TAX FLASH NEWS

20 July 2020

Pursuant to transfer of business unit, unutilised ITC under different heads can be transferred to other states by filing ITC 02 – Authority for Advance Ruling, Andhra Pradesh

The Authority for Advance Ruling, Andhra Pradesh (AAR) has recently passed an order[1] allowing interstate transfer of unutilised input tax credit (ITC) pursuant to supply of business unit as going concern.

Facts of the case

The applicant had transferred its entire business operation in the state of Andhra Pradesh including its capital assets as a going concern to its other business unit in Karnataka for a consideration. In this regard, the applicant filed an application before the AAR to seek a ruling on the following

1. Whether the transaction of sale of the business would amount to supply of goods or supply of services?
2. Whether the applicant can claim the benefit of exemption notification no. 12/2017-Central Tax (Rate) dated 28 June 2017, wherein by virtue of entry no. 2 specific exemption has been granted for services provided by way of transfer of going concern? and
3. Whether the applicant can transfer the unutilised ITC to unit located in Karnataka?

AAR's order

As per entry 4(c) of schedule II of the CGST Act, 2017, transfer of business assets is treated as 'supply of goods'. However, since in the instant case the business is transferred/sold in its entirety, including capital assets, it cannot be grouped under 'supply of goods'. Further, since the definition of services qualifies 'anything other than goods' as services, transfer of business as going concern would automatically fall under the ambit of 'supply of services'.

Further, the description of services under Sl.No.2 of Chapter 99 of Notification No. 12/2017 - Central Tax (Rate) dated 28.6.2017 provides for "Services by way of transfer of a going concern, as a whole or an independent part thereof" as nil rated, the transaction is not liable to tax.

On the question of transfer of the unutilised ITC under different heads i.e. CSGT, SGST and IGST, the AAR referring to the provisions contained under Rule 41 of the CGST Rules read with Section 18(3), held that the transferor can transfer unutilised ITC to the transferee, which is lying in its electronic credit ledger by filing form GST ITC-02.

Our comments

Though there are several AARs wherein the sale of the business as going concern has been held to be exempt from levy of GST. However, in the instant case, the order by AAR is unique in two ways, one it has allowed sale of business to its another unit located in another state and second, it has allowed the transfer of ITC from one state to another. It would be prudent to note that recently vide circular no. CBEC-20/06/13/2019-GST dated 23 March 2020, CBIC had clarified that for the purpose of determining the ratio for apportionment of ITC, the value of assets in case of business reorganisation, shall be considered at the state level and not at all India level. This would necessitate the transferee company/unit to also obtain registration in the state where the transferor company/unit has registration. Considering the circular and the challenges in the GSTN system for carrying out such transfer of ITC, one needs to see how the ruling by AAR is being implemented.

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[1] Shilpa Medicare Limited [2020-VIL-199-AAR]

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