

 सत्यमेव जयते	RAJASTHAN AUTHORITY FOR ADVANCE RULING GOODS AND SERVICES TAX KAR BHAWAN, AMBEDKAR CIRCLE, NEAR RAJASTHAN HIGH COURT JAIPUR – 302005 (RAJASTHAN)	 राष्ट्र कर बाजार
---	---	---

ADVANCE RULING NO. RAJ/AAR/2022-23/25

Umesh Kumar Garg Joint Commissioner	:	Member (Central Tax)
Mahesh Kumar Gowla Additional Commissioner	:	Member (State Tax)
Name and address of the applicant	:	M/s Airports Authority of India, Civil Airport Road, Sanganer, Jaipur-302011, Rajasthan
GSTIN of the applicant	:	08AAACA6412D1Z8
Clause(s) of Section 97(2) of CGST/SGST Act, 2017, under which the question(s) raised	:	(b) Applicability of a notification issued under the provisions of this Act (e) Determination of the liability to pay tax on any goods or services or both. (g) 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.
Date of Personal Hearing	:	28.04.2022, 14.12.2022 & 03.02.2023
Present for the applicant	:	Hem M Chhajed, CA
Date of Ruling	:	20.03.2023

Note: Under Section 100 of the CGST/SGST Act, 2017, an appeal against this ruling lies before the Appellate Authority for Advance Ruling constituted under section 99 of CGST/SGST Act, 2017, within a period of 30 days from the date of service of this order.

At the outset, we would like to make it clear that the provisions of both the CGST Act and the SGST 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 SGST Act. Further to the earlier, henceforth for the purposes of this Advance Ruling, a reference to such a similar provision under the CGST Act / SGST Act would be mentioned as being under the "GST Act".

The issue raised by M/s Airports Authority of India, Civil Airport Road, Sanganer, Jaipur-302011, Rajasthan (hereinafter the applicant) is fit to pronounce advance ruling as it falls under the ambit of the Section 97(2) (b), (e) & (g) given as under:

- (b) Applicability of a notification issued under the provisions of this Act
- (e) Determination of the liability to pay tax on any goods or services or both.
- (g) 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.

A. SUBMISSION OF THE APPLICANT: (in brief)

- 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. AAI has been created for the purposes of establishing or assisting in the establishment of the airports and for matters connected thereto.
- 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.
- 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 traveling 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.
- Section 12-A of Airports Authority of India Act ("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 AAI may deem fit.
- In the pursuance of Section 12A of AAI Act, Airports Authority of India has decided to invite bids for undertaking the operation, management and development of certain airports of the AAI on a public private partnership basis to bring efficiency in service delivery, expertise, enterprise and professionalism and to harness necessary investment.

Airport has been defined in Article 1 clause 1.1 of the concession agreement. For reference the definition of airport is defined as under:

"Airport" means Jaipur International Airport located at the Site, and includes civil, mechanical and electrical works, the Terminal Building, Cargo Facilities, Runway and all Project Assets necessary for and associated with operation and expansion of the Airport;

- 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 01.09.2020 which required Adani Enterprise Limited to execute the concession agreement through a special purpose vehicle.
- Adani Enterprise Limited has promoted and incorporated a special purpose vehicle as "Adani Jaipur International Airport Limited" (herein after referred as "Concessionaire") under Companies Act 2013 and in accordance with the terms of Request for proposal ("RFP").
- After receipt of security clearance from Ministry of Home Affairs, GOI through MOCA, Applicant has accepted the request of the concessionaire and entered into a Concession Agreement dated 19.01.2021 between the Applicant and the Concessionaire for Operations, Management and Development of Airport through Public Private Partnership subject to the terms of the agreement.
- 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].
- The Scope of the Project is covered under Clause 2.1 of Article 2 of the agreement. For your reference scope of project is reproduced hereunder:
 - (a) design, development, financing, construction, up gradation 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.

To understand the scope of project it is essential to understand the term project and project assets. The terms project and projects assets is defined in clause 1.1 of Article 1 of the concession agreement.

"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 authorizations relating to or in respect of the Airport;
- 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 (i.e. Airports Authority of India) following sum as consideration for transfer: -
- Rs. 2,53,00,00,000/- 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.2,56,00,000/- 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. (Onetime 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 Throughput 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.

B Interpretation and understanding of applicant on question rose (in Brief)

- In the present case as explained above it can be said that by the underlying transaction business of operation, management and development of the airport which is getting carried out by the applicant will be undertaken by the Concessionaire. Thus, in common parlance it can be said that present transaction amount to transfer of business from the applicant to the Concessionaire.
- 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.
- As per Section 5 of the IGST Act, which is the charging section, integrated Goods and Services Tax ('IGST') shall be levied on all inter-state supplies of goods or services or both.
- Thus, it is clear that GST is leviable on supply of goods or services. Thus, it is imperative to analyses whether the transfer of business qualifies as 'supply'. The term 'supply' has been defined in section 7 of CGST Act. Section 7 of the Act is reproduced hereunder:
 - 7. (1) for the purposes of this Act, the expression "supply" includes—
 - (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;
 - (aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation.—For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its

members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;]

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

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

*(d) [***]*

(1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]

(2) Notwithstanding anything contained in sub-section (1),—

(a) Activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified^{39a} by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of 40[sub-sections (1), (1A) and (2)], the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods.

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

a. Supply should be of goods or services

b. Supply should be made for a consideration

c. Supply should be made in the course of furtherance of business

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

Subsequently 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.

- It is worth noting that Section 7(1A) of the CGST Act provides a reference to Schedule II of the CGST Act which provides for the classification of the underlying transaction/activity i.e. whether it qualifies as goods or services. However, Schedule II is silent on the transaction undertaken by the applicant.
- However, in Sr. No. 2 of the Notification No.12/2017 - Central Tax Rate dated June 28, 2017, provides exemption which is as under:
 -
 - In exercise of the powers conferred by 1[sub-section (3) and sub-section (4) of section 9, sub-section (1) of section 11, sub-section (5) of section 15 and section 148] 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 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.

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

Service by way of transfer;

The 'transfer' should be of the going concern;

Such transfer must be as a whole or an independent part thereof

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

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

"the 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."

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

- 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.

Certain clauses in the agreement which reflects that there is transfer of assets, liabilities, rights etc are as under:

“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 zero zero 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.

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.

There have been instances where the Courts have interpreted the term 'transfer' to include the meaning of temporary transfer, such as;

- a. Reference can be made from 20th Century Finance Corpn. Ltd. v. State of Maharashtra, (2000) 6 SCC 12 In Corpus Juris Secundum [Vol. 87, p. 892.] , it is defined to mean,

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

- b. 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)]

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

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

- d. 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.

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

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

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

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

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

The clause 16.1.1 of the concession agreement specifies as under:

“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 zero zero 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.”

On reading the above clause it is clear that applicant has transferred all the rights and liabilities to the concessionaire and concessionaire will continue the business from 0000 hours on commercial operation date.

The Commercial Operation date has been defined in clause in 15.1 of concession agreement. For your reference extract of clause is reproduced hereunder:

The commercial operation date ("COD") of this Concession shall be the date on which all conditions Precedent have been satisfied in accordance with Article 4 and the concessionaire has achieved Financial Close and the concessionaire shall from the COD be entitled to commence the operation and management of the Airport and shall be entitled to demand and collect fee in accordance with the provisions of Article 28.

The above clause clearly specifies applicant is not intending to close the operations of the airport and the concessionaire. However, it is intending to transfer the operations of the airport to the Concessionaire for efficient management.

There is joint management period, which indicates that both the parties to contract are intending to continue operations of the airport. Joint Management period has been defined in clause 6.5.1 of the Agreement.

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.

Clause 3 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 applicant. 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.

Clause 3.1.1 and 3.1.2 of the concession agreement is reproduced hereunder;

Subject to and in accordance with the provisions of this agreement, Applicable laws and the Applicable permits, the authority hereby grants to the concessionaire, the concession set forth herein including the exclusive right, lease and authority to operate, manage and develop the Airport ("Concession") for the period of 50 (fifty) years commencing from the COD, and the concessionaire hereby accepts the Concession and agrees to implement the project subject to and in accordance with the terms and conditions set forth herein.

3.1.2. Subject to and in accordance with the provisions of this agreement, the authority, applicable laws and the applicable permits, the concessionaire hereby granted shall oblige or entitle (as the case may be) the concessionaire to:

- a) the Right of Way, access and lease to the Site for the purpose of and to the extent conferred by the provisions of this Agreement;*
- b) finance the development and expansion of the Airport;*
- c) Operate, maintain and manage the Airport and regulate the use thereof by third parties;*

- d) demand, collect and appropriate Fee from Users liable for payment of Fee for using the Airport or any part thereof and refuse entry of any such User if the Fee due is not paid;
- e) perform and fulfil all of the SPV's obligations under and in accordance with this Agreement;
- f) save as otherwise expressly provided in this Agreement, bear and pay all costs, expenses, Taxes and charges in connection with or incidental to the performance of the obligations of the SPV under this Agreement; and
- g) neither assign, transfer or create any lien or encumbrance on this Agreement, or the Concession hereby granted or on the whole or any part of the Airport nor transfer, or part possession thereof, save and except as expressly permitted by this Agreement or the Substitution Agreement.

In addition, SPV shall undertake development, finance, operation and maintenance of real estate at the Site specified in Schedule A, in accordance with Schedule B and Schedule C, and to use such development for commercial purposes in accordance with terms specified with the right to sub-lease and/ or sub-license any or all parts thereof by way of Project Agreements.

Given the above, as per the accounting concept, the airport business by the applicant will be construed as a going concern in absence of intention of liquidation or curtailing the operations.

In view of the above explanation it can be concluded that the underlying transaction involves transaction relating to "a going concern".

2. The above, clauses 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 foreseeable future spanning 5 decades. The Contract is for transfer of the development, maintenance and management of Jaipur International Airport, Jaipur. In pursuance to AAI Act, the AAI has constructed the airport at Jaipur and has been operating it under and in accordance with the AAI Act. The concessionaire has taken insurance, novated all the existing agreements as mentioned in Schedule V, so as to maintain effective running of operations of the airport. The concessionaire has entered into Memorandum of Understanding with the Government of India as per Schedule R to the said Contract. On plain reading of the contract, it is forthcoming that there are various standards specified in the Contract to ensure that the operations, development and maintenance of the said Airport is undertaken in pursuance with the AAI Act by the concessionaire.

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.

- 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. Jaipur 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.

- The Jaipur airport of the applicant is the independent part of the applicant. However, rights to operate manage and maintain the airport will be transferred. The word 'independent' in common parlance denotes the stand alone or capable of being functional individually.

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

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

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

The AAI and concessionaire had taken following steps to ensure business continuity:

- (a) All existing contracts entered by AAI have been novated and the requisite insurance has been taken by concessionaire.
- (b) Neither AAI nor its affiliates will commission a new airport within a 50 km radius of the Airport prior to the expiry of ten years from COD. This condition is a proof that the scale of business operations undertaken by concessionaire shall continue for a foreseeable future.
- (c) As per section 12(3)(f) AAI Act, it is the statutory function of the AAI that it may establish and maintain hotels, restaurants and restrooms at or near the airports among its other functions. This function has also been transferred to concessionaire.
- (d) As per section 12(3)(r) AAI Act, it is the statutory function of the AAI that it may undertake any other activity at the airports and the civil enclaves in the best commercial interests of the Authority including cargo handling, setting up of joint ventures for the discharge of any function assigned to the Authority. This function has also been transferred to concessionaire.
- (e) The city side developments activities are statutory functions assigned to AAI vide the AAI Act which has been transferred to concessionaire and this view cannot be short sighted.

The contract is a business arrangement wherein the statutory functions of AAI, which are in part but of an independent nature, have been transferred to concessionaire and consideration for the same has been charged on concessionaire.

- (f) The Article 2 of the contract wherein the scope of the Project is detailed, which includes the operation, management and development of the airport. The 'airport' also includes all project assets necessary for and associated with the operation and expansion of the airport. The project assets are physical and other assets relating to or forming part of the site including the rights over the site in the form of lease, right of way or otherwise; the aeronautical assets and non-aeronautical assets; tangible assets such as civil works and equipment including foundations, drainage works, electrical systems, communication systems and administrative office; project facilities situated on the site; buildings and immovable fixtures or

structures forming part of city side development; all rights of the concessionaire under the project agreements; financial assets such as receivables, security deposits, all negotiable instruments etc; insurance proceeds; applicable permits and authorizations relating to or in respect of the airport.

The Contract is self-contained to ensure that Airport business continues without hindrances.

Therefore, the Contract entered between AAI and SPV is for Transfer of Going concern of an independent part of the business carried out by AAI with respect to the Operations, development and maintenance of the subject Airport.

The applicant relies on following pronouncements:

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

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

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

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

- ii. M/s. Innovative textiles ltd (Uttarakhand AAR),

In another advance ruling decision, 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:

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

- Article 3.1.1 of the draft concession agreement provides that the Company would be given a right to carry on the airport business for a period of 50 years. On completion of the tenure of the concession period, the assets and liabilities would revert back to

AAI. This would also happen on premature termination due to breach of concession agreement. Thus, it is the intention of the contract that the business so transferred is intended to be carried on with regularity and with the nature of permanency during the concession period.

- 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/OO30/2011, 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.

➤ 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. 12/2017-Central Tax (Rate) dated 28 June 2017.

➤ 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 be regarded that the entire arrangement as one and covered within the meaning of transfer of going concern and thus exempted.

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

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

➤ 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.

➤ 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”

- 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.

- 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"

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

- Applicant draws your attention to the decision of the Hon'ble Bombay High Court in the case of Navi Mumbai Builder's Association v. Union of India, 53 GSTR 374, which is held as under:

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

activity as supply of goods or supply of services, particularly in relation to land and building and includes a lease, then, the consideration therefore as a premium/one-time premium is a measure on which the tax is levied, assessed and recovered. Then probe into the legislation any further cannot be done.

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

- 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.
- 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.
- 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.

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

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

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

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

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

- (i) **Select Employees Cost** shall mean those employees of the Authority as set forth in Schedule S (of the rank of assistant general manager and below) who are posted at the Airport by the authority and shall be deployed at the Airport for the duration of the Joint Management period and Deemed Deputation period
- (ii) **Joint Management Period** shall mean the period commencing from the COD and ending on the date which is 1(one) calendar year after the COD

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

- 46.1 According to the clause 6.5.3 of the concession agreement the Senior Personnel shall remain deputed at the airport for a period not exceeding 3 months from the COD. After the expiry of 3 months the senior personnel shall be redeployed by the authority and the cost shall be borne by the AAI.
- 46.2 During the Joint Management but not later than 90 days from the COD the concessionaire shall make employment offers to minimum 60% of Select Employees. The recipient of the employment offers shall accept or decline the employment offers within one month when the employment offer is made.
- 46.3 The Select Employees who have declined the offer of employment or not received the offer of employment will continue their services in AAI and will be redeployed after the completion of Deemed Deputation period.
- 46.4 After the expiry of Deemed Deputation period if the Accepting employees are less than 60% of the Select employees which is called "Deficit Employees". Deficit Employees Cost shall be pass through in determination of aeronautical charges and shall be payable until retirement or other separation from Authority's services of the Deficit Employees whichever is earlier.
- The deficit employees cost, if any, as raised upon by the concessionaire on the applicant is "pass through" i.e. only the liabilities payable by the applicant will be recovered from the concessionaire and are not in nature of any damages recovered.
 - Further the "select employees" had the option to choose whether to join the concessionaire or not. However, the applicant was contractually obligated to pay the salaries and other emoluments to the select employees hired for the purpose of the operations of Jaipur airport.
 - The applicant has merely passed over its liability arisen out of the employment contracts of the "select employees" to the concessionaire. And thus this cannot be considered as any damages levied upon the concessionaire.
 - The applicant submits that the said employees were transferred along with the business. Hence if the transfer of business is treated as transfer as going concern as just exempted vide Entry No. 2 of the exemption notification No 12/2017 - Central Tax (Rate), then said transaction also be covered by the same.

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 as under: 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 as under:

"The subject issue hinges on whether business arrangement between AAI and SPV is a transfer of going concern or otherwise. According to Accounting Standard-I issued by ICAI that a fundamental accounting assumption is that of 'Going Concern' according to which 'the enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. The transfer of a going concern means transfer of a running business which is capable of being carried on by the transferee as an independent business in continuity without any hindrance for a foreseeable period. Such transfer of business will comprise transfer of assets

for running the business. Such transfer as going concern may involve transfer of employees as requisite to carry on the business without interruption. In effect, it implies that the business will continue in the new hands with regularity and a nature of permanency. [Para 22]

Findings on the issue if subject contract entered between AAI and SPV merits transfer of going concern or otherwise are:

i. Foreseeable Future

The subject business arrangement has been set in place for 50 years, which is for a foreseeable future spanning 5 decades. The subject contract is for transfer of the development, maintenance and management of SVP International Airport, Ahmedabad from AAI to SPV.

In pursuance of AAI Act, the AAI has constructed the airport at Ahmedabad and has been operating it under and in accordance with the AAI Act. SPV has taken insurance, novated all the existing arrangements, so as to maintain effective running of operations of the airport. SPV has entered into Memorandum of Understanding with the Government of India as per said contract. On plain reading of the contract, it is forthcoming that there are various standards specified in the contract to ensure that the operations, development and maintenance of the said Airport is undertaken in pursuance with the AAI Act by the SPV.

It is held that this business arrangement satisfies the concept for foreseeable future.

ii. Transfer of Assets and Liabilities

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

Further, it is opined that it is not essential to transfer all assets and liabilities for a transaction to qualify for a transfer of business. That is to say, that even if some assets are retained by the AAI and the SPV after such transfer carries out subject business activities without any obstruction, it shall still qualify to be a transfer of a business.

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

It is found that AAI has transferred to SPV the exclusive right and authority to operate, manage and develop the Airport for a period of 50 years commencing from the Commercial Operation Date.

iv. Transfer of Employees from AAI to SPV

The SPV shall bear the select employees costs, as set forth in the said contract. Further, during the joint management period, the SPV shall make employment offers to a minimum of 60 per cent of select employees and SPV shall be the new employer of the accepting employees on the terms and conditions mutually agreed between SPV and the accepting employees.

v. Steps taken for Business Continuity

There is a condition of the said contract, that neither AAI nor its affiliates shall commission a new airport within a 50 km radius of the subject Airport prior to expiry of ten years from COD. This condition is a proof that the scale of business operations undertaken by SPV shall continue for a foreseeable future.

The contract is self-contained to ensure that Airport business continues without hinderances. [Para 23]

Thus, the subject contract entered between AAI and SPV is for transfer of going concern of an independent part of the business carried out by AAI with respect to the operations, development and maintenance of the subject Airport. [Para 23.1]

Further, subject business arrangement is pronounced as transfer of going on concern, though there is no sale, as transfer of going on concern is not limited to sale (slump sale/item wise sale) but such transfer may be witnessed in circumstances such as sale/gift/lease/leave or license/hire/in any other manner. [Para 23.2]

It is held that subject business arrangement between AAI and SPV merits to be covered under transfer of going concern. Further for transfer of going concern for transfer to be effected, sale is not the only criteria. Transfer simpliciter, vide subject business arrangement, is valid enough to term subject going concern as transferred from AAI to SPV. [Para 23.3]

Supply as per section 7 is the taxable event. The first requisite for supply to be witnessed is that there shall be a supply of goods or supply of services or both.

Thus for subject transfer of business by AAI to SPV is to be termed as supply, the first and foremost condition is that business shall be either as a 'Goods' or 'Services'. [Para 24]

It is found that business is not Goods for it is not a movable property and thereby transfer of business cannot be supply of goods. [Para 24.1]

Prima facie from reading the section 7 (supply definition), section 2(52) (goods definition), section 2(102) (services definition), section 2(17) (business definition) CGST Act, it is not directly forthcoming if business is a service, consequently making supply of business a supply of service. For illustration, the meaning of section 2(17)(d) prima facie is not forthcoming, if the word 'Business' is substituted for the word 'service'. [Para 24.4]

From the construction of the wordings in the sections 18(3), 22(3) and 85(1); Schedule II(4) of CGST Act and the rule 41(1) CGST Rules, it is found that 'transfer of business' is more of an event in pursuance to a business arrangement. [Para 24.6]

In exercise of powers conferred under section 11(1), the Central Government has issued Notification No. 12/2017 - Central Tax (Rate), dated 28-6-2017, wherein at Sl. No. 2 of Notification No. 12/2017 - Central Tax (Rate), dated 28-6-2017 reads the description of service as 'services by way of transfer of a going concern, as a whole or an independent part thereof'. The plain meaning of the words 'services by way of transfer of a going concern,' is 'transfer of a going concern service'. [Para 24.8]

Sl No. 2 of Notification No. 12/2017 which has been issued in exercise of powers granted by section 11(1), it is held that business is service and transfer of business is supply of service. [Para 24.9]

The transfer of business may be by way of sale, gift, lease, leave and license, hire or in any other manner whatsoever. The wording used in the Notification No. 12/2017 is transfer of business and not sale of business. Further, it is held that transfer of business may be as a whole or independent part. [Para 24.10] Thus, subject business arrangement is 'transfer of business of an independent part with respect to SVP International Airport' by AAI to SPV for a period of fifty years which is a foreseeable future. AAI has not ceased to be a registered person under GST after this transfer, but continues its other operations. Therefore, subject supply is Transfer of going concern as an independent part with respect to the said Airport. [Para 24.11]

It is held that there are payments to be made to the AAI by SPV, as specified in the subject contract. This business arrangement has been entered with consideration involved as per the terms and conditions of the contract. The consideration may be one time or in instalments or as per the agreed terms between AAI and SPV. In this context, the payment made by the SPV to AAI includes the estimated deemed regulatory asset based, payment made by SPV towards the estimated initial non-aeronautical investments, concession fees, all these payments are as per the terms and conditions of the contract and are the consideration to be paid by SPV to AAI for execution of the contract. [Para 25]

Further, business being an inclusive definition, as per section 2(17) it is apt to interpret that the transfer of business may be in the course or furtherance of business itself. [Para 25.1]

In terms of Sl. No. 2 of Notification No. 12/2017 - Central Tax (Rate), transfer of going concern is supply of service, it is held that subject business arrangement is supply of service as per section 7(1). [Para 25.3]

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

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. There is no merit to draw any parallel between the 'transfer of business' which is the subject matter and 'transfer of business assets' as mentioned in Schedule II(4) to the CGST Act. AAI has not ceased to be a taxable person. [Para 26.2]

On detailed reading of the subject contract and it is found that the subject business arrangement is 'transfer of going concern service'. Thereby, no merit is found to vivisection the subject contract and examine the treatment of aeronautical assets/non-aeronautical assets/other business assets in the contract entered between AAI and SPV. The substance of the contract compels one under GST scheme of law interpretation, to classify the subject business arrangement as 'transfer of going concern service'. [Para 26.3]

On transferring the said Airport business to SPV, the SPV will cause to continue to successfully operate said business for a foreseeable future. Thus the subject

transfer is that of transfer of going concern as an independent part. In this context, there is no merit to examine Schedule II(4)(c) to the CGST Act as it is limited to the transfer of business assets activity. Such attempt to vivisect the contract renders a myopic view and runs counter to the 'transfer of going concern service' envisages in the substance of the contract.

The consideration may be as per the terms and conditions of the contract and there is no restriction on consideration being upfront/one time/in instalments/as per agreed terms of the contract. Concession fees are paid to SPV to AAI during the concession period, calculated on a formula based on passenger footfall. Concession fees payable by SPV to AAI are not to be confused with the user fees payable by the users to SPV. AAI had not received any concession fees during the inception period and that all the concession fees were received by it after the Commencement of Operations (CoD). [Para 27.1]

Thus, the subject supply of 'Transfer of going concern service' is supply under section 7

The subject supply is 'transfer of going concern service'. Schedule II(4) to the CGST Act refers to activities or transactions relating to Transfer of business assets to be treated as supply of goods or supply of services. Therefore, in instant case, there arises no need to examine Schedule II (4).

The subject supply is covered at Entry No. 2 of Notification No. 12/2017 - Central Tax (Rate), dated 28-6-2017. Concession fee is a part of the consideration paid by SPV to AAI in subject matter. The consideration for the subject supply 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. [Para 29]

Concession fee is a part of the consideration paid by SPV to AAI in subject matter. The consideration for the subject supply 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. [Para 29]. No appeal has been preferred against the aforesaid order before appellate authority of advance ruling neither by Centre nor State.

- In light of the aforesaid facts of the case, judicial pronouncements and relying upon the decision of Gujarat AAR, the Applicant is of the view that the said transaction is exempted by the Entry No. 2 of the exemption notification No 12/2017 – Central Tax (Rate) dated 28-06-2017.

C. QUESTIONS ON WHICH THE ADVANCE RULING IS SOUGHT:-

1. Whether the transfer of business by the Airport Authority of India to the M/s. Adani Jaipur International Airport Limited be treated as Supply u/s. 7 of the Central Goods and Service Tax Act, 2017 ("CGST"), viz-a-viz Rajasthan State Goods and Service Tax Act, 2017 ("RSGST") ?
2. Whether the transfer of business by Airports Authority of India to M/s. Adani Jaipur International Airport Limited is treated as supply as going concern and covered in clause 4 of schedule II of CGST Act viz-a-viz RSGST?
3. Whether the transfer of business by M/s. Airports Authority of India to M/s. Adani Jaipur 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 Jaipur 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 Jaipur 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 Jaipur International Airport Limited? If Yes, 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 Jaipur 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 Jaipur 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 RSGST Act?

D. PERSONAL HEARING

In the matter personal hearing was granted to the applicant on 28.04.2022, 14.12.2022 & 03.02.2023. Shri Hem M Chhajed, CA, Authorized Representative appeared for personal hearing. He reiterated the submission already made in written submission. He requested for early disposal of the application.

E. COMMENTS OF THE JURISDICTIONAL OFFICER

Comments received from the Dy. Commissioner, State Tax, Circle-F, Zone-II, Jaipur vide letter dated 10.02.2022 are as under: -

Q.1. Whether the transfer of business by the Airport Authority of India to the M/s. Adani Jaipur International Airport Limited be treated as Supply u/s. 7 of the Central Goods and Service Tax Act, 2017 {"CGST"} viz-a-viz Rajasthan State Goods and Service Tax Act, 2017 {"RSGST"}?

Ans. 1 Yes, according to definition of supplies GST Act, 2017 Section 7 of CGST Act, 2017: Scope of Supply (chapter iii levy and collection of tax), For the purposes of this Act, the expression "supply" includes-

- (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a

consideration by a person in the course or furtherance of business:

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

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

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

(c) the activities specified in Schedule I, made or agreed to be made without a consideration, so, according to Section 7 of CGST Act, 2017 the said transfer of business falls under the purview of supply.

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

Ans.2. Yes, according to the Schedule II of Central Goods and Services Act 2017 - Activities to be treated as supply goods or supply of services where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets. Whether or not for a consideration, such transfer or disposal is a supply by this person; 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 lot use, for any purpose other than a purpose of the business, whether or not for a consideration, the usage or making available of such goods is a supply of services;

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 of furtherance of his business immediately he ceases to be taxable person, unless (i) business is transferred as going concern to another person; or (ii) the business is carried on by a personal representative who is deemed to be taxable person.

Q.3. Whether the transfer of business by M/s. Airports Authority of India to M/s. Adani Jaipur 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 under Section 11 of CGST Act 2017.

Ans. 3. Yes, According to Notification 12/2017 of CGST Act 2017 "Notification No. 12/2017- Central Tax (Rate) New Delhi, the 28th June, 2017 G.5.R.....(E).- 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 to the Council, hereby exempts the interstate 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,	Description of Services	Rate (per	Condition
-------	----------------------	-------------------------	--------------	-----------

	Heading, Group or Service Code (Tariff)		cent)	
2	Chapter 99	Services by way of transfer of a going concern, as a whole or an independent part thereof.	Nil	Nil

Q.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 Jaipur International Airport Limited?.

Ans. 4. No answer is given.

Q.5. Whether the aforesaid transfer of asset is treated as services and the classification for the same?

Ans. 5. No. the aforesaid transfer of asset is to be treated as supply of goods.

Q.6. Whether the concession fees paid by M/s. Adani Jaipur International Airport Limited to M/s. Airports Authority of India be treated as consideration for transfer of business?

Ans.6. Yes, the concession fees paid by M/s Adani Jaipur International Airport Limited to M/s. Airports Authority of India is treated as consideration for transfer of business?

Q.7. Whether GST is applicable on Monthly/Annual concession fees charged by the Applicant on the M/s. Adani Jaipur International Airport Limited? If Yes, What rate?

Ans.7. Yes, 18%

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

Ans.8. Yes, 18%

Q.9. Whether GST is applicable on the reimbursement claimed of Municipal tax, Property Tax and Water Charges by the Applicant from M/s. Adani Jaipur International Airport Limited? If yes at what rate ?

Ans.9. No.

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

Ans.10. Yes , if any credit taken regarding point no 3 & 9.

F. FINDINGS, ANALYSIS & CONCLUSION:

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

1) We have carefully examined the statement of facts, supporting documents filed by the Applicant along with application, oral and written submissions made at the time of hearing and the comments of the Central Tax Authority. We have also considered the issues involved, on which advance ruling is sought by the applicant, and relevant facts. We would like to discuss the submission made by applicant and will take up the above question for discussion one by one.

2) The applicant i.e. 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. AAI has been created for the purposes of establishing or assisting in the establishment of the airports and for matters connected thereto.

2.1) applicant has decided to invite bids for undertaking the operations, management and development of airport of the applicant 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. For your reference the definition of airport is defined as under:

"Airport" means Jaipur International Airport located at the Site, and includes civil, mechanical and electrical works, the Terminal Building, Cargo Facilities, Runway and all Project Assets necessary for and associated with operation and expansion of the Airport;

2.2) the applicant accepted the bid of Adani Enterprise Limited and issued letter of Award dated 01.09.2020 which required Adani Enterprise Limited to execute the concession agreement through a special purpose vehicle

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

- (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.
- (e) Concessionaire agrees to pay the Applicant (i.e. Airports Authority of India) following sum as consideration for transfer: -
 - Rs. 2,53,00,00,000/- 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.2,56,00,000/- 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. (onetime 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 Throughput 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.*

3) Now we would like to discuss on questions raised before AAR one by one.

3.1) We observe that applicant has understood by themselves that they have transferred the business to M/s. Adani Jaipur International Airport Limited. The applicant has not put question before appellate authority that whether the business module executed through agreement between M/s. AAI and M/s. ADIAL is transfer of business or not.

3.2) So, we would like to discuss the matter whether the transfer of business as claimed by applicant falls under the ambit of Supply under GST and would be treated as Supply u/s. 7 of the Central Goods and Service Tax Act, 2017 ("CGST") viz-a-viz Rajasthan State Goods and Service Tax Act, 2017.

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, license, 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.

Further, as per Sec. 2(17) (d) of the CGST Act, 2017, "business" includes-- (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit; (b) any activity or transaction in connection with or incidental or ancillary to subclause (a); Page 25 of 32 (c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction; (d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business; (i) Any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;

Hence, transfer of assets during transfer of business is included in the definition of business. Hence we observe that the activity of transfer of business is in the nature supply and falls under the Sec. 7(1) of CGST Act, 2017.

3.3) We would like to refer the definition of Goods in CGST Act, Section 2 (52) CGST Act, defines Goods as follows: "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply .

In light of above definition, we observe that business is not Goods for it is not a movable property and thereby Transfer of Business cannot be supply of goods.

Furthermore, on going through the definition of Service, Section 2(102) CGST Act, which defines Service as follows: "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or

by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

We observe "Business" may be covered under the umbrella of the definition of Service, in accordance to Section 2(102) CGST Act and the activity of transfer of business is in the nature of supply.

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

4.1) The applicant claimed that they have transfer the business to M/s. Adani Jaipur International Airport Limited. Now we would like to examine whether the transaction falls under the supply of going concern. The term 'going concern' is not defined in CGST Act, 2017.

From the various available definitions and various ruling pronounced in various judgments i.e. Indor Rama Textile Limited 1 (2013), of Delhi High Court, Allahabad Bank v ARC Holdink [2] (2000) of Supreme Court, AE International Aero Engines AG and Ors. vs. United Breweries (Holdings) Limited and Ors ILR 2017 Karnataka 2225 of Karnataka High Court, We observe that for 'transfer of business of going concern, any agreement must have some contents - (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) Business activity constituted by transfer of assets and liabilities should have capability to run independently.

4.2) So, it is obvious, to merit as to whether business arrangement entered vide Concession Agreement dated 16.01.2021 is transfer of Going concern or otherwise.

4.3) Accounting Standard-I issued by ICAI that a fundamental accounting assumption is that of 'Going Concern' according to which "the enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations". We hold that transfer of a going concern means transfer of a running business which is capable of being carried on by the transferee as an independent business in continuity without any hindrance for a foreseeable period. Such transfer of business will comprise transfer of assets for running the business. Such transfer as going concern may involve transfer of employees as requisite to carry on the business without interruption. In effect, it implies that the business will continue in the new hands with regularity and a nature of permanency.

4.4) In accordance to submissions made by the applicant, it has been observed that 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. Applicant while prescribing technical and commercial terms and conditions for operations, management and development of the Jaipur International Airport (herein after referred as "Airport") invited proposals by Request for proposal ("RFP") dated 14.12.2018. After evaluation of the bids received from the bidders and receipt of approval of GOI, the applicant accepted the bid of M/s Adani Enterprise Limited and issued letter of Award dated 01.09.2020 which required M/s Adani Enterprise Limited to execute the concession agreement through a special purpose vehicle. Adani Enterprise Limited has promoted and incorporated a special purpose vehicle company as "Adani Jaipur International Airport Limited" (hereinafter

referred as SPV). A Concession Agreement dated 16.01.2021 has been entered between Airports Authority of India and Adani Jaipur International Airport Limited for Operations, Management and Development of Jaipur International Airport, Jaipur.

4.5) 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 of the Airport in a phased manner (b) operations, maintenance and management of the Airport in accordance with the provisions of the Agreement, Applicable laws and Applicable Permits; (c) development, operation and maintenance of City side (d) performance and fulfillment 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.

4.6) We observe after going through the concession letter dated 16.01.2021, that M/s AAI has transferred the business for operation, management and development of the Jaipur International Airport, Jaipur to SPV (AJIA) for a period of 50 years which establishes that there is continuance of business for the foreseeable future.

4.6) We also find many provisions in the agreement in respect of 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.

4.7) We have gone through some of the articles of this agreement wherein we observe 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.

4.8) 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.

4.9) 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.

4.10) We observe 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.

4.11) we would like to discuss that if liabilities have not been transferred, even if it compromises the definition of out going concern.

4.12) we observe that it is not necessary for an entity to shift its whole of assets or liability. Here in this case AAI have vast assets but they has transferred Jaipur International Airport through concessional agreement dated 16.01.2021 for the sustainability and continuity of business after transfer of business to SPV. Thus we can reach on conclusion that if any enterprise is having the intention to continue the business even if all assets or liability are not transferred and if only those assets which are essential to continue the business are transferred as an whole or independent part than, it may be treated as going concern.

4.13) 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.

4.14) we find that the Authority of Advance Ruling of Gujarat also vides 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.

4.15) we find that the Authority of Advance Ruling of UP also vides Advance Ruling No Up ADRG-03/2022 dated 13/05/2022 passed ruling that the business arrangement between AAI and SPV merits to be covered under transfer of going concern.

4.16) Thus, we are of the view that the business arrangement between AAI and SPV vide Concession Agreement dated 16.01.2021 is squarely covered under transfer of going concern.

5.) The other part of question is whether the transfer of business by Airports Authority of India to M/s. Adani Jaipur International Airport Limited is covered in clause 4 of schedule II of CGST Act viz-a-viz RSGST. The clause 4 of schedule II of CGST Act is as under:-

4. Transfer of business assets

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

(b) where, by or under the direction of a person carrying on a business, goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the

business, whether or not for a consideration, the usage or making available of such goods is a supply of services;

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

(i) the business is transferred as a going concern to another person; or (ii) the business is carried on by a personal representative who is deemed to be a taxable person.

5.1) We find that vide Concession Agreement dated 16.01.2021, AAI has only transferred its Jaipur Airport business to the M/s AJAIL (SPV) but its other business are not transferred AAI through this Concession Agreement, hence AIA has not ceased to be a Taxable person and for other business the AAI is a taxable person and registered under GST.

5.2) 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.

5.3) Thus, we observe that the transfer of business by Airports Authority of India to M/s AJAIL (SPV) is transfer of a 'going concern' and the same is not covered in clause 4 of schedule II of CGST Act.

6.) Now we will examine as to whether the transfer of business by M/s. Airports Authority of India to M/s. Adani Jaipur International Airport Limited is covered under the Entry No. 2 of the exemption notification No 12/2017 — Central Tax (Rate) dated 28-06-2017.

6.1) According to Notification 12/2017 of CGST Act 2017 "Notification No. 12/2017-Central Tax (Rate) New Delhi, the 28th June, 2017 G.5.R.....(E).- 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 to the Council, hereby exempts the interstate 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

6.2) We observe that in exercise of powers conferred under Section 11(1) CGST Act, the Central Government has issued Notification 12/2017CT(R) dated 28-6-2017, wherein at serial no. 2 of said Notification, reads the description of service as 'Services by way of transfer of a going concern, as a whole or an independent part thereof'. We have already discussed that transfer of business is service thus, 'services by way of transfer of a going concern,' is 'Transfer of a going concern service'.

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

7.) We observe that there is no need to answer the next question, because answer of previous question is not negative.

8.) The next question has already discussed in answer of 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.

9.) The next question of the applicant is as to whether the concession fees paid by M/s. Adani Jaipur International Airport Limited to M/s. Airports Authority of India be treated as consideration for transfer of business?

9.1) We observe that Consideration for Services by way of transfer of a going concern may be as per the terms and conditions of the Contract and there is no restriction on consideration being upfront/ one time/ in installments. 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.

10) 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 Jaipur International Airport Limited? If yes at what rate?

10.1) The monthly/annual concession fees is also part of consideration for Services by way of transfer of a going concern and exempted from GST vide entry no. 2 of Notification No. 12/2017-CT@ dated 28.06.2017.

11) The next question is Whether GST is leviable on the invoice raised by the Applicant for reimbursement of the salary/ staff cost on M/s. Adani Jaipur International Airport Limited? If yes at what rate?

11.1) 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. For example 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.

11.2) we have gone through the conditions and arrangements made for applicants employees in agreement which has been mentioned in earlier paras as well as submitted by applicant in his submission. 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.

11.3) We observe that points of agreements that payment of salary or emoluments of staff is onus of applicant i.e. AAI. The M/s. Adani Jaipur 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. Further, AAI will receive interest on delayed payment of reimbursement. Thus we observe in light of condition the emoluments received by the AAI form a part of services by transfer of outgoing concern. It seems the supply of manpower services by AAI to the M/s. Adani Jaipur International Airport Limited (SPV).

11.4) Further we find from conditions that the "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. Thus it is ample clear reimbursement of the salary/ staff cost will attract GST as it doesn't form any part of services by transfer of outgoing concern.

11.5) In light of declarations, it is clear that 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 by outgoing concern for the operations management and development of the airport,

11.6) Thus after examination of all conditions and considering nature of supply, we hold that the invoice raised by the Applicant for reimbursement of the salary/ staff cost on M/s. Adani Jaipur International Airport Limited falls is a consideration for supply which falls under the ambit of manpower service and hence taxable @ 18%. Not for supply of transfer of business as a going concern.

12) For the next question of applicant, We observe that the reimbursement of municipal tax, property tax and water charges has occurred in light of the terms of Concession Agreement dated 16.01.2021 and falls under the Supply of Transfer of Going concern Service', which is exempt from GST as discussed earlier.

13) We observe on the next question regarding any reversal of ITC under section 17 (2) / (3) of CGST Act viz-a-viz RGST Act that AAI is providing services by way of transfer of a going concern which is exempt supply in light of Sl.No. 2 of Notification 12/2017 of CGST Act 2017 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.

In view of above discussion we rule as under

In view of the foregoing, we rule as follows: -

RULING

(Under Section 98 of the Central Goods and Services Tax Act, 2017 and the Rajasthan Goods and Services Tax Act, 2017)

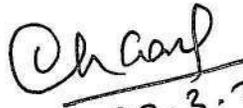
- Q.1** Whether the transfer of business by the Airport Authority of India to the M/s. Adani Jaipur International Airport Limited be treated as Supply u/s. 7 of the Central Goods and Service Tax Act, 2017 ("CGST"), viz-a-viz Rajasthan State Goods and Service Tax Act, 2017 ("RSGST") ?
- Ans.1** The Subject Supply of "Transfer of Going Concern service" is Supply under Section 7 CGST Act, 2017.
- Q.2.** Whether the transfer of business by Airports Authority of India to M/s. Adani Jaipur International Airport Limited is treated as supply as going concern and covered in clause 4 of schedule II of CGST Act viz-a-viz RSGST?
- Ans.2** 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 RGST.
- Q.3.** Whether the transfer of business by M/s. Airports Authority of India to M/s. Adani Jaipur 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?
- Ans.3.** The subject Supply is covered at Entry No. 2 of Notification 12/2017-CT(R).
- Q.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 Jaipur International Airport Limited?
- Ans.4.** Ruling not required, in pursuance to Ruling at serial no 3.
- Q.5.** Whether the aforesaid transfer of asset be treated as services and the classification for the same?
- Ans.5.** Ruling not required, in pursuance to Rulings at serial no 2 & 3
- Q.6.** Whether the concession fees paid by M/s. Adani Jaipur International Airport Limited to M/s. Airports Authority of India be treated as consideration for transfer of business?
- Ans.6.** Concession Fee is a part of the Consideration paid by SPV to AAI in subject matter
- Q.7.** Whether GST is applicable on Monthly/Annual concession fees charged by the Applicant on the M/s. Adani Jaipur International Airport Limited? If Yes, What rate?
- Ans.7.** The consideration for the subject Supply is exempt from GST vide Entry No. 2 of Notification 12/2017-CT(R) dated 28-6-2017
- Q.8.** Whether GST is leviable on the invoice raised by the Applicant for reimbursement of the salary/ staff cost on M/s. Adani Jaipur International Airport Limited? If yes, at what rate ?
- Ans.8.** Yes, at the rate of 18% (9 % CGST and 9% SGST)

Q.9. Whether GST is applicable on the reimbursement claimed of Municipal tax, Property Tax and Water Charges by the Applicant from M/s. Adani Jaipur International Airport Limited? If yes, at what rate?

Ans.9.No

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

Ans.10. Yes


20.3.2023
(Umesh Kumar Garg)
MEMBER
CENTRAL TAX




20/03/2023
(Mahesh Kumar Gowla)
MEMBER
STATE TAX

SPEED POST

✓ M/s Airports Authority of India, Civil Airport Road, Sanganer, Jaipur-302011, Rajasthan

F. No. AAR/SF/2022-23/316

Date: 20/03/2023

Copy to: -

1. The Chief Commissioner, CGST and central Excise, (Jaipur Zone), NCRB, Statue Circle, Jaipur, Rajasthan 302005
2. The Chief Commissioner, State Tax, Kar Bhawan, Bhawani Singh Road, Ambedkar Circle, C-Scheme-, Jaipur 302005.
3. The Pr.Commissioner, CGST and Central Excise Commissionerate Jaipur, Rajasthan.
4. The Dy. Commissioner, State Tax, Circle-F, Zone-II, Jaipur.