WEST BENGAL AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX
14 Beliaghata Road, Kolkata – 700015
(Constituted under section 96 of the West Bengal Goods and Services Tax Act, 2017)

BENCH

Mr Brajesh Kumar Singh, Joint Commissioner, CGST & CX
Mr Joyjit Banik, Senior Joint Commissioner, SGST

Preamble

A person within the ambit of Section 100 (1) of the Central Goods and Services Tax Act, 2017 or West Bengal Goods and Services Tax Act, 2017 (hereinafter collectively called 'the GST Act'), if aggrieved by this Ruling, may appeal against it before the West Bengal Appellate Authority for Advance Ruling, constituted under Section 99 of the West Bengal Goods and Services Tax Act, 2017, within a period of thirty days from the date of communication of this Ruling, or within such further time as mentioned in the proviso to Section 100 (2) of the GST Act.

Every such appeal shall be filed in accordance with Section 100 (3) of the GST Act and the Rules prescribed thereunder, and the Regulations prescribed by the West Bengal Authority for Advance Ruling Regulations, 2018.

Name of the applicant	KANAHIYA REALTY PRIVATE LIMITED
Address	1, Metro Tower, Ho Chi Minh Sarani, Kolkata-700071, West Bengal
GSTIN	19AADCK8406G1ZG
Case Number	12 of 2021
ARN	AD190721000123P
Date of application	July 05, 2021
Order number and date	11/WBAAR/2021-22 dated 30/09/2021
Applicant's representative heard	Mr.Rahul Dhanuka, Authorized Representative

1.1 At the outset, we would like to make it clear that the provisions of the Central Goods and Services Tax Act, 2017 (the CGST Act, for short) and the West Bengal Goods and Services Tax Act, 2017 (the WBGST Act, for short) have the same provisions in like matter except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the WBGST Act. Further to the earlier, henceforth for the purposes of these proceedings, the expression 'GST Act' would mean the CGST Act and the WBGST Act both.

1.2 The applicant intends to manufacture and supply hosiery goods such as Vests, Briefs, etc. The applicant further proposes to implement a scheme with the objective of incentivizing its sale of hosiery goods amongst the retailers whereby it would offer unconnected goods for sale at a discounted price to such retailers who have bought a certain unit of hosiery product from it as would be prescribed in its retail scheme circular. However, the retailers will be at liberty not to purchase the goods offered under the said promotional schemes.

1.3 The applicant submits that under the said retail scheme, various products like gold coins, refrigerators, coolers, split air conditioner, etc. would be offered at reduced/ discounted prices to such retailers who purchase specified units of hosiery goods. For example, the retailer would be eligible to buy a split air conditioner for Rs. 50 only against purchase of 1300 boxes of hosiery goods.

1.4 The applicant has made this application under sub-section (1) of section 97 of the GST Act and the rules made there under raising following questions vide serial number 14 of the application in FORM GST ARA-01:

(1) *Whether the supply of goods such as gold coins, refrigerator, mixer grinder, cooler, split air conditioner, etc. at nominal price to retailers against purchase of specified units of hosiery goods pursuant to a promotional scheme would qualify as individual supplies taxable at the rates applicable to each of such goods as per section 9 of the CGST Act or mixed supply taxable at the highest GST rate as per Section 2(74) read with section 8 (b) of the CGST Act, 2017, in light of the fact that the hosiery goods and good being sold at nominal price are sold under separate invoices with separate prices.*

(2) *Whether credit of the input tax paid on the items being sold at nominal prices (as indicated above) would be available to the applicant.*

1.5 The aforesaid question on which the advance ruling is sought for is found to be covered under clause (a) and (d) of sub-section (2) of section 97 of the GST Act.

1.6 The applicant states that the question raised in the Application has neither been decided by nor is pending before any authority under any provision of the GST Act.

1.7 The officer concerned from the Revenue has raised no objection to the admission of the Application.

1.8 The Application is, therefore, admitted.

2. Submission of the applicant

Fact of the case as sumitted by the applicant along with interpretaion of law made by him is reproduced verbatim herein under:

2.1 The hosiery goods would be sold initially on a separate invoice with GST at the applicable rate being recovered from the retailers on the said invoice. Once the eligibility criteria, as defined in the circular released by the applicant would be met, the goods specified in the scheme such as gold coins, refrigerator, mixer grinder, cooler, split air conditioner, etc (herein after referred to as, the said goods) would be offered for sale and the sale would be conducted vide a separate invoice with GST recovered from the retailer on reduced/ discounted price at the applicable rate. It is important to note that the retailers have the right to refuse and may choose not to buy the said goods.

2.2 The applicant, prior to the sale of the said goods to the retailers, would purchase the same from the open market against GST invoice and would make the necessary tax payment. The

applicant post payment of the applicable GST as indicated in the invoice, also intends and seeks to avail credit of the same as per the provisions under section 16 of the CGST Act and the rules framed thereunder for discharging its output tax liability. However, section 17 (5) of the CGST Act, lists down various supplies on which credit of the input tax paid cannot be availed. More specifically, the apprehension for which advance ruling is being sought arises from a reading of sub-clause (h) of section 17(5) of the CGST Act, which reads as below:

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

(a)..

…

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and

…"

2.3 The applicant apprehends that the GST authorities, on account of the discount which is being proposed to be provided by the applicant on the said goods may qualify the same as gifts and hence deny credit of the same.

2.4 The applicant further apprehends that in the alternative, the tax authorities may also try and classify the supply of the said goods and the hosiery goods as mixed supply in accordance with section 2(74) read with section 8 (b) of the CGST Act, 2017**.**

2.5 Section 2(74) and 8(b) of the CGST Act reads as below:

> *"(74) —mixed supply means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.*
>
> *Illustration. — A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drinks and fruit juices when supplied for a single price is a mixed supply. Each of these items can be supplied separately and is not dependent on any other. It shall not be a mixed supply if these items are supplied separately;"*
>
> Section 8 (b) of the CGST Act, reads as below:
>
> *"8. Tax liability on composite and mixed supplies. - The tax liability on a composite or a mixed supply shall be determined in the following manner, namely: —*
>
> * * * * * * * * *
>
> *(b) a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax."*

2.6 On reading of the aforesaid provisions, it emerges that if two or more supplies qualify as mixed supply then the supply of the two or more goods must be treated as supply of such goods which attracts the highest rate. If applied to the aforesaid facts, then the supply of hosiery goods and the split air conditioner would qualify as supply of split air conditioner which attracts a tax rate of 28%.

2.7 The applicant argues that supply of hosiery goods and the supply of goods under promotional scheme are separate individual supplies and hence do not qualify as 'mixed supply'. The supply of the said goods would be subsequent to the supply of the hosiery goods to the retailers, as the criteria for being eligible to purchase the said goods can only be met post sale of the hosiery goods. Needless to say that supply of hosiery goods and said goods would be for 2 separate prices.

2.8 The applicant submits that under the GST framework, every form of supply is taxable unless specifically exempted. Section 7 of the CGST Act broadly defines supply to mean any form of transaction which is undertaken for a consideration. The applicant further submits that supply under GST can partake the character of a 'mixed supply' or 'composite supply'. It becomes very necessary to determine the nature of the supply since the taxability thereof is dependent on it.

2.9 The applicant submits that for any supply to qualify as a 'mixed supply' the parameters stipulated under Section 2(74) of the CGST Act has to be met. As extracted in the aforesaid paragraphs, the following important conditions can be culled out from the definition of 'mixed supply':

- For any supply to qualify as a 'mixed supply' there has to be two or more individual supplies or combination of such supplies made in conjunction to each other.
- The said supplies must be made for a single price.
- The said supplies must not qualify as a composite supply.

2.10 The applicant submits that only if the aforesaid conditions are cumulatively met in any scenario, then the supply can be said to qualify as a 'mixed supply'. It is to be noted that all the aforesaid conditions have to be met for a supply to be characterized as 'mixed supply'. Fulfillment of any one or two conditions will not be sufficient for characterizing a supply as 'mixed supply'.

2.11 The applicant submits that *perse*, none of the parameters as discussed above are met in the present case. The first condition is that there has to be two or more supplies which are made in conjunction to each other. Hence, in the facts of the present case, it has to be first ascertained whether the supply of hosiery goods and the supply of said goods can be said to have been made 'in conjunction with' each other or not.

2.12 The applicant submits that in the present case, the supply of hosiery goods and the supply of the said goods would not be made 'in conjunction with' each other. Rather as per the proposed retail scheme circular, supply of the said goods would be contingent upon the supply of hosiery goods. In other words, it is not necessary that the supply of hosiery goods would *ipso facto* entail a supply of the said goods. It is only when the retailers meet the prescribed criteria as would be stipulated in the proposed retail scheme circular, the supply of said goods would take place. Further, the factum of supply of the said goods need not be necessarily present. If the retailer chooses not to avail of the said goods, then said goods would not be supplied to him. The applicant therefore submits that the very basic criteria of qualifying as a 'mixed supply', i.e., the supplies are to be 'in conjunction with' each other is not met in the present case.

2.13 The applicant submits that the second condition for qualifying as a 'mixed supply' is that the two supplies must be made for a single price. This is one of the essential conditions for any supply to qualify as a 'mixed supply'. In case, the supplies are not made for a single price, then the same would not qualify as a 'mixed supply'.

2.14 The applicant in this regard places reliance on the case of In Re: Columbia Asia Hospitals Pvt. Ltd, 2019 (20) GSTL 154 (AAR-GST) wherein the issue pertained to valuation of medicines, food, drinks and healthcare services. The Hon'ble AAR in this regard held that:

> *"(b) In case where the same do not form a part of the composite supply but still are supplied for a single price, then they would constitute a mixed supply and the entire price received would be liable to be taxed at the highest rate applicable to the goods or service supplied as per Section 8 of the CGST Act, 2017…*
>
> *c) In case where supplies of medicines, food and drinks and healthcare services are not supplied for a single price and form separate and independent supplies, then such supplies are to be taxed separately at the rates applicable to such supply of goods or services. Here the valuations of the individual supplies are to be valued on the basis of the provisions of Section 15 of the CGST Act".*

2.15 The applicant submits that in the present case, the supply of the hosiery goods and the supply of the said goods would be for different prices. The applicant would be raising separate invoices for the supply of the hosiery goods and the supply of the said goods. Not even a single transaction of the hosiery goods and the said goods would be made for a single price. The applicant would be ascribing separate consideration for the supply of hosiery goods and the supply of said goods. Hence, the second condition for qualifying as a 'mixed supply' is also not met on the facts of the present case.

2.16 The applicant submits that third condition of qualifying as a 'mixed supply' is that the supply should not qualify as a 'composite supply'. 'Composite supply' is defined under Section 2(30) of the GST Act to mean supply of two or more taxable supplies which are made in conjunction to each to each other and are naturally bundled in the course of business and one of the supplies is a principal supply. The applicant submits that as the supply of hosiery goods and the supply of the said goods would not be made 'in conjunction with' each other and would not be naturally bundled in the ordinary course of business, the supply of hosiery goods and the supply of the said goods would not qualify as a 'composite supply'.

2.17 The applicant submits that although one of the conditions of qualifying as a 'mixed supply' may seem to be met in the present case, but the other two conditions, i.e., supply to me made 'in conjunction with' each other and that the same has to be made for a single price would indisputably not be satisfied. The applicant therefore submits that once the parameters for qualifying as 'mixed supply' under Section 2(74) are not met, the supply of hosiery goods and the supply of said goods which are disjointed and unconnected cannot be characterized as 'mixed supply'.

2.18 The applicant submits that the since the supplies in question would not qualify as 'composite supply' as well, the supplies if at all taxable will have to be taxed individually in line with the rationale propounded in the case of Columbia Asia Hospitals Pvt Ltd (*supra)*. The applicant therefore submits that the supply of hosiery goods and supply of said goods will not qualify as a 'mixed supply' and therefore has to be treated and valued as individual supplies only.

2.19 With reference to the question raised towards admissibility of input tax credit, the applicant submits that it would be entitled to take input tax credit of the GST paid while procuring the said goods at the time of discharging its output tax liability. Section 16(1) of the GST Act provides that a

registered person is entitled to take credit of any input tax charged to him on the supply of goods or services which are used or intended to be used in the course or furtherance of business.

2.20 The applicant submits that the critical condition which has to be met for availing the input tax credit is that the goods must be used in the course or furtherance of business. The applicant submits that Section 2(17) of the CGST Act defines the term 'business'. Relevant portion of the definition of the term 'business' is extracted hereunder:

"(17) business includes –

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

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

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

2.21 According to the applicant, the term 'business' has been defined in the widest possible manner so as to include any form of activity, trade or adventure which is carried out by a person irrespective of whether any pecuniary benefit is involved or not. Further, sub-clause (b) of Section 2(17) also includes within its ambit those activities which are ancillary or incidental to the carrying out of any activity, trade or adventure.

2.22 The applicant submits that the retail scheme circular which is proposed to be floated by the applicant is aimed and intended to boost the sale of its hosiery goods. The primary activity of the applicant is the sale of hosiery goods and to boost the sale of the same and to have a competitive edge over its competitors, the applicant would provide the said goods to those retailers who meet the criteria as would be prescribed under the retail scheme circular. So, the provision of providing said goods under the retail scheme circular would undoubtedly qualify as an activity which is incidental and undertaken in the course or furtherance of business.

2.23 The applicant submits that the question as to what activity qualifies as incidental or ancillary activity for the purpose of conducting business has come up for consideration in various cases. Reference in this regard is placed on the judgment of the Hon'ble Supreme Court in the case **State of Tamil Nadu v Binny Ltd, Madras, (1982) 49 STC 17 (SC)** wherein the issue was whether running of a textile store by the owner of a textile factory for the purposes of its employees would qualify as an activity incidental to the carrying of the business. The Hon'ble Supreme Court in this regard observed that:

> "*3…All that the statute requires is that the work should not be irrelevant to the purpose of the establishment. Now if a canteen maintained by a cinema owner for the benefit of cinema goers can be regarded as incidental to the purpose of the cinema theatre which is to carry on the business of exhibiting films in the theatre, we fail to see how a Store run by the owner of a textile undertaking for sale of provisions to the workman employee in the factory can be said to be anything other than Incidental to the business of manufacture of textiles. We are clearly of the view that the activity of selling provision to workmen in the Store was incidental to the business of manufacture of textiles and the sales were,*

therefore, transactions falling within the definition of business in Clause (ii) of Section 2(d).."

2.24 The applicant also draws attention to Section 17(5)(h) of the GST Act where credit of input tax has been restricted if the goods are written off, destroyed, stolen or given as gift. The applicant submits that it has an apprehension that input tax credit on the said goods may be denied to it on the basis that the same is being given as 'gift'. However, the semantics of the retail scheme circular would evidence that the same would not be given as a 'gift' and therefore restriction envisaged under Section 17(5)(h) would be inapplicable in the present case.

2.25 The applicant submits that the CGST Act does not define the term 'gift' and therefore reference has to be placed on the definition of the term 'gift' occurring under other statutes. Section 2(xii) of the Gift Tax Act, 1958 ("Gift Tax Act") defines the term 'gift' as "*transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer or conversion of any property referred to in section 4, deemed to be a gift under that section".*

2.26 The applicant submits that a particular thing would qualify as 'gift' if the same is given voluntarily and without any consideration. Therefore, only when a particular thing is given either free of cost or no consideration is charged for the same at all, the act of giving the particular goods would qualify as 'gift'.

2.27 The applicant submits that the Hon'ble Supreme Court in the case of **Naramadaben Maganlal Thakker v Pranjivandas Maganlal Thakker & Ors, 1997 (2) SCC 255** while interpreting the term 'gift' under Transfer of Property Act, 1882 held that 'gift' means*"…. to mean the transfer of certain existing movable or immovable property made voluntarily and without consideration…"*

2.28 The applicant therefore submits that the sine qua non for something to qualify as 'gift' is that no consideration can be attached to the same. 'Gift' is something which is given completely out of one's volition and without any concomitant charge. The applicant intends to provide the said goods to the retailers at a certain consideration. For instance, if the retailers meet the criteria as prescribed in the proposed retail scheme circular, then the applicant would provide an air-conditioner for INR 50. Hence, the provision of said goods will not be completely free of cost. The applicant would be charging a nominal consideration for the same and hence it cannot be said that the said goods are being given as 'gift'.

2.29 The applicant submits that Section 17(5)(h) seeks to restrict credit on goods when given as 'gift'. It does not prescribe or stipulate that even if any goods is given at a nominal or discounted rate, the same would qualify as 'gift'. The applicant submits further that there is no provision under the CGST Act akin to Section 22(13A) of West Bengal Value Added Tax Act, 2003 which conspicuously provided that where the per unit sale price of any goods is less than per unit purchase price of such goods, input tax credit or input tax rebate in respect of such goods shall be restricted to the amount of output tax payable on sale of such goods. The applicant, in favour of his argument that input tax credit cannot be denied if goods are sold below the purchase price, has placed his reliance on the judgement given by the Hon'ble Hight Court of Rajasthan in the case of **Commercial Tax Officer vs Jyoti Electronics** [2016 (336) E.L.T.517 (Raj)].

2.30 The applicant therefore submits that since the said goods are to be sold for a consideration, they will not qualify as 'gift' and consequentially will not be hit by the restriction under Section 17(5)(h) of the CGST Act.

3. Submission of the Revenue

3.1 The concerned officer from the revenue has expressed her agreement with the interpretation of law as presented by applicant with respect to the issues on which advance ruling is sought for.

4. Observations & Findings of the Authority

4.1 We have gone through the records of the issue as well as submissions made by the authorised representatives of the applicant during the course of personal hearing. We have also considered the submission made by the officer concerned from the Revenue.

4.2 The instant application is made in respect of a sales promotion scheme to be floated by the applicant where various items like gold coins, refrigerators, coolers, split air conditioner, etc. would be offered at a reduced/ discounted price by the applicant to his retailers who will purchase a specified units of hosiery goods. Separate invoices would be issued for supply of hosiery goods and supply of goods offered under promotional scheme for different prices. The issue involved in the instant case is twofold: (i) determination of nature of supply and (ii) admissibility of input tax credit.

4.3 We first take the issue in respect of determination of nature of supply. The applicant has contended that supply of hosiery goods and supply of goods under promotional scheme shall not be covered under 'mixed supply' as defined under clause (74) of section 2 of the GST Act as the supplies:

(i) are not made in conjunction with each other;
(ii) are not made for a single price;
(iii) do not constitute a composite supply.

4.4 It is admitted that mixed supply and composite supply are mutually exclusive thereby conditions as defined under clause (30) of section 2 of the GST Act in respect of composite supply must not be present in a supply so as to qualify for mixed supply. The applicant further contended that the supply shall not be treated as 'composite supply'. We find that a supply made by a taxable person shall satisfy the following conditions so as to regard it as composite supply:

(i) Supply should consist of two or more taxable supplies of goods or services or both;
(ii) Supplies should be naturally bundled and supplied in conjunction with each other in the ordinary course of business;
(iii) One of the supplies should be principal supply.

4.5 It has been submitted by the applicant that under the promotional scheme, the hosiery goods would be sold first on a separate invoice and once the retailer would met the eligibility criteria, the goods specified in the scheme would be supplied to the said retailer vide a separate invoice. So, the supply of hosiery goods followed by the supply of goods under promotional scheme shall not take place for a single price. As the supply of the aforesaid two items shall be made for different prices, it doesn't satisfy the condition of being 'made for a single price' and the supplies, therefore, cannot be regarded as mixed supply. We also agree with the view of the applicant.

4.6 The question therefore comes whether the supply involved in the instant case can be termed as composite supply. We find that the supply shall not fall under the category of 'composite supply' since supply of hosiery goods and goods under promotional scheme cannot be considered as naturally bundled and supplied in conjunction with each other in the ordinary course of business.

4.7 We therefore hold that supply of hosiery goods and goods under promotional scheme are separate supply and tax on the supply shall be levied at the rate of each such item as notified by the Government.

4.8 The next question raised by the applicant pertains to admissibility of input tax credit on the items intended to be supplied by the applicant at a nominal rate under promotional scheme. Sections 16 of the GST Act deals with 'eligibility and conditions for taking input tax credit' which entitles a registered person to take credit of input tax charged on any supply of goods or services or both to him which are used on intended to be used in the course or furtherance of his business. In this regard, we accept the submission of the applicant that the retail scheme circular which is proposed to be floated by the applicant is aimed and intended to boost the sale of its hosiery goods. So, the provision of providing said goods under the retail scheme circular would undoubtedly qualify as an activity undertaken in the course or furtherance of business.

4.9 On the other hand, section 17 of the GST Act deals with 'apportionment of credit and blocked credits'. Sub-section (5) of section 17 begins with a non obstante clause which restricts input tax credit in certain scenarios even where the same is eligible in terms of sub-section (1) of section 16 of the Act ibid. Clause (h) of Sub-section (5) of section 17 stipulates that input tax credit shall not be available in respect of the 'goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples'.

4.10 The applicant argues that the goods under promotional scheme cannot be treated as 'gift' since 'gift' is something which is given completely out of one's volition and without any concomitant charge. In the instant case, the applicant intends to provide the said goods to the retailers at a certain consideration, though at a very nominal price and that too upon fulfilment of the criteria as specified in the scheme circular. Hence, it cannot be said that the said goods are being given as 'gift' and therefore restriction of availment of input tax credit under clause (h) of Sub-section (5) of section 17 shall not be applicable in respect of the said goods.

4.11 In the case in our hand, a nominal value shall be assigned to the goods under promotional scheme. So, the same shall not be supplied free of cost and therefore cannot be termed as 'gift'. However, we are of the view that in the given scenario, the value of the said goods shall be required to be determined as per provision of section 15 read with rule 27 of the CGST/ WBGST Rules, 2017 as we find that here price is not the sole consideration for the supply.

4.12 Sub-section (1) of section 15 of the GST Act reads as under:

> *(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and <u>the price is the sole consideration for the supply.</u> [emphasis supplied]*

4.13 The applicant has admitted that supply of the said goods would be contingent upon the supply of hosiery goods and the supply of said goods would take place only when the retailers meet the prescribed criteria as would be stipulated in the proposed retail scheme circular. The applicant would therefore certainly not make any supply of the said goods at such reduced price where the retailers fail to achieve the target or do not opt for the scheme. Supply at a very nominal

price is therefore not an independent supply rather it entirely depends upon the supply of hosiery goods under certain conditions.

In view of the above discussions, we rule as under:

RULING

(i) Supply of goods at nominal price to retailers against purchase of specified units of hosiery goods pursuant to a promotional scheme would qualify as individual supplies taxable at the rates applicable to each of such goods as per section 9 of the GST Act.

(ii) Credit of the input tax paid on the items being sold at nominal prices would be available to the applicant.

(BRAJESH KUMAR SINGH)

Member

West Bengal Authority for Advance Ruling

(JOYJIT BANIK)

Member

West Bengal Authority for Advance Ruling