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| GUJARAT AUTHORITY FOR ADVANCE RULING GOODS AND SERVICES TAX D/5, RAJYA KAR BHAVAN, ASHRAM ROAD, AHMEDABAD – 380 009. |  |
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ADVANCE RULING NO. GUJ/GAAR/R/46/2021

(IN APPLICATION NO. Advance Ruling/SGST&CGST/2021/AR/20)

Date: 27-08-2021

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| Name and address of the applicant | : | M/s. Airport Authority of India, A, Ahmedabad Airport, Cantonment Area, Shahibaug, Ahmedabad-380003 |
| GSTIN/ User Id of the applicant | : | 24AAACA6412D1ZE |
| Date of application | : | 15-6-21 |
| Clause(s) of Section 97(2) of CGST / GGST Act, 2017, under which the question(s) raised. | : | (a), (b), (c), (e) and (f) |
| Date of Personal Hearing | : | 27-7-21 and 12-8-21 |
| Present for the applicant | : | Shri Hem M Chhajed, CA |

Brief Facts:

1. M/s. Airport Authority of India (hereinafter referred to as AAI, for the sake of brevity) is an authority created under the Airport Authority of India Act, 1994 (hereinafter referred to as the AAI Act). The AAI Act was enacted to provide for the constitution of the AAI for the better administration and cohesive management of the airports. AAI has been created for the purpose of establishing or assisting in the establishment of airport and for the matters connected thereto.

2. As per Chapter III, Section 12(1), (2) of AAI Act, the functions of the AAI are :

(i) To manage the airports, the civil enclaves and the aeronautical communication stations efficiently;

(ii) To provide air traffic service and air transport service at any airport.

3. Further, AAI may undertake various activities specified in Section 12(3) of AAI Act, as required from time to time to achieve the above object such as:

(i) Plan, develop, construct and maintain runways, taxiways, aprons, terminals and ancillary building at the airports and civil enclaves;

(ii) Establish airports or assist in the establishment of private airports by rendering such technical, financial or other assistance which the Central Govt. may consider necessary for such purpose;

(iii) Plan, procure, install and maintain navigation aids, communication equipment, beacons and ground aids at the airports and at such location as may be considered necessary for safe and operation of aircrafts;

- (iv) Provide air safety services and search and rescue, facilities in co-ordination with other agencies;
- (v) Establish and maintain hotels, restaurants and restrooms at or near the airports;
- (vi) Arrange for postal, money exchange, insurance and telephone facilities for the use of passengers and other persons at the airports and civil enclaves;
- (vii) Regulate and control the plying of vehicles, and the entry and exit of passengers and visitors, in the airports and civil enclaves with due regard to the security and protocol functions of the Govt. of India.
- (ix) Develop and provide consultancy, construction or management services and undertake operations in India and abroad in relation to airports, air navigation service, ground aids and safety services or any facilities threat.
- (x) Establish and manage heliports and strips;
- (xi) Provide such transport facility as are, in the opinion of the Authority, necessary to the passengers travelling by air;
- (xii) Take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power or the discharge of any function conferred or imposed on it by AAI Act;
- (xiii) Perform any other function considered necessary or desirable by the Central Government for ensuring the safe and efficient operation of aircraft to, from and across the air space of India;
- (xiv) Establish training institutes and workshops;
- (xv) Any other activity at the airport and the civil enclaves in the best commercial interests of the Authority including cargo handling, setting up of joint ventures for the discharge of any functions assigned to the Authority.

4. Section 12 A of the AAI Act allows AAI, in the Public interest or in the interest of better management of airports, to make lease of the premises of an Airport (including building and structures thereon and appearing thereof) to carry out some of its functions under section 12 as the AAI may deem fit.

5. In the pursuance to Section 12A of AAI Act, the AAI has invited bids for undertaking the operation, management and development of certain airports of the AAI on a public private partnership basis to bring efficiency in service delivery, expertise, enterprise and professionalism and to harness necessary investment.

6. Single stage two envelop system through Central Public Procurement Portal was followed for selection of successful bidder for the Operation, Management and Development of Sardar Vallabhai Patel Airport for a lease period of 50 years ('Project'). Request for proposal (RFP) documents for the Airport was issued on 14-12-18. The Project would be implemented in accordance with the terms and conditions stated in the

RFP and Concession Agreement dated 14-2-20 entered into between the Authority and the Concessionaire (the selected bidder).

7. In 2019, Airports Authority of India conducted PPP (Public Private Partnership) bidding process in which M/s. Adani Enterprises Limited (the “Concessionaire”), an Ahmedabad-based business conglomerate had won the bid of the airport quoting highest bid among all.

8. The Concessionaire agrees to pay to AAI the following sum as consideration for transfer: -

- Rs. 2,71,00,00,000/- towards Estimated Deemed Initial Regulatory Asset Base (“RAB”) i.e. estimated depreciated value of Investments made by the Applicant in the Aeronautical Assets at the airport as on 31st March 2018.
- Rs. 6,41,00,000/- towards Estimated Initial Non-Aeronautical Investments i.e. estimated depreciated value of investments made by the applicant towards development of the Non-Aeronautical Assets at the Airport as on 31st March 2018.
- Actual amount incurred by AAI in respect of contracts relating to Work-in-Progress as on the Commercial operation Date (“COD”).
- Reimbursement of salaries incl. of other cost paid to employees of AAI having designation of Asst. General Manager and below during the Joint Management Period and deemed deputation period as per Clause 6.5.4 of the Concession Agreement. Subject to the select employee cost i.e. clause 6.5.4 of the concession agreement, the concessionaire shall pay the amount as indicated in invoice raised by applicant towards emoluments of the select employees.
- Monthly concession Fee during the concession period shall be paid to the applicant calculated as follows:
$$\text{(Per Passenger Fee for international Passengers * International Passenger Throughput for that month) + (Per Passenger Fee for Domestic Passengers * Domestic Passenger Throughput for that month)}$$
- Monthly Concession Fee as consideration for granting lease right of land, building and the immovable assets.

9. The Concessionaire has been awarded Letter of Award (“LOA”) for operation, management and development of the airport.

10. It has been agreed that in pursuance of the said LOA, the **concessionaire will be forming Special Purpose Vehicle company (hereinafter referred to as the SPV, for the sake of brevity)**. This SPV and the AAI will be entering into concessionaire agreement for operation, management and development of the airport which include civil, mechanical, electrical works, terminal buildings, cargo facilities, runway and all other project assets.

11. As per the Article 3 of the agreement, the SPV will be undertaking the operations, management and development of the airport for a period of 50 years subject to the compliance of various terms and conditions as set forth in the concessionaire agreement.

AAI will cease to operate, manage and develop the airport as per this agreement from a prescribed date.

12. It is important here to refer to the definition of the terms, Airport, Project and 'Project Assets' as defined in the agreement. The relevant definitions are as follows:

“Airport means Sardar Vallabhbhai Patel International Airport located at the Site, and includes civil, mechanical and electrical works, the Terminal Building, Cargo Facilities, Runway and all Project Assets necessary for and associated with operation and expansion of the Airport.”

“Project means the operations, management and development of the Airport in accordance with the provisions of this Agreement, and includes all works, services and equipment relating to or in respect of the Scope of the project.”

“Project Assets means all physical and other assets relating to or forming part of the Site including:

- a) rights over the Site in the form of lease, Right of way or otherwise;*
- b) the Aeronautical Assets and the Non-Aeronautical/ Assets;*
- c) tangible assets such as civil works and equipment including foundations, drainage works, electrical systems, communication systems and administrative offices;*
- d) Project Facilities situated on the Site;*
- e) buildings and immovable fixtures or structures forming part of City Side Development;*
- f) all rights of the Concessionaire under the Project Agreements;*
- g) financial assets, such as receivables, security deposits, all negotiable instruments etc.;*
- h) insurance proceeds; and*
- i) Applicable Permits and authorisations relating to or in respect of the Airport.”*

13. The applicant has submitted various relevant clauses of the agreement which throws light on the underlying transaction as under :

| <i>Reference in the agreement i.e. Clause No./ Article No.</i> | <i>Summary of the clause</i> |
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| <i>Recital A</i> | <i>The functions and powers of the AAI, under the AAI Act include the development, maintenance and management of the airports in India. In pursuance thereof, the AAI, having constructed the airport at Ahmedabad in the State of Gujarat, is operating it under and in accordance with the Act.</i> |
| <i>Recital B</i> | <i>The GOI has decided to invite bids for undertaking the operations, management and development of certain airports of the AAI on a public private partnership basis to bring efficiency in service delivery, expertise, enterprise and professionalism apart from harnessing necessary investments.</i> |

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| <p><i>Recital D</i></p> | <p><i>After evaluation of the bids received from the bidders and receipt of the security clearance from the Ministry of Home Affairs, GOI, the AAI accepted the Bid of one of the companies of the querist and issued its Letter of Award, requiring, to execute this Agreement within the time period prescribed, through a special purpose vehicle.</i></p> |
| <p><i>Recital E</i></p> | <p><i>Accordingly, the AAI and the SPV are entering into this Agreement for operations, management and development of the Airport through Public Private Partnership.</i></p> |
| <p><i>Article 2 Scope of Project</i></p> | <p><i>The scope of the Project shall mean and include, during the Concession Period (50 years), the operations, management and development of the Airport covering:</i></p> <ul style="list-style-type: none"> <i>a) design, development, financing, construction, up-gradation and expansion of the Airport;</i> <i>b) operations, maintenance and management of the Airport;</i> <i>c) development, operation and maintenance of City Side;</i> <i>d) Performance and fulfilment of other incidental matters.</i> |
| <p><i>Article 3 Grant of Concession</i></p> | <p><i>The concession under this agreement includes the exclusive right, lease and authority to operate, manage and develop the Airport for a period of 50 (fifty) years commencing from the COD which will oblige and entitle to the SPV for following:</i></p> <ul style="list-style-type: none"> <i>a) the Right of Way, access and lease to the Site for the purpose of and to the extent conferred by the provisions of this Agreement;</i> <i>b) finance the development and expansion of the Airport;</i> <i>c) Operate, maintain and manage the Airport and regulate the use thereof by third parties;</i> <i>d) demand, collect and appropriate Fee from Users liable for payment of Fee for using the Airport or any part thereof and refuse entry of any such User if the Fee due is not paid;</i> <i>e) perform and fulfil all of the SPV's obligations under and in accordance with this Agreement;</i> <i>f) save as otherwise expressly provided in this Agreement, bear and pay all costs, expenses, Taxes and charges in connection with or incidental to the performance of the obligations of the SPV under this Agreement; and</i> <i>g) neither assign, transfer or create any lien or encumbrance on this Agreement, or the Concession hereby granted or on the whole or any part of the Airport nor transfer, or part possession thereof, save and except as expressly permitted by this Agreement or the Substitution Agreement.</i> <p><i>In addition, SPV shall undertake development, finance, operation and maintenance of real estate at the Site specified in Schedule A, in accordance with Schedule B and Schedule C, and to use such development for commercial purposes in accordance with terms specified with the right to sub-lease and/ or sub-license any or all parts thereof by way of Project Agreements.</i></p> |
| <p><i>Article 4 Conditions Precedent`</i></p> | <p><i>Various conditions for both the parties viz. the AAI and the SPV which are to be complied/ fulfilled before transfer.</i></p> <p><i>Further, there is provision with respect to payment of damages in case of delay in compliance of the above conditions and provision for termination in case of delay of more than prescribed time limit.</i></p> <p><i>Some of the important conditions on part of the AAI are as under:</i></p> <ul style="list-style-type: none"> <i>a) procurement of the Right of Way to the Site for the</i> |

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| | <p>SPV;</p> <p>b) novation Existing Contracts in favour of the SPV;</p> <p>c) grant to the SPV, by means of a power of attorney, to act for and behalf of the AAI as its agent in respect of such of the Existing Contracts which cannot be novated in favour of the SPV for any reason.</p> <p>Some of the important conditions on part of the SPV are as under:</p> <p>a) to provide Performance Security to the AAI in accordance with Clause 9.1 of the agreement;</p> <p>b) procure all the Applicable Permits as may be required for the commencement of the Project;</p> <p>c) maintained shareholding of the SPV in accordance with the requirements of the RFP and this Agreement.</p> |
| Article 5. Obligations of the SPV | Various obligations are prescribed for the SPV to ensure operations, management and development of the Airport including the compliance with all the regulatory requirements including permit from DGCA. |
| Article 6. Obligations of the AAI | Various obligations are prescribed for the AAI which include assistance to the SPV to perform functions in accordance with the present agreement. Also, SPV shall be liable to pay the AAI such amounts as on COD in respect of the contract relating to work in progress. |
| Article 7 Representation and warranties | Representation by the parties to contract that they are capable to enter into this contract and perform the functions under the contract. |
| Article 9 Performance security | SPV undertakes to perform certain functions under this agreement and to ensure these performances, SPV must provide performance security of Rs. 130 Crores. Further, there are provisions of appropriation of the said security in case of non-fulfilment of obligations prescribed and release of performance security on fulfilment of underlying conditions under the contract. |
| Article 10 Right of way | The AAI undertakes to grant of way to the SPV for carrying out survey, investigation etc. It further undertakes to grant lease of the land on payment of monthly concession fees. |
| Article 12 Development and expansion of airport | Certain obligations on part of the SPV are prescribed for development and expansion of the airport. This include development of the airport as per master plan, drawings etc. and in accordance with the specifications and standards. |
| Article 13 Monitoring Construction of | AAI can monitor the construction work undertaken pursuant to this agreement. |
| Article 15 Entry into Commercial service | The commercial operation date ('COD') of this concession shall be the date on which conditions precedent have been satisfied and the SPV shall be entitled to commence the operation and management of the airport. Further, there is prescribed time limit to achieve COD and there is provision for termination due to delay. |
| Article 16 Transitional arrangements | All revenues, receipts, expenditure and other financial transactions for and in respect of the Airport shall be deemed to be transferred from the AAI to the SPV with effect from COD and all rights, obligations and liabilities in respect thereof shall vest exclusively in the SPV from the Transfer Date. All liabilities incurred by the AAI prior to COD, including any debt obligations and payments to the AAI or any third party, shall continue to vest in the AAI at all times. Further, it provides that the SPV shall be deemed to have assumed control over all Aeronautical Assets and Terminal Building on the COD. Certain obligations are also provided for smooth transition of the operations of the airport and to meet the regulatory |

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| | requirements. |
| Article 17 Change of scope | Any change of scope is permitted subject to the prescribed procedure and approval for providing safer and improved services to the user. |
| Article 18 Operation, maintenance And management | During the concession period, SPV shall operate and maintain the airport in accordance with this agreement, applicable laws and applicable permits. |
| Article 19 O&M Services | Prescribes services which shall be provided by the SPV to ensure proper operation and management of the airport. |
| Article 20 Reserved services | SPV agrees that only designated Gol agencies can undertake certain prescribed services like security services, customs control etc. |
| Article 22 Traffic regulation and census | The SPV shall regulate vehicular traffic, evolve system thereof. The SPV shall also collect the data relating to airside and landside passengers. Further, it shall install, operate and maintain computer system for efficient transparent management of traffic. |
| Article 23 Key performance indicators | The SPV shall operate the airport such that it achieves or exceeds the specified key performance indicators and service quality indicators. However, this article does not apply to city side development. |
| Article 24 Independent Engineer | Appointment of independent engineer for performance of duties and functions as set forth in schedule L of the agreement. These duties and functions include: review of design and drawings, review, inspection and monitoring of Construction work; reviewing and witnessing the Tests on completion of construction review, inspection and monitoring of O&M; determining, as required under the Agreement, the period or any extension thereof, for performing any duty or obligation; assisting the Parties in resolution of Disputes as set forth in Paragraph 8. The independent engineer shall submit regular periodic reports to the AAI along with the SPV. |
| Article 25 City side development | The SPV shall be entitled to undertake City Side Development on the land specified in Schedule A, subject to the conditions stipulated in Schedule B and Schedule C and to exploit such development for commercial purposes with the right to sub-lease any or all parts thereof by means of an agreement,(s), which agreement(s) shall be identified as a Project Agreement, irrespective of its value and notwithstanding anything contrary contained herein. |
| Article 26 Financial Close | Financial close means readiness of senior lenders to disburse funds under the financing agreements. It has been provided that within prescribed time limit, the SPV shall obtain financial close and there is termination provision in case of failure to obtain financial close. |

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| <p>Article 27 Concession fee</p> | <p>Monthly concession fee computed basis certain formula shall be payable by the SPV to the AAI. However, the monthly concession fee shall not be included as a part of costs for provision of aeronautical services. Further, in case of fall in prescribed passenger traffic, contract can be terminated by the SPV and upon such termination, the AAI shall be liable to pay to the SPV an amount equal to 70% of termination payment. It has been further agreed that the AAI shall not commission a new airport within a 50km radius of the airport prior to expiry of 10 years from COD.</p> |
| <p>Article 28 Fees</p> | <p>On and from COD and till the Transfer Date, the SPV has the sole and exclusive right to demand, collect and appropriate Fees from the Users for the provision of the Aeronautical Services and Non-Aeronautical Services, including the airlines and passengers, in accordance with the provisions of the Regulatory Framework. It also provides that the SPV acknowledges and agrees that any user, who is not liable for payment of Fee shall be entitled to use the Airport, without any restrictions except to the extent specified. Further, the SPV shall pay the AAI, the amount equal to the estimated depreciated investment made by the AAI in the aeronautical assets as well as in non-aeronautical assets.</p> |
| <p>Article 30 Insurance</p> | <p>The SPV shall obtain proper insurance for various contingencies and comply with the conditions prescribed for insurance policies.</p> |
| <p>Article 34 Suspension of SPV's rights</p> | <p>Upon occurrence of the SPV's default, the AAI shall be entitled to suspend rights of the SPV under this agreement and the AAI can act on behalf of the SPV.</p> |
| <p>Article 35 Termination</p> | <p>Various contingencies leading to termination for the SPV's default or for the AAI'S default are agreed. Termination payment in case of termination on account of default of either parties or termination on account of expiry of concession period is also provided.</p> |
| <p>Article 43 Redressal of public grievances</p> | <p>The SPV shall maintain public relation office at the airport where complaint register shall also be kept. The SPV shall inspect the complaint register and take prompt and reasonable action for redressal.</p> |

14. Further, AAI has submitted as follows:

(i) In the present case it can be said that by this transaction, the business of operation, management and development of the airport which is getting carried out by the applicant will be undertaken by the Concessionaire. Thus, in common parlance it can be said that present transaction amount to transfer of business from the applicant to the Concessionaire.

(ii) It is clear that GST is leviable on supply of goods or services. Thus, it is imperative to analyse whether the transfer of business qualifies as 'supply'. The term 'supply' has been defined in section 7 of CGST Act. Section 7 of the Act is reproduced hereunder:

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, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation.—For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;]

(b) import of services for a consideration whether or not in the course or furtherance of business; [and]

*(c) the activities specified in Schedule I, made or agreed to be made without a consideration [***]*

*(d) [***]*

(1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either 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 40[sub-sections (1), (1A) 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.

(iii) On reading the above definition it is clear that the transaction will constitute supply only when the following conditions are satisfied:

- a. Supply should be of goods or services*
- b. Supply should be made for a consideration*
- c. Supply should be made in the course of furtherance of business*

GST is leviable on supply of goods as well as supply of services. Hence, for levy to sustain, it is important to analyse whether underlying transaction in the present case amounts to supply of goods or services.

In terms of Sec. 2(52) of CGST Act, “*goods means 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*”

Therefore, to be called as goods, it has to be movable property. **As business cannot be said to be movable, transfer of business cannot be said to be a transfer of goods.**

Now the next question arises is whether the transfer of business will come under the purview of definition of services.

Section 2 (102) of the CGST Act defines ‘services’ as:

“ *‘services’ means 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.*”

As per the definition of services, anything other than goods is called a service. Therefore the above transaction of transfer of business will be supply of services.

(iv) It is worth noting that Section 7(1A) of the CGST Act provides a reference to Schedule II of the CGST Act which provides for the classification of the underlying transaction/activity i.e. whether it qualifies as goods or services. However Schedule II is silent on the transaction undertaken by the applicant.

However in Sr. No. 2 of the Notification No.12/2017 - Central Tax Rate dated June 28, 2017, provides exemption which is as under:

| Sr No | Chapter, Section, Heading, Group or Service Code (Tariff) | Description of Services | Rate (per cent) | Condition |
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| 2 | Chapter 99 | <i>Services by way of transfer of a going concern, as a whole or an independent part thereof.</i> | Nil | Nil |

From the above it is clear that any transfer on a going concern is supply of service and exempted from levy of tax.

Alternatively, it can be said that the transfer of business as a going concern as a whole or independent part thereof is considered as service. However, the same has been specifically exempted from the levy of GST via above mentioned notification.

At this juncture, it is imperative to analyze whether the transaction in the given context qualifies for the exemption. The exemption essentially lays down the following conditions:

- (i) Service by way of transfer;
- (ii) The 'transfer' should be of the going concern;
- (iii) Such transfer must be as a whole or an independent part thereof

It becomes imperative to understand the meaning of word '**transfer**' in the above exemption entry. In general connotation transfer can be permanent as well as temporary.

Union of India vs Dr. Maqsood Ahmed [AIR 1963 Bom110, 114], wherein, the Court has held that,

"the word 'transfer' is a larger word and the word 'sale' is a specific word. A transfer may be by means of a lease, mortgage or sale or in any other mode."

(v) It would be worthwhile to note that whilst the definition of supply includes sale but the exemption notification does not refer to sale of going concern to be exempted. It uses the word 'transfer'. Given that there is no definition of 'transfer', two views are possible. The first view is that it could mean an outright sale. The second view could be that it may not necessarily mean outright sale because if the intention of the legislature was to exempt sale of going concern, it could have used the term sale. However, it has used the word transfer of going concern to be an exempt transaction.

(vi) In the present case, there is transfer of business of operating, managing and developing of the airport for a period of 50 years as per clause 3.1.1 of the concession agreement. The rights of the concessionaire shall lapse after the said period and will be transferred back to the applicant as mentioned in clause 36.1 of the agreement. Hence, it can be said that there is temporary transfer of business.

(vii) However, in exemption entry 2 of the Notification No.12/2017 -Central Tax (Rate) dated 28 June 2017, there is no specific mention to cover only permanent transfer. Hence, it can be concluded that even temporary transfers are covered in the said entry.

(viii) It is settled law that the words shall be interpreted with its literal meaning. Certain clauses i.e. 16.1,16.1.2, 16.2 and 16.3 in the agreement reflects that there is transfer of assets, liabilities, rights etc. Further, general meaning of the word 'transfer' as well as its definition in various Acts suggests that it is not restricted to permanent transfer. The various definitions of the term transfer are summarized below for ready reference:

Arms Act, 1959

Section 2(1Xk)

Transfer with its grammatical variations and cognate expressions, includes letting on hire, lending, giving and parting with possession.

Foreign Exchange Management Act 1999

Section 2(za)

Transfer includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

Prevention of Money Laundering Act, 2003

Section 2(za)

Transfer includes sale, purchase, mortgage, pledge, gift, loan or any other forms of transfer of right, title, possession or lien.

Corous Juris Secundum , 6th Edition as cited in 20th Century Finance Corporation Ltd (2000) 6 SCC 12

Common use of the word transfer is, to denote the passing of title in property or an interest therein from one person to another and in that sense the term means that the owner of the property delivers it to another person with the intent of passing the rights which he had in it to the latter.

- a. Rashtriya Ispat Nigam Ltd. vs Commercial Tax Officer, Company Circle, Visakhapatnam [(1990) 77 STC 182(AP)] – Andhra Pradesh High Court

“The essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. While construing the word “transfer” due regard must be had to the thing to be transferred.”

This ruling was confirmed by Supreme Court [Refer State of Andhra Pradesh & Anr. vs M/s. Rashtriya Ispat Nigam Ltd. (Appeal (civil) 31 of 1991)]

- b. Bharat Sanchar Nigam Ltd. vs UOI [2006] 3 STT 245(SC)

“While dealing as to what constitute a transaction for the transfer of the right to use the goods the Supreme Court laid down certain attributes which must be present in a transaction. One of the attributes was that for the period during which the transferee has such legal right, it has to be the exclusion to the transferor - this is the necessary concomitant of the plain language of the statute - viz. a “transfer of the right to use” and not merely a licence to use the goods.”

- c. Indus Towers Ltd. vs Deputy Commissioner of Commercial Taxes, Enforcement 1, Bangalore and Others [[2012] 56 VST 369 (Kar)]

“In the context of transfer of right to use goods, the High Court held that what is important is that the legal right transferred to use the goods in favour of a person should not get affected during the period of contract by permitting another person for similar use.”

From the above, it can be inferred that the transfer in entry 2 of exemption Notification includes temporary transfers also.

(ix) Now the second question arises is whether the above transfer is a going concern or not. “Going Concern” is not defined under CGST Act. However going concern is an accounting principle which indicates that business would continue, and management is not intending to liquidate or stop business for near future.

(x) As per Accounting Standard 1, issued by the Institute of Chartered Accountants of India, the enterprise is normally viewed as a Going Concern, that is, as continuing in operation for the foreseeable future.

In terms of financial transaction ‘going concern’ has the meaning that at the point in time to which the description applies, the business is live or operating and has all parts and features necessary to keep it in operation.

Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business. Such transfer of business as a whole will comprise comprehensive transfer of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc.

It implies that the business will continue in the new hands with regularity and a nature of permanency.

In the present case, the above test is satisfied because, even after transfer, concessionaire will be in position to manage, operate airport and undertake the functions as were undertaken by applicant. Moreover, there will not be any interruption in the operations of the airport on account of the underlying transaction.

(xi) Now the third question arises is whether the transfer is a whole or an independent part thereof. In the present case the applicant is not transferring the entire business, however the applicant is transferring its independent unit i.e. Sardar Vallabhbhai Patel International airport. Hence, it becomes necessary to determine whether operation of the airport can be said to be independent part of a going concern of the AAI.

(xii) The Ahmedabad airport of the applicant is the independent part of the applicant. However, rights to operate, manage and maintain the airport will be transferred.

The word 'independent' in common parlance denotes the stand alone or capable of being functional individually.

The concept of business is changing, and new age business undertaking may contain various different businesses and a single business out of the entire business undertaking may contain different units. In such scenario, even transfer of a unit can be said to be transfer of independent part of business

In the present case, we understand that the Airport is capable of operating as an independent unit. The operation of the airport can generate revenue.

Hence, it can be said that the airport is an independent part of a going concern of the applicant.

(xiii) The applicant relies on following pronouncements:

The Karnataka Authority for Advance Ruling in case of M/s Rajashri Foods Pvt. Ltd. (Karnataka AAR), held that,

“the activity of transfer of a going concern constitutes a supply of service. The ruling further held that the transaction of transfer of one of the units of the Applicant as a going concern is covered under Sr. No.2 of the Notification No.12/2017 Central Tax (Rate) dated June 28, subject to the condition that the unit is a going concern”

The authority further analysed the concept of going concern as under:

“9. A going concern is a concept of accounting and applies to the business of the company as a whole. Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business. Such transfer of business as a whole will comprise comprehensive transfer of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc. In the instant case, the Applicant has not furnished any documentary evidence to establish that the Applicant is a going concern except their admission that its an ongoing business and the transaction proposes to transfer all the assets

and liabilities to the new owner. It implies that the business will continue in the new hands with regularity and a nature of permanency."

In another advance ruling decision rendered in case of M/s. Innovative textiles ltd (Uttarakhand AAR), internationally accepted guidelines were discussed [issued by His Majesty's Revenue & Customs (HRMC)] to treat the transfer of business as a going concern as under:

- *The assets must be sold as part of a 'business' as a 'Going concern'.*
- *The purchaser intends to use the assets to carry on the same kind of business as the seller*
- *Where only part of a business is sold it must be capable of separate operation*
- *There must not be a series of immediately consecutive transfers.*

(xiv) Article 3.1.1 of the draft concession agreement provides that the Company would be given a right to carry on the airport business for a period of 50 years. On completion of the tenure of the concession period, the assets and liabilities would revert back to AAI. This would also happen on premature termination due to breach of concession agreement. Thus, it is the intention of the contract that the business so transferred is intended to be carried on with regularity and with the nature of permanency during the concession period.

(xv) Attention at this stage is also invited to the international jurisprudence in this regard.

- a. *Hon'ble Constitutional Court of South Africa in the case of Aviation Union of South Africa and Another Vs. South African Airways (Pty) Ltd and Others MANU/SACC/0030/2011, while interpreting the provision o, Section 197 of Labour Relations Act, it was held that transfer of o perations of airport from first person to second and subsequently from second person to first amounts to transfer of business by one person to another as a going concern.*
- b. *In case of Robinson Family Limited vs. the Commissioners for Her Majesty's Revenue and Customs (20121 UKFTT 360 GC), Hon'ble United Kingdom First Tier Tribunal has held that transfer of property by way of lease for the letting business amounts to transfer of a going concern.*

(xvi) Therefore the applicant submits that a view can be taken that the transaction amounts to services by way of transfer of a going concern, as a whole or an independent part thereof which is covered in the entry 2 of the exemption Notification No. 1212017-Central Tax (Rate) dated 28 June 2017.

(xvii) As per the concessionaire agreement, apart from a lump sum consideration, monthly concession charges would also be paid by the Company to AAI. Thus it can regarded that the entire arrangement as one and covered within the meaning of transfer of going concern and thus exempted.

(xviii) Monthly/ annual concession fees paid by the concessionaire to the Applicant consideration for granting lease right of land, building and the immovable assets.

(xix) The applicant submits that the lease is for a long term lease i.e. 50 years.

(xx) Applicant would like to draw attention to Schedule III wherein activities or transactions which shall be treated neither as a supply of goods nor supply of services.

“Sale of land and subject to clause (b) of paragraph 5 of schedule II, sale of building”

Hence sale of land is neither a supply of goods nor service and hence not covered under the ambit of GST.

(xxi) Land though explicitly not defined in the CGST Act, 2017 viz-a-viz SGST Act, 2017 reference could be drawn from various other statutes as under:

“Section 3(a) of Land Acquisition Act, 1894

The expression ‘land’ includes benefits that arise out of land and things attached to earth or permanently fastened to anything attached to the earth”

“Section 3(4) of Bombay Land Revenue Code, 1879

‘land’ includes benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth and also shares in or charges on the revenue or rent of village or other defined portions of territory”

Section 3(26) of General Clause Act, 1897

‘Immovable property’ shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth”

(xxii) The assessee would also like to draw the attention to term “Sale” as defined under the Immovable Property Act, 1981:

Section 54 of Transfer of Property Act, 1882 defines the term “Sale” as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Supreme Court in the case of **Kaliaperumal vs Rajagopal and anr (AIR 2009 SC 2122)** has observed that ‘Sale’ is defined as a transfer of ownership for a price. In a sale there is an absolute transfer of all rights in the properties sold. No rights are left with the transferor.

Hon’ble Bombay High Court in the case of **Provident investment Co. Ltd vs Commissioner of income tax - AIR 1954 Bom 95** observed that a sale or transfer presupposes the existence of the property which is sold or transferred. It presupposes the transfer from one person to another of the right in the property.

(xxiii) Attention is drawn to the Entry 49 of the List II of Seventh Schedule of the Constitution of India, which empowers only the state government to levy any tax on land which is produced hereunder:

“49. Taxes on Land and Buildings”

(xxiv) Applicant is of the view that a long term lease for a period exceeding 30 years tantamount to Sale of the immovable property since the lessor is deprived of the right to use, enjoy and possess the property once the said lease has been granted.

(xxv) Further attention is also drawn to Article 30 of the Gujarat Stamp Duty Act wherein the aforesaid transaction is treated as conveyance.

(xxvi) The applicant draws attention to the decision of the Hon'ble Bombay High Court in the case of Navi Mumbai Builder's Association v. Union of India, 53 GSTR 374, which is held as follows:

“On a plain reading of the GST Act, the argument of the assessee is not agreeable. The assessee also relies upon Schedule II, which is referable to section 7. These are the activities to be treated as supply of goods or services. The substantive provision section 7 in clearest terms says that the activities specified in Schedule I made or agreed to be made without a consideration and the activities to be treated as supply of goods or supply of services referred to in Schedule II would be included in the expression 'supply'. However, clause (a) of sub-section (1) of section 7 includes 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. The definitions are referred to simply to reinforce the conclusion that the CIDCO is a person and in the course or in furtherance of its business, it disposes of lands by leasing them out for a consideration styled as one-time premium. Therefore, if one refers to Schedule II, section 7, then, Item No. 2 styled as land and building and any lease, tenancy, licence to occupy land is a supply of service. Any lease or letting out of a building, including commercial, industrial or residential complex for business, either wholly or partly is a supply of service. It is settled law that such provisions in a taxing statute would have to be read together and harmoniously in order to understand the nature of the levy, the object and purpose of its imposition. No activity of the nature mentioned in the inclusive provision can thus be left out of the net of the tax. Once this law, in terms of the substantive provisions and the Schedule, treats the activity as supply of goods or supply of services, particularly in relation to land and building and includes a lease, then, the consideration therefor as a premium/one-time premium is a measure on which the tax is levied, assessed and recovered. Then probe into the legislation any further cannot be done. [Para 14]

One is concerned here with the GST Act and the tax on supply of goods and services. It is not disputed that the position of the CIDCO for the purpose of orderly planning and development will be of no assistance in the sense while developing a new township, the objective of the planning authority is not to earn money, but to develop the area so that the purpose of setting up a township is achieved by more people wanting to live in the area in lieu of the various amenities provided in the area. The CIDCO is one such authority. It is entirely for the legislature, therefore, to exercise the powers conferred by sub-section (2) of section 7 of the GST Act and issue the requisite notification. Absent that notification, merely going by the status of the CIDCO, it cannot be held that the lease premium would not attract or invite the liability to pay tax in terms of the GST Act.”

(xxvii) The applicant submits that if the monthly/ annual fees are considered to be consideration for transfer of business over and above the initial/ upfront payments then

the exemption shall be available and thus Navi Mumbai Builder's Association v. Union of India is distinguishable.

(xxviii) The applicant submits that it receives reimbursement of property tax, water tax, electricity etc. payable from the concessionaire. The applicant submits that the said reimbursements are in nature of pure agents and thus cannot be treated as supply under section 7 of the CGST Act.

(xxix) The applicant also raises invoice for emoluments of various employees of AAI engaged by the concessionaire i.e. "Adani Group". The applicant submits that the said invoice is raised to covered the emoluments of the Government employees transferred under the agreement.

(xxx) The applicant submits that the said employees were transferred along with the business. Hence if the transfer of business is treated as transfer as going concern as just exempted vide Entry No. 2 of the exemption notification No 12/2017 – Central Tax (Rate), then the said transaction also be covered by the same.

(xxxi) For transfer of spares and consumables on need basis by the Applicant to the concessionaire, the applicant states that it is supply under section 7 and taxable at applicable rate.

15. AAI has submitted further submissions;

(i) In the present case as explained above it can be said that by the underlying transaction business of operation, management and development of the airport which is getting carried out by the applicant will be undertaken by the Concessionaire. Thus, in common parlance it can be said that present transaction amount to transfer of business from the applicant to the Concessionaire.

(ii) One of the considerations which concessionaire is liable to bear is for the Authority's Employees.

According to clause 6.5.4 of the concession agreement the concessionaire shall bear the Select Employees Cost for Joint Management period and Deemed Deputation period.

The concessionaire shall pay on monthly basis the amount as indicated in the invoice raised by the applicant on the concessionaire with regard to the emoluments payable to the Select Employees.

Applicant reproduces herewith the relevant definition for better understanding of clause 6.5

(i) Select Employees Cost shall mean those employees of the Authority as set forth in Schedule S (of the rank of assistant general manager and below) who are posted at the Airport by the authority and shall be deployed at the Airport for the duration of the Joint Management period and Deemed Deputation period

(ii) Joint Management Period shall mean the period commencing from the COD and ending on the date which is 1(one) calendar year after the COD

(iii) Deemed Deputation Period shall mean the period commencing from the expiry of the Joint Management period and ending on the date which is 2 (two) calendar years therefrom

(iii) The deficit employees cost, if any, as raised upon by the concessionaire on the applicant is “pass through” i.e. only the liabilities payable by the applicant will be recovered from the concessionaire and are not in nature of any damages recovered.

(iv) Further the “select employees” had the option to choose whether to join the concessionaire or not. However the applicant was contractually obligated to pay the salaries and other emoluments to the select employees hired for the purpose of the operations of Ahmedabad airport.

(v) The applicant has merely passed over its liability arisen out of the employment contracts of the “select employees” to the concessionaire. And thus this cannot be considered as any damages levied upon the concessionaire.

(vi) The Ld. Bench had inquired whether the contracts have been novated and whether the concessionaire has taken insurance. As per the communication received from the concessionaire all the contracts have been novated, aero dome license has been issued and requisite insurance has been taken.

(vii) The Ld. Bench had inquired whether the concessionaire has paid any fee/consideration during the inception period. As per concession agreement, the inception period refers to the period commencing from the date execution of concession agreement and expiring upon occurrence of Commercial Operation Date. Applicant submits that during the inception period the concessionaire is not required to pay any fee to applicant.

(viii) The Ld. Bench has inquired that for how many years the applicant has obtained the airport land on lease form government. Applicant submits that the land for the airport has been acquired and transferred to applicant either free of cost or cost sharing basis by State Governments. Therefore, the ownership of the land is in the name of applicant which has been leased out to the Concessionaire, as per the terms of the agreement.

(ix) The Ld. Bench had further asked to clarify in regards to lease viz-a-viz Going Concern. The applicant submits that the transaction is nothing but a financial lease which is akin to transfer. The period of O&M is for fifty years. The concessionaire is transferred with the risk and rewards of the said asset for the estimated life of the assets. Finance lease as defined by AS 19 issued by the Institute of Chartered Accountants of India is as under:

“finance lease is a lease that transfers substantially all the risks and rewards incident to ownership of an asset.”

(x) The applicant submits that though the assets are transferred for a period of 50 years which is for a substantial foreseeable future, there is no doubt that the SVP or the concessionaire can run the business as going concern

Questions on which Advance Ruling is sought:

1. Whether the transfer of business by the AAI to the M/s. Adani Ahmedabad International Airport Limited be treated as Supply u/s. 7 of the Central Goods and Service Tax Act, 2017 (“CGST”) viz-a-viz Gujarat State Goods and Service Tax Act, 2017 (“GSGST”)?
2. Whether the transfer of business by AAI to M/s. Adani Ahmedabad International Airport Limited is treated as supply as going concern and covered in clause 4 of schedule II of CGST Act viz-a-viz GSGST?

3. Whether the transfer of business by AAI to M/s. Adani Ahmedabad International Airport Limited is covered under the Entry No. 2 of the exemption notification No 12/2017 – Central Tax (Rate) dated 28-06-2017 issued u/s Section 11 of CGST Act 2017?
4. If the answer is negative, then whether GST is leviable on the transfer of Existing assets (“RAB”), Aeronautical Assets, non-aeronautical assets and Capital work in progress by AAI to the M/s. Adani Ahmedabad International Airport Limited?
5. Whether the aforesaid transfer of asset be treated as services and the classification for the same?
6. Whether the concession fees paid by M/s. Adani Ahmedabad International Airport Limited to AAI be treated as consideration for transfer of business?
7. Whether GST is applicable on Monthly/Annual concession fees charged by the AAI on the M/s. Adani Ahmedabad International Airport Limited?
8. Whether GST is leviable on the invoice raised by AAI for reimbursement of the salary/ staff cost on M/s. Adani Ahmedabad International Airport Limited? If yes at what rate?
9. Whether GST is applicable on the reimbursement claimed of Municipal tax, Property Tax and Water Charges by the AAI from M/s. Adani Ahmedabad International Airport Limited? If yes at what rate?
10. Whether GST is applicable on transfer of spares and consumables for consideration by the AAI to M/s. Adani Ahmedabad International Airport Limited? If yes at what rate?

Personal Hearing

16. Personal Hearing was granted on 27-7-2021. However, AAI requested for adjournment.

17. Further, another Personal Hearing was granted on 12-8-21 Shri Hem M Chhajed, CA appeared for hearing (Video Conferencing) on 12-8-21 and reiterated the contents of the application. To specific enquiry with respect to Question 10, he was asked to submit the list of consumables and spares on which AAI seeks to know the GST rate. Shri Chhajed requested to withdraw this Question 10 with respect to Tax rate, as he was not in a position to submit the list of consumables and spares, for this activity is a proposed activity outside the gamut of the subject contract.

Revenue’s Submission:

18. We note that the Revenue has neither appeared for the Personal Hearing granted on both the dates 27-7-21 and 12-8-21 nor submitted its comments on the issue at hand.

FINDINGS

19. At the outset we would like to make it clear that the provisions of CGST Act and GGST Act are in pari materia and have the same provisions in like matter and differ from each other only on a few specific provisions. Therefore, unless a mention is particularly made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the GGST Act.

20. We have carefully studied the subject Agreement entered between AAI and SPV and considered all the submissions made by AAI.

21. Prior to proceeding into our discussion and findings, we take it on record that Shri Chajed, during Personal Hearing submitted that due to the Contract entered between AAI and SPV, the GST paid by AAI prior to the contract, in the course of running the business of Airport, will now, in pursuance to the said contract, be paid by SPV instead of AAI and that the subject Questions for Advance Ruling is limited to the GST liability with respect to the Business Arrangement entered between AAI and SPV vide Contract dated 14-2-20.

22. We find that the subject issue hinges on whether said business arrangement between AAI and SPV is a transfer of going concern or otherwise. Therefore, firstly, we proceed to examine if subject business arrangement entered vide subject Contract dated 14-2-20 is Transfer of Going concern or otherwise. We gather from Accounting Standard-I issued by ICAI that a fundamental accounting assumption is that of 'Going Concern' according to which "*the enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations*". We hold that transfer of a going concern means transfer of a running business which is capable of being carried on by the transferee as an independent business in continuity without any hindrance for a foreseeable period. Such transfer of business will comprise transfer of assets for running the business. Such transfer as going concern may involve transfer of employees as requisite to carry on the business without interruption. In effect, it implies that the business will continue in the new hands with regularity and a nature of permanency.

23. We detail our findings on the issue if subject Contract entered between AAI and SPV merits transfer of Going Concern or otherwise, as follows:

i. **Foreseeable Future**

We find that the subject Business Arrangement has been set in place for 50 years, which is for a foreseeable future spanning 5 decades. We find that subject Contract is for transfer of the development, maintenance and management of SVP International Airport, Ahmedabad from AAI to SPV.

In pursuance to AAI Act, The AAI has constructed the airport at Ahmedabad and has been operating it under and in accordance with the AAI Act. SPV has

taken insurance, novated all the existing agreements as mentioned in Schedule V, so as to maintain effective running of operations of the airport. We find that SPV has entered into Memorandum of Understanding with the Government of India as per Schedule R to the said Contract. On plain reading of the contract, it is forthcoming that there are various standards specified in the Contract to ensure that the operations, development and maintenance of the said Airport is undertaken in pursuance with the AAI Act by the SPV.

We hold that this business arrangement satisfies the concept for foreseeable future.

ii. Transfer of Assets and Liabilities

We find that the SPV shall assume control of all Aeronautical Assets, Non aeronautical assets and Terminal Building on the commercial operation date. The Aeronautical assets are required and necessary for the performance of aeronautical services at the airport. Services, other than aeronautical services, are termed as non aeronautical services for which the non aeronautical assets are required for its performance. The Terminal Building is the stand alone/ integrated passenger terminal building with separately identified area for domestic passengers and international passengers on the site and the land appurtenant thereto, including the kerbside and approach roads.

Further we note the transfer of finances from AAI to SPV wherein all revenues, receipts, expenditure and other financial transactions for and in respect of the Airport shall be deemed to be transferred from the AAI to SPV on commercial operations date and all rights, obligations and liabilities in respect thereof shall vest exclusively in the SPV until the transfer date.

We note that in pursuance to this Contract, all the existing security deposits, earnest money deposits, bank guarantees, performance securities or other like instruments for and in respect of the airport shall be released to the counter party by AAI upon the same being submitted by such counter party to the SPV within 180 days of COD. Further we find that all the liabilities arising as a result thereof of this contract shall be deemed to be the liabilities of the SPV.

Further, we are of the opinion that it is not essential to transfer all assets and liabilities for a transaction to qualify for a transfer of business. That is to say, that even if some assets are retained by the AAI, and the SPV after such transfer carries out subject business activities without any obstruction, it shall still qualify to be a transfer of a business. We find our view in compliance with judicial discipline as laid down by the H'ble Bombay High Court in the case of Sunderdas Harjiwan-1987-65-STC-450 (Bom).

iii. Legal backing for Transfer of functions to AAI to SPV

We refer to the provisions to Section 12A of AAI Act, wherein as per Section 12(A) subsections (1) and (4), AAI, in the the public interest or in the interest of better management of airport may lease premises of an airport(including buildings and structures thereon and appertaining thereto) to carry out some of its functions under Section 12 as AAI may deem fit, and SPV who had been

assigned this function of the AAI shall have all the powers of AAI necessary for the performance of such functions.

We find that AAI has transferred to SPV the exclusive right and authority to operate, manage and develop the Airport for a period of 50 years commencing from the Commercial Operation Date *covering the following functions, as follows:*

- (a) design, development, financing, construction, up-gradation and expansion of the Airport in a phased manner*
- (b) operations, maintenance and management of the Airport in accordance with the provisions of the Agreement, Applicable laws and Applicable Permits;*
- (c) development, operation and maintenance of City side*
- (d) performance and fulfilment of all other obligation of the SPV and matters incidental thereto or necessary for the performance of any or all of the obligations of the SPV under this contract.*

iv. Transfer of Employees from AAI to SPV

The SPV shall bear the Select employees costs, as set forth in Schedule S to the said Contract. Further, during the joint management period, the SPV shall make Employment Offers to a minimum of 60% of select employees and SPV shall be the new employer of the Accepting employees on the terms and conditions mutually agreed between SPV and the accepting employees.

v. Steps taken for Business Continuity

- a. Further, we note that AAI vide letter dated Nil received on 17-8-21 submitted that all existing contracts entered by AAI have been novated and the requisite insurance has been taken by SPV.
- b. We find it a condition of the said Contract, that neither AAI nor its affiliates shall commission a new airport within a 50 km radius of the subject Airport prior to the expiry of ten years from COD. This condition is a proof that the scale of business operations undertaken by SPV shall continue for a foreseeable future.
- c. We note that as per Section 12(3)(f) AAI Act, it is the statutory function of the AAI that it may establish and maintain hotels, restaurants and restrooms at or near the airports among its other functions. We note that this function has also been transferred to SPV. As per Section 12(3)(r) AAI Act, it is the statutory function of the AAI that it may undertake any other activity at the airports and the civil enclaves in the best commercial interests of the Authority including cargo handling, setting up of joint ventures for the discharge of any function assigned to the Authority. We have studied the subject contract entered between AAI and SPV. We find

that the subject contract is a business arrangement wherein the statutory functions of AAI, which are in part but of an independent nature, have been transferred to SPV and consideration for the same has been charged on SPV. We find the business arrangement vide the Contract reflects the transfer of business from AAI to SPV. We find that city side development activities are statutory functions assigned to AAI vide the AAI Act. We find no merit to vivisect the contract and hold that such a view would be short sighted. The Contract in toto envisages transfer of part business of AAI to SPV.

d. We note Article 2 of the subject contract wherein the scope of the Project is detailed, which includes the operation, management and development of the airport. We further note that 'airport' also includes all project assets necessary for and associated with the operation and expansion of the airport. There project assets are physical and other assets relating to or forming part of the site including the rights over the site in the form of lease, right of way or otherwise; the aeronautical assets and non aeronautical assets; tangible assets such as civil works and equipment including foundations, drainage works, electrical systems, communication systems and administrative office; project facilities situated on the site; buildings and immovable fixtures or structures forming part of city side development; all rights of the concessionaire under the project agreements; financial assets such as receivables, security deposits , all negotiable instruments etc; insurance proceeds; applicable permits and authorisations relating to or in respect of the airport. We find that the Contract is self-contained to ensure that Airport business continues without hindrances.

23.1 In conspectus of the aforementioned findings, we find that the subject Contract entered between AAI and SPV is for Transfer of Going concern of an independent part of the business carried out by AAI with respect to the Operations, development and maintenance of the subject Airport.

23.2 Further, we find it prudent to clarify our thought process in pronouncing the subject business arrangement as transfer of going on concern, though there is no sale , as transfer of going on concern is not limited to sale (slump sale/ Item wise sale) but such transfer may be witnessed in circumstances such as sale/gift/lease/leave or license/hire/ in any other manner.

23.3 In conspectus of aforementioned findings, we hold that subject business arrangement between AAI and SPV merits to be covered under transfer of going concern. Further we hold that for transfer of going concern for transfer to be effected, sale is not the only criteria. Transfer simpliciter, vide subject business arrangement, is valid enough to term subject going concern as transferred from AAI to SPV.

24. Now that we have held subject business arrangement as transfer of going concern, We now detail our findings on the Questions for which Rulings have been sought by AAI.

Question 1: Whether the transfer of business by AAI to SPV be treated as Supply under Section 7 CGST?

Findings:

(i) We hold that in GST era, Supply as per Section 7 CGST Act is the taxable event. The first requisite for Supply to be witnessed is that there shall be a supply of Goods or Supply of services or both. Section 7 CGST defines Supply as follows:

‘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;.....
.....*

(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II..’

(ii) Thus for subject Transfer of Business by AAI to SPV to be termed as Supply, the first and foremost condition is that Business shall be either as a ‘Good’ or ‘Service’. We refer to the definition of Goods in CGST Act. Section 2 (52) CGST Act defines Goods as follows:

“goods” means 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.

24.1 With reference to said definition, we find that business is not Goods for it is not a movable property and thereby Transfer of Business cannot be supply of goods.

24.2 We now refer to the definition of Service. Section 2(102) CGST Act defines Service as follows:

“services” means 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.

What we have before us is whether ‘ Business’ may be covered under the umbrella of the definition of Service, as per Section 2(102) CGST Act. To ascertain the same, we refer to the definition of business. We reproduce the definition of Business as per Section 2(17) CGST Act, as follows:

2(17) “business” includes—

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

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

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

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

(i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;

24.3 On reading the two definitions of ‘Supply’ and ‘Business’ as defined in CGST Act, we are now faced with the task to examine if business is a service and consequently, will transfer of business be a supply of service. For examining the same, we experiment by substituting the word, ‘ business’ in the place of the word ‘service’ in the definition of supply of service and find the following meaning is expressed as follows:

| | |
|---|---|
| Meaning of Supply in present context | Substitution of the word ‘ business’ in place of the word ‘service’ |
| Supply includes Supply of Services , such as transfer, made or agreed to be made for a consideration by a person in the course or furtherance of business | Supply includes Supply of Business , such as transfer, made or agreed to be made for a consideration by a person in the course or furtherance of business |

24.4 Prima facie from reading the section 7 (supply definition), section 2(52) (goods definition), section 2(102) (services definition), section 2 (17) (business definition) CGST Act, it is not directly forthcoming if business is a service, consequently making supply of business a supply of service. For illustration, the meaning of Section 2(17)(d) CGST Act, prima facie is not forthcoming , if the word ‘ Business’ is substituted for the word ‘ service’, as illustrated as follows:

| | |
|---|--|
| Section 2(17)(d) CGST Act | Substitution of the word ‘Business’ for the word ‘Service’ |
| Business includes supply of goods and services in connection with commencement or closure of business. | Business includes supply of goods and Business in connection with commencement or closure of business |

24.5 Further, on careful reading of the provisions of CGST Act and Rules, we find the phrase ‘Transfer of Business’ has been mentioned in

- i. CGST Act at the following sections- Section 18(3) ; section 22(3); section 85
- ii. CGST Rules – Rules 41.
- iii. Schedule II(4)(c) to CGST Act.

Section 18(3)CGST Act reads of follows:

18(3) Where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or **transfer of the business** with the specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit

which remains unutilised in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed.

Section 22(3) CGST Act reads as follows:

(3) Where a **business** carried on by a taxable person registered under this Act is **transferred**, whether **on account of succession or otherwise**, to another person as a **going concern**, the transferee or the successor, as the case may be, shall be liable to be registered with effect from the date of such transfer or succession.

Section 85(1) CGST Act reads as follows:

85. (1) Where a taxable person, liable to pay tax under this Act, **transfers his business** in whole or **in part**, by sale, gift, lease, leave and license, hire **or in any other manner whatsoever**, the taxable person and the person to whom the business is so transferred shall, jointly and severally, be liable wholly or to the extent of such transfer, to pay the tax, interest or any penalty due from the taxable person upto the time of such transfer, whether such tax, interest or penalty has been determined before such transfer, but has remained unpaid or is determined thereafter.

Rule 41(1) CGST Rules reads as follows:

(1) A registered person shall, in the event of sale, merger, de-merger, amalgamation, lease or **transfer or change in the ownership of business for any reason**, furnish the details of sale, merger, de-merger, amalgamation, lease or **transfer of business**, in **FORM GST ITC-02**, electronically on the common portal along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee.

Schedule II(4)(c) CGST Act reads as follows:

4(c). Transfer of business assets

(c) where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless— (i) the **business is transferred** as a going concern to another person.

24.6 From the construction of the wordings in the said sections 18(3); 22(3) and 85(1); Schedule II(4) of CGST Act and the Rule 41(1) CGST Rule, we find that ‘transfer of Business’ is more of an event in pursuance to a business arrangement.

24.7 We hold that Gujarat Authority for Advance Ruling is a creature of the Statute and cannot go beyond the confines of the statute for interpretation of GST law. Therefore, whether ‘business’ is a service or otherwise and thereby transfer of business is a supply

or otherwise as per section 7(1) CGST Act, we have to find our way through the sections of CGST Act to interpret the same and to pronounce our Ruling. We take our cue from section 11(1) CGST Act. Section 11(1) CGST Act reads as follows:

Section 11. (1): Power to grant exemption from Tax) Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by notification, exempt generally, either absolutely or subject to such conditions as may be specified therein, goods or services or both of any specified description from the whole or any part of the tax leviable thereon with effect from such date as may be specified in such notification.

24.8 We note that in exercise of powers conferred under Section 11(1) CGST Act, the Central Government has issued Notification 12/2017CT(R) dated 28-6-2017, wherein at serial no. 2 of said Notification, reads the description of service as ‘Services by way of transfer of a going concern, as a whole or an independent part thereof’. The plain meaning of the words ‘services by way of transfer of a going concern,’ is ‘Transfer of a going concern service’. This is the interpretation of these wordings at the cited sr no. 2 of the said Notification 12/2017-CT(R).

24.9 Now taking our cue from the said Sr no. 2 of Notification 12/2017 which has been issued in exercise of powers granted by Section 11(1) CGST Act, we hold that business is service and transfer of business is supply of service.

24.10 Further, we hold that transfer of business may be by way of sale, gift, lease, leave and license, hire **or in any other manner whatsoever**. The wording used in the Notification No. 12/2017 is transfer of business and not sale of business. Further we hold that transfer of business may be as a whole or **independent part**.

24.11 Thus we hold that subject business arrangement is ‘Transfer of business of an independent part with respect to SVP International Airport’ by AAI to SPV for a period of fifty years which is a foreseeable future. Further Shri Chajed, during personal hearing, submitted that AAI has not ceased to be a Registered Person under GST after this transfer, but continues its other operations. Therefore, subject supply is Transfer of Going Concern as an independent part with respect to the said Airport.

25. Now we examine if subject supply is made for a consideration in the course or furtherance of business. We find that there are payments to be made to the AAI by SPV, as specified in the subject Contract. We hold this business arrangement has been entered with consideration involved as per the terms and conditions of the Contract. We hold that the consideration may be one time or in installments or as per the agreed terms between AAI and SPV. In this context, the payment made by the SPV to AAI includes the estimated deemed regulatory asset base, payment made by SPV towards the estimated initial non-aeronautical investments, Concession fees, all these payments are as per the terms and conditions of the contract and are the consideration to be paid by SPV to AAI for execution of the contract.

25.1 Further, business being an inclusive definition, as per Section 2 (17) CGST Act, we find it apt to interpret that the transfer of business may be in the course or furtherance of business itself.

25.2 Thus in subject case, we find

- i. *Service Provider- AAI*
- ii. *Service Receiver- SPV*
- iii. *Consideration in the course/ furtherance of business.*

25.3 Now that we have taken our cue from Notification 12/2017 sr no. 2 that transfer of going concern is supply of service, we hold that subject business arrangement is Supply of Service as per section 7(1) CGST Act.

Question 2: Whether the transfer of business by AAI to SPV is treated as supply as going concern and covered in clause 4 of schedule II of CGST Act?

26. We find from the aforementioned discussions and findings that the subject transfer of business by AAI to SPV is treated as supply of going concern.

We refer to Schedule II (4) CGST Act, reproduced as follows:

4. Transfer of business assets

(a) where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer or disposal is a supply of goods by the person;

(b) where, by or under the direction of a person carrying on a business, goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, whether or not for a consideration, the usage or making available of such goods is a supply of services;

(c) where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless—

(i) the business is transferred as a going concern to another person; or

(ii) the business is carried on by a personal representative who is deemed to be a taxable person.

26.1 We note that AAI has not ceased to be a Taxable person as AAI has only transferred its Ahmedabad Airport business to the SPV but its other business are not transferred and for such business the AAI is a taxable person and registered under GST.

26.2 We note that Schedule II (4) CGST Act stipulates whether the transactions with respect to ‘Transfer of Business Assets’ to be treated as supply of Goods or supply or services. We find no merit to draw any parallel between the “ Transfer of Business” which is our subject matter and “ transfer of Business Assets” as mentioned in Schedule II(4) CGST Act. We note that AAI has not ceased to be a taxable person.

26.3 On detailed reading of the subject Contract and as detailed in the aforementioned paragraphs, we find the subject business arrangement is ‘transfer of going concern service’. We, thereby, find no merit to vivisection the subject Contract and examine the

treatment of aeronautical assets/ non aeronautical assets/ other business assets in the Contract entered between AAI and SPV. As detailed in our findings, the substance of the Contract compels us, under GST scheme of law interpretation, to classify the Subject Business Arrangement as 'Transfer of Going concern Service'.

27. Besides the detailed findings in aforementioned paragraphs 23 and 24 of this Ruling, further facts ascertaining that subject Business Arrangement is Transfer of Going Concern Service is as follows:

- i. *The transfer of aeronautical and non aeronautical assets by AAI to SPV, was requisite for performance of the Contract at Ahmedabad Airport. The running business transferred by AAI to SPV needs the subject assets for it to keep running.*
- ii. *AAI has transferred its present business of Airport comprehensively to SPV. This transfer includes transfer of financial assets, aeronautical assets, non aeronautical assets and capital investment including building and structure for efficient operation, management and development of the Airport.*
- iii. *SPV shall comply with all applicable laws and applicable permits (including renewals as required) in the performance of its obligations under the Contract.*
- iv. *SPV shall provide or cause to be provided Aeronautical and Non aeronautical services at the Airport in accordance with the subject contract, applicable laws and applicable permits.*
- v. *SPV shall procure electricity, telecommunication services, water and other utilities, as may be necessary for the operation of the Airport, from respective local utilities upon payment of charges in accordance with applicable laws.*
- vi. *As per Article 5.14, the SPV is set up for the sole purpose of exercising the rights and observing and performing its obligations and liabilities under this Agreement, i.e., the operation, management and development of the Airport. SPV shall not have any shareholding interest or otherwise in any entity, or any other form of arrangement with any person, which may allow it to undertake or perform any other business activity.*
- vii. *The Airport shall be known, promoted, displayed, advertised and branded by the same name of SVP International Airport only at all times and SPV shall ensure that any advertisement, display or otherwise at or in relation to the Airport shall contain the logo of the AAI. These obligation on part of SPV reflects the underlying principle that Transfer of Business with respect to Airport will be a running business, in effect, this is Transfer of Going concern.*
- viii. *All the rights and interests in the Airport shall vest in the SPV until the Transfer date.*
- ix. *SPV shall provide or cause to be provided the infrastructure for operation of fuelling services on equal access basis for all the aircrafts at the Airport. SPV shall upgrade and maintain Cargo facilities. SPV shall operate Terminal Building. SPV shall provide or cause to be provided, at its own cost and expense, the infrastructure required for operation of check-in services at the Airport for and in respect of departing users. SPV shall or cause to operate the Parking. SPV has agreed and ensures that only Designated GOI Agencies are authorised to undertake the following Reserved Services, such as, CNS/ATM services, security services, meteorological services, mandatory health services, customs control, immigration services, quarantine services. With respect to general indemnity, the SPV shall indemnify designated GOI agencies. We find that proceeds from all insurance claims, except life and injury, shall be paid to SPV. The Contingency and*

Safety management arrangements shall be procured and ensured by the SPV. These are facts on record that subject business is transferred by AAI to SPV as going concern and SPV ensures that subject business keep running with regularity and a nature of permanency. Vide subject contract, SPV accepts and agrees to implement the Project. The Project as per Article 1 of the said Contract is defined as follows:

'Project' means the operations, management and development of the Airport in accordance with the provisions of the Agreement and includes all works, services and equipment relating to or in respect of the scope of the Project.

27.1 What we note from the said Contract is that on transferring the said Airport business to SPV, the SPV will cause to continue to successfully operate said business for a foreseeable future. Thus the subject transfer is that of transfer of going concern as an independent part. In this context, we find no merit to examine Schedule II(4)(c) CGST Act as it is limited to the transfer of business assets activity. Such attempt to vivisect the Contract renders a myopic view and runs counter to the 'Transfer of Going concern service' envisaged in the substance of the Contract.

Concession Fees:

- i. We have discussed in the aforementioned paragraphs that consideration may be as per the terms and conditions of the Contract and there is no restriction on consideration being upfront/ one time/ in instalments/ as per agreed terms of the Contract.
- ii. We find that Concession fees are paid by SPV to AAI during the concession period, calculated on a formula based on passenger footfall. We make it clear that Concession fees payable by SPV to AAI are not to be confused with the user fees payable by the users to SPV.
- iii. On specific enquiry to Shri Chajed, during the personal hearing, he submitted that AAI had not received any Concession fees during the Inception period and that all the concession fees were received by it after the Commencement of Operations (COD).

28. We note that AAI has sought Ruling on its Question No. 10 whether GST is applicable on transfer of spares and consumables for consideration by AAI to SPV? If yes, at what rate?

28.1 During the Personal Hearing, Shri Chajed was required to submit the details of the goods and related documents for ascertaining the GST liability, to which he replied that said Question No 10 does not pertain to the spares and consumables covered in the Contract. But they may be a proposed transaction in the future between AAI and SPV that AAI may supply spares and consumables to SPV and that the applicant is not aware of the details at present. Further, during hearing, he submitted to withdraw the said Question with respect to the Tax rate, as the details of the goods are not available.

28.2 Further, we note that vide AAI's letter dated Nil received on 10-8-21, at paragraph 47, AAI submitted that for transfer of spares and consumables on need basis by AAI to

SPV, the AAI will deem it supply under Section 7 CGST Act and taxable at applicable rate.

28.3 We find that the spares and consumables referred to in Question 10, are those which are not covered in the subject Contract dated 14-2-20, and as AAI during Personal hearing requested to withdraw the said Question no 10 with respect to GST Tax rate, as details of goods are not available with them and further vide said letter dated 10-8-21 submitted that AAI will supply said goods to SPV on need basis and deem it supply under Section 7 CGST Act, we hold back from pronouncing a Ruling on this Question No. 10 to the subject Application, save that GST to be paid on subject proposed supply mentioned at Question no 10, as per the law.

29. We pass the Ruling:

RULING

Ruling on Questions raised, in seriatim:

1. The Subject Supply of 'Transfer of Going Concern service' is Supply under Section 7 CGST Act.
2. i. The subject Supply is '**Transfer of Going Concern Service**'.

ii. Schedule II (4) CGST Act refers to activities or transactions relating to **Transfer of business assets** to be treated as supply of goods or supply of services. Therefore, in present case, there arises no need to examine Schedule II(4) CGST Act.
3. The subject Supply is covered at Entry No. 2 of Notification 12/2017-CT(R).
4. Ruling not required, in pursuance to Ruling at serial no 3.
5. Ruling not required, in pursuance to Rulings at serial no 2 & 3.
6. Concession Fee is a part of the Consideration paid by SPV to AAI in subject matter.
7. The consideration for the subject Supply is exempt from GST vide Entry No. 2 of Notification 12/2017-CT(R) dated 28-6-2017.
8. Ruling same as at Sr no 7. Further, the issue of reimbursement of staff cost has arisen in pursuance to the terms of subject Contract dated 14-2-20 wherein the 'the Supply of Transfer of Going concern Service' is exempt from GST. The contract is for 'transfer of going concern service', therefore the consideration / re-imburement of cost is exempt from GST.
9. Ruling same as at Sr. No 7. Further, the issue of reimbursement has arisen in pursuance to the terms of subject Contract dated 14-2-20 wherein the 'Supply of Transfer of Going concern Service' is exempt from GST. The contract is for 'transfer of going concern service', therefore the consideration / re-imburement of cost is exempt from GST

10. GST on proposed supply of spares and consumables by AAI to SPV, these supplies being outside the scope of subject contract, is leviable to tax as per law, as discussed at paragraph 27.3 of this Ruling.

(SANJAY SAXENA)
Member(S)

(ARUN RICHARD)
Member(C)