

Whether or not the applicant is obliged to reverse input tax credit (ITC) under Section 17 (2) read with Rule 42 in view of the sale of alcoholic liquor for human consumption effected by it at its premises under the facts & circumstances of the present case? HELD BY AAR Under the facts & circumstances of the present case, the applicant is required to reverse input tax credit (ITC) in terms of sub-section (2) of section 17 read with Rule 42 of the GST Rules for sale of alcoholic liquor for human consumption. UPHOLD BY AAR

APPELLATE AUTHORITY Order No. 02/WBAAAR/APPEAL/2023, Dated 26th April, 2023

WEST BENGAL APPELLATE AUTHORITY FOR ADVANCE RULING

AT 14, BELIAGHATA ROAD, KOLKATA-700015

Before:

Mr Anil Kumar Gupta, Member

Mr Khalid Aizaz Anwar, Member

In the matter of

Appeal Case No. 02/WBAAAR/APPEAL/2023 dated 26.04.2023

- And -

In the matter of:

An Appeal filed under Section 100 (I) of the West Bengal Goods and Services Tax Act. 2017/ Central Goods and Services tax Act. 2017. by Karnani FNB Specialities LLP. III, Haute Street Building. 1st Floor, 86A, Topsia Road South. Kolkata- 700046 against the Ruling passed by the West Bengal Advance Ruling Authority vide Order No. ZD 1902230079958 (22/WBAAR/2022-23) dated 09.02.2023.

Present for the Appellant:	Mr. Rajarshi Dasgupta, Advocate
Present for the Respondent:	Mr Jishnu Das. Joint Commissioner of State Tax
Matter heard on:	18.07.2023
Date of Order:	31.07.2023

1. This Appeal has been filed by Karnani FNB Specialities LLP (hereinafter referred to as "the Appellant") on 26.04.2023 against Advance Ruling Order No. 22/WBAAR/2022-23 dated 09.02.2023. pronounced by the West Bengal Authority for Advance Ruling (hereinafter referred to as the 4 WBAAR').

2. The request of Condonation of delay in filing of appeal was accepted under provision of Section 100(2) of the West Bengal Goods and Services Tax Act, 2017/ Central Goods and Services Tax Act. 2017.

3. The appellant is engaged in business of providing restaurant service from their lounge bar called "The GRID" and is also providing catering services as well as banquet renting services from their banquet called "The Almond". The restaurant service is provided from the premises located at Haute Street Building. 86A, Topsia Road South, Kolkata while the banquet/catering services is being provided from the premise located at Bengal Eco Intelligent Park. EM-3. EM Block, Sector V, Bidhannagar, Kolkata. The appellant supplies various goods and services from the said premises and pays appropriate GST.

4. Along with such supplies or on a standalone basis, at times, the appellant is also engaged in selling/serving of alcoholic liquor for human consumption to its customers from GRID and no alcoholic liquor for human consumption is being sold or served at the banquet of the appellant.

5. The appellant procures various inputs and input services and pays GST at the time of procurement of such inputs and input services. While restaurant services attracts 5% GST with no ITC, banquet rentals from Almond attracts GST 47 18% with full ITC. Accordingly, the appellant only avails credit to the extent of inputs and input services procured for banquet (Almond) and no ITC is being availed in respect of procurement of any goods or services related to the restaurant (GRID). Therefore, the principal question that arises is whether the appellant is required to undertake reversal in terms of Rule 42 to the extent of the turnover that relates to sale of alcoholic liquor for human consumption.

Question sought before WBAAR:

6. The Appellant sought an advance ruling under section 97 of the West Bengal Goods and Services Tax Act, 2017/ the Central Goods and Services Tax Act, 2017, (hereinafter collectively referred to as "the GST Act") on the following question:

Whether or not the applicant is obliged to reverse ITC under Section 17(2) of the CGST Act read with Rule 42 of the CGST Rules, in view of the sale of alcoholic liquor for human consumption effected by it at its premises under the facts and circumstances of the case?

Observations and Findings of WBAAR:

7. WBAAR held that the activities of selling of alcoholic liquor for human consumption by the applicant qualifies as supply under the GST Act. The applicant contends that by virtue of Article 366 (12A), the scope of GST has been restricted, under the Constitution of India, to specifically exclude sale of alcoholic liquor for human consumption. WBAAR was unable to accept this proposition. Article 366(12A) of the Constitution as amended by 101 st Constitutional Amendment Act, 2016 defines the Goods and Services Tax (GST) as a Tax on supply of goods or services or both, except taxes on the supply of alcoholic liquor for human consumption'. It, therefore, stands to reason that the taxable event under the GST Act is supply i.e., goods and services tax is a tax which is levied on supply of goods or services or both. The specific exclusion delineates that tax shall not be levied on supply of alcoholic liquor for human consumption. Accordingly, section 9 of the GST Act which deals with 'Levy and collection' excludes levy of tax on the 'supply of alcoholic liquor for human consumption'.

8. WBAAR further observed that sale of alcoholic liquor for human consumption is a supply under the GST Act on which tax is not leviable. A supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act is defined as 'Non-taxable supply' in clause (78) of section 2 of the GST Act. Thus, sale of alcoholic liquor for human consumption shall be treated as non-taxable supply, as discussed. Further, 'exempt supply' as defined in clause (47) of section 2 of the GST Act includes non-taxable supply. A conjoint reading of section 2(47) and 2(78) thus denotes clearly that the aforesaid supply would also be treated as 'exempt supply' under the GST Act.

9. WBAAR finally took the issue of reversal of input tax credit in respect of which the applicant has made this application. Sub-section (2) of section 17 of the GST Act read with rule 42 of the GST Rules allows a registered person to utilize input tax credit to the extent of input tax paid on inputs and input services that are used for making taxable supplies including zero-rated supply. Credit of input tax attributable to 'exempt supplies' is to be reversed as per the prescribed formula. As WBAAR held that the activities of selling of alcoholic liquor for human consumption by the applicant would be treated as 'non-taxable supply' and therefore falls under the category of 'exempt supply' under the GST Act, the applicant is required to reverse input tax credit attributable to the exempt supply under sub-section (2) of section 17 of the GST Act read with rule 42 of the GST Rules.

Ruling of WBAAR:

10. In view of above, the WBAAR vide Order No. 22/WBAAR/2022-23 dated 09.02.2023 ruled that:

Under the facts & circumstances of the present case, the applicant is required to reverse input tax credit ('ITC') in terms of sub-section (2) of section 17 of the GST Act read with Rule 42 of the GST Rules for sale of alcoholic liquor for human consumption.

Submissions of the appellant and Grounds of Appeal:

11. The Appellant has filed the instant appeal against the above mentioned Advance Ruling dated 09.02.2023 with a prayer to set aside/modify the said order or pass any such further or other orders as may be deemed fit and proper in the facts and circumstances of the case on the following grounds.

12. The appellant has stated that WBAAR has erred in stating that alcoholic liquor for human consumption qualifies as goods under GST Law. The appellant mentioned that alcoholic liquor for human consumption is subject under Entry 51 of the State List. The Constitution only empowers the State Government to levy excise duty on alcoholic liquor for human consumption. It is to be noted that as a necessary corollary liquor does not form the subject matter of GST to be levied either by the State or the Central Government. It is pertinent to note that alcoholic liquor for human consumption has specifically been kept out of GST regime by inserting the definition of GST under Article 366(12A) of the Constitution of India which reads as "Goods and Service Tax means any tax on supply of goods, or services or both except tax on supply of alcoholic liquor for human consumption". Further, alcoholic liquor for human consumption does not find any reference in List I of the 7th Schedule which otherwise means that alcoholic liquor for human consumption is not goods under Union List and since, the levy of tax on alcohol for human consumption is governed by the State List as per Entry no. 54 of the Constitution of India, alcohol for human consumption cannot be termed as goods under Sec 2(52) of the GST Act irrespective of the fact that the definition of goods does not outrightly exclude alcohol for human consumption from its ambit for the simple reason that the latitude of Sec 2(52) of the GST Act cannot exceed the scope of the Constitution of India. Therefore, qualification of sale of alcohol to be a supply under the premise of GST does not arise.

13. Given this background, it is the appellant's humble submission that the latitude of Section 2(47) read with Section 2(78) of the GST Act cannot exceed the scope as put forth in the Preamble of the Act and the Constitution of India and therefore if sale of alcohol do not qualify as supply under GST, any revenue earned out of sale of alcohol cannot be termed to be either an exempt supply under section 2(47) of the GST Act or non-taxable supply under Section 2(78) of the GST Act.

14. The Appellant submits that Section 17 of the GST Act contemplates reversal of credit in certain situations viz "exempt supplies", and "supply for purposes other than business". In other words, when an assessee, for instance, makes an exempt supply, it is not allowed to utilize credit for making payment of its tax liability, rather it will have to reverse the credit which is akin to demand of tax liability. In a situation where supply of alcohol is treated as a non-taxable supply and thereby an 'exempt supply', the applicant will have to consequently reverse ITC. In effect, the applicant will be discharging GST liability on output supply of alcoholic liquor by way of reversal of ITC.

15. In this context, the Applicant relies upon the maxim Quando aliquid prohibetur fieri, prohibetur ex directo et per obliquum- The maxim denotes the settled position of law that whenever a thing is prohibited, it is prohibited, whether done directly or indirectly. As stated above, "tax on goods and services" has been defined to unequivocally exclude taxes on alcoholic liquor. Thus, when sale of alcoholic liquor cannot be brought to tax directly, it cannot even be brought to tax indirectly by way of reversal of ITC. Reliance in this regard is placed on the decision in the case

of Commissioner of Central Excise, Pondicherry v. Acer India Ltd., (2004) 8 SCC 173, wherein while holding that the value of software pre-loaded into computers cannot be included in the 'transaction value' of such goods for the purpose of levy of excise duty, in the absence of a valid levy tax thereon, the Hon'ble Supreme Court held as follows-^

"84. In other words, computers and softwares are different and distinct goods under the said Act having been classified differently and in that view of the matter, no central excise duty would be leviable upon determination of the value thereof by taking the total value of the computer and software. So far as, the valuation of goods in terms of 'transaction value' thereof, as defined in Section 4(3)(d) of the Act is concerned, suffice it to say that the said provision would be subject to the charging provisions contained in Section 3 of the Act as also Sub-Section (1) of Section 4. The expressions "by reason of sale" or "in connection with the sale" contained in the definition of 'transaction value' refer to such goods which is excisable to excise duty and not the one which is not so excisable. Section 3 of the Act being the charging section, the definition of 'transaction value' must be read in the text and context thereof and not de'hors the same. The legal text contained in Chapter 84, as explained in Chapter Note 6, clearly states that a software, even if contained in a hardware, does not lose its character as such. When an exemption has been granted from levy of any excise duty on software whether it is operating software or application software in terms of heading 85.24, no excise duty can be levied thereupon indirectly as it was impermissible to levy a tax indirectly. In that view of the matter the decision in PSI Data Systems (supra) must be held to have correctly been rendered. "~

16. The Hon'ble Supreme Court held that when software has already been granted an exemption, it was not open to the Department to levy tax on it by including it in the value of another excisable commodity i.e. what could not have been done directly could not be done indirectly either. It is therefore, submitted that the GST Act ought not to be interpreted in manner prejudicial to such settled position, where the applicant has to bear tax on such activity in an indirect manner where it is directly and expressly excluded from the scope of the statute.

17. Fundamentally, credit of taxes incurred on inputs must be denied where inputs have not been used for making taxable supply (i.e., on which output tax is not payable). This is on the basis that where no output tax is payable, there can ever be any cascading effect of taxes, with regard to the taxes incurred on the inputs which have been put to use for making the output supply, and accordingly, concept of input tax credit would be wholly not warranted. This would also include cases where the inputs on which credits are sought to be claimed have no nexus whatsoever with the output taxable supplies or these are used for non-business purposes.

18. In the present case, as set out in the facts of this application, none of the credit availed by the applicant pertains to purchase of alcoholic liquor for human consumption. To put it differently, the entire credit availed by the applicant pertains to those input goods and input services that have been used in making taxable supplies only.

19. Under these circumstances, if "exempted supply" is read to include sale of alcoholic liquor for human consumption, even though none of the credits availed by the applicant was on account of procurement of alcoholic liquor for human consumption, then that would (apart from being contrary to the legislative power of the Parliament) run contrary to the very objective of the legislation. This is on the basis that even where the credits have no nexus with the output supply of alcoholic liquor for human consumption and have nexus solely with the taxable goods and services supplied by the applicant, it is nonetheless being asked to reverse part of that credit.

Written submissions of the appellant:

20. The appellant has also given further written submission wherein apart from the submissions made in Appeal application, the following points have been submitted:-^

(a) With regard to common input services availed at the head office, the appellant in terms of Section 17 of the GST Act, 2017 read with Rule 42 of the GST Rules, 2017 consider the

turnover arising out of sale of alcoholic liquor for human consumption in the computation of "total turnover" of the state as well as in the computation of "exempted turnover" in spite of the fact that the turnover of liquor is in no ways linked to "Banquet Services" or "Banquet Leasing Services". This means that for the purpose of computing total turnover or exempt turnover in terms of Rule 42 of the GST Rules, 2017, the appellant included turnover arising out of sale of alcoholic liquor for human consumption, which in no ways was related to Banquet rental, in as much as no alcohol was billed out of the Banquet of the appellant.

(b) Therefore, the principal question that arises is whether the appellant is required to undertake reversal in terms of Rule 42 to the extent of the turnover that relates to sale of alcoholic liquor for human consumption.

(c) 3rd explanation provided under Rule 42(1) clearly excludes entry 51 and entry 54 of List II of the seventh schedule to the Constitution from aggregate value of exempt supplies and the total turnover

(d) In view of above, it is clearly the intent and philosophy of GST legislation to clearly exclude the same from the aggregate value of exempt supplies and the total turnover, and if this being so, the turnover arising out of sale of alcoholic liquor will also form a part of the same and hence be excluded.

(e) Further reference can be made to several legislations in India, which govern the levy of sales tax on alcohol and the term "goods" are defined under such Acts. It is thus clear that the legislative intent was nowhere to bring alcoholic liquor into the ambit of the statute and therefore the definition of 'goods' under section 2(52) of the GST Act, 2017, cannot include alcoholic liquor for human consumption when such items form a part of Entry 54, List II (State List). Thus, the contention of the Ld. Member in the Advance Ruling that alcoholic liquor constitutes "goods" under the GST Act, 2017 and hence, supply under section 7 of GST Act, 2017 is baseless and therefore, turnover arising out of sale of alcoholic liquor cannot be said to be part of total turnover while computing eligible under Rule 42 of the GST Rules, 2017,

(f) It is a settled principle of law that credit of taxes incurred on inputs must be denied where inputs have not been used for making taxable supply (i.e. on which output tax is not payable). This is on the basis that where no output tax is payable, there can ever be any cascading effect of taxes, with regard to taxes incurred on the inputs which have been put to use for making the output supply, and accordingly, concept of input tax credit would be wholly not warranted. This would also include cases where the inputs on which credits are sought to be claimed have no nexus whatsoever with the output taxable supplies or these are used for non-business purposes. In the present case, as set out in the facts of this application, none of the credit availed by the applicant pertains to purchase of alcoholic liquor for human consumption. To put it differently, the entire credit availed by the applicant, even the common credit pertains to those input goods and input services that have been used in making taxable supplies only.~

21. The submissions of concerned officer of Revenue are given as under:-^

a) The RTP has submitted that supply of liquor for human consumption is not supply of goods. In support of its claim the RTP has invoked Article 366(12A) which empowers parliament to levy tax on supply of goods and services excluding liquor for human consumption. So this article only provides power to levy tax. But Section 7(1) of GST Act, 2017 defines the term "supply" which includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in course of furtherance of business. It is clear that supply of liquor for human consumption is also supply as per definition given in section 7(1) of GST Act, 2017.

b) The next issue is whether it is non-taxable supply or not. The RTP has contended that the supply of liquor is not non-taxable supply as this is not at all to be considered as supply under GST Act invoking Article 366(12A) of Constitution of India where constitution excludes alcohol for

human consumption from the ambit of levying tax. But Section 2(78) of GST Act defines non-taxable supply as supply of any goods or services or both which is not leviable to tax under this Act or under the IGST Act. The definition given here is in consonance of Article 366(12A) which only empowers to levy tax. So definition of non-taxable supply as per Section 2(78) is completed and cannot be restricted and conditioned invoking Article 366(12A) of Constitution. So from the above discussion it is clear that supply of liquor is non-taxable supply.

c) Now we need to understand exempt supply. Section 2(47) of GST Act defines exempt supply as supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under Section 6 of IGST Act. and includes non-taxable supply. As supply of liquor is non-taxable supply it also comes under exempt supply. So it comes under the purview of reversal of ITC as per Section 17(2) of WBGST Act, 2017 when such supply is effected along with taxable supply.

d) The RTP has given some case reference like Superintendent and Remembrancer of Legal Affairs, West Bengal Vs Ors..(1975) 4 SCC 754. Popatlal Shah Vs State of Madras, 1953 SCR 677 to clear that the legislative intent was nowhere to bring alcoholic liquor into the ambit of statute and any reading of the provisions that permits it would only render the provision ultra vires the Constitution. Completely agreeing on this point it should be remembered that in order to understand the legislative intent we need to interpret it according to its true essence and purpose of the law without trying to restrict, condition it by referring other article/section in completely different perspective.

e) To sum up, ITC should be reversed since the RTP effects sale of alcoholic Liquor for human consumption in addition to supply of restaurant and outdoor catering services.~

Personal Hearing:

22. During the course of hearing held on 18.07.2023, the Appellant's authorised representative reiterated the points as stated in the Grounds of Appeal as well as the written submissions. The matter has been examined and written and oral submissions made before us are considered.

23. During the course of hearing, the Appellant's authorised representative mentioned that the appellant provides catering service at the banquet hall "The Almond" by their own restaurant "The Grid". It is further submitted the Appellant issues separate invoices for renting of banquet hall and catering services.

Discussions and findings:

24. During the course of Hearing, it came to the notice that the appellant is availing some common input tax credit (ITC) at Head office which is being used both for the supply of services provided at Banquet Hall as well as the services provided at their Restaurant from where alcoholic liquor for human consumption is supplied.

25. The explanation to Rule 42(1) of the GST Rules, 2017 is produced below:-^

"Explanation: For the purposes of this clause, it is hereby clarified that the aggregate value of exempt supplies and the total turnover shall exclude the amount of any duty or tax levied under entry 84 [and entry 92A] of List I of the Seventh Schedule to the Constitution and entry 51 and 54 of List II of the said Schedule."~

Entry 51 and 54 of List II of seventh schedule is reproduced below:

"Entry 51: Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:-^

(a) alcoholic liquors for human consumption

(b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in subparagraph (b) of this entry"~

"Entry 54: Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I. "

From the plain reading of the explanation to the Rule 42(1) of the GST Rules, 2017 as well as Entry 5 I and 54 of List II of seventh schedule, it is clear that for the purpose of computation of exempt turnover as well as total turnover, duties and taxes on alcoholic liquor for human consumption shall be excluded and not the whole value of sales of alcoholic liquor for human consumption.

26. The appellant has claimed that under several legislations in India the term "goods" has been defined for charging of taxes on alcoholic liquor, and so the definition of 'goods' under section 2 (52) of the GST Act, 2017, cannot include alcoholic liquor for human consumption. This claim of the appellant is not tenable. Defining "goods" in other Acts, does not bar defining the same in any other Acts including GST Act 2017. Clause 12A of Article 366 of the Constitution which was inserted vide Section 14 of the Constitution (101st Amendment) Act, 2016 also establishes alcoholic liquor for human consumption as goods even though that is in exclusion for the purpose of charging GST.

27. Section 14 of the Constitution (101st Amendment) Act, 2016 is reproduced below:-^

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;~

In the above definition of 'Goods and Services Tax", the exclusion is in agreement that alcoholic liquor for human consumption is goods and the taxable event is supply, though GST shall not be levied on it.

Therefore, it is established that alcoholic liquor for human consumption is "goods" even under virtue of the Constitution.

28. Accordingly, Section 9 of the GST Act, 2017 provides for levy of GST on intra-state supplies of goods and/or services except on the supply of the alcoholic liquor for human consumption. This provision is in consonance of Clause 12A of Article 366 of the Constitution.

29. Further, as per Section 49(4) of the GST Act, the amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or 1GST Act. So, the objective behind ITC is for making payment towards output tax. Therefore, ITC cannot be allowed for the supplies which are non-taxable. Hence, as alcoholic liquor for human consumption is non-taxable, ITC cannot be allowed for supply of the same.

30. In view of above discussions, we rule that the sale of alcoholic liquor for human consumption is a non-taxable supply under Section 2(78) of the GST Act, 2017 and subsequently is an exempt supply under Section 2(47) ibid. Therefore, the appellant is required to reverse input tax credit (ITC) in terms of sub-section (2) of section 17 ibid read with Rule 42 of the GST Rules, 2017 for sale of alcoholic liquor for human consumption.

31. The WBAAR Ruling No. 22/WBAAR/2022-23 dated 09.02.2023 is confirmed and the Appeal stands rejected.

-Sd/-

(Mr. Khalid Aizaz Anwar)
Member, West Bengal Appellate
Authority for Advance Ruling

-Sd/-

(Mr. Anil Kumar Gupta)
Member, West Bengal Appellate
Authority for Advance Ruling