered.
- The bills should have seal & signature of the retailer with contact number
- The claims have to be submitted on or before 20th of July 2019.
- The scheme is applicable for Masalas, Instant Mixes, Sweets, Townbus snacks only (CTC is excluded) 50% bill value should be of masalas.
- Any disputes are subjected to Hosur (Tamil Nadu) jurisdiction only.

As per the scheme the targets and/slabs are as below:

Turnover Criteria	Rs. 1,50,000	Rs. 1,00,000	Rs.50,000	Rs. 25,000
Rewards/product	Trip to Dubai	Gold Voucher	Television	Air Cooler

As per the scheme and the slabs mentioned supra, the reward articles will be handed over by them to those retailers who achieve the target. Once the claims are submitted by the retailers, it would be scrutinized and eligible retailers under the scheme would be identified. The appellant has furnished the sample copies of the communication letter from them to eligible retail outlets. The appellant has stated that they have procured these goods and/or services i.e. Trip to Dubai, Gold voucher, Television and Air-cooler on payment of applicable GST charged by the vendor. The quantity, cost of procurement of these goods and services and related input taxes are as follows:

	Air Cooler	LED TV	Gold Voucher	Dubai trip
Qty	2138	466	117	229

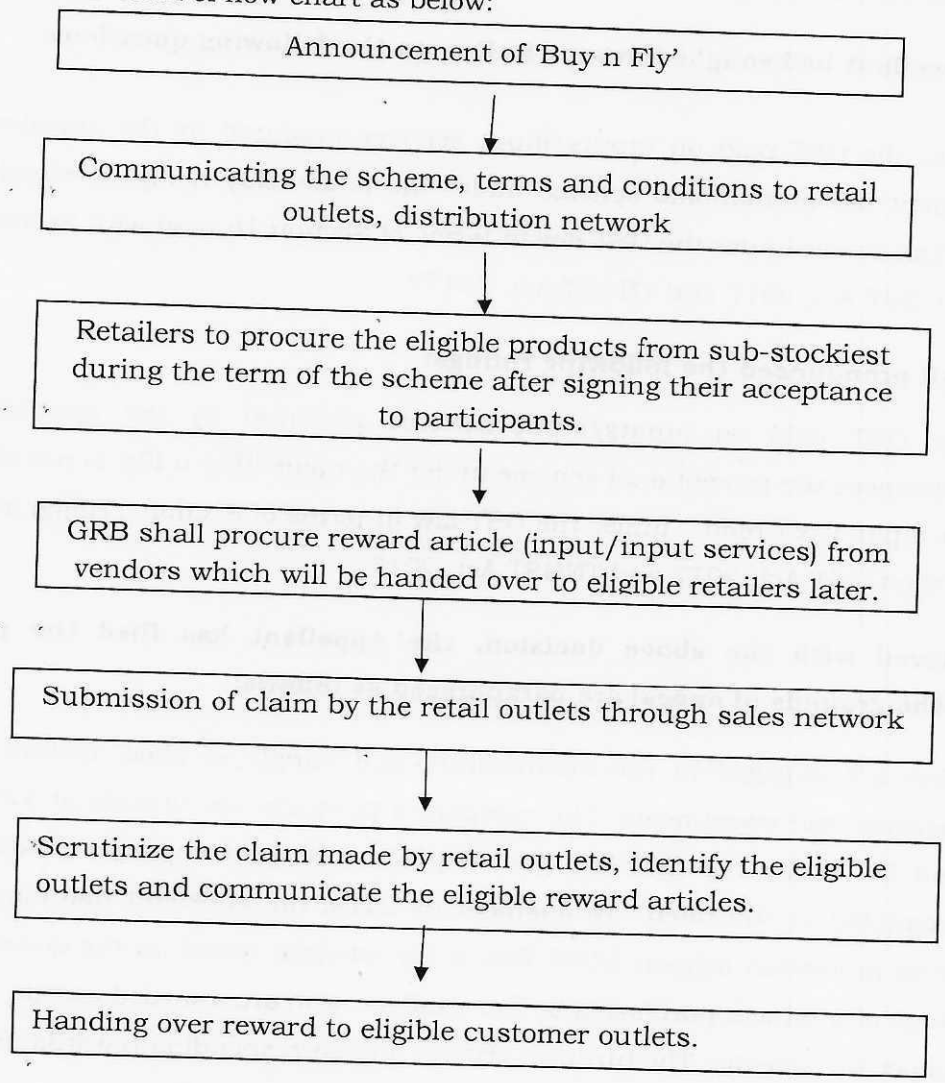
Cost	65,01,390	29,61,868	23,40,000	1,25,18,515
Input Taxes	Rs.11,11,910 IGST	Rs.2,66,568 CGST & SGST each		Rs.11,730 IGST

During the scheme period, the secondary market sales of the products i.e. purchases by the retailers stood as follows:

Sales and purchases by retailer:

Instant mix	Masala	Sweets	Snacks	Total
4,98,02,214	6,26,04,105	1,07,85,585	67,43,671	12,99,35,575

The appellant has furnished sample copies of invoices received from vendor in respect of these inward supplies. The appellant has also submitted the flow of scheme in the form of flow chart as below:



2.3 On interpretation of law, the appellant has stated that they procured these goods and services in the course of business and it has direct nexus with the business carried on by the company/appellant; that marketing and business expansion is an indispensable activity of every company's operations and 'Buy n Fly' scheme is a sales promotion scheme which was launched to promote the sales of GRB brand Instant mix, Masalas, ready to eat sweets and snacks; They have stated that the Trip to Dubai voucher, Gold voucher, Television and Air-cooler procured by the company will be used in its business or in the course of business by way of handing over them as rewards to the eligible retail outlets who participated in the scheme.

3. The Appellant had sought Advance Ruling on the following questions:

Whether the GST paid on inputs/input services procured by the appellant to implement the promotional scheme under the name 'Buy n Fly' is eligible for Input Tax Credit under the GST law in terms of Section 16 read with Section 17 of the CGST Act, 2017 and TNGST Act, 2017?

4.The AAR pronounced the following rulings:

The GST paid on inputs/input services procured by the appellant to implement the promotional scheme under the name 'Buy n Fly' is not eligible for Input Tax Credit under the GST law in terms of Section 17(5)(g) and (h) of the CGST Act, 2017 and TNGST Act, 2017.

5. Aggrieved with the above decision, the Appellant has filed the present appeal. The grounds of appeal are paraphrased as follows:

- They are engaged in the manufacture and supply of ghee, instant mixes, masalas and sweetmeats. The company's products are taxable at 12%, 18% and 5% under the GST law (the Act). None of the company's products are 'exempted' or 'nil-rated.' To augment its sales, the appellant had launched a sales promotion scheme titled 'Buy n Fly' wherein based on the quantity and value of products purchased by the retailers, who are awarded certain rewards as per the scheme. The turnover criteria and corresponding rewards under the scheme `have been stated in the 'The Facts of the case' /Supra
- They are eligible to claim input tax credit in respect of procurement of inputs and inputs services, being Trip to Dubai, Gold voucher, Television and Air-cooler; that they procure these goods and services in the course of business

and it has direct nexus with the business carried on by them. Marketing and business expansion is an indispensable activity of every company's operations and 'Buy n Fly' scheme is a sales promotion scheme which was launched to promote the sales of appellant brand Instant mix, Masalas, ready to eat sweets and snacks. From the facts mentioned it is very much evident that their secondary sales have increased and benefits have accrued to them; the Trip to Dubai voucher, Gold voucher, Television and Air-cooler procured by them will be used in their business or in the course of business by way of handing over them as rewards to the eligible retail outlets who participated in the scheme.

- As per the provisions of the Act, any registered person is eligible to claim input tax credit charged on supply of goods or services or both to him which are used or intended to be used in the course or furtherance of business. Further, the conditions specified u/s 16(2) that the registered person should possess the tax invoice issued by the supplier; registered person must have received the goods; Tax charged in respect of such supply has been actually paid to Government; registered person has furnished the return u/s 39 of CGST Act, 2017 are fulfilled by them and hence they are eligible to take Input Tax credit of inputs and input services, being Trip to Dubai voucher, Gold voucher, Television and Air-cooler; that these are procured with an intent to implement the 'Buy n Fly' scheme which is part of business of the appellant; the expenditures incurred by the appellant in respect of 'Buy n Fly' scheme are in the nature of sales promotion expenditure with the sole objective to increase its sales; that once the conditions prescribed u/s 16 are satisfied, the ITC can be claimed.
- GST is in a very nascent stage in terms of litigation or advance rulings on certain aspects are concerned; so, they can rely on the erstwhile law for taking the cue of the matters, the intention of the law makers, the broader aspect of judgments in interpreting the law and adopt the same analogy in the GST cases as well. Few of the cases on similar matters under erstwhile law are referred herein below:-
  - In the case of *CCE & ST vs M/s Dwarikesh Sugar Industries Ltd. 2016 (12) TMI 915-(Tri-All)* it was held that sales promotion expenses or sales commission expenses incurred by the appellant is an input service.
  - In the case of *M/s Coca Cola India Pvt. Ltd. vs CCE-Pune 2009 (8) TMI 50 (Bom-HC)* the Hon'ble High Court has held that once the cost incurred on the service has been added to the cost of final product, and

is so assessed, it is recognition by revenue of the advertisement services having a connection with manufacture of the final product. Hence eligible to avail cenvat credit in advertisement services.

- In the case of *CCE, Pune vs. Dai Ichi Karkaria 1999 (112) ELT 353 (SC)*, the Hon'ble Supreme Court held that credit may be availed in respect of inputs whose cost may not be included in the pricing of the product and consequently, not included in transaction value. It is submitted that inclusion of cost of inputs in the pricing of the product and consequently in transaction value is not a primary/supreme condition for availing ITC. The Hon'ble Court observed that the availment of credit may not immediately, directly and proportionately impact the assessable value of the finished product.
- In the case of Pepsi Foods LTD. Vs CCE, CHANDIGARH - (1995 (10) TMI 222 - CEGAT NEW DELHI) it was held that, the expenses incurred by the appellants, in relation to advertising would become includible in the assessable value. The contention of the appellants that, they are the manufacturers of only `concentrates' for beverages, and that they have never advertised for sale promotion of such concentrates, or that what they were advertising for, was only for their `Brand Name, and not the beverages, and because of that, the advertising expenses are not includable in the assessable value, do not appear convincing as, by such advertisements, they have been ultimately enhancing marketability in trade, of their `concentrates for beverages'. The appeal so far as it relates to enhancement in assessable value by addition of expenses incurred for advertisement stands allowed.
- In the case of Manhattan Associates Development Centre Pvt. Ltd. Vs Com. Of ST B'lore - (2015 (11) TMI 344 - CESTAT BANGALORE), it was held that sub-clause under Rule 2(l) of CENVAT Credit Rules 2004 clearly says that the input service which are used directly or indirectly, in or in relation to the final products and clearance of final products up to the place of removal of the manufacturer/ service provider would be covered within the definition of 'Input Service'. Further, reference was made to CESTAT, Ahmedabad's decision in the case of Ultratech Cement Ltd.Vs. CCE, Bhavnagar [2011(22) STR 578 (Tri. Ahmd.)], which has quoted Hon'ble Supreme Court's decision in the case of Maruti Suzuki Ltd. Vs. Commissioner [2009(240) ELT 641 (SC)] and

Hon'ble Bombay High Court's decision in the case of Coca-Cola India Pvt. Ltd. Vs. Commissioner [2009(15) STR657 (Bom.)] saying that input services/activities in relation to business can cover all activities/services relating to the functioning of the business and the expression of business is wide. Accordingly, the bench was of the view that the definition of input service is wide and the input services in question would be covered for relief.

- In the case of M/S Shree Cement Limited Vs CCE & ST, JAIPUR-II - (2014 (8) TMI 250 - CESTAT NEW DELHI), the appellant claimed to have remitted service tax on 'event management' service provided by a third party to facilitate the organization of a dealer/ retailer meet for promotion, marketing, advertisement, and promotion of its products, though in a temple premises. It was held that, credit allowed on above expenses and appeal was allowed in favor of the appellant.

- The ratio of the above judgments which entitle a assessee to take input credit on sales promotion expenses related to the business squarely applies under the GST law; the ratio of the above judgement would clearly apply to appellant case and under the GST law as well. Similarly in the present case, the 'Buy n Fly' scheme launched by appellant is a sales promotion scheme which is an inextricable part of business activity of the appellant. The yardstick of taking input tax credits on such sales promotion expenses has been widely accepted under the erstwhile law, Courts and trade at large.
- The definition of 'business' given u/s 2(17) of the CGST Act, 2017 is very wide; it is an inclusive definition and it includes any activity or transaction in connection with or incidental or ancillary to any trade, commerce, manufacture or profession carried out by the registered person. In other words, it includes both activities which have direct and indirect nexus to the business of the registered person. Hence, the launch of 'Buy n Fly' scheme and procurement of various inputs/input services forms part of their business activities and eligible for input tax credit u/s 16 of the CGST Act, 2017.
- One more condition under the provisions of CGST Act, 2017 is that the inward supply should not get covered u/s 17(5) which deals with blocked credits under the Act. Clause (h) of the said sub-section draws attention under the present case which specifies that *credit shall not be eligible in case of goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples.*

Considering this context, it is submitted that rewards such as Dubai Trip voucher, Gold voucher, TV and Air-cooler handed over to eligible retail outlets shall not fall under clause (h). Clause (h) deals with goods disposed of by way of 'gift' which cannot be equated to 'rewards'. The term 'Gift' has not been defined under the CGST Act, 2017 and therefore it would be appropriate to refer to other enactments and judicial pronouncements in order to ascertain the meaning of the term 'gift'.

- The term 'Gift' under Gift Tax Act, 1958 was defined as
  '(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'
- As per Black's Laws Dictionary (Fourth edition):
  A voluntary transfer of personal property without consideration. A voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money.
- As per Transfer of Property Act, 1882:
  "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

➢ In the case of *Sonia Bhat vs State of UP 1981 (3) TMI 250 (SC)*, it was observed that concept of gift is diametrically opposed to the presence of any consideration or compensation. A gift has aptly been described as a gratuity and an act of generosity and stress has been laid on the fact that if there is any consideration then the transaction ceases to be a gift.

➢ In the case of *Narmadaben Maganlal Thakker vs Pranivandas Maganlal Thakker & Others (1997) 2 SCC 255* it was observed that Gift means to transfer certain existing moveable or immoveable property voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee.

➢ In the case of *Birla Corporation Ltd. vs DCIT, Kolkata 2011 (10) TMI 194-ITAT (Kol)*, the issue involved was whether the presents which were given to stockiest and dealers were in the nature of advertising/sales promotion expenses or in the nature of gifts. It was observed by the Hon'ble Tribunal that an expenditure which had direct nexus with the sales promotion and

publicity cannot be classified as gifts. The articles distributed by the assessee had direct nexus with the sales achieved through stockiest/dealer and expenditure was incurred purely for sales promotion purposes. It was held that expenditure was not incurred for giving gifts, which are normally to be given without any consideration out of one's own volition. It may be noted that this decision was under the Income Tax laws.

- From the foregoing, it becomes amply clear that 'gifts' are only those which are given on a voluntary basis i.e. one's own volition without any conditions attached, whereas reward is provided with an expectation of some benefit to be received.
- In the instant case, they have formulated the 'Buy n Fly' scheme with a view to increase its sales and according to the scheme certain slabs/targets are set which, only if achieved by the retailers, they would become eligible to the rewards under the scheme. Therefore, the object of the scheme is purely sales promotion and not to offer any gifts voluntarily to its retailer outlets/dealers without conditions or eligibility criteria. The entire scheme has been formulated to further its business and the inputs and input services are procured purely and only in the course or furtherance of business. This fact has been admitted by the Advance Ruling Authority
- The entire expenditure related to the scheme was incurred by them in the course or furtherance of their business, this is the primary condition for availment of Input Tax Credit and has been satisfied by them in line with sec. 16(1) of the CGST Act, 2017. The term "input" is NOT to be equated with the term 'goods'. The phrase *'in the course or furtherance of business'* encompasses a wide range of functions within the business. The term "business" as defined under the GST law includes any activity or transaction which may be connected, or incidental or ancillary to the trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity; there is neither a requirement of continuity nor frequency of such activities or transactions for them to be regarded as 'business'. The law poses no restriction that the goods must be used on the shop floor, or that they must be supplied as such/ as part of other goods/ services; it would be sufficient if the goods are used in the course of business, of for furthering the business. The term 'course of business' is one that can be stretched beyond the boundaries consolidating activities that have direct nexus to outward supply; what is usually done in the ordinary routine of a business by its management is said

to be done in the "course of business". "Furtherance of business" is a new term, and an entirely new concept, that has been introduced in GST. Additionally, there is no other condition attached to the term "input", especially in relation to the outward supply. Further, the law provides a flexibility for this purpose by inserting the words "or intended to be used" before "in the course....". By this, the law secures the meaning of the term "input" even for cases where goods have been purchased but, are yet to be used in the business. Thus, the conditions of ready-to-use and put-to-use would not be relevant for considering goods as "inputs". Therefore, it becomes amply clear that the appellant is eligible for ITC on the expenditure incurred related to said scheme.

- Board Circular No. 92/11/2019-GST dated March 7, 2019 states that *"input tax credit shall not be available to the supplier on the inputs, input services and capital goods to the extent they are used in relation to the gifts or free samples distributed without any consideration"* .The contrary view is that if there is consideration then the Input Tax Credit cannot be denied. In appellant's case the prices paid for the product by the Dealers, Stockist, Retailers includes the component of Sales Promotion Expenses which is a part of the costing for the product and paid for when invoiced. Therefore appellant are eligible to take ITC. Further, referring to para C of same circular, they have submitted that Para C of the circular squarely applies to product incentive which is provided by the appellant though it is not in terms of discount but as incentive, so the yardstick for taking credit even on such incentive schemes is available and hence ITC is available.
- By reading the provision given under Section 17 (5) (g) of the CGST Act, no ITC shall be allowed where such goods/ services are used for personal consumption. It is very important to note the choice of words by the legislature i.e., "used" for "consumption". However, nowhere in GST law the term 'personal consumption' is defined. In such circumstances, they refer to settled legal principles under erstwhile indirect taxation regime to draw reasonable conclusion under current law. Under the erstwhile CENVAT Credit Rules, 2004 ('CCR') wherein similar term was used in definition of "input" and "input service". As per the CCR, tax paid on input and input service shall be available as credit which can be utilised for discharging output tax. However, following two important point must be noted-

- Definition of "input" excludes any goods, such as food items, goods used in guesthouse, residential colony, club or a recreation facility and clinical establishment, when such goods are used primarily for personal use or consumption of any employee.
- Definition of "input service" excludes services such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of club, health and fitness centre, life insurance, health insurance and travel benefits extended to employee on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee.

As can be observed from the above, the main distinctions from the erstwhile Service Tax regime and the GST regime in this regard are as follows:

- Under CCR, the terms personal use or consumption are provided whereas under the GST, only personal consumption is provided; and
- Under CCR, the restriction applies only when personally used or consumed by the employees whereas under the GST, no such dispensation is provided.

Although there is a minute difference in the terminology used, the aspect of personal consumption is the same under both the statutes.

➢ It is to be noted that the Learned AAR referred the judgement pronounced by the Madras High Court in the case of C. Govindarajulu Naidu & Co. vs State Of Madras AIR 1953 Mad 116, (1952) 2 MLJ 614 while analysing the term 'Consumption'. By referring to the analogy provided in the aforesaid judgement, it is concluded that the term 'Consumption' cannot be understood in the limited sense of eating but in the wider sense of 'Using'. As mentioned above ,the distinction as to why the same principle cannot be applied under the case in hand , the GST law has specified the terms 'used for personal consumption'. If the intent of the legislature is to cover all the items of personal use, they would have omitted the term 'consumption' and retained the term 'use' after the word 'personal' as was under the CCR. Rather, the legislators have categorically omitted the term 'use' after the word 'personal'. The distinguishing feature is detailed below to understand the difference between the term as per the Cenvat Credit Rules (CCR) and under GST

- CCR - Personal use or consumption
- GST - Personal consumption

It may be noted that the Hon'ble Madras High Court in the aforesaid judgement was analysing the applicability of Article 286 of the Indian Constitution as to powers of the State to levy tax on the inter-state sales.

> "Article 286 of the Constitution so far as is material is as follows:
> *286(1). No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.*
> *EXPLANATION: For the purpose of Sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State."*

This is analysed in the context of 'Production' and 'Consumption' i.e., creation and then its utilisation. The judgment is conveyed in the context of levying tax in the state of consumption. Thus, it is bound to have a wider sense than the usual understanding of eating. The language of Entry 52 in schedule II of the Indian Constitution has both the terms 'consumption' and 'use' disjunctively. But Entry 53 speaks of taxes on the consumption or sale of electricity; and obviously consumption here can mean only use and not the general sense of eating. Given the above differentiation, this analogy cannot be made squarely applicable while analysing the term 'Personal Consumption' as mentioned in the GST law.

- For a moment, agreeing but not admitting to the analysis of the Authority for Advance Ruling (AAR) of the term 'Consumption', the Appellant believes that this is erroneous and wishes to bring the following scenario to the Learned Appellate Authority's attention. Consider a trader of personal air cooler and LED TV and other personal household items who purchases the goods and avails ITC and thereafter sells the same goods to its customer who then uses the goods personally then applying the same criteria adopted by the AAR in interpreting the provisions of Section 17 (5) (g) of the CGST Act, the trader shall not be eligible for ITC which is not tenable leaving the provisions redundant and otiose. Therefore, the Appellant submits that the rewards given to the retailers on achievement of specified targets as per the scheme shall not be considered as goods or services used for personal consumption. The credit is not based on the end consumption and the test for denying the credit is whether the person procuring the goods /

services which they personally consume as opposed to business purposes which fact has not been distinguished by the AAR authority. If the AAR authority logic of interpretation of the term personal consumption is extended to interpreting the provisions of Section 17(5) (g) this would result in absurdity as traders dealing in goods for personal consumption will not be eligible to avail ITC on such goods. Therefore, the term personal consumption shall be limited to goods or services personally consumed by them for denial of the credit which is not the case .

- Product price inclusive of sales promotion cost As a part of the Product Maximum Retail Price (MRP) fixing the following elements of cost are included in the pricing
    - Material Cost
    - Labor Cost
    - Manufacturing Overheads (such as Electricity , Water , Consumables for manufacturing , Repairs and Maintenance for Plant and Machinery and allied equipments)
    - Packaging Cost (both Inner and Outer Packing)
    - Transportation Expenses
    - Storage and Related Costs
    - Advertisement and Sales Promotion Cost
    - Head Office and Regional Office Overheads
    - Distributor Margin
    - Profit Margin

All these elements of cost form the basis of fixation of the MRP. From the above it is evident that the price of the product has an element of the Advertisement and Sales Promotion Cost included and hence the consideration for the product on which GST is discharged has this element inbuilt. Generally, the objective behind running any Sales Promotion Campaign are as under

- Keeping Sales Volume at the same levels or achieve incremental volumes
- Pushing sales volume at the expense of the Competitors by encouraging dealers to move the products
- Giving Customers a taste of Products which helps to sustain or increase Sales Volumes and Values.

- Sales Promotion Expenses incurred are pursuant to a contractual obligation which is supported by signed copies of the acknowledgements by the Dealers before implementation of the Scheme. In other words, the promotional materials which was provided to the Dealers there was quid pro quo. Based on what has

been stated supra, it is evident that the Costing of the products are inclusive of the Advertisement and Sales Promotion component. The consideration which is paid for the product includes the element of the Sales Promotion campaign costs and therefore the contractual obligation arising from running such campaigns has the element of consideration on which GST is being discharged. The AAR authorities have not disputed these facts and therefore the price at which the product has been sold to the Dealers, Stockiest, Retailers covers a part of the Advertising and Sales Promotion Cost and therefore the consideration is embedded .

- It is therefore in light of this, they submitted that, the related input tax credit is permissible and cannot fall under the exclusion on ineligible Input Credit as provided in Section 17(5) (h) of the CGST Act and its corresponding provision under the SGST Act.
- It is very important to note here that, during the period under review there was an incremental sales of 24% compared to the same period in the previous year and the such huge incremental sales is documented in the GSTR 3B returns This incremental sale proves the point on factual side of things that there is furtherance of business . The Appellant submitted that such a huge incremental sales is not possible if the promotional materials were in the nature of Gifts.
- The MRP price at which appellant sells to the dealers is not changed and the price pre campaign and post campaign remains the same. The actual benefit of running the Sales Promotion campaign is given to the dealers who have achieved the targets and such achievement are verified by their Sales Force. Hence, it can be clearly demonstrated in their case that the various goods and services procured for running the campaign are not by way of a Lucky Draw or chance but becomes eligible only on achieving a Sales Target.
- The Appellant further relies on the Australian High Court ruling in the matter of Federal Commissioner Taxation Vs McPhail wherein it has that to constitute a " gift" it must appear that the property transferred was transferred voluntarily and not as a result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return. Therefore the promotional materials which was provided to the dealers, stockiest and retailers was not voluntary and there was a contractual obligation and consideration which has been established and therefore the AAR authorities stand that the promotional materials are in the nature of Gift is not valid.

- The AAR authorities have also taken a stand that the distribution of goods and services to the retailers as per the scheme is not a 'Supply' as defined under Section 7 of the CGST Act (Para 7.6 of the ruling). It is submitted that the stand of the AAR authorities is not tenable as there is consideration paid which fact cannot be denied and therefore it is a supply falling under the provisions of Section 7 of the CGST Act.
- The Maharashtra Advance Ruling referred by the Advance Ruling Authority in the case of M/s Biostadt India Limited, [2019 (3) TMI 540] is not squarely applicable in the instant case as the facts of case differ wherein it also been observed by the learned advance ruling authority that the gold coins are not given to their customers under any contractual obligation and are voluntarily given on certain conditions achieved by their customers. In appellant case, the products are accorded through a pre contractual obligation and there is consideration paid for and only upon fulfilment of conditions that products are given as reward and this will not take color of gift. Hence the Appellant stated that facts of the case on which the ruling was rendered are significantly different from the judgement of the Maharashtra Advance Ruling Authorities and the ratio decidendi of the above judgement cannot be applied to the facts on record which have been established before the Advance Ruling authorities by the Appellant The yardstick to be applied are to be examined based on the facts of the case to decide on the applicability & admissibility.

Personal Hearing

6.1 The Appellant was granted personal hearing as required under law before this Appellate Authority on 31.01.2022. The Authorized representatives of the Appellant Thiru. S. Sridharan, VP Sales & Marketing and Thiru. G.Viswanathan-CA reiterated their submissions made by them in the appeal application and stated that the appeal is against the rejection of Input Tax Credit in respect of Goods and Services used for trade promotion. They furnished additional submissions and the same was taken on record. They stated that the product costing included trade promotion expenses, gift is voluntary extension but in their case there exists a contractual obligation. Further, they stated that Section 17(5)(g) do not apply to their case as the usage test is to be applied at the stage of procurement and not at the consumer end, while interpreting the said section and section 17(5)(h) also do not

apply as there is a contractual obligation in their case and the gifts cannot be said to be given on own volition.

6.2 In the additional submissions, they have stated that as follows:

- denial of credit under section 17(5)(g) -inconsistencies in the order of AAR:-

  a. The reliance placed by the AAR authorities on the case relating to C.Govindarajulu Naidu & Co Vs State of Madras AIR 1953 Mad 116, (1952) 2MLJ 614 is misplaced and the judgment was delivered in context of Article 286 of the Constitution.
  b. The differentiating aspects of this judgment which has been relied upon by AAR which cannot be applicable to the case on hand have been highlighted in the Grounds of Appeal filed already.
  c. The language used in GST is "goods or services or both used for personal consumption and not goods or services or both for personal consumption use as provided in the Cenvat Credit Rules"
  d. The test for taking the ITC is not dictated under the GST law based on the last leg of consumption but whether the input and input services are procured and used for the purpose of the business.
  e. Attention of the learned members is invited to the example mentioned in the grounds of appeal.

- Denial of Credit under section 17(5)(h)- Inconsistencies in the Order of AAR:-

  i. The AAR has held that the promotional materials were in the nature of gifts which was given voluntarily and hence would squarely fall under the provisions of section 17(5)(h) and hence credit has to be denied.

  ii. AAR has completely ignored the fact that there was a contractual obligation which was based on a scheme which was circulated to the trade in advance, sample copies of the Acceptance of the scheme by members of the trade has been furnished.

  iii. Once a Contractual Obligation comes into play the giving of the promotional materials cannot be construed as a Gift.

  iv. That there was consideration which was inbuilt in the pricing of the product which fact has not been denied by AAR. After accepting this position it is stated that the observation of the State Jurisdictional Authority order that the gifts /free samples was distributed without any consideration is not

appropriate. Further in the same the State Jurisdictional Authority have come to a wrong conclusion that the gift was voluntary is also wrong as they have themselves stated " *Since the offers are given voluntarily by the appellant on fulfillment of certain conditions these are to be treated as gifts/rewards*"

v. The reliance placed by the AAR on the Maharashtra Advance Ruling in the matter of Biostadt India Limited has no bearing on the facts of the case before the Learned members as there is consideration on which incremental output tax has been paid and there is acceptance of the scheme by the members of the trade.

vi. It has also been established before the AAR authorities that there was incremental supplies during the period in which the scheme was operated and the taxes on such outward supplies was offered in the returns.

vii. once there is a contractual obligation coupled with consideration which fact is not denied by the AAR then the conditions for availing credit as detailed in Circular No 92/11/2019 dated 7th March 2019 have been fulfilled.

viii. These promotional items was given only on achieving the targets which was stated in the Scheme and hence cannot be termed as Gift.

The various case laws in support of what constitutes a Gift form a part of the Grounds of Appeal filed already. Further the admissibility of Sales Promotion Expenses as Input Credit under the erstwhile laws has also been supported with case laws. As the grounds for denial of the ITC as espoused in the order passed by the AAR is not in line with the facts of the case it is humbly submitted before the learned members of the AAAR that they may please take all the facts on record and render justice.

Discussion and Findings

7. We have gone through the entire facts of the case, documents placed on record, Order of the Lower Authority & submissions made by the appellant before us. In this case, the appellants have sought for advance ruling as to whether the GST paid on inputs/input services procured by them to implement the promotional/ reward scheme by name called as "Buy n Fly" would be eligible for Input Tax Credit under the GST law in terms of Section 16 readwith Section 17 of the GST Act. It is their contention that these goods/services do not fall under 'gift' (Section 17(5)(h)) as the same was not given in volition, but on contractual obligation, on their retailers achieving the targeted sales nor these goods/services called as 'goods/services used for personal consumption(Section 17(5)(g)).

8.1 In their submissions and at the time of personal hearing it is stated that the product costing included trade promotion expenses, i.e., for arriving at M.R.P. of their manufactured products, 'Advertisement and Sales Promotion Cost' are included in the pricing but the actual details of the product costing was not established. We find that the appellant has also stated that there was no change in the M.R.P. and the price pre-campaign and post-campaign remains the same. It was further stated that these goods/services were purchased for furtherance of business and there was a 24% increase in sales of their products due to the scheme. Therefore the appellant pleaded that their reward scheme would not fall under gift and thereby provisions of section 17(5)(h) would not apply to them. The appellants further contended that provisions of section 17(5)(g) of the CGST Act,2017 do not apply to them as the usage test is to be applied at the stage of procurement and not at the consumer end.

8.2 Section 16 of the CGST Act, 2017 empowers the taxpayer for entitlement of taking the tax charged on the Inputs as input tax credit on the goods or services or both supplied to him which are used or intended to be used in the course or furtherance of his business and such unbridled flow of input tax credit got restriction in section 17 of the Act. The sub-section(5) of the section 17 begin with Non-obstante clause that Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18 and hence the sub-section (5) of section 17 would independently apply and the Parliament consciously restricts the input tax credit which is a concession and not a vested right. Section 17(5) restricts the availability of the input tax credit on the goods and services and clauses (g) and (h) stipulates that the circumstances under which such input tax credit would not be available as

(g) goods or services or both used for personal consumption

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

8.3 The clause (g) forbid the input tax credit for the goods or services used for personal consumption and the Parliament in its wisdom did not place any further restriction as to who use the goods or services or both for personal consumption and it is obvious reason that under the GST law the flow of input tax credit is allowed until its consumption and hence such personal consumption be by the appellant or by its retailers would disentitle them to avail such input tax credit. Hence the plain reading of clause (g) reveals that the goods or services or both used for personal consumption by the appellant or its retailers would make the related input tax credit

unavailable for the appellant, as the retailers of the appellant ultimately consumed the goods and services provided under reward scheme and the contention that the clause (g) would be applicable to the stage of procurement use and not on the last use would be of no avail to the appellant. In the example cited by the appellant, the goods though are in the nature of the consumables for the ultimate consumer, the dealer procures for further supply of such goods and therefore he is entitled for credit on such goods but the ultimate consumer to whom the dealer supplies such goods on charging GST is not eligible for the credit of tax paid by him on purchase of such goods, in view of Section 17(5)(g) above. In the case at hand, the appellant has not procured the goods/services for further supply but for consumption by the retailers under the scheme and hence the cited example do not apply to the facts of the case as the appellant in the case at hand becomes the ultimate consumer of the said goods/services. Though the appellant claim that the cost of the products procured for the scheme are part of the M.R.P. pricing, the appellant did not file the actual value of costing attributed to the reward scheme in the final price of the products manufactured. Also, the referred decisions except in the case of CCE Pune Vs. Dai Ichi Karkaria[1999 (112) ELT 353 (SC)] and M/s. Coca Cola India Pvt Ltd Vs. CCE Pune [2009(8) TMI 50 (Bom- HC)] are that rendered by various Tribunals whose decisions are based on the verification of facts of the case and do not hold substantial guidance value on law. In the decisions of the Hon'ble Supreme Court and the High Court the eligibility to credit is spoken in the context of the expenditure being a part of the cost of the final product, which is assessed. In the case at hand, the actual costing which is assessed has not been substantiated to hold the expenses at hand for which credit is claimed.It is pertinent to note that the appellant has stated that the M.R.P. remained the same both Pre and Post Campaign, which points that the goods and services distributed under the scheme were without valuable consideration.

8.4 It is interesting to note that the appellant provided rewards by way of goods and also foreign tours by providing valid air tickets and that's why they coined the reward scheme as " Buy n Fly". Thus what they provided in the scheme was goods and services. The provisions of the clause (h) stipulates that input tax credit would not be available for goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples. Thus this clause is exclusively applicable for goods. The appellant claimed that these goods were not given on own volition but on contractual obligation, for achieving the targeted sales and the product costing included the sales

promotional expenses and hence they vehemently opposed to be called the transactions as gift. At the time of personal hearing, the Authorised Representative reiterated that product costing include promotional expenses but they did not file the supporting statement for the year 2019-20 during which how much of promotional expenses including that of the amount related to the reward scheme in question was factored like the amount or percentage and in its absence, the advance ruling authority would not be able to venture into the correctness of the contention of costing factored by the appellant. The jurisprudence referred to by the appellant in this context, pertains to the existing law the provisions of which by their own statements are not the same to that of GST provisions. Howsoever, the GST Provisions are explicit in as much as Section 17(5) starts with 'Non-Obstante' Clause and the Act restricts the credit of tax paid on certain items as explained above.

8.5 Further, the claim that there was 24% increase in sales during period under reward scheme when compared to the same period in the previous year and that the scheme furthered the business and therefore the GST paid on the goods/services distributed under the scheme are eligible to the appellant is not acceptable in the given facts. Furtherance of business as imprinted in section 16 of the CGST Act conveys that the inputs or input services 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 alone are entitled for taking credit. Here 'him' denotes the taxpayer, but the promotional rewards scheme for which inputs and input services procured by him meant for his buyers and not for his own activity like advertising the product, etc. But the fact remains that non-obstante clause in section 17(5) of the CGST Act, 2017 would make the argument of appellant that the reward scheme meant furtherance of business futile and hence on both clauses (g) and (h) of sub-section (5) of section put embargo on availability of input tax credit itself as such situations were obviously found in the reward scheme of the appellant.

8.6 The appellant has referred to the Circular No.92/11/2019 dated 7.3.2019 issued under Section 168(1) of the Act, and claimed that their situation falls under 'C. Discounts including 'Buy more, save more offers'. Para 'C' provides clarification in cases when staggered discount is offered to customers; periodic/year ending discounts to stockiest, etc based on the criteria spelt in, whereas in the case at hand, the retailers/stockiest are extended rewards which are definitely not 'Discounts' discussed in Para C of the circular. The appellants case more aptly falls under Para

A of the Circular. It has been established that the giving away of goods/services under the scheme is not a 'Supply' and therefore ITC of the GST paid on the goods/services procured for the 'Buy n Fly Scheme' is not available to the appellant. Further, the various other Case laws relied upon by the appellant and Advance Ruling Authority pertain to the issues dealt with under the legacy Acts viz., Central Excise, Service Tax Act, TNGST Act 1959 , Income Tax Act and Transfer of property Act and not relatable to the provisions under the GST Act 2017.

9. To sum up, as per the provisions of the CGST Act/TNGST Act 2017 more precisely, Section 17(5) of the Act, the gifts or rewards given without consideration even though they were given for sales promotion do not qualify as inputs for the purposes of Credit, since no GST is paid on its disposal. Therefore, we hold that the input tax credit on the inputs and input services involved in the goods and services used for the purpose of reward is not available for the appellant and accordingly the ruling given by the Advance Ruling Authority of Tamil Nadu requires no intervention and the appeal is dismissed.

10. In view of the above facts, we rule as under:

RULING

For reasons discussed above, we do not find any reason to interfere with the order of the Advance Ruling Authority in this matter. The subject appeal is disposed of accordingly.

2/10

(K.PHANINDRA REDDY)
Additional Chief Secretary/
Commissioner of Commercial Tax
Tamil Nadu /Member AAAR.

(M.V.S.CHOUDARY)
Chief Commissioner of GST
& Central Excise
Chennai Zone/Member AAAR.

APPELLATE AUTHORITY FOR ADVANCE RULING
23 FEB 2022
GOODS AND SERVICE TAX
Chennai-5, Tamilnadu.

To

Tvl. GRB DAIRY FOODS PVT.LTD,

No.10 Sidco Shed Sipcot Industrial Complex, Hosur, Krishnagiri District,

Tamil Nadu- 635126 **// By RPAD //**

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4. Assistant commissioner,(ST)Hosur (North) I Assessment circle,
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6. Master File / spare