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

ADVANCE RULING NO. UP ADRG-03/2022 DATED-13/5/2022
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	AIRPORTS AUTHORITY OF INDIA CHAUDHARY CHARAN SINGH INTERNATIONAL AIRPORT, AMAUSI, LUCKNOW-226009
2.	GSTIN or User ID	09AAACA6412D1Z6
3.	Date of filing of Form GST ARA-01	24.02.2022
4.	Represented by	Shri Hem Chhajed, Chartered Accountant/Authorized representative
5.	Jurisdictional Authority-Centre	Range- Range-I, Division - Lucknow-I
6.	Jurisdictional Authority-State	Sector- Corporate-Circle, Range-Lucknow (A)
7.	Whether the payment of fees discharged and if yes, the CIN	Yes SBIN21120900267011

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

1. M/s AIRPORTS AUTHORITY OF INDIA, CHAUDHARY CHARAN SINGH INTERNATIONAL AIRPORT, AMAUSI, LUCKNOW-226009 (here in after referred to as the applicant) is a registered assessee under GSTN: 09AAACA6412D1Z6.

2. The applicant has filed application for advance ruling in Form ARA-01 and submitted as under-

(1) Airports Authority of India (the 'AAI') is the authority created under the Airports Authority of India Act, 1994 (the 'AAI Act'). AAI Act was enacted to provide for the constitution of the AAI for the better administration and cohesive management of the airports.

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

- To manage the airports, the civil enclaves and the aeronautical communication stations efficiently;
- To provide air traffic service and air transport service at any airport.

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

- Plan, develop, construct and maintain runways, taxiways, aprons and terminals and ancillary buildings at the airports and civil enclaves;
- Establish airports or assist in the establishment of private airports by rendering such technical, financial or other assistance which the Central Government may consider necessary for such purpose;
- Plan, procure, install and maintain navigational aids, communication equipment, beacons and ground aids at the airports and at such locations as may be considered necessary for safe navigation and operation of aircrafts;
- Provide air safety services and search and rescue, facilities in co-ordination with other agencies;
- Establish and maintain hotels, restaurants and restrooms at or near the airports;
- Establish warehouses and cargo complexes at the airports for the storage or processing of goods;
- Arrange for postal, money exchange, insurance and telephone facilities for the use of passengers and other persons at the airports and civil enclaves;
- 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 Government of India;
- Develop and provide consultancy, construction or management services, and undertake operations in India and abroad in relation to airports, air navigation services, ground aids and safety services or any facilities thereat;
- Establish and manage heliports and airstrips;
- Provide such transport facility as are, in the opinion of the Authority, necessary to the passengers travelling by air;
- 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;
- 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;
- establish training institutes and workshops;
- 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.

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

3. The applicant has sought advance ruling on following questions-

(1) Whether the transfer of business by the Airport Authority of India to the M/s. Adani Lucknow International Airport Limited be treated as Supply u/s. 7 of the Central Goods and Service Tax Act, 2017 ("CGST") viz-a-viz Uttar Pradesh State Goods and Service Tax Act, 2017 ("UPGST")?

(2) Whether the transfer of business by Airports Authority of India to M/s. Adani Lucknow International Airport Limited is treated as supply as going concern and covered in clause 4 of schedule II of CGST Act viz-a-viz UPGST?

(3) Whether the transfer of business by M/s. Airports Authority of India to M/s. Adani Lucknow 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 M/s. Airport Authority of India to the M/s. Adani Lucknow 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 Lucknow International Airport Limited to M/s. Airports Authority of India be treated as consideration for transfer of business?

(7) Whether GST is applicable on Monthly/Annual concession fees charged by the Applicant on the M/s. Adani Lucknow International Airport Limited?If yes at what rate?

(8) Whether GST is leviable on the invoice raised by the Applicant for reimbursement of the salary/ staff cost on M/s. Adani Lucknow 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 Applicant from M/s. Adani Lucknow International Airport Limited? If yes at what rate?

(10) Whether any reversal is required in accordance with section 17 (2) / (3) of CGST Act viz-a-viz UPGST Act?

4. The applicant has submitted statement of relevant facts as under-

(1) In the pursuance of Section 12A of AAI Act, applicant has decided to invite bids for undertaking the operations, management and development of airport on a public private partnership basis to bring efficiency in service delivery, expertise, enterprise and professionalism and to harness necessary investment. Airport has been defined in Article 1 clause 1.1 of the concession agreement as under:

"means Chaudhary Charan Singh International Airport located at the Lucknow, 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;

(2) Applicant while prescribing technical and commercial terms and conditions for operations, management and development of the *Chaudhary Charan Singh International Airport* (herein after referred as "Airport") invited proposals by 'Request for Proposal' ("RFP") dated 14.12.2018.

(3) Single Stage two envelope system through Central Public Procurement Portal (CPPP) was followed for selection of Successful Bidder. After evaluation of the bids received from the bidders and receipt of approval of GOI, the applicant accepted the bid of Adani Enterprise Limited and issued letter of Award dated 15.07.2019 which required Adani Enterprise Limited to execute the concession agreement through a special purpose vehicle.

(4) Adani Enterprise Limited has promoted and incorporated a special purpose vehicle as "Adani Lucknow International Airport Limited" (Concessionaire/SPV) under Companies Act, 2013 and in accordance with the terms of RFP.

(5) The Concessionaire vide letter dated 29.01.2020 requested the applicant to accept it as the entity which shall undertake and perform the obligations and exercise the rights of selected bidder including the obligation to enter into Concession agreement.

(6) After receipt of security clearance from Ministry of Home Affairs, GOI through MOCA, Applicant has accepted the request of the concessionaire and entered into an Concession Agreement dated 14.02.2020 between the Applicant and the Concessionaire for Operations, Management and Development of Airport through Public Private Partnership subject to the terms of the agreement.

(7) In accordance with and subject to the provisions of the Agreement and applicable laws, the applicant has granted Concessionaire the exclusive right, lease and authority to operate, manage and develop the Airport for a period of 50 years commencing from the Commercial Operation Date [Clause 15.1.1].

(8) The Scope of the Project is covered under Clause 2.1 of Article 2 of the agreement as under-

(a) design, development, financing, construction, upgradation and expansion of the Airport in a phased manner, on the Site and as per the requirements broadly set forth in Schedule A and Schedule B together-with provision of respective project Facilities as specified in schedule B, and in conformity with the specification and standards set forth in Schedule C, and in accordance with the Applicable laws and Applicable permits;

(b) operations, maintenance and management of the Airport in accordance with the provisions of this Agreement, Applicable Laws and Applicable permits

(c) development, operation and maintenance of city Side, in accordance with the provisions of this Agreement, and, in particular, Schedule A, Schedule B and Schedule C; and

(d) performance and fulfillment of all other obligations of the concessionaire and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement, in accordance with the provisions of this Agreement, Applicable Laws and Applicable permits.

(9) The terms project and projects assets is defined in clause 1.1 of Article 1 of the concession agreement as under-

*"**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;

(10) In nutshell the whole airport operations which were run by the applicant would be given to the Concessionaire for the period of 50 years for agreed consideration. Concessionaire agrees to pay the Applicant following sum as consideration for transfer: -

- Rs. 1,43,00,00,000/- 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. (As per Clause 28.11.3 of the Concession Agreement which is subject to adjustment as per Clause 28.11.3(a) and 28.11.4).
- Rs. 4,93,00,000/- 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. (As per Clause 28.12.1 and 28.12.2) which is subject to adjustment as per Clause 28.12.3 and 28.12.4 of the Concession Agreement. (One time payment)
- Actual amount incurred by AAI in respect of contracts relating to Work-in-Progress as on the Commercial operation Date ("COD") as per Clause 6.4.5 of the Concession Agreement.
- 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 as per clause 6.5.5 of the Concession Agreement.
- Monthly concession Fee during the concession period shall be paid to the applicant calculated as under:

(Per Passenger Fee for international Passengers * International Passenger Throughput for that month) + (Per Passenger Fee for Domestic Passengers * Domestic Passenger Throughout for that month)

- The monthly concession fee is calculated as per Clause 27.1.1 of the concession agreement and monthly concession is subject to revision of per passenger fee as per Clause 27.3 of the concession agreement. Monthly Concession Fee as consideration for granting lease right of land, building and the immovable assets, as per Clause 10.2.2 of the Concession Agreement.

(11) In the present case as explained above, it can be said that by the underlying 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.

(12) As per the provisions of Section 9 of CGST Act, Central Goods and Service Tax ('CGST') is leviable on intra-state supplies of goods or services. Similarly, State Goods and Service Tax ('SGST'), is also leviable on intra-state supplies of goods and services.

(13) As per Section 5 of the IGST Act, which is the charging section, lntegrated Goods and Services Tax ('IGST') shall be levied on all inter-state supplies of goods or services or both.

(14) Thus, 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

(15) As per definition of supply, 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*

(16) 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.

(17) 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.

(18) 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.

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

In exercise ..., hereby exempts the intra-State supply of services of description as specified in column (3) of the Table below from so much of the central tax leviable thereon under sub-section (1) of section 9 of the said Act, as is in excess of the said tax calculated at the rate as specified in the corresponding entry in column (4) of the said Table, unless specified otherwise, subject to the relevant conditions as specified in the corresponding entry in column (5) of the said Table, namely:—

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

(20) The exemption at Sr. No. 2 of the Notification No.12/2017 - Central Tax Rate dated June 28, 2017essentially 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

(21) 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. In the case of *Union of India vs Dr. Maqsood Ahmed [AIR 1963 Bom110, 114], the Court has held that*

"the work '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."

(22) It would be worthwhile to note that 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.

(23) 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.

(24) 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. It is settled law that the words shall be interpreted with its literal meaning.

(25) clause 16 of the agreement reflects that there is transfer of assets, liabilities, rights etc.

> ***"16.1 Transfer of Finances***
> *All revenues, receipts, expenditure and other financial transactions for and in respect of the airport shall be deemed to be transferred from the authority to the concessionaire with effect from 0000 (zero zerozero zero) hours on COD and all rights, obligations and liabilities in respect thereof shall vest exclusively in the concessionaire from that hour and until the Transfer Date."*
> *All liabilities incurred by the Authority prior to COD, including any debt obligations and payments to the Authority or any third party, shall continue to vest in the Authority at all times, and the Authority shall, indemnify, defend, save and hold harmless the concessionaire against any and all suits, proceedings , actions, demands and claims for any loss, damage, cost and expense of whatever kind and nature under or in connection with any Novated contracts or the Non Novated contracts arising before the COD. Provided that the authority shall not be liable for any individual claim which is less than Rs.2,00,00,000/- (Rupees two crores),nor shall be aggregate liability of the authority for all claims (excluding related interest and enforcement costs) under any or all Novated Contracts and/or Non-novated contracts be equal to or exceed Rs 20,00,00,000 (Rupees twenty crore).*
> ***16.1.2***
> *All existing security deposits, earnest money deposits, bank guarantees, performance securities or other like instruments for and in respect of the Airport, including those as may have been furnished by the counterparty(ies) to all Novated contracts, shall be released to the counter party by the Authority upon the same being submitted by such counter party to the concessionaire within 180 (one hundred eight) days of COD.*
> ***16.2 Transfer of Non-Aeronautical Assets***
> *Subject to clause 6.3, the concessionaire shall be deemed to have assumed control of all Non- Aeronautical Assets on the COD*
> ***16.3 Transfer of Aeronautical Assets***
> *The concessionaire shall be deemed to have assumed control of all, Aeronautical Assets and Terminal Building on the COD.*

(26) 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.

RashtriyaIspat 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. RashtriyaIspat Nigam Ltd. (Appeal (civil) 31 of 1991)]

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 thestatute - viz. a "transfer of the right to use" and not merely a licence to use the goods."

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.

(27) 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.

(28) 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.

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

(30) 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. Hence, it can be said that there is a going concern.

(31) The clause 3.1.1, 3.1.2 and 16.1.1 of concession agreement reflects that the Business Arrangement between the AAI and concessionaire has been set in place for 50 years, which is for a forseeable future spanning 5 decades.

(32) The business arrangement between the AAI and concessionaire satisfies the concept for foreseeable future. Hence it is clear that the underlying transaction involves transaction relating to "a going concern for a foreseeable future.

(33) 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. Chaudhary Charan Singh 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.

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

(35) The applicant relies on following pronouncements-

(j) The Karnatka 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"

(ii) 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:

(a) The assets must be sold as part of a 'business' as a 'Going concern'.

(b) The purchaser intends to use the assets to carry on the same kind of business as the seller

(c) Where only part of a business is sold it must be capable of separate operation

(d) There must not be a series of immediately consecutive transfers.

(36) Article 3.1.1 of the 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.

(37) 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/OO3O/2011, while interpreting the provision o, Section 197 of Labour Relations Act, it was held that transfer of operations 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 t20121 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.*

(38) 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. 12l2017-Central Tax (Rate) dated 28 June 2017.

(39) 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.

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

(41) Applicant would like to draw your 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.

(42) 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"*

(43) 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.*

(44) 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"

(45) 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.

(46) The applicant submits that if the monthly/ annual fees are considered to be consideration for transfer of business over and above the initial/ one time payments then the exemption shall be available and thus Navi Mumbai Builder's Association v. Union of India is distinguishable.

(47) 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.

(48) 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 cover the emoluments of the Government employees transferred under the agreement.

(49) One of the consideration which concessionaire is liable to bear is for the Authority's Employees. 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. 2of the exemption notification No 12/2017 – Central Tax (Rate), then the said transaction also be covered by the same.

(50) In the identical case the Authority for Advance Ruling of Gujarat in the case of Airport Authority of India[2021] 131 taxmann.com 249 held that *the consideration for the 'Transfer of going concern service' is exempt from GST vide Entry No. 2 of Notification No. 12/2017 - Central Tax (Rate), dated 28-6-2017. Further, the issue of reimbursement of staff cost has arisen in pursuance to the terms of subject contract dated 14-2-2020 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/reimbursement of cost is exempt from GST.*

5. 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.

6. The application for advance ruling was forwarded to the Jurisdictional GST Officer to offer their comments/views/verification report on the matter. The Joint Commissioner, (Corporate Circle)-I, Commercial Taxes, Lucknow vide his letter C.No. 2021-22/J323/Joint Comm. (Corporate) Va. Ka. L.Jo.Pr.L. Dated 23.03.2022 submitted point wise comments as under-

(1) the transfer of business by M/s AAI to M/s Adani Lucknow International Airport Limited is covered in supply under Section 7 of the CGST Act, 2017 but transfer of business during lease period appears different from supply.
(2) No. There is mention of 'transfer of assets' in Clause -4(Schedule-2).
(3) it may be treated under exemption as per entry 2 of the Notification No. 12/2017.
(4) Explained as above in point no. 3.
(5) as both assets and business are included in 'transfer', it may be considered as supply of service.
(6) concession fee paid by M/s Adani Lucknow International Airport Limited to AAI may be considered as transfer of business.
(7) Explained as above in point no. 3
(8) Explained as above in point no. 6
(9) Explained as above in point no. 6

7. The applicant was granted a personal hearing on 09.05.2022 which was attended by Shri Hem Chhajed, CA/Authorized representative. During Personal hearing, he reiterated the submissions made in the application of advance ruling.

DISCUSSION AND FINDINGS-

8. 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 to the earlier, henceforth 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'.

9. We have gone through the Form GST ARA-01 filed by the applicant and observed that the applicant has ticked following issues on which advance ruling required-

(ii) Applicability of a notification issued under the provisions of this act
(v) Determination of the liability to pay tax on any goods or services or both
(vii) Whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both within the meaning of that term.

At the outset, we find that the issue raised in the application is squarely covered under Section 97(2) of the CGST Act 2017. We therefore, admit the application for consideration on merits.

10. We have gone through the submissions made by the applicant and have examined the same. We observe that the applicant has sought advance ruling on the following questions-

(1) Whether the transfer of business by the Airport Authority of India to the M/s. Adani Lucknow International Airport Limited be treated as Supply u/s. 7 of the Central Goods and Service Tax Act, 2017 ("CGST") viz-a-viz Uttar Pradesh State Goods and Service Tax Act, 2017 ("UPGST")?

(2) Whether the transfer of business by Airports Authority of India to M/s. Adani Lucknow International Airport Limited is treated as supply as going concern and covered in clause 4 of schedule II of CGST Act viz-a-viz UPGST?

(3) Whether the transfer of business by M/s. Airports Authority of India to M/s. Adani Lucknow 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 M/s. Airport Authority of India to the M/s. Adani Lucknow 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 Lucknow International Airport Limited to M/s. Airports Authority of India be treated as consideration for transfer of business?

(7) Whether GST is applicable on Monthly/Annual concession fees charged by the Applicant on the M/s. Adani Lucknow International Airport Limited? If yes at what rate?

(8) Whether GST is leviable on the invoice raised by the Applicant for reimbursement of the salary/ staff cost on M/s. Adani Lucknow 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 Applicant from M/s. Adani Lucknow International Airport Limited? If yes at what rate?

(10) Whether any reversal is required in accordance with section 17 (2) / (3) of CGST Act viz-a-viz UPGST Act?

11.1 Now we proceed to examine as to whether the transfer of business by the Airport Authority of India to the M/s. Adani Lucknow International Airport Limited be treated as Supply u/s. 7 of the Central Goods and Service Tax Act, 2017 ("CGST") viz-a-viz Uttar Pradesh State Goods and Service Tax Act, 2017 ("UPGST")?

11.2 As per Sec. 7(1) of CGST Act, 2017, "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;*

.....

As the definition of supply covers transfer, the activity of transfer of business is covered under the definition of supply. However, a question may arise whether the activity is in the course or furtherance of business.

11.3 As per sec. 2(17)(d) of the CGST Act, 2017, *business includes supply or acquisition of goods including capital goods and services in connection with commencement or closure of business.*

11.4 Hence, transfer of assets during transfer of business is included in the definition of business.

11.5 As such, the activity of transfer of business is in the nature of supply.

12.1 Next we proceed to examine as to whether the transfer of business by Airports Authority of India to M/s. Adani Lucknow International Airport Limited is treated as supply as going concern and covered in clause 4 of schedule II of CGST Act viz-a-viz UPGST.

12.2 The term 'going concern' is not defined in CGST Act, 2017. However, Going concern is defined in AS- 1 as follows:

> *"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."*

12.3 The transfer of business as a going concern has been analysed in various tax rulings as well. In the landmark judgement of *In* ***Re: IndorRama Textile Limited*** [1] (2013), the Delhi High Court observed that a company is said to be transferred as a going concern when the assets and liabilities being transferred constitute a business activity capable of being run independently for a foreseeable future. Prior to this case, Supreme Court in case of ***Allahabad Bank v ARC Holding*** [2] (2000) also held that if the company is sold off as a going concern, if there are any liabilities relevant to the business or undertaking, the liabilities too are transferred along with the assets of the company. In *Jayaprakash Shyamsundar Mandare v. Laxminarayan Murlidhar AIR 1983 Bom 364,* it was held that a company can be sold off as a going concern only when the company in question is still in operation. Further, the Karnataka High Court observed in *IAE International Aero Engines AG and Ors.* vs. *United Breweries (Holdings) Limited and Ors ILR 2017 KARNATAKA 2225* , that a company cannot be sold off as a going concern if the company in question has already stopped its operations.

12.4 As such, for transfer of business to be classified as 'transfer of going concern'-

(a) business should be continued for a foreseeable period.

(b) there is no intention to liquidate the business and there should be continuity of the same business by the transferee as was being carried on by the transferor.

(c) assets and liabilities being transferred constitute a business activity capable of being run independently.

12.5 Therefore, for answering the question no. 2, it is necessary to examine as to whether business arrangement entered vide Concession Agreement dated 14.02.2020 is transfer of Going concern or otherwise

12.6 As per submissions made by the applicant, it has been observed that-

12.6.1 the Airports Authority of India has decided to invite bids for undertaking the operations, management and development of certain airports on a public private partnership basis under Section 12A of AAI Act, 1994.

12.6.2 Applicant while prescribing technical and commercial terms and conditions for operations, management and development of the *Chaudhary Charan Singh International Airport* (herein after referred as "Airport") invited proposals by Request for proposal ("RFP") dated 14.12.2018.

12.6.3 After evaluation of the bids received from the bidders and receipt of approval of GOI, the applicant accepted the bid of Adani Enterprise Limited and issued letter of Award dated 15.07.2019 which required Adani Enterprise Limited to execute the concession agreement through a special purpose vehicle.

12.6.4 Adani Enterprise Limited has promoted and incorporated a special purpose vehicle company as "Adani Lucknow International Airport Limited" (hereinafter referred as SPV).

12.6.5 A Concession Agreement dated 14.02.2020 has been entered between Airports Authority of India and Adani Lucknow International Airport Limited for Operations, Management and Development of Chaudhary Charan Sungh International Airport, Lucknow.

12.6.6 As per Article 2 of the agreement, the scope of the project shall mean the operations, management and development of the Airport covering-

(a) design, development, financing, construction, up-gradation and expansion ofthe Airport in a phased manner

(b) operations, maintenance and management of the Airport in accordance withthe 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

12.7In the present case, there is transfer of business for operation, management and development of the Chaudhary Charan Sungh International Airport, Lucknow (hereinafter referred as CCSI Airport) to SPV for a period of 50 years as per clause 3.1.1 of the concession agreement. Accordingly, we find that under this business arrangement, there is clear cut provision for continuance of business for the foreseeable future.

12.8We find that there are various provisions in the agreement for business continuity such as-

(a) The applicant has submitted that all existing contracts entered by AAI have been novated and the requisite insurance has been taken by SPV.

(b) 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.

(c) the statutory function of the AAI to establish and maintain hotels, restaurants and restrooms at or near the airports as per Section 12(3)(f) AAI Act has also been transferred to SPV.

(d) 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 as per Section 12(3)(r) AAI Act has also been transferred to SPV.

(e) The city side development activities are statutory functions assigned to AAI vide the AAI Act which has also been transferred to SPV.

(f) the scope of the project includes operations, management and development of the Airport.

12.9 We find that as per Article 16.2 and 16.3 of the agreement, the SPV shall assume control of all Aeronautical Assets, Non Aeronautical assets and Terminal Building on the commercial operation date (hereinafter referred as 'COD'). Further, we find that as per Article 16.1.1 of the agreement, 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 COD and all rights, obligations and liabilities in respect thereof shall vest exclusively in the SPV until the transfer date.

12.10 We find that as per Article 16.1.2 of the agreement, 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 commercial operation date. 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.

12.11 Furthermore, we are of the opinion that it is not essential to transfer all assets and liabilities against 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 takeover carries out subject business activities without any obstruction then it shall qualify to be a transfer of a business.

12.12 We find that as per Article 16.1.1 of the Agreement, all the liabilities incurred by the AAI prior to commercial operation date including any debt obligations and payments to AAI or any third party shall continue to vest in AAI at all times. It is for the sustainability and continuity of business after transfer of business to SPV.

12.13 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). On the basis of which we can conclude that if any enterprise is having the intention to continue the business it could be said to be a going concern. It is not necessary that all the assets and liabilities shall be transferred, it is sufficient if only those assets which are essential to continue the business are transferred, but what is being transferred should be capable of being considered as a whole or an independent part.

12.14 We find that the SPV shall bear the Select employees costs, as set forth in Schedule 'S' to the said Contract. Further, as per Article 6.5.6 of the Agreement, 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. In the Allahabad Bank Case (supra) also, the Supreme Court acknowledged the need to sell a company as a going concern on the basis to preserve the interests of the workforce of the company.

12.15 We find that the Authority of Advance Ruling of Gujrat also vide **Advance**

Ruling No. GUJ/GAAR/R/46/2021 dated 27.08.2021 passed ruling that the business arrangement between AAI and SPV merits to be covered under transfer of going concern.

12.16 As such, we are of the view that the business arrangement between AAI and SPV vide Concession Agreement dated 14.02.2020 is squarely covered under transfer of going concern.

12.17 The applicant has also sought also as to whether transfer of business by Airports Authority of India to M/s. Adani Lucknow International Airport Limited is covered in clause 4 of schedule II of CGST Act viz-a-viz UPGST. The said para 4 of Schedule II are reproduced below:

> ***Para 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, 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, 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.*

12.18 The para 4(a) is in respect of transfer or disposal of goods forming part of the assets of a business and para 4(b) is in respect of goods put to any private use or for use, other than a purpose of business and both are not applicable to the instant case. Further, the para 4(c) is applicable only when a person ceases to be a taxable person.

12.19 We find that AAI has not ceased to be a Taxable person as AAI has only transferred its LucknowAirport 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.

12.20 We further 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 of services. Having gone through the subject Contract, we find the subject business arrangement is 'transfer of going concern'. As such, we find no merit to vivisect the subject Contract and examine the treatment of aeronautical assets/ non aeronautical assets/ other business assets in the Contract entered between AAI and SPV.

12.21 As such, the transfer of business by Airports Authority of India to SPV is transfer of a 'going concern' and the same is not covered in clause 4 of schedule II of CGST Act.

13.1 Now we proceed to examine as to whether the transfer of business by M/s. Airports Authority of India to M/s. Adani Lucknow 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.

13.2 The Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 reads as under-

In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts the intraState supply of services of description as specified in column (3) of the Table below from so much of the central tax leviable thereon under subsection (1) of section 9 of the said Act, as is in excess of the said tax calculated at the rate as specified in the corresponding entry in column (4) of the said Table, unless specified otherwise, subject to the relevant conditions as specified in the corresponding entry in column (5) of the said Table, namely:-

Table

Sl. No.	*Chapter, Section, Heading, Group or Service Code (Tariff)*	*Description of Services*	*Rate (per cent.)*	*Condition*
(1)	*(2)*	*(3)*	*(4)*	*(5)*
2	*Chapter 99*	*Services by way of transfer of a going concern, as a whole or an independent part thereof*	*Nil*	*Nil*

13.3 The said notification exempts 'services by way of transfer of going concern' and in order to avail the above exemption, the following conditions shall be satisfied –

(i) The transfer of business shall be transfer of a going concern.

(ii) The business which is being transferred shall be transferred as a whole or independent part.

13.4 For answering the question, it is necessary to examine as to whether transfer of business is supply of goods or a service?

13.5 In terms of Sec. 2(52) of CGST Act, 2017, *"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".*

13.6 Therefore, to be called as goods, it has to be movable property. In case of the judgment given by Andhra Pradesh High Court in case of Paradise Food Court v. State of Telangana 2017 VIL 238 AP in the context of VAT Law, it was held that the "business" is not movable property and is, therefore, not goods. As business cannot be said to be movable, transfer of business cannot be said to be a transfer of goods.

13.7 In terms of sec. 2(102), services mean anything other than goods. The term service is wider in its scope. As it covers anything other than goods, transfer of business which cannot be considered transfer of goods will fit into the definition of "service".

13.8 We have already discussed that 'transfer of business' is service and business

arrangement between AAI and SPV vide Concession Agreement dated 14.02.2020 is covered under transfer of going concern. Further, the independent part of business of the applicant i.e. the CCSI Airport, Lucknow is being transferred to SPV vide the said agreement.

13.9 As such, we are of the view that the transfer of business by M/s. Airports Authority of India to M/s. Adani Lucknow International Airport Limited is squarely 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.

14. *The next question of the applicant is '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 M/s. Airport Authority of India to the M/s. Adani Lucknow International Airport Limited?'* As the answer of previous question is not negative, there is no need to answer the said question.

15. The next question of the applicant whether the aforesaid transfer of asset be treated as services and the classification for the same? As already discussed in question no. 2 &3, the transfer of asset is part of transfer of going concern as such ruling is not required on the said question.

16. The next question of the applicant is as to whether the concession fees paid by M/s. Adani Lucknow International Airport Limited to M/s. Airports Authority of India be treated as consideration for transfer of business? Consideration for transfer of business may be as per the terms and conditions of the Contract and there is no restriction on consideration being upfront/ one time/ in instalments. Concession fees is payable by SPV to AAI during the concession period, calculated on a formula based on passenger footfall. The same is part of consideration for transfer of business assets.

17. The next question of the applicant is as to whether GST is applicable on Monthly/Annual concession fees charged by the Applicant on the M/s. Adani Lucknow International Airport Limited? If yes at what rate? The monthly/annual concession fees is also part of consideration for transfer of business assets and exempted from GST vide entry no. 2 of Notification No. 12/2017-CT® dated 28.06.2017.

18.1 The next question of the applicant is as to whether GST is leviable on the invoice raised by the Applicant for reimbursement of the salary/ staff cost on M/s. Adani Lucknow International Airport Limited ? If yes at what rate?

18.2 We find that clause 6.5 of the agreement defines deployment and emoluments of the staff of the AAI in relation to new system to be adopted. Para 6.5.3 (ii) says "It is clarified that the Concessionaire shall not be liable to bear any costs in respect of the Senior Personnel, rather than it shall be borne entirely by the Authority". These personnel, as per para 6.5.3(i), on the expiry of such 03 month period shall be transferred out of the airport and redeployed by the Authority. Hence in this regard there is no case of GST on payment of salary. But the para 6.5.4 says that the Concessionaire shall bear the Select Employee cost of the Joint Management period and Deemed Deputation period. The agreement further clears out in following paras;

> ***6.5.5-*** *Subject to clause 6.5.4, the Concessionaire shall pay to the authority, on a monthly basis, such amounts as may be indicated in an invoice to be raised by the*

Authority on the Concessionaire with regard to the emoluments payable by the Authority to the Select Employees (the ***"Select Employee Costs"****).*

(i) The Concessionaire shall make payment of the Select Employees cost on or prior to seven days from the date on which the invoice is raised.

(ii)- Upon the Concessionaire making such payment the Concessionaire shall not be held responsible for non-payment of emoluments by Authority to the Select Employees.

(iii)- In the event of delay in payment of the Select Employee Costs on the part of the Concessionaire, the Concessionaire shall be liable to pay interest to the Authority for the period of delay calculated at a rate equal to 2% (two percent) above the Bank Rate.

(iv)- The Select Employee Cost shall determined from time to time in accordance with the relevant service rules on a cost-to-company basis and shall, as applicable, include cost toward voluntary retirement.

(v)- It is clarified that the liability of the Concessionaire under this Clause 6.5.5 shall stand reduced to the extent of the Accepting Employees.

18.3 A Simple purview of the points of agreement clearly establishes that payment of salary to the staff (in this case Select Employees) is not the responsibility of the recipient of this service, rather it is the sole responsibility of the AAI to pay emoluments to their Staff. Para 6.5.5 (ii) absolves the Adani Lucknow International Airport Limited (SPV) from paying emoluments to the manpower which is engaged in providing their services in operation of the airport and this manpower can demand or and will receive their emoluments from the AAI only. And para 6.5.5 (iii) makes it imperative upon the recipient of service to pay interest to the Authority at a rate equal to 2% (two percent) above the Bank Rate in case of delay in payment of reimbursement to AAI. Hence this is not case where payment of emoluments to AAI is a part of transfer of business as a going concern, rather it is the supply of manpower services by AAI to SPV.

18.4 This situation is further elaborated in following Paras of the agreement:-

6.5.6- *At any time during the Joint Management Period, but no later than 90 (ninety) days from the COD, the Concessionaire shall make offers of employment ("Employment Offers") to a minimum of 60% (sixty percent) of the Select Employees.*

(i)- It is clarified that, in the event of reduction in the number of Select Employees in the manner set forth in Clause 6.5.1, the minimum number of Select Employees to whom Employment Offers are required to be made shall stand correspondingly reduced, with any fractions thereof rounded off to the nearest whole number.

(ii)-The terms and conditions of the Employment offers shall, in terms of salary, positions, etc., be the same as the current employment terms of the Select Employees on an annual cost-to-company basis.

18.5 A perusal of above conditions clearly stipulates that the Select Employees, who are appointed and deployed by the AAI, are not part of the transfer of business as a whole **till the time they are absorbed in and by the recipient SPV** because their absorption in the new entity is conditional to acceptance of offers of employment by the employees of AAI. As such, the emoluments paid to employees of AAI till their acceptance of employment offers, is not governed by the tenets of transfer of business as a going concern.

18.6 Again para 6.5.7 stipulates:

> ***6.5.7****-The recipients of the Employment Offers shall accept or decline the Employment offers within 1 (one) month of the Employment offer being made.*
>
> ***(i)****-Such Select Employees shall, upon accepting the Employment Offers (the "Accepting Employees"), resign from the employment of the Authority, and cease to be employees of the Authority.*
>
> ***(ii)****- The Concessionaire shall be the new employer of the Accepting Employees on the terms and conditions mutually agreed between the Concessionaire and the Accepting Employees.*

18.7 Thus it is amply clear that "Select Employees" may exercise their choice whether they wish to join the new entity or not, and only upon accepting the offer of employment and joining the new entity, they become a part of the transfer of business as a going concern. Moreover only upon accepting the employment offers, they cease to be employees of the AAI and those who do not accept the offer will not be the part of the transfer of going concern. Para 6.6.9 says:

> *At the end of the Deemed Deputation Period, all Select Employees opting to continue employment with the Authority or those who have not received Employment Offers, shall continue their employment with the Authority and shall be transferred out of the Airport and redeployed by the Authority.*

18.8 Consequent upon the above deliberation and declaration, it is crystal clear that the deemed deputation period is not a one way road to transfer of business as a going concern, because the employees of AAI may opt or may not opt for employment under the SPV and there may be circumstances in which they do not receive employment offers or they continue their services with the AAI and in this condition they will be redeployed by the AAI and removed from the airport which will be managed and operated by the SPV. Thus there is no case for exemption on the reimbursement of emolument of employees to the AAI as services of manpower supply is provided by one distinct entity to another distinct entity where transfer of business as a going concern is not a precondition nor this supply of manpower services is a corollary to the agreement for transfer of business for the operations management and development of the airport.

18.9 In a relevant advance ruling decision **No. 89/2021 dated 17.12.2021 of the Authority of Advance Ruling UP** in the case of **Broadcast Engineering Consultants Limited**, it was held that cost of emolument when reimbursed are liable for imposing GST.



18.10 In view of the discussions above, it appears that reimbursement of cost of emoluments of employees is a consideration for supply of manpower service and not for supply of transfer of business as a going concern and hence taxable @ 18%.

19. The next question of the applicant is as to whether GST is applicable on the reimbursement claimed of Municipal tax, Property Tax and Water Charges by the Applicant from M/s. Adani Lucknow International Airport Limited? If yes at what rate? The issue of reimbursement of municipal tax, property tax and water charges has arisen in pursuance to the terms of Concession Agreement dated 14-2-20 and Supply of Transfer of Going concern Service' is exempt from GST as discussed above. The re- imbursement of cost is also part of consideration for 'Supply of Transfer of Going concern Service' as such is exempt from GST.

20. The next question of the applicant is as to whether any reversal is required in accordance with section 17 (2) / (3) of CGST Act viz-a-viz UPGST Act? If any person is transferring the business as a going concern, then the same will be treated as an exempted supply in terms of above discussed notification. Further, as per sec. 17 read with rule 42 of CGST Rules, 2017, in case any registered person is having any exempted supplies, then ITC pertaining to such exempted supplies shall be reversed proportionately.

21. Accordingly, we pass the Ruling:

RULING

Question 1- Whether the transfer of business by the Airport Authority of India to the M/s. Adani Lucknow International Airport Limited be treated as Supply u/s. 7 of the Central Goods and Service Tax Act, 2017 ("CGST") viz-a-viz Uttar Pradesh State Goods and Service Tax Act, 2017 ("UPGST")?

Answer 1- The Subject Supply of 'Transfer of Going Concern service' is Supply underSection 7 CGST Act, 2017.

Question 2- Whether the transfer of business by Airports Authority of India to M/s. Adani Lucknow International Airport Limited is treated as supply as going concern and covered in clause 4 of schedule II of CGST Act viz-a-viz UPGST?

Answer- The subject Supply is 'Transfer of Going Concern Service' and the same is not covered in clause 4 of schedule II of CGST Act viz-a-viz UPGST.

Question 3- Whether the transfer of business by M/s. Airports Authority of India to M/s. Adani Lucknow 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?

Answer 3- The subject Supply is covered vide Entry No. 2 of Notification 12/2017-Central Tax (Rate) dated 28.06.2017.

Question 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 M/s. Airport Authority of India to the M/s. Adani Lucknow International Airport Limited?

Answer 4- Ruling not required, in pursuance to Ruling at serial no 3.

Question 5- Whether the aforesaid transfer of asset be treated as services and the classification for the same?
Answer 5- Ruling not required, in pursuance to Rulings at serial no 2 & 3.

Question 6- Whether the concession fees paid by M/s. Adani Lucknow International Airport Limited to M/s. Airports Authority of India be treated as consideration for transfer of business?
Answer 6- No.

Question 7- Whether GST is applicable on Monthly/Annual concession fees charged by the Applicant on the M/s. Adani Lucknow International Airport Limited?If yes at what rate?
Answer 7- No

Question 8- Whether GST is leviable on the invoice raised by the Applicant for reimbursement of the salary/ staff cost on M/s. Adani Lucknow International Airport Limited ? If yes at what rate?
Answer 8 – Yes, at the rate of 18% (9 % CGST and 9% SGST).

Question 9- Whether GST is applicable on the reimbursement claimed of Municipal tax, Property Tax and Water Charges by the Applicant from M/s. Adani Lucknow International Airport Limited? If yes at what rate?
Answer 9- No.

Question 10- Whether any reversal is required in accordance with section 17 (2) / (3) of CGST Act viz-a-viz UPGST Act?
Answer 10- Yes.

22. 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 AIRPORTS AUTHORITY OF INDIA,
CHAUDHARY CHARAN SINGH INTERNATIONAL AIRPORT,
AMAUSI, LUCKNOW-226009

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. Ex,, 7-A, Ashok Marg Lucknow
4. The Deputy/Assistant Commissioner, CGST & Central Excise, Division I, Kendriya Bhawan, Sector-H, Aliganj, Lucknow.
5. Through the Additional Commissioner, Gr.1, Commercial tax, Zone-I, LKO. 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 Khand, Gomti Nagar, Lucknow – 226010, within 30 days from the date of service of this order.