

**AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICE TAX
UTTAR PRADESH
4, Vibhuti Khand, Gomti Nagar, Lucknow-**

ADVANCE RULING NO. UP ADRG 79 /2021

DATED 28-06-2021

PRESENT:

1. **Shri Abhishek Chauhan**
Additional Commissioner, Central Goods and Service Tax
Audit Commissionerate, Lucknow Member (Central Tax)
2. **Shri Vivek Arya**
Joint Commissioner, State Goods and Service Tax Member (State Tax)

1.	Name of the Applicant	DR WILLMAR SCHWABE (I) PRIVATE LIMITED A-36, Sector-60, Noida, 201301, U.P.
2.	GSTIN or User ID	09AAACD0463D1Z4
3.	Date of filing of Form GST ARA-01	04.03.2021
4.	Represented by	Mr. Tarun Trehan (C.A.)
5.	Jurisdictional Authority-Centre	Range-9, Noida
6.	Jurisdictional Authority-State	Noida, Sector-12
7.	Whether the payment of fees discharged and if yes, the amount CIN	Yes PUNB20110900140051

**ORDER UNDER SECTION 98(4) OF THE CGST ACT, 2017 & UNDER SECTION 98
(4) OF THE UPGST ACT, 2017**

1. M/s DR WILLMAR SCHWABE (I) PRIVATE LIMITED, A-36, Sector-60, Noida, 201301, U.P. (here in after referred to as the applicant) is a registered assessee under GST having GSTN: 09AAACD0463D1Z4.

2. The applicant has sought advance ruling on following question-

- a) Whether ITC is available to the Applicant on GST charged by service provider on hiring of bus, having seating capacity of more than thirteen person for transportation of employees to & from workplace.
- b) Whether GST is applicable on amount recovered by the Applicant from employees for usage of bus transportation facility.
- c) If ITC is available as per (a), whether it will be restricted to the extent of cost borne by the Applicant (employer).

3. As per declaration given by the applicant in Form ARA-01, the issue raised by the applicant is neither pending nor decided in any proceedings under any of the provisions of the Act, against the applicant.

4. The applicant has submitted following facts-

- (1) The applicant is engaged in manufacture and supply of Homeopathic Medicines and related products in India.
- (2) The Applicant has entered into an arrangement with 'Bhati Motors', pursuant to which the Applicant is availing bus hiring services, on contract basis, for transportation of its employees, to & from the workplace (Noida).
- (3) The approved seating capacity in such buses can be more than thirteen persons and, in some cases, even less than thirteen persons. The buses hired by the Applicant, where the seating capacity is more than 13 passengers, are non-air conditioned. M/s Bhati Motors is having the contract carriage permit issued by the relevant regulatory authorities in respect of buses deployed for employee transportation service. Further, M/s Bhati Motors is charging GST on supplies made to the Applicant.
- (4) The Applicant recovers some amount from its employees towards provision of such facility as per its internal HR policy. The same usually varies from 5% to 10%, depending upon the category of employee. Further, the difference between amount paid to transport service provider for hiring bus/motor vehicle and amount recovered from employees is cost to company
- (5) The facilities provided by the Applicant to its employees like transportation facilities etc. are having a direct nexus with the business activities of the Applicant and the said activities are not undertaken merely for the benefit of employees since the said facilities are made available so long as the employees are in the Applicant's employment. In other words, once the employee ceases to be in employment with the Applicant, he/she is not authorized to use the transportation facility i.e. the employer-employee relationship is must to avail this facility. Thus, the expenses incurred by the Applicant like leasing, renting or hiring of motor vehicles etc. for transportation of its employees to & from the workplace (Noida) are used or intended to be used by the Applicant in the course or furtherance of his business. Also, w. e. f. 01.02.2019, Section 17(5)(b)(i) of the CGST Act has been amended by virtue of the CGST Amendment Act, 2018, to block ITC only on leasing, renting or hiring of motor vehicles having approved seating capacity of not more than 13 persons. Hence, input tax credit is now allowed on leasing, renting or hiring of motor vehicles having seating capacity of more than 13 person. Therefore, there is no restriction in Section 17(5) towards availment of ITC on such leasing, renting or hiring of motor vehicles etc. by the Applicant.
- (6) The Applicant also understands that the amount recovered by it from the employees is not towards any independent supply made by it. Rather, it is a condition of the employment contract and is towards recovery of part of the cost of transportation facilities extended by it. The ITC on such leasing, renting or hiring of motor vehicles cannot be denied to the extent of amount recovered by the Applicant from the employees as the service received is eligible for the ITC and the mere fact that some amount has been recovered from employees will not change such eligibility.
- (7) The expenses incurred by the Applicant for procuring facilities like leasing, renting or hiring of motor vehicles etc. for transportation of its employees to & from the workplace (Noida), are used or intended to be used in the course or furtherance of Applicant's business in terms of Section 16 of CGST Act and ITC, to that extent, shall be allowed to the Applicant. In this regard, reliance can be placed on following decisions –
 - a) *Commissioner of Central Excise v. M/s Federal Mogul Goetze (India) Ltd, 2011 (9) TMI 120 - Punjab and Haryana High Court;*

b) *Commissioner of Central Excise, Bangalore-III, Commissionerate v. Stanzen Toyotetsu India (P.) LTD, 2011 (4) TMI 201 - Karnataka High Court;*

- (8) Section 17(5)(a) restricts ITC in respect of motor vehicle having seating capacity of not more than 13 persons (including driver). In respect of the motor vehicle having sitting capacity of more than 13 passenger, there is no restriction of ITC under Section 17(5). ITC of motor vehicle as well as of services of renting, leasing or hiring of that motor vehicle will be available to the taxable person subject to fulfilment of conditions mentioned under Section 16 of CGST Act.
- (9) The Applicant has made available certain facilities to its employees like transportation facilities for commuting to and from the workplace via buses and such facilities are not undertaken for the benefit of employees. Rather, such facilities are having a direct nexus with the business activities of the Applicant as the said facilities are made available as long as the employees are in the Applicant's employment. It can also be said that there exists no intention of supplying such services by the Applicant in the literal as well as intentional meaning of the term. Instead, these represent expense for the employer wherein employee is the user/ beneficiary. Accordingly, going by the purposive interpretation of the phrase 'supply of goods or services or both' given under Section 7, the provision of transportation facility would not be covered under the said phrase. Thus, no GST would be leviable on such expenses.
- It is further submitted that the amount recovered, if any, by the Applicant from its employees does not amount to 'consideration' in terms of Section 2(28) of the CGST Act.
- (10) In support of the above contentions, reliance can be placed on the Advance Ruling in case of *Re: M/s. Tata Motors Limited, 2020 (9) T.M.I. 352 - Authority for Advance Ruling, Maharashtra*
- (11) the ITC on such leasing, renting or hiring of motor vehicles cannot be denied to the extent of amount recovered by the Applicant from the employees as the service received is eligible for the credit and mere fact that some amount has been recovered from the employee will not change such eligibility.

5. The application for advance ruling was forwarded to the Jurisdictional GST Officer to offer their comments/views/verification report on the matter. The Additional Commissioner, Commercial Tax Gautam Budh Nagar Zone vide his letter C. No.138/2020-21/विधि/कार्या 0-एडी0कमि0वा0क0गौ0बु0न0जो0नो0 dated 19.05.2021 has forwarded report bearing C.No. 73/पी - 03/जचा0कमि0(का0पा0)वा0क0सं0-बी नोयडा/2020-21 dated 13.04.2021 of the Joint Commissioner (Executive), Commercial Tax, Gautam Budh Nagar Division-B, Noida wherein it was opined that:-

“ जी एस टी अधिनियम के प्रावधान 17(5)(b)(i) एवं द्वितीय परंतुक से स्पष्ट होता है कि व्यापारी द्वारा अपने कर्मिको को प्रदान की जाने वाली सेवा किसी प्रचलित विधि से बाध्यकारी न होने के कारण सर्विस प्रोवाइडर द्वारा चार्ज की जाने वाली जी एस टी का लाभ व्यापारी को आई टी सी के रूप में अनुमन्य नहीं है. इस सम्बन्ध में AAR HIMACHAL PARADESH का सर्वश्री प्रसार भारती ब्रॉड कास्टिंग कारपोरेशन ऑफ़ इंडिया के प्रकरण में निर्णय दिनांक 24.02.2020 प्रासंगिक है.

व्यापारी के द्वितीय प्रश्न के सम्बन्ध में CBIC के द्वारा दिनांक 10-07-2017 को जारी प्रेस विज्ञप्ति प्रासंगिक है जिसमें स्पष्ट किया गया था कि -'The Supply by the employer to the employee in terms of contractual agreement entered into between the employer and

employee, will not be subject to GST.' इस प्रकार चुकि व्यापारी ट्रांसपोर्टेशन सुबिधा के सम्बन्ध में सर्विस प्रोवाइडर नहीं है, अतः उनकी कर्मचारियों से ट्रांसपोर्ट सुबिधा के रूप में वसूली गयी धनराशि पर जी एस टी की देयता भी नहीं है. इसी सम्बन्ध में AAR UTTAR PRADESH का सर्वश्री NORTH SHORE TECHNOLOGIES PVT LTD के प्रकरण में निर्णय दिनांक 29-06.2020 प्रासंगिक है.

व्यापारी का तृतीय प्रश्न, प्रश्न १ के उत्तर में निष्प्रयोज्य है तथा कार्यालय स्तर पर व्यापारी के प्रश्नों के सम्बन्ध में कोई कार्यवाही न तो की गयी है और न ही अनिस्तारित है ”

6. The applicant was granted a personal hearing on 31.05.2021 which was attended by Shri Tarun Trehan, Chartered Accountant/Authorized representative. During personal hearing, he reiterated the submissions made in the application of advance ruling and also submitted compilation of documents, provisions and judgments via email and requested to decide the case accordingly.

DISCUSSION AND FINDING

7. At the outset, we would like to make it clear that the provisions of both the CGST Act and the UPGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the UPGST Act. Further for the purposes of this Advance Ruling, a reference to such a similar provision under the CGST Act / UPGST Act would be mentioned as being under the 'CGST Act'.

8. We have gone through the submissions made by the applicant and have examined the explanation submitted by them. At the outset, we find that the issue raised in the application is squarely covered under Section 97(2)(d) and 97(2)(e) of the CGST Act 2017 being matter related to admissibility of input tax credit and determination of the liability to pay tax. We therefore, admit the application for consideration on merits.

9. We observe that the applicant has sought advance ruling on the issue-

- a) Whether ITC is available to the Applicant on GST charged by service provider on hiring of bus, having seating capacity of more than thirteen person for transportation of employees to & from workplace.
- b) Whether GST is applicable on amount recovered by the Applicant from employees for usage of bus transportation facility.
- c) If ITC is available as per (a), whether it will be restricted to the extent of cost borne by the Applicant (employer).

10. Section 16 of the CGST Act, 2017 is in respect of eligibility and conditions for taking input tax credit which is reproduced as under-

Section 16. (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,-

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both.

Explanation.- For the purposes of this clause, it shall be deemed that the registered person has received the goods where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961.), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

11. We find that Section 17 of the CGST Act, 2017 provides for apportionment of credit and blocked credit. It is pertinent to have a look at the relevant legal provisions under Section 17(5) of the CGST Act. The Section 17 (5) has been amended by CGST (Amendment) Act, 2018 (No. 31 of 2018) dated 29.08.2018 made effective from 01.02.2019 vide **Notification No. 02/2019 – C.T.- 2019 dated 29.01.2019**. The same are given below:

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

(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:

(A) further supply of such motor vehicles; or

(B) transportation of passengers; or

(C) imparting training on driving such motor vehicles:

(aa) vessels and aircraft except when they are used

(i) for making the following taxable supplies, namely:—

(A) further supply of such vessels or aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

(D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) : provided that the input tax credit in respect of such services shall be available –

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein:

(ii) where received by a taxable person engaged

(I) in the manufacture of such motor vehicles, vessels or aircraft; or

(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;

(b) the following supply of goods or services or both –

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or service or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(i) membership of a club, health and fitness centre; and

(ii) (i ii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force. "

12. Prior to 01.02.2019, Section 17 of CGST Act, 2017 read as under:-

Section 17: (5) Notwithstanding anything contained in subsection (1) of section 16 and subsection (1) of section 15, input tax credit shall not be available in respect of the following, namely:-

(a) motor vehicles and other conveyances except when they are used

(i) for making the following taxable supplies, namely:

(A) further supply of such vehicles or conveyances ; or

(B) transportation of passengers; or

(C) imparting training on driving, flying, navigating such vehicles or conveyances;

(ii) for transportation of goods:

(b) the following supply of goods or services or both

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre:

(iii) rent-a-cab, life insurance and health insurance except where

(A) the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force: or

(B) such inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as part of a taxable composite or mixed supply.

13. Prior to CGST Amendment Act as mentioned in para-11, the ineligibility of ITC was for services under the head 'rent a cab'. 'Rent a cab' being a wide term included all types of motor vehicles which were hired for transportation of employees.

14. With the introduction of new provisions w.e.f. 01/02/19, ITC on renting, leasing and hiring of motor vehicles have been disallowed only for vehicles having capacity upto 13 seats. (Section 17(5)(b)(i))

15. Thus, in our opinion, ITC can be availed on service of leasing, renting or hiring of motor vehicles under the following conditions w.e.f. 01/02/19:

- **The Vehicle has approved seating capacity of more than 13 persons (including driver).**
- **The service of leasing, renting or hiring is used for furtherance of business as per Section 16(1)**
- **The service provider furnishes invoice as per Section 31 and Rule 46**
- **All other conditions as prescribed under Section 16(2) are complied.**

16. The applicant has submitted that the transportation facility is provided to the employees so long as they are in the Applicant's employment and once the employee ceases to be in employment with the Applicant, he/she is not authorized to use the transportation facility i.e. the employer-employee relationship is must to avail this facility. Thus, the expenses incurred by the Applicant like leasing, renting or hiring of motor vehicles etc. for transportation of its employees to & from the workplace (Noida) are used or intended to be used by the Applicant in the course or furtherance of his business.

17. Therefore in the subject case, since the applicant has specifically submitted that they are using motor vehicles having approved seating capacity of more than thirteen persons (including the driver), the applicant shall be eligible for Input tax Credit in this case. However we would like to make it very clear that if the motor vehicle hired by them does not have an approved seating capacity of more than thirteen persons (including the driver), then in that case the applicant will not be eligible for Input Tax Credit.

18. The second question raised by the applicant is whether GST is applicable on nominal amount recovered by Applicants from their employees for usage of employee bus

transportation facility in non-air conditioned bus. To answer this question we now refer to Schedule III to the CGST Act which lists activities which shall be treated neither as a supply of goods nor a supply of services. As per clause 1 of the said Schedule-III, services by an employee to the employer in the course of or in relation to his employment shall be treated neither as a supply of goods nor a supply of services.

Since the applicant is not supplying any services to its employees, in view of Schedule III mentioned above, we are of the opinion that GST is not applicable on the nominal amounts recovered by Applicants from their employees in the subject case.

19. The last question raised by the applicant is if ITC is available to them, whether it will be restricted to the extent of cost borne by the Applicant. I find that the issue has already been settled by the Hon'ble High Court of Bombay in the case of CCE Nagpur Vs. Ultratech Cement Ltd., 2010 (260) ELT 369 (Bom.) wherein the Hon'ble High Court has held that although the assessee is entitled for input service credit for the manufacturing of final product but the amount reimbursed by the employees by way of contribution is not entitled for input service credit.

20. In view of the above discussions, we, both the members unanimously rule as under;

RULING

Question (a) Whether ITC is available to the Applicant on GST charged by service provider on hiring of bus, having seating capacity of more than thirteen person for transportation of employees to & from workplace.

Answer:- ITC is available to the applicant only after 01.02.2019.


Question (b) Whether GST is applicable on amount recovered by the Applicant from employees for usage of bus transportation facility.


Answer:- No.

Question (c) If ITC is available as per (a), whether it will be restricted to the extent of cost borne by the Applicant (employer)

Answer:- Yes.

21. This ruling is valid only within the jurisdiction of Authority for Advance Ruling Uttar Pradesh and subject to the provisions under Section 103(2) of the CGST Act, 2017 until and unless declared void under Section 104(1) of the Act.


(Vivek Arya)
Member of Authority for Advance
Ruling


(Abhishek Chauhan)
Member of Authority for Advance
Ruling

To,

M/s Dr. Willmar Schwabe (I) Pvt Ltd
A-36, Sector-60, Noida
UP-201301

AUTHORITY FOR ADVANCE RULING –UTTAR PRADESH

Copy to –

1. The Chief Commissioner, CGST & Central Excise, Lucknow, Member, Appellate Authority of Advance Ruling.
2. The Commissioner, Commercial Tax, Uttar Pradesh, Member, Appellate Authority of Advance Ruling.
3. The Commissioner, CGST & C. Excise, C-56/42, Sector-62, Noida, 201309.
4. The Deputy/Assistant Commissioner, CGST & C. Excise, Division-II, 4th Floor, C-56/42, Renu Tower, Sector-62, Noida- 201309.
5. Through the Additional Commissioner, Commercial Tax, Gautam Budh Nagar Zone Noida, Uttar Pradesh to jurisdictional tax assessing officers.

Note: An Appeal against this advance ruling order lies before the Uttar Pradesh Appellate Authority for Advance Ruling for Goods and Service Tax, 4, Vibhuti Khnad, Gomti Nagar, Lucknow – 226010, within 30 days from the date of service of this order.