KARNATAKA APPELLATE AUTHORITY FOR ADVANCE RULING

6TH FLOOR, VANIJIYA THERIGE KARAYALAYA, KALIDASA ROAD,

GANDHINAGAR, BANGALORE-560009

(Constituted under section 99 of the Karnataka Goods and Services Tax Act,2017 vide Government of Karnataka Order No FD 47 CSL 2017, Bengaluru, dated 25-04-2018)

BEFORE THE BENCH OF

Shri. A.K.JYOTISHI, MEMBER

SHRI. M.S.SRIKAR, MEMBER

ORDER NO: KAR/AAAR/03/2018-19 **DATE – 23/10/2018**

Name and address of the appellant	M/s. United Breweries Limited, 20th Mile,Tumkur Road, Nelamangala, Bangalore Rural -562123
GSTIN or User ID	29AAACU6053CIZH
Advance Ruling Order against which appeal is filed	No.KAR ADRG 09/2018, Dated 28.06.2018
Date of filing appeal	26.07.2018
Represented by	Sri. Shivadass, Advocate.
Jurisdictional Authority-Centre	Assistant Commissioner of Central Tax, Division 5, Bangalore North West Commissionerate
Jurisdictional Authority-State	-NA-
Whether payment of fees for filing appeal is discharged. If yes, the amount and challan details	Yes. Payment of Rs.20,000/- made vide Challan No.CKG6132327,dated 26.07.2018

PROCEEDINGS

(Under Section 101 of the CGST Act, 2017 and the KGST Act, 2017)

At the outset, we would like to make it clear that the provisions of both the Central Goods and Service Tax Act,2017 and the Karnataka Goods and Service Tax Act,2017 (hereinafter referred to as CGST Act,2017 and KGST Act,2017) are identical, except in certain provisions. As such, unless a mention is made specifically to any such dissimilar provision, a reference to

the CGST Act would also mean a reference to the corresponding similar provision under the KGST Act.

The present appeal has been filed under Section 100 of CGST Act, 2017 and the KGST Act, 2017 by **M/s.United Breweries Limited** (hereinafter referred to as 'Appellant') against Advance Ruling No. KAR ADRG 09/2018 dated 28.06.2018 pronounced by the Karnataka Authority for Advance Ruling.

Brief facts of the case:-

1. The appellant is registered under GST with GSTIN No. **29AAACU6053CIZH** and is engaged in manufacture and supply of beer under various brand names. The appellant, apart from manufacturing beer on its own, also has an arrangement with contract brewing/bottling units **(hereinafter referred to as the 'CBU')** who make the brands of beer belonging to the appellant and supply such beer to market. CBUs in making the beer brands owned by the Appellant, procure the raw materials, packaging materials, incur overheads and other manufacturing costs etc, on their own; and the beer they make is sold by them directly to Government Corporations/ in wholesale depending on the state market regulation.

2. The CBUs, upon the sale of such goods, pay the statutory levies and taxes. The CBUs further account for all the manufacturing cost and distribution overheads in their books of account since it is they who procured all resources for the manufacture of the beer. Further, CBUs retain a certain amount of profit. After accounting all these revenues and deducting the part of their share from the total turnover that is had from the sale of such beer in each period, the CBUs transfer the balance of amount from the total turnover to the Appellant.

3. The appellant filed an application on 10.01.2018 before the Karnataka Authority for Advance Ruling (hereinafter referred to as 'Authority") under Section 97 of CGST/KGST Act, 2017 read with Rule 104 of CGST/KGST Rules,2017 in form GST ARA-01, seeking a ruling on the following:

a. *Whether, beer bearing brand/s owned by the Appellant manufactured by Contract Brewing Units out of the raw materials, packaging materials and other input materials procured by it and accounted by it and thereafter selling such beer to various parties under its invoicing would be considered as supply of services and whether GST is payable by the CBUs on the profit earned out of such manufacturing activity?*

b. *Whether, GST is payable by the Brand Owner on the "Surplus Profit" transferred by the CBU to Brand Owner out of such manufacturing activity?*

4. The appellant made elaborate submissions before the Authority that they are in the business of manufacture and sale of beer under brand owned by them. They also have manufacturing arrangement with CBUs; that the CBUs procure the required material and manufacture beer according to the specifications of the Appellant, label them with brand owned

by Appellant and sell the final product as per the State excise laws. In order to ensure the quality and standard of the beer the manufacturing process is supervised by personnel deputed by the Appellant to work with the CBUs.

5. After realization of the Sale proceeds from the sale of beer made so, the CBUs pay all the statutory levies and taxes. Besides this the CBUs retain the manufacturing cost, the manufacturing and distribution overheads and its portion of net profit. The balance of the sale proceeds, after the CBUs have apportioned part of the proceeds as enumerated above, is transferred to the Appellant as surplus/profit earned by the brand owner.

6. The contract manufacturing arrangement empowers the CBUs to use the brand name of the Appellant for the limited purpose of facilitating manufacture of Appellant's own brands of beer and this usage is in accordance with Section 48(2) of Trademark Act.

7. The Appellants submitted that the levy of service tax in relation to the activity of production/process of alcoholic liquor for or on behalf of the brand owners like the Appellant commenced on 01.09.2009 under Business Auxiliary Service and continued up to 30.06.2012. They further state that thereafter, w.e.f 01.07.2012 the activity of production of or process amounting to manufacture was covered under Section 66D (Negative List), implying that the activity undertaken by the CBU went out of the purview of Service Tax. The statute was yet again amended and the process undertaken by the CBUs once again came under the purview of Service Tax w.e.f.01.06.2015.

8. During the alternating periods when this arrangement of manufacturing at the hands of CBUs was taxable, the then CBEC issued clarificatory Circular F.No.332/17/2009-TRU dated 30.10.2009 to tide over issues related to valuation and taxability which reads as follows:

1. *Service Tax would be payable on the bottling/job charges, distribution costs and other re-imbursables.*

2. *Service Tax on the value of raw materials and packaging materials would be exempt only when such charges are specifically mentioned in the invoice raised/documents maintained by the CBU.*

3. *Statutory levies, namely Excise Duty/VAT, do not present any 'consideration' for rendering the service. Whether, such amount is paid by BO or by CBU, they have no nexus with the provisions of service. As such these levies will not be included for charging service tax.*

4. *Similarly, the surplus/profit earned by the BO being in the name of Business Profit (which falls within the purview of direct taxes) will not be chargeable to service tax.*

9. Further, the Appellant submitted before the Authority that during the period from 23.09.2009 to 30.06.2012 and 01.06.2015 to 30.06.2017, the CBUs have discharged Service Tax

on the agreed bottling charges (comprising of manufacturing overheads and margin of profit) and the amounts reimbursed by the Appellant towards agreed expenses.

10. Further, the appellant had cited past litigations (pre-GST period) before the Authority, in respect of the matter regarding taxability at the hands of the BO in respect of the amount received by them from the CBUs; that even though CBEC had clarified that there was no service provided by the brand owner to the CBUs by permitting use of brand name, the field formation of service tax administrations held that the activity amounted to provision of Intellectual Property Service and charged service tax thereon. The brand owner contested the issue and the Tribunal, relying on the aforementioned CBEC Circular dated 30.10.2009 held that the said activity was not liable to Service Tax.

11. The appellant also discussed before the Authority, an adjudication order passed in their own case wherein the adjudicating authority held that Service Tax was payable on the amount accounted by them as 'Brand Fee' under Intellectual Property Service. In respect of activity of permitting the CBU to use Brand Name, the Appellant drew reference to the decision taken in the case of BDA Pvt Ltd reported in 2014(35)STR570(Del)- the decision in case of BDA Pvt Ltd, was upheld by the Apex Court as reported in 2016(42)STRJ143(SC) .

12. Further, the Appellant presented that in the GST regime, post 01.07.2017, alcoholic liquor for human consumptions has been kept out of the levy of GST. With respect to the manufacturing activity carried out by the CBUs the levy of GST would arise only on the activity of 'treatment or process which is applied to another persons' goods as per Schedule II to the CGST Act,2017. **They further submitted that since the CBUs procure the materials on their own account and are not applying any treatment or process on the goods belonging to the Appellant, GST would not be applicable on the activity.** In respect of the income earned by the brand owner, they submitted that the CBEC had already clarified that there is no service from the brand owner.

13. Before the Authority, the Appellant also drew attention to Notification No.11/2017 Central Tax (Rate) dated 28.06.2017 to drive home the point that the activity of manufacture would amount to supply of service only if manufacturing is carried out on physical inputs(goods) owned by others (Sl.No.26 of the Notf). In their case, since the CBUs manufacture beer out of raw materials physically procured by them, the activity of manufacture of beer of Appellant's brand does not amount to supply of service by the CBUs to the Appellant and therefore GST is not payable in respect of the amount retained in the hands of the CBUs.

14. Further, in respect of question-2, Appellant has argued its case by citing several case laws in favour of their arguments before the Authority, viz. Tribunal's decision in the cases of M/s. Skol Breweries Ltd reported in 2013 (29) STR 9(Tri), Radico Khaitan Limited reported in 2016(44) STR133(Tri) and BDA Pvt Ltd reported in 2014(35) STR570(Tri) which was later upheld by the Hon'ble Supreme Court as reported in 2016(42) STR J143(SC) wherein it was held that the activity of permitting the CBU to manufacture alcoholic beverages on behalf of the principal does not amount to rendering of taxable service under the category of IPR service. **The**

appellant has further stated that there has been no change in the law during the GST regime as compared to the law existing during the prior period for which the issue was decided by the Supreme Court. Consequently, the ratio of the judgments applies to the present law and therefore they are not liable to pay GST on the surplus profit earned by Appellant.

15. On a detailed examination of the issue, the Authority, vide Advance Ruling No.KAR ADRG 09/2018, dated 28.06.2018 (hereinafter referred to as 'Impugned Order) made the following observations:

a. *The CBUs are not engaged in supply of Service to the applicant and therefore there does not arise any liability to pay GST on the amount retained by the CBU's as their profit.*

b. *GST is payable by the Brand Owner(UBL) on 'Surplus Profit' transferred by the CBU to brand owner out of the manufacturing activity and the supply of service to the CBUs is classified under Service Code(Tarrif)999799 and liable to GST at 18% (CGST-9%,SGST-9%) on the amount received from the CBU's.*

16. Being aggrieved by the above mentioned Ruling of the Authority (hereinafter referred to as 'Impugned Order'), an appeal was preferred before Appellate Authority for Advance Ruling on 26.07.2018 on following grounds:

i. The appellant submitted that in the impugned order, AAR has held that the GST is payable by the Brand Owner (Appellant) on "Surplus Profit" transferred by the CBU to brand owner out of the manufacturing activity and the supply of service to the CBUs is classified under Service Code (Tariff) 999799 and liable to GST at 18% (CGST-9% & SGST-9%) on the amount received from the CBUs.

ii. The Authority has erred in holding that the classification of 'other miscellaneous service' under Service Code (Tariff) 999799 would apply to the amount of Surplus Profit transferred by the CBUs to the Appellant when there is no rendition of service by the Appellant to the CBUs in the first place.

iii. The appellant submitted that the activity of supply of alcoholic liquor for human consumption is outside the purview of GST and the sale proceeds from the supply of alcoholic liquor for human consumption or any part thereof would not become exigible to GST for the reason that it is shared between CBUs and the Appellant as per agreement.

iv. The appellant submitted that the Authority erred in holding that GST is leviable on surplus profit without following the already settled principles in the Appellant's own case under the erstwhile Service Tax regime wherein it was held that Appellant's share of surplus profit is not liable to Service Tax.

v. The Authority erred in holding that there was a supply of service under Central/State Goods and Service Tax Act,2017, whereas there is only a monetary transaction between the Appellant and the CBU by way of transfer of apportioned profit from supply of beer, which is excluded from the ambit of charge under provision of the said Act.

vi. The Authority erred in not appreciating the fact that the arrangement between the Appellant and the CBU was in the nature of consortium for earning profit from operation of beer manufacture and supply, necessitated by the regulations governing the supply of beer; that the Authority erred in not following the settled positions as cited in the relied upon decisions above wherein it was held that the activity of permitting the CBU to manufacture alcoholic beverages on behalf of the principal does not amount to rendering of taxable service under the category of IPR service.

vii. In view of the above grounds, the appellant have filed this appeal.

Personal Hearing:-

17. The Appellant was called for a personal hearing before the AAAR on 28.08.2018 but they sought for an adjournment which was allowed by the AAAR. Another hearing was fixed on 25.09.2018 and the Appellant was represented by Mr.Shivadass, Advocate who made detailed submissions before the Appellate Authority. It was made clear that the clarification given by the Authority pertaining to the levy of GST on the activities of the CBU was accepted by the Appellant and is not a subject matter of challenge in the present appeal. The Advocate for the Appellant explained in detail the business model of the Appellant and took the Members through the various clauses of the agreements entered into with the CBUs to drive home the point that the amount which comes to the Appellant (UBL) is a sharing of profit and not a consideration for rendering any service. It was submitted that in order to levy GST there has to be a conscious supply of service by the Appellant and not a default supply of service as held by the Authority; that in their case there is no 'supply' per se as defined under Section 7 of the CGST Act; that it is not there case that there is a supply by the Appellant to the CBUs but the said supply is part of the negative list or exemption notification and therefore not chargeable to GST. The Appellant made written submissions during the time of the personal hearing and also submitted additional written submissions on 28.09.2018.

18. In the written submissions, they submitted that for anything to constitute a supply in terms of Section 7 of the CGST Act, it must necessarily be demonstrated that there has been a supply of goods or services, there must be a consideration for such supply and the supply should be in the course of or furtherance of business. They submitted that in the present arrangement, the Appellant has no occasion to supply any goods or services to the CBUs as the arrangement merely requires the CBUs to undertake the activity of manufacturing beer using their already established, functional distilleries for which the CBUs hold a licence. Further, as the beer manufactured by the CBU is the Appellants branded beer, it is in the Appellant's own interest to ensure that the quality standards of the raw material procured by the CBUs and the manufacturing process followed by the CBUs are within standards commensurate with the brand

image of the Appellant. For this purpose, the Appellant deputes a process executive, commercial executive and other key personnel as may be required by it to the CBU's brewery to guide th procurement of raw material, supervise the manufacturing process and packaging of finished goods; that the true intent of such supervision is only in the interest of the Appellant's own business and not an activity for the CBUs; that therefore, the question of supply of service does not arise.

19. They further submitted that the Appellant does not provide any right on the trademark/brands owned by it to the CBUs either and the impugned order itself holds that the Appellant is not providing any services relating to intellectual property owned by it to the CBUs. They submitted that one of the mandatory pre-requisites of 'supply' is consideration which in itself covers two aspects viz., that there ought to be payment by the recipient to the supplier and that such payment ought to be in respect of, in response to or for the inducement of the supply in question; that in their case, the arrangement between the CBU and the Appellant is such that all proceeds from the sale of beer by CBUs would be deposited in a bank account jointly operated by the Appellant and the CBUs; that from such account the operational costs of the CBU would be serviced and the surplus remaining after deducting the manufacturing cost incurred is nothing but profit earned by the Appellant, which would be transferred to the Appellant; that the arrangement does not involve any payment of money by the CBU from its pocket/share to the Appellant ; that the surplus profit belongs to the Appellant itself to begin with and appropriation of the Appellant's own money to itself cannot take the character of consideration; that this was clearly clarified by the CBIC vide Circular dated 30.10.2009 in relation to service tax wherein it was clarified that the surplus profit earned by the brand owner being in the nature of business profit (which falls within the purview of direct taxes) will not be chargeable to service tax.

20. They reiterated that for any payment of money to amount to consideration, it should be directly relatable to the supply of service or goods; that in the present case, the Authority has held that there is no supply of goods from the Appellant to the CBUs then it is logical to assume that there might be a service which is provided by the Appellant to the CBUs; that the line of reasoning by the Authority that, even though the present arrangement is not covered under Section 7(1)(a) to Section 7(1)(d) of the CGST Act, even activities which do not fit within the aforesaid clauses would be in the nature of supply is erroneous and the ruling is to be set aside on this ground.

21. In order to clarify certain queries raised by the Members during the personal hearing, the Appellant made additional written submissions vide letter dated 28.09.2018 wherein they inter alia stated that the following activities are performed by the Company in terms of the agreement with the CBUs, viz:

a) Allow the CBUs the representational right for manufacture and supply of beer under labels specified in the Agreement.

b) Prescribe process parameters and specifications through process executive appointed by the Company.

c) Depute a Process Executive for inspection of the brewery, laboratory and advise on processing and quality control of beer produced for and on behalf of the Company.

d) Depute a Commercial Executive for procurement of raw materials, packaging materials and such other materials.

They submitted that the above activities are undertaken in the interest of its own business and not for the CBUs; in other words, these supervisory activities are undertaken by the Company to ensure that the manufacturing undertaken by the CBUs is of the desired quality of beer so as to ensure the business of the Company and its brand image is not compromised; that the cost incurred in appointing these executives is borne by the Company and is not recovered from the CBUs; that the representational right for manufacture and supply merely enables the CBU to affix the brand logo of the Company on the bottles of beer manufactured by the CBU; that it does not authorize the CBU to exploit the brand for its own business or interest. Therefore, there is no supply in relation to the brand either.

22. They submitted that 'consideration' has been defined under the CGST Act as 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; that there must be a conceivable correlation between the supply and the payment; that unless an actual link is established between a payment and any supply of goods or service, the payment will not assume the character of consideration; that in the present case, 'surplus profit' by no stretch of imagination can be said to be fitting within the definition of 'consideration' for the reason that the surplus reimbursed to the Company varies from month to month and is also 'NIL ' in certain months, even though the activities performed remain constant; that when the activities remain constant but the surplus paid to the Company varies or no surplus flows to the Company, it can be said that the surplus profit has no correlation with the activities in question; that if the surplus profit was to be treated as consideration for the activities undertaken by the Company then there would not be any month where no amount is paid by the CBU to the Company. To substantiate the above arguments, they relied on the Service Tax Education Guide dated 19.06.2012 and the Supreme Court's decisions in the case of UOI vs Intercontinental Consultants and Technocrats Pvt Ltd reported at 2018 (10) GSTL 401 (SC) and Commissioner of Service Tax vs Bhyana Builders (P) Ltd reported at 2018 (10) GSTL 118 (SC). In view of the above, they submitted that the surplus profit received by the Company can in no way be said to be 'consideration' received by the Company and therefore the question of levy of GST on the said amount does not arise.

DISCUSSION AND FINDINGS:

23. We have gone through the records in detail and have taken into consideration the submissions made by the Appellant in writing as well as the detailed arguments made by their Advocate during the personal hearing.

24. To frame the matters that lie for a decision before us, the facts are briefly summarized hereunder:

The Appellant, M/s United Breweries Ltd has held itself out as being engaged in the manufacture and supply of beer under various brand names. Apart from manufacturing beer on its own, and for different commercial and economic considerations, the Appellant enters into agreements with other brewing units (called Contract Brewing Units, CBUs), who have their own bottling plants and the necessary licences to manufacture and supply beer.

In terms of the agreement with the CBUs, the Appellant permits its brands to be used by Contract Brewing Units who manufacture and sell beer under the Appellant's brands directly to Government corporations/or in wholesale depending on State market regulations.

25. Under the agreement, CBUs manufacture beer by procuring raw materials, packaging materials, incurring overheads and other manufacturing costs. The CBUs undertake the activity of making the beer using their already established functional distilleries for which the CBUs also hold a licence to operate. As the beer manufactured by the CBUs bears the Appellant's brand, in order to ensure that the quality standards of the raw material procured by the CBUs and the process of making beer followed by the CBUs are within the standards commensurate with the brand image of the Appellant, **the Appellant deputes a Process Executive, Commercial Executive and other key personnel to the CBU's brewery to guide the procurement of raw material, supervise the manufacturing process and packaging of finished goods.** As per the agreement, the CBU makes a specified quantity of beer per annum that it has been mutually agreed to and which it then causes to be sold in the market ultimately, through the Government corporations/or in wholesale depending on State market regulations. The Appellant has permitted the CBUs to use its labels for branding of its beer for sale pursuant to the terms of the agreement and such representational right is granted only for making and supply of beer but for no other purpose.

26. As per the agreement, the CBUs shall pay a brand fee of Rs 5/- per case to the Appellant in consideration of the representational right to make and supply the beer to the market under labels granted by the Appellant. The beer so manufactured by the CBUs are disposed off to State Beverages Corporation/State regulated depots or to the Wholesalers / Indenters holding necessary permits / licences under the relevant Excise laws of the State. All proceeds from sale of the beer are to be deposited in a bank account, jointly operated by the two parties. This jointly operated bank account exclusively holds the proceeds of such sale as are had from the sale of beer produced under the above arrangement. The operational cost incurred by the CBU is serviced from this account and the balance amounts which remain are to be made over towards the reimbursement of expenses incurred by the brand owner (Appellant) by being transferred to the account of the Appellant. The amount towards such reimbursement of expenses incurred by the Appellant is arrived at as under:

	Amount (Rs/case)
Turnover of the Brewer	(X)
Less: Variable cost incurred (raw material, PM and other consumables)	(Y)
Less: Bottle cost (at prevailing market rates)	(Z)
Less: Retention for energy and fixed cost by the brewer	73
Balance payable to UBL	
Brand fee	5
Remaining as reimbursement to UBL	(W)

27. In the background of the above facts, two questions were raised before the Karnataka Authority for Advance Ruling (AAR) viz:

a) Whether manufacture of beer (bearing brand owned by the Appellant) by the CBUs under its invoicing would be considered as a supply of service and whether GST is payable by the CBUs on the profit earned out of such manufacturing and supply of beer?

b) Whether GST is payable by the brand owner on the 'surplus profit' transferred by the CBU to the Brand Owner out of such manufacturing activity?

28. On the first question, the Authority ruled that the activity undertaken by the CBUs is not in the nature of job-work, and hence no GST is payable. The ruling on this aspect has been accepted by the Appellant and is not challenged in this appeal.

On the second question, the Authority ruled that GST is payable by the Brand Owner (UBL) on what has been termed as the 'surplus profit' transferred by the CBU to the brand owner out of the manufacturing activity since the said amount is received as a consideration for rendering a service. The Authority has classified the service rendered by the Appellant under S A Code 999799 as "Other services nowhere else classified" and held that the rate of GST payable on such amount transferred from the CBUs is 18%. It is on this latter issue that the present appeal has been filed.

29. As such, we will limit our discussion and findings to this issue i.e whether the amount transferred to the Appellant by the CBUs in terms of the brewing agreement, is an amount which represents a consideration for an activity which can be termed as a 'supply' under Section 7 of the CGST Act.

Proceeding anon, it is noted that prior to the introduction of GST, the events which were liable to tax under the existing laws were the events of manufacture, sale and the provision of a taxable service. Under the GST regime of taxation, the taxable event which attracts the levy of GST is

the 'supply' of goods or services, in terms of Section 9 of the CGST (and SGST) Act or Section 5 of the IGST Act, depending on whether the transaction of 'supply' is intrastate or interstate.

It thus appears that the object of tax in GST is clear and far more comprehensive and is certainly broader than any single earlier law that has been subsumed in it. The object of tax in GST is 'supply' as understood in Section 7 of the Act. It is a concept which, going purely by what has been written down in the GST law, is wider than the concepts of 'manufacture', 'sale of goods', 'provision of services' etc. which were the objects of taxation in respective laws concerning Central Excise, VAT or Service Tax. The broader object of taxation in GST, in effect, also integrates and irons out the disputes that existed at the boundary layers of the objects of taxation in each individual law, by bringing comprehensiveness and clarity to the object of taxation in GST. Each of these concepts that existed earlier, plays a part in understanding the concept of what is meant by supply, but as is obvious, neither is sufficient alone to understand 'supply'. In order to construe what is 'supply' one starts with the layman's understanding of the expression as meaning 'to make something available to another or to fulfill the want of another'.

30. Under the GST law, the word 'supply' has not been defined but rather the scope of what constitutes 'supply' is stated in Section 7 of the CGST Act which reads as under:

> *7. (1) For the purposes of this Act, the expression* ***"supply" includes -***
>
> *(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*
>
> *(b) import of services for a consideration whether or not in the course or furtherance of business;*
>
> *(c) the activities specified in Schedule I, made or agreed to be made without a consideration; and*
>
> *(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.*
>
> *(2) Notwithstanding anything contained in sub-section (1),-*
>
> *(a) activities or transactions specified in Schedule III; or*
>
> *(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.*
>
> *(3) Subject to the provisions of sub-sections (1) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—*
>
> *(a) a supply of goods and not as a supply of services; or*
>
> *(b) a supply of services and not as a supply of goods.*

The word 'includes' in Section 7 (1) of the CGST Act, gives a wider meaning to the words or phrases in the Statute. The word includes is usually used in the interpretation clause in order to enlarge the meaning of the words in the statute. When the word 'includes' is used in the main Statute, it must be construed as comprehending not only such things as they signify according to their nature and impact but also those things which the interpretation clause declares they shall include. [[para 23] - Commercial Taxation Officer, Udaipur vs Rajasthan Taxchem Ltd. 2007 (209) ELT 0165 S.C.- relied on]. Clause (a) of Section 7 (1) recognizes the forms of transactions by which a supply is effected, it presupposes an agreement between the two transacting parties to engage in the dealings, and the condition that such a dealing in course of furtherance of business, and not otherwise. Clause (b) recognizes imports of services for a consideration to an activity that would be construed as a 'supply' even if it is not made in course of furtherance of business. Clause (c) lays down that the activities that are classed in Schedule I would be deemed to be falling within the meaning of 'supply' even when such a transaction is made or agreed to be made without a 'consideration' or recompense. Clause (d) refers to Schedule II which lays down the activities to be treated as supply of goods or supply of services.

Subsection (2) of Section 7 indicate which are the activities which will be interpreted to not be a supply, and Subsection (3), enables the the Government to on the recommendations of the Council, specify, by notification, the transactions that are to be treated as a supply of goods and not as a supply of services and vice- versa.

31. Therefore, for an activity to qualify as "supply" in terms of Section 7 of the CGST Act, the following conditions are to be fulfilled:

(i) The activity has to involve a transaction in either 'goods' or 'services' or both;

(ii) The activity should be undertaken for a consideration

(iii) There should be agreement to engage in the transactions of the nature specified;

(iv) The activity should be in course or furtherance of business

Broadly speaking, when the above circumstances are accomplished by (at least) the two persons involved in the transactions, then it can be inferred that the activity is a 'supply' under GST law and thereby chargeable to GST. There are however, certain exceptions to the above principles viz.

(i) Certain activities have been termed as a 'supply' even when they are made without a consideration. Such supplies have been listed in Schedule I to the CGST Act; and

(ii) Certain activities, even when made for a consideration, have been termed as not a supply of either goods or services and thus kept outside the scope of levy of GST. These activities have been listed in Schedule III of the CGST Act.

The CGST Act 2017 in CHAPTER III dealing with LEVY AND COLLECTION OF TAX lays down in Section 9:

9. (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, ***except on the supply of alcoholic liquor for human consumption****, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.*

(2) The central tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) The central tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also he does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.

The levy clearly excludes the **supply of alcoholic liquor for human consumption.**

This is in line with the Amendment of the following clause of Article 366 effected vide The Constitution (One Hundred And First Amendment) Act, 2016 that received the assent of the President on the 8th September, 2016, and was published for general information on the same day.

14. In article 366 of the Constitution,—

(i) after clause (12), the following clause shall be inserted, namely:—

*'(12A) "**goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption**;';*

(ii) after clause (26), the following clauses shall be inserted, namely:—

*'(26A) "**Services" means anything other than goods**;*

(26B) "State" with reference to articles 246A, 268, 269, 269A and article 279A includes a Union territory with Legislature;'.

32. We also take note of the decision in Gursahai Saigal vs. CIT 48 ITR (SC) 1, wherein it has been held that those sections which impose the charge or levy should be strictly construed; but those which deal merely with the machinery of assessment and collection should not be subjected to a rigorous construction but should be construed in a way that makes the machinery workable. In proceeding to apply the above principles to the instant case to determine whether the activity undertaken by the Appellant qualifies as a 'supply' within the scope of Section 7 of the CGST Act, we have gone through the actual Brewing and Distribution Agreement entered into by the Appellant with M/s Master (India) Brewing Company. The Appellant has also submitted copies of the agreement entered into with M/s Denzong Albrew Private Ltd that is identical to the agreement with Master Brewing Company and hence at this moment it appears to be a reasonable presupposition with regard to the consideration of the matters that lie before us, we can generalise to state that any reference to 'Agreement' in our discussion will mean the agreement with Masters (India) but the conclusions will apply to all the agreements entered into by the Appellant with different brewers as they are in essence the same.

The clauses of the agreement which are relevant to the issue at hand are reproduced hereunder:

2.1 Brewer and UBL confirm that there are no legal or contractual impediments to enter into this contract for:

(a) manufacture of UBL beer by Brewer

(b) providing process parameters from time to time by UBL to Brewer and Brewer availing of the sam for manufacture of UBL Beer

(c) permitting Brewer to use the trademarks owned by UBL and use such trademarks by Brewer, and dispose off UBL beer upon order being received by it.

2.2 UBL hereby grants to Brewer a non-assignable, non-transferable and non-exclusive right during the term:

2.2.1 use the process for manufacture of UBL's Beer in the territory under the supervision and control of UBL;

2.2.2 manufacture, bottle, package and dispose off UBL's beer in the territory and for no other purpose upon the condition that UBL beer shall be produced according to the process parameters and specifications prescribed by the Process Executive appointed by UBL from time to time during the Agreement.

3. Personnel and Raw materials

3.1 UBL shall, at its own cost throughout the duration of this Agreement, arrange for its Process Executive to be deputed to the Brewery, and UBL will inform Brewer about the deputation of such Process Executive and his replacements from time to time. Such Process Executive shall be responsible for the brew as per specifications provided from time to time, inspection of brewery, laboratory and other departments and advice on processing and quality control of beer produced for and on behalf of UBL.

3.2 UBL shall depute other key personnel, as may be required by UBL to the brewery for supervising the production, processing and quality control of the beer manufactured. UBL may also depute a Commercial Executive who shall guide the procurement of raw materials, packaging and such other materials used in the manufacture of beer.

4. Confidentiality

4.6 All know-how acquired by Brewer under the terms of this Agreement and any improvement in the specifications made by Brewer relating to the production and packaging of UBL's beer shall remain the sole property of UBL and shall be used by Brewer only in accordance with the provisions of this agreement.

5. Production

5.1 Brewer shall brew, bottle, package and store UBL beer:

5.1.1 In conformity with the brew specifications provided by the Process Executive of UBL from time to time, including usage if all ingredients, raw materials, brew specifications, methods and quality parameters laid down by the Process Executive under the supervision of UBL. UBL will provide irs own yeast, if necessary, and the brewer will propagate and store this yeast separately, solely for the use of UBL brands.

5.4. The Process Executive deputed by UBL may take samples of UBL's beer free of cost as and when required by UBL for analytical and quality tests and advise such changes in the brew from time to time.

5.6. Brewer shall label and package UBL beer as er directions and/or specifications of UBL. Bottles, cans and other containers to be used including crown corks, lables and materials, shape and text of exterior cartons and cases shall be procured by Brewer as per UBL directions and / or specifications and Brewer shall adopt and comply with any requests made by UBL in such matter which shall not infringe any relevant laws or statutory regulations. Procurement and payment for raw materials, packing materials and such other materials shall be under the guidance of the Commercial Executive deputed by UBL.

5.8. Brewer shall adhere strictly to the Process Executive's advice on the brewing, fermentation and lagering time for UBL's beer.

7. Brand Fee

Brewer agrees that in consideration of the representational right for manufacture and supply of beer under labels mentioned in Annexure I having been granted by UBL, Brewer shall pay a Brand Fee of Rs 5 per case.

Such payment shall be made on a monthly basis and not later than 10th day of the following month.

8. Reimbursement

Balance due towards reimbursement of expenses incurred by the brand owner is arrived at as under:

	Amount (Rs/case)
Turnover of the Brewer	(X)
Less: Variable cost incurred	
(Raw material, PM & other consumables0	(Y)
Less: Bottle cost (at prevailing market rates)	(Z)
Less: Retention for energy & fixed cost by the Brewer	(73)
Balance payable to UBL as	
Brand Fee	(5)
Remaining as reimbursement to UBL	(W)

All proceeds from sale of product will be deposited in a bank account, jointly operated by the two parties, exclusively for beer produced for the company. The operational costs (including variable costs, bottle cost and retention fee) will be serviced from this account. The surplus will then be transferred into UB's account.

11. Representational Rights

UBL has permitted Brewer to use the Labels for branding of UBL beer for sale pursuant to the terms and conditions contained in this Agreement and such representational right is granted only for manufacture and supply of Beer and for no other purpose. Any steps taken by Brewer or UBL for recordal under the relevant provisions of the Trade Marks Act shall be to the benefit of UBL alone.

33. The terms of the Agreement as mentioned above make it is evident that the parties to the Agreement have clearly defined roles. The Brewer shall make beer bearing the brand of UBL and shall dispose off the beer under the concerned States' Excise laws, to those who are authorised to purchase /deal in beer in terms of the relevant regulations. The brewer will make the beer in strict conformity to the brew specifications and quality parameters laid down by the Appellant. In order to make the UBL beer, the brewer procurers the raw material, packaging material and other materials, at their own cost. The UBL beer is made by the brewer in his own distillery using his own equipment. The proceeds from the sale of the UBL beer are used by the brewer to cover his operational costs like purchase of raw materials, packaging materials, consumables, bottle cost, cost on account of energy consumption and his profit. The CBUs clearly make and supply **alcoholic liquor (beer, in this case) for human consumption, and the same is excluded from the purview of GST.**

It is also clear that the CBUs collect a **consideration/ payment** for the supply of the product (beer) made by them to the Beverages Corporation/State regulated depots or to the Wholesalers / Indenters holding necessary permits / licences under the relevant Excise laws of the State

concerned. The beer is made by the CBUs under a contractual agreement with the Appellant, the terms of which have been detailed above.

34. The sale proceeds for the supply of branded alcoholic liquor for human consumption which is made in terms of the contractual agreement, accrues to the CBU and is collected in a joint account (whatever be the motivation for collecting it in a joint account may not be of relevance). The sum of such sale considerations represents an income or the sales turnover of the CBU operations. GST is not leviable on these sales. The CBUs incur expenses in making the beer which among other things include the expenditures in procurement of different goods (example hops, yeast, bottles, cans etc.) and services (for example, transport, banking etc.). Out of these goods and services that the CBUs spend on, many are exigible to GST levies as they may apply - there being no general exemption being available under GST, to such raw materials/ services that are used in making the alcoholic liquor for human consumption. The income so had from CBU operations are then partially disposed of by being charged as the expenses and the profit for CBU and as the payments for use of brand name etc. The remaining amounts which represent the sales turnover or income from the sale of beer (termed as surplus profits by the Appellant) are transferred to the Appellant.

35. As regards the role of the Appellant in the contractual agreement, they, on their part, give the brewer the right to use their process for manufacture of their branded beer under their supervision and control. To ensure that the beer made at the brewery meets their specified standards, the Appellant, at their cost, deputes Process Executives and Commercial Executives to the brewer, who will provide the specifications, methods and quality parameters; guide the brewer in procurement of raw materials, packing materials and such other materials; give directions for carrying out quality control of the beer manufactured by the brewer; take samples for analytical and quality tests and advise changes in the brew from time to time and advise the brewer on the brewing, fermentation and lagering time of the UBL beer.

36. For providing the brewer the representational right to make and supply beer under their brand, the Appellant receives from the brewer a Brand fee of Rs 5 per case. In addition, the Appellant also receives an amount which in terms of clause 8 of the Agreement, is termed as "reimbursement of expenses incurred by the brand owner". This amount is not fixed but is variable depending on the sales in a particular month, the adjustment from the sale proceeds towards the variable costs incurred by the brewer, the brewer's profit and the brand fee paid by the Brewer to the Appellant. The surplus remaining after this, if any (denoted as W in the Agreement), is transferred to the Appellant's account. Therefore, it is evident that the Appellant receives two kinds of amount from the Brewer in terms of the Agreement.

a) One is the Brand Fee which is fixed at Rs 5 per case, and

b) The other is the variable component 'W' which is the surplus amount remaining in balance after the sale proceeds have been apportioned towards the brewer's operational costs and brand fee.

37. The question on which a ruling was sought from the Authority was whether, GST is payable on both the amounts received by UBL i.e Brand Fee of Rs 5/- per case and on the component 'W'. The ruling held in the affirmative in respect of both the amounts treating both of them as 'Surplus Profit'. The reasoning adopted by the Authority is that the amounts received by UBL is for an act which is either a supply of goods or a supply of service; that evidently no goods have been supplied by UBL to the Brewer and hence the only act for which the amounts

could have been received is for the 'supply of service'. In this connection, it is essential to clearly distinguish the nature of the receipts by the Appellant as Brand Fee and Reimbursed surplus since the two amounts are clearly received for activities performed by the Appellant for the CBUs. **'Activity'** has not been defined in the GST law. In terms of the common understanding of the word, activity would include an act done, a work done, a deed done, an operation carried out, execution of an act, provision of a facility etc. It is a term with very wide connotation. **The concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration.** There is no dispute that the amount transferred to the Appellant's account is a Brand Fee which is fixed at Rs 5 per case as per the agreement. This Brand Fee being a fixed rate is paid to the Appellant every month based on the volume of sales of beer. As regards, the amount denoting a reimbursement of expenses, this amount which is denoted as 'W' in the Agreement, is variable and depends on the balance remaining if any, after adjusting components 'Y', 'Z', Rs 73 per case, and Rs 5 per case from the turnover of UBL brand beer sales. The Appellant in his submission has stated that in some months no amount as surplus is transferred to the Appellant.

38. As regards Brand Fee, clause 7 of the Agreement states that "Brewer agrees that in consideration of the representational right for manufacture and supply of beer under labels mentioned in Annexure I having been granted by UBL, Brewer shall pay a Brand Fee of Rs 5 per case. Such payment shall be made on a monthly basis and not later than 10th day of the following month." A plain reading of this clause makes it evident that the Brand Fee paid by the Brewer to the Appellant is in return for the grant of right to manufacture and supply branded beer of UBL. The Agreement itself recognises that this payment of Brand Fee is a consideration for the act of granting the right to manufacture and sell branded beer. We proceed to examine whether the act of granting the representational right to manufacture and sell branded beer is a 'supply' by the Appellant, in terms of Section 7 of the CGST Act. As already stated in Para 31 above, for an activity to qualify as "supply", following conditions are to be fulfilled:

(i) The activity has to involve 'goods' or 'services' or both;

(ii) The activity should be undertaken for a consideration;

(iii) The activity should be in course or furtherance of business

39. The term **'Goods'** has been defined in Section 2 (52) of the CGST Act, to mean " every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply". The term **'Services'** has been defined in Section 2(102) of the said Act to mean "anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged." Given the above definitions, in the instant case, the Brand Fee will clearly not be categorised as 'goods'. It is important to note that the arrangement with the CBUs is for contract manufacturing of beer but under the strict supervisions and as per the guidance and specifications of the Appellant. The Appellant has deputed its personnel at the brewer's distillery, to guide, supervise and monitor the manufacture of beer bearing its brand name. As seen from the agreement, the procurement of raw materials, packing materials and consumables are made by the brewer under the guidance of the Commercial Executive deputed by the Appellant. The brewing, fermentation and lagering time for the UBL beer is done by strictly

adhering to the advise of the Process Executive deputed by UBL. The beer specifications, methods and quality parameters are laid down by the Process Executive. In some case, UBL provides its own yeast. Quality control of the UBL beer manufactured is done from time to time, as per the directions of the Process Executive and the data is submitted to UBL. The Process Executive may also advise the Brewer on changes in the brew from time to time. The labelling and packaging of the UBL beer is done as per the specifications of UBL and the Brewer is bound to adopt and comply with any requests made by UBL in such matter. Therefore, it is seen that at every stage in the manufacture, starting from the procurement of raw materials to the methods of brewing, fermentation, lagering, bottling, packing and labelling, the Brewer is provided with technical know-how and supervision by the Appellant and is also using the right vested on him to use the Trademarks and labels of the Appellant on the UBL branded beer manufactured and sold by him. The entire know-how regarding the manufacture of Beer, such as nature of raw materials to be procured, the ratio and proportion of mixing the raw materials, the manner of packing the beer, etc being the sole intellectual property of the Appellant is shared with the Brewer under an agreement. The purpose of entering into such an arrangement with other breweries is purely for economic and commercial reasons taking into consideration the restrictions in availability of Excise licences in other States and the huge investment in setting up its own manufacturing facility in other States. Therefore, it is evident that, the Appellant has provided a service to the Brewer by way of granting him the know-how to manufacture the beer according to their specified standards and has also provided the Brewer with adequate personnel to supervise its manufacture, packing and sale. This service has been rendered by the Appellant in the course of his business. As per the terms of the Agreement, the Brewer pays a consideration to the Appellant in return for the latter granting the representational right to use its Trademarks and labels in the manufacture and supply of beer by the Brewer. Hence, the activity rendered by the Appellant to the Brewer is a service which has been undertaken by the Appellant in the course of his business under an agreement and for which, in terms of the agreement, he gets a consideration. As such, the activity performed by the Appellant in terms of the agreement can be termed as a 'supply' under Section 7 of the CGST Act.

40. In terms of Section 7(1) of the CGST Act, 'supply' also includes within its scope, the activities referred to in Schedule II of the Act which have been categorised as either a supply of goods or a supply of service. Clause 5(c) of the said Schedule II, refers to "temporary transfer or permitting the use or enjoyment of any intellectual property right" as a supply of service. The phrase "intellectual property right" has not been defined under the GST law. In a general sense, the term intellectual property right would include the following:-

(i) Copyright
(ii) Patents
(iii) Trademarks
(iv) Designs
(v) Any other similar right to an intangible property

In the erstwhile Service Tax law, the Finance Act, 1994, had defined "intellectual property right" to mean "any right to intangible property, namely, trademarks, designs, patents or any other similar intangible property, under any law for the time being in force, but does not include copyright". There is a clear difference between permitting someone to use intangibles and a divestment of the right to use such intangibles. In the case of **S.P.S. Jayam and Co. vs Registrar**, Tamil Nadu Taxation Special Tribunal and others (2004) 137 STC 117(MAD), the High Court held that the Royalty received as consideration of use of trade mark is consideration

of transfer of right to use a movable asset and upheld its taxation under the sales tax laws. The court observed that "For transferring the right to use the trademark, it is not necessary to hand over the trademark to the transferee or give control or possession of trademark to him." The court further observed that "Simply because the assessee retained the right for himself to use the trademark and reserved the right to grant permission to others to use the trademark, it would not take away the character of the transaction as one of transfer of a right to use."

41. In the GST law, by virtue of clause 5(c) of Schedule II, the act of temporarily transferring any intellectual property right or permitting the use of or enjoyment of any intellectual property right has been categorised as a supply of service. In the instant case, the Appellant has permitted the CBUs to use the trademarks owned by it, permitted the Brewer to acquire the know-how relating to the production and packaging of UBL's beer, which is the sole property of UBL and has permitted the Brewer to use the Labels for branding of UBL beer for sale by the Brewer. All these amount to permitting the Brewer to use UBL's intellectual property rights. Therefore, by virtue of clause 5(c) of Schedule II of the CGST Act, the said activity amounts to a supply of service. To this extent we differ with the findings of the Authority, wherein, in Para 14.6 of the order dated 28.06.2018, they stated that, "it becomes evident that the applicant is engaged in supply of service which is not covered under Schedule II." We hold that the activity of the Appellant undertaken with contracting units in terms of the Agreements are in the nature of permitting the use of intellectual property right and hence is squarely covered under clause 5(c) of Schedule II of the Act.

42. In return for rendering the service of providing the right to manufacture and supply branded beer to the Brewer along with the right to use the Trademarks and Labels, the Appellant gets a consideration which comprises of a Brand Fee of Rs 5 per case as well as a reimbursement of expenses. The quantum of reimbursement (denoted as W in the Agreement) is dependent on the surplus profit available at the hands of the Brewer. Section 2(31) of the CGST Act defines 'consideration' in relation to the supply of goods or services as "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". In this case, the 'Brand Fee' is the consideration for grant of the representational right to manufacture and sell beer bearing the UBL brand name. The Agreement also, in clause 7, recognises that the Brand Fee is a consideration for the representational right for manufacture and supply of beer.

43. As regards the reimbursed expenses received by the Appellant, clause 8 of the Agreement provides for the reimbursement of the expenses incurred by the brand owner which is arrived at after servicing all the operational costs, retention cost and brand fee from the sale proceeds of the beer. The surplus if any, will be transferred to the Appellant's account. This surplus, as the agreement denotes, is a reimbursement for the 'expenses incurred' by the brand owner. It is evident from the agreement that the Appellant incurs expenses towards deputing his personnel to the CBU's distillery; expenses are incurred by the Appellant in ensuring that its business interests are secured by the manufacture of beer to its specifications and standards. These expenses are being reimbursed by the CBU out of the profit arising from the sale of beer by the CBUs. It is important to note that the amount transferred to the Appellant (M/s UBL) is out of the surplus profit earned by the CBUs from the sale of beer. It is not a profit earned by the Appellant. As per the agreed terms, the surplus profit earned by the CBU is transferred to the Appellant as a reimbursement of the expenses incurred by the Appellant. Clearly, the amount transferred under the nomenclature "reimbursement of expenses' is a payment made by the CBU

out of its surplus profit and the payment made is in return for an activity performed by the Appellant. The question is whether the activity so performed is in connection with 'goods' or 'service'? The Appellant as per his own submissions states that he is not selling goods in his transactions with the CBUs. When we look at clause 3.1 of the Agreement, it states that 'UBL shall, at its own cost throughout the duration of this Agreement, arrange for its Process Executives to be deputed to the Brewery." Further, clause 6.3 of the Agreement states that 'Registration of labels and payment of fees thereof shall be the responsibility of UBL..'. This indicates that the Appellant has on its part incurred some expenditure to enable the Brewer to manufacture and sell its branded beer. This expenditure incurred is in connection with according the representational rights for the manufacture and sale of branded beer to the CBUs. We have already held in the preceeding paras, that the Appellants have rendered a service to the Brewer which is categorised as a 'supply' taxable to GST. In connection with rendering the taxable service, the Appellants have incurred expenditure which is being reimbursed by the Brewer out of his surplus profit. In other words, the reimbursement of expenses by the Brewer to the Appellant is a form of payment made in connection with a service of permitting the CBUs to use the intellectual property rights as well as providing other services as laid out in their agreement. The total consideration given to the Appellant by the Brewer in terms of the Agreement, for this service rendered by the Appellant, is comprised of two components and quantified as a fixed amount of Rs 5 per case (Brand Fee) and any surplus remaining with the Brewer. Therefore, we are of the view that the component 'W' also forms a part of the consideration received by the Appellant for supply of service. This component 'W' therefore, is also liable to GST being a consideration for the supply of taxable service. The grant of representational right to the Brewer and the receipt of the consideration in the form of Brand Fee and reimbursed expenses, are all undertaken in the course of the business of the Appellant. Therefore, all the parameters of 'supply' as defined in Section 7 of the CGST Act are duly satisfied and therefore, the entire amount i.e Brand Fee as well as the reimbursed expenses, received by the Appellant as a consideration for the supply of service is chargeable to GST.

44. We observe that in the pre-GST regime, this Brand Fee of Rs 5 per case was charged to service tax under the category of Intellectual Property Service. The Appellant has disputed this levy of service tax and their appeals are pending in various fora. In the course of these proceedings, to determine whether GST is leviable on the said amount, the Appellant has heavily relied on the decisions given by the CESTAT and the Courts on the subject matter of levy of service tax on the Brand Fee. We have taken note of the said case laws. We note that the Bombay HC quoted the following observations of Earl of Halsbury in the case of *Qumin vs. Leathem (1901) AC 495 (HL) in Blue Star Ltd. vs. CIT (1996) 217 ITR 514 520.* - "Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides."

A study of the decisions cited by the Appellant reveals that the facts in the cases before the Tribunal and Court are not similar to the instant case as is indicated hereunder:

a) Skol Breweries Ltd vs Commissioner of C.Ex & ST, Aurangabad reported in 2014 (35) STR 570 (Tri-Mumbai) : In this case, the facts are patently different in as much as the CBU (FIPL) is only responsible for bottling, packing and dispatch as per the specification, terms, formula, etc laid down by the appellant (Skol); as per the impugned agreement, the risk of manufacture and sales lies

with the appellant in respect of Foster brand Beer got manufactured by it from FIPL; FIPL is bound to charge the price from the notified Indenter of the appellant as fixed by the appellant. Taking these facts into consideration, the Tribunal held that no services have been provided by the appellant to FIPL. The facts in the instant case are not identical and hence this case cannot be relied upon.

b) BDA Pvt Ltd vs Commissioner of C.Ex, Meerut reported in 2015 (40) STR 352 (Tri-Del) : The facts in this case are that the appellant (BDA) gets IMFL manufactured by M/s Pilkhani (CBU) on job work basis; as per the agreement, the cost of raw material and other expenses were either paid by the appellant or reimbursed by the appellant; the State levies such as excise levy or taxes were also reimbursed to M/s Pilkhani by the appellant; the IMFL was sold by or as per the directions of the appellant ; profit/loss on account of the manufacturing and sale of IMFL is entirely on account of appellant who holds the property risk and reward of the product. The Tribunal held that since the CBU received a consideration for manufacture on job work basis, the appellant is not required to pay service tax. In terms of the CGST Act 2017, Section 2 (*68*) defines "job work" to mean any treatment or process undertaken by a person on goods belonging to another registered person and the expression "job worker" shall be construed accordingly. It has been brought out before us that in the present matter this is not the situation where there is a treatment or process undertaken on any goods the ownership of which lays with the Appellant and given this fact which are completely different from the case law cited, we rule that this particular decision is not relevant in the present set of facts and circumstances and therefore also cannot be relied upon.

c) State of Karnataka vs UBL reported in 2015-VIL-479-KAR: In this case, the agreement with the CBU was such that the CBU manufactured the beer on behalf of the assessee and supplied only to the assessee or to its indentors; no right was given to the CBUs to directly sell the beer to its own customers; the CBUs neither had any right over the product nor did they have any right to sell or exploit the beer so produced, nor fix any price of the product. The High Court concluded that the CBU was only the captive manufacturer of the assessee and hence the brand franchise fee of Rs 10 per case is not subjected to KST. This case again is on a different footing on basic facts and hence cannot be considered for the present issue at hand.

d) Radico Khaitan Ltd vs Commissioner of Service Tax, Delhi reported in 2016 (44) STR 133 (Tri-Del): In this case too the Tribunal held that, in terms of the agreement, the CBUs are actually manufacturing the branded liquor as job workers for the appellant (Radico) for which they are getting fixed amount as per the rate approved in terms of the agreement; the CBU has no freedom of marketing the manufactured products; the sale and distribution of the manufactured product is in control of the appellants; full sale proceeds are received by the appellants and the CBUs are paid amount as per the pre-fixed rates; that the CBUs are paying the service tax under Business Auxillary Service and hence the appellant is not required to pay any service tax. These facts are

different from the terms of the agreement in the instant case and hence cannot be relied upon.

e) The Court and the Tribunals in the above mentioned cases relied on the Circulars dated 27.10.2008 and 30.10.2009 issued by the CBEC to hold that no service tax was to be paid by the brand owner. In the two Circulars mentioned above, the factual matrix was that the CBUs were job workers for the brand owners and rendering service to the brand owners and the CBUs were required to pay service tax on the service rendered by them to the brand owners. These Circulars do not have any relevance to the instant case as the question is whether the brand owner (the Appellant in this case) has rendered any service to the CBU and whether GST is required to be paid by the brand owner.

45. Thus, the different cases cited by the Appellant in support of its contentions may be applicable to the definitions, to what were the objects of taxation in the existing laws – each of such objects of taxation in the existing laws, covers only partially, at best, the idea of what is sought to be taxed as supply in GST. In view of the above, the reliance placed by the Appellant on the decisions taken by the High Court and the Tribunals in the pre-GST scenario will not come to their assistance in deciding their liability under GST. The concept of GST is based on the taxable event of 'supply'. We have already observed that there has been a supply of service by the Appellants to the CBUs for which a consideration is received from the CBUs in the form of Brand Fee and a reimbursement of expenses.

46. The Authority had classified the service rendered by the Appellant under Tariff Code 999799 as 'Other services nowhere else classified'. The scheme of classification of services adopted for the purposes of GST is a modified version of the United Nations Central Product Classification. This code is merely an accounting code and is primarily an instrument for assembling and tabulating statistical data on different services. Although it does, at the end of the day, decide the rate of tax to be imposed, it does not appear to have any other statutory ramification in terms of determining exigibility. The roots of this practise can be understood by looking at the erstwhile Service Tax regime wherein the CBEC vide Circular No.165/16/2012 ST dated 20.11.2012 has restored service specific old accounting codes. These codes had been restored solely for the purpose of statistical analysis. These 120 service specific accounting codes were used for payment of service tax and registration.

47. After considering the entire gamut of activities performed by the Appellant, it may be difficult to arrive at any nomenclature for the services delivered by the Appellant to the CBU. While the Brand fee and the reimbursed expenses, are received by the Appellant in (direct) consideration for permitting the CBUs the use of the representational right to make and sell their branded beer, the service supplied can at times have the colour and character of being an erstwhile "franchise' service or/ and "IPR service' in terms of the Finance Act 1994. On the other hand, the so termed 'surplus profit' amounts received have the characteristics of being a consideration received for a 'mixed supply'.

While in overall terms, at times the service supplied assumes the character of permitting the use of intellectual property rights, or of being a franchise service, at other times it takes on the colour and character of being secondment of personnel. The varied nature in the character of the services supplied by the Appellant, makes it difficult to determine the predominancy in terms of characterisation since the consideration for some elements of the supply is being received in terms of a variable amount "W". We do acknowledge and recognise that in each tax period, the

manner of determination of 'W' as it has been laid down in the contract with CBUs would likely make it a variable for each tax period. Since, the activity which the Appellant engages in with respect to contract does not essentially change, but the volume of consideration can change in each tax period, it does pose a challenge in terms of giving one particular nomenclature to the activities of the Appellant that would remain unchanged over all tax periods. However, this aspect is limited the issue of the SAC alone and that too when one proposes to generalise the classification across all tax periods- within one particular tax period, it may still be possible to have a determinate 'W' which could help in applying the predominancy test. At the moment though, we note that there is a standard rate of 18% which applies across the whole range of services that are taxed under GST. However, this fact of having one predominant supply that may be constant across tax periods, does not do anything to negate exigibility of the service supplied. The framework of the Service Tariff Codes under GST still provides a possible solution by categorising such services under Service Code 99979 as "Other Miscellaneous services'. The sub-heading under this service code is 999799 which is "other services nowhere else classified'. The GST applicable under this category of service is 18%.

48. In view of the above discussions, the Ruling dated 28.06.2018 passed by the Karnataka Authority for Advance Ruling is modified as under:

a) The activity engaged in by the Appellant by way of granting the contracting brewing units the representational right to manufacture and supply beer bearing its brand name, in return for a consideration, is a supply of service as mandated in Section 7 of the CGST Act read with clause 5(c) of the Schedule II of the said Act.

b) The supply of service by the Appellant is taxable to GST in terms of Section 9 of the CGST Act.

c) The service supplied by the Appellant is classified under the Service Code 999799 as "other services nowhere else classified".

d) The amounts received by the Appellant from the contracting units under the Agreement, in the nature of Brand Fee and reimbursement of expenses, is termed as a consideration for the supply of service and is chargeable to GST at the applicable rate of 18%.

49. The appeal is disposed off in the above manner.

(A.K.JYOTISHI)
Member
Karnataka Appellate Authority

23/7/18
(M.S. SRIKAR)
Member
Karnataka Appellate Authority