THE MAHARASHTRA APPELLATE AUTHORITY FOR ADVANCE RULING FOR GOODS AND SERVICES TAX

(constituted under Section 99 of the Maharashtra Goods and Services Tax Act, 2017)

ORDER No. MAH/AAAR/SS-RJ/25/2018-19 **Date- 14.03.2019**

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri. Rajiv Jalota, MEMBER

GSTIN Number	27AABCB1518L1ZS
Legal Name of Appellant	Bajaj Finance Limited
Registered Address	3rd Floor, Panchshil Tech Park, Viman Nagar, Pune-411 014.
Details of appeal	Appeal No. MAH/GST-AAAR-25/2018-19 dated 14.12.2018 against Advance Ruling No. GST-ARA-22/2018-19/B-85 dated 06.08.2018
Jurisdictional Officer	State Tax Officer (VAT-C-707) Pune

PROCEEDINGS

(under Section 101 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST 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 provisions under the MGST Act.

The present appeal has been filed under Section 100 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by Bajaj Finance Limited (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-22/2018-19/B-85 dated 06.08.2018.

BRIEF FACTS OF THE CASE

A. The Appellant is a non-banking financial company and is *inter alia* engaged in providing various types of loans to the customers such as auto loans, loans against the property, personal loans, consumer durable goods loans, etc. All these loans are interest bearing loans.

B. The Appellant, *inter alia,* enters into agreements with borrower/customers for providing loans to them. The loan agreements provide for repayment of the outstanding dues/Equated Monthly Installments (EMI) through cheque/ Electronic Clearing System ('ECS')/ National Automated Clearing House ('NACH') or any other electronic or clearing mandate. The illustrative copies of loan agreement entered into between the Appellant and the customers have been enclosed.

C. In case of dishonour of cheque/ECS/NACH or any other electronic or clearing mandate by the customers, the Appellant collects penal/bounce charges, which is in line with the agreed terms and conditions between the borrower and the Appellant. The bounce charges are generally a fixed amount per default committed by the customer, e.g. Rs.350/- for each dishonour of cheque/ECS. The bounce charges are collected only from the defaulting customers and not from all customers.

D. The relevant extract of clauses of a sample auto loan agreement in respect of bounce charges is reproduced below for ease of reference:

"I. DEFINITIONS AND ABBREVIATIONS:

"Bounce Charges" *shall mean, dishonor of post-dated cheque / ECS/ ADM/ entrusted by the borrower / co appellant / co borrower for clearance of EMI (monthly instalments) or non-payment of installment on or before respective due date for other modes.*

II. TERMS OF THE LOAN:

3. The Borrower agrees and confirms that:

.....(iv) BFL is entitled to levy penalty as follows on default:

(a) Bounce Charges of up to Rs.350/- on each Bounce as per clause B of the schedule.

.....

Schedule forming part of Auto Loan agreement:

(B) Penal Charges for bounce up to Rs. 350/- per default / per month ……"

E. The amount of bounce charges collected from the customers are accounted by the Appellant in its core accounting platform i.e. SAP under General Ledger Code 60000150.

F. Under the GST law implemented from July 01, 2017, the Appellant is of the view that bounce charges collected by it from the customers (for the breach of the terms and conditions of the loan agreement) are in the nature of penalty/ liquidated damages, and therefore, the same is not a consideration for supply of service and hence, should not be subjected to the levy of GST. However, considering the ambiguity on taxability of penal/ bounce charges under the GST law, as an abundant caution, the Appellant had filed an application for Advance Ruling before the Maharashtra Authority for Advance Ruling (hereinafter referred to the '**Ld. AAR**') on 09.05.2018, on the following question:

"Whether the Bounce Charges collected by the Appellant should be treated as a supply under the GST regime?"

G. The Ld. AAR passed the Order holding that the bounce charges collected by the Appellant amounts to supply of services under Sr. No. 5(e) of Schedule II to the CGST Act, and is therefore liable to GST.

H. Aggrieved by the impugned order dated 06.08.2018, the Appellant has filed this appeal, *inter alia,* on the following grounds which are urged without prejudice to each other.

GROUNDS OF APPEAL

A. The impugned AAR order is a non-speaking order and is liable to be set aside on this ground alone.

1. At the outset, it is submitted that the impugned AAR order is a non-speaking order, in as much as the Ld. AAR while passing the said order has failed to consider the following submissions made by the Appellant and has also failed to record any findings in that regard:

(i) Bounce Charges collected by the Appellant for the breach of contract by the customer, is not covered under the ambit of clause (e) of Entry 5 of Schedule

II to the CGST Act. The said clause can be made applicable only when there is an agreement to the obligation to tolerate an act or situation, and the word 'obligation' implies a duty or a liability on the person making the obligation, with a corresponding right to the other person to enforce such obligation. However, in the present case, there is no obligation upon the Appellant to tolerate the act of non-payment or delayed payment by the borrower. The payment of bounce charges neither obligates the Appellant not to take any legal action against the borrower, nor the borrower gains any right to sue the Appellant for any legal action taken by the Appellant. Therefore, the bounce charges payable by the borrower on breach of its contractual obligation cannot be treated as a payment for any obligation on the Appellant towards the borrower.

(ii) Even internationally, the damages received by way of compensation for termination or breach of a contract are not treated as a supply and therefore not subjected to GST/VAT levy.

(iii) The present issue of Bounce Charges is squarely covered by the Australian GSTD 2013/1, according to which, the payment of a 'failed payment fee' (similar to bounce charges) is not a consideration for supply.

(iv) Without prejudice to the above, penalty for delayed payment of consideration is to be included in the value of the supply in view of clause (d) of sub-section (2) of Section 15 of the CGST Act. Therefore, any treatment given to the main consideration for supply (i.e. interest on loans) shall also be equally applicable to the penalty for delayed payment of such consideration (i.e. bounce charges). Hence, the bounce charges would also be exempt from GST, as in the case of interest on loans.

2. It is submitted that the above submissions are very crucial to determine whether the bounce charges collected by the Appellant are liable to GST. However, the impugned AAR order is completely silent on the above submissions and fails to provide any reasons/observations for not accepting the same.

3. While passing the impugned AAR order, the Ld. AAR was under an obligation to consider each and every submission of the Appellant and record the reasons for

acceptance or rejection of every submission of the Appellant, in order to establish the linkage between the facts, and grant sanctity to the order. In this regard, reliance is placed on the following judgements of the Apex Court:

- **State of Orissa v. Dhaniram Luhar, (2004) 5 SCC 568**
- **Oryx Fisheries Pvt. Ltd. v. Union of India, 2011 (266) E.LT. 422 (S.C.)**
- **Asstt. Commr., Commercial Tax Department v. Shukla & Brothers, 2010-TIOL-131-SC-CT**
- **Commissioner of CGST & Central Excise v. M/s Development Credit Bank Ltd., 2018-TIOL-2313-HC-MUM-CX**

4. However, the Ld. AAR has failed to consider the above submissions of the Appellant, and the said error on part of the Ld. AAR has rendered the impugned AAR order as irregular and non-speaking.

B. <u>Bounce Charges do not fall within the ambit of 'supply' under the GST regime.</u>

5. Under the GST regime, the taxable event is the 'supply' of goods or services. The scope of the term 'supply' is provided under Section 7 of the CGST Act, which is reproduced herein below for reference:

> *"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, licence, rental, lease or disposal **made or agreed to be made for a consideration** by a person in the course or furtherance of business;*
>
> *(b) import of services for a consideration whether or not in the course or furtherance of business;*
>
> *(c) **the activities specified in Schedule I, made or agreed to be made without a consideration**; and*
>
> *(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II."*

6. On perusal of the above provision, it can be seen that clause (a), (b) and (c) define the scope of supply, whereas, clause (d) classifies certain activities specified in Schedule II as supply of goods or supply of services. Clause (a) covers all kinds of supply of goods or services made or agreed to be made for a consideration by a person in the course or furtherance of business. Clause (b) specifically includes import of services for a consideration, whether or not in the course or furtherance of business. Clause (c) expands the scope of supply by including activities specified in Schedule I, made or agreed to be made without consideration.

7. It is therefore submitted that for an activity to be treated as supply under the GST law, it has to be carried out for a consideration, except those activities specified in Schedule I for which consideration is not necessary. In other words, any activity undertaken without consideration, except those activities specified in Schedule I, shall not be treated as 'supply', and accordingly, will not be leviable to GST.

8. It is submitted that the present case of bounce charges collected by the Appellant is neither a case of import, nor, is covered in the list of activities specified in Schedule I. Therefore, clause (b) and clause (c) of Section 7(1) of the CGST Act are not applicable in the present case. Further, as submitted above, clause (d) is only for the purpose of determination whether a particular activity is a supply of goods or supply of services. Therefore, it is relevant to first determine whether a particular activity is covered within the scope of clause (a), (b) or (c) of Section 7(1) of the CGST Act. In any case, the bounce charges collected by the Appellant is also not covered under clause (d), as explained in detail in the submissions made below.

9. In this background, it is necessary to understand whether the bounce charges collected by the Appellant constitute a supply for consideration under clause (a) of Section 7(1). In this regard, it is relevant to refer to the definition of the term 'consideration' given in Section 2(31) the CGST Act as under:

"(31) "consideration" in relation to the supply of goods or services or both includes–

–

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) *the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:"*

10. Since the above definition is an inclusive one, the meaning of the term 'consideration' has to be understood from various external aids, including the natural meaning given in various dictionaries, meaning given to the term in rulings by various forums, etc.

11. It is submitted in this regard that the concept of consideration has been derived from the Latin phrase "*quid pro quo*" which means "something in return for something". It is a well settled principle that "where there is no consideration, there is no contract".

12. Reference in this regard is also made to the definition of the term 'consideration' provided in Section 2(d) of the Indian Contract Act, 1872, which reads as under:

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

13. Furthermore, it is submitted that various dictionaries define the term 'consideration' as follows:

BLACK'S LAW DICTIONARY

Consideration means something which is of value in the eye of law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant.

WEBSTER DICTIONARY

Something of value given or done in exchange for something of value given or done by another, in order to make binding contract; inducement for a contract.

14. From the above discussed meaning of the term 'consideration', it can be said that consideration would necessarily mean "*quid pro quo*", i.e. something in return. It is a benefit which must be bargained for between the parties, and is essential reason for

a party entering into a contract. Further, the consideration for an activity must be at the desire of the other person.

15. However, damages for the breach of contract cannot be treated as a consideration for any activity. It is submitted that upon breach of contract, the aggrieved party is entitled to claim compensation for breach of contract. Such compensation is a legal and statutory right provided under Section 73 and 74 of the Indian Contract Act, 1872, and even without any specific clause in the contract for the damages or compensation payable upon the breach of contract, the party suffering such breach has the statutory right to claim damages or compensation from the party who has broken the contract.

16. The provisions of Section 73 and 74 are extracted herein below for reference:

"73. Compensation for loss or damage caused by breach of contract. –

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

74. Compensation for breach of contract where penalty stipulated for. –

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation. – A stipulation for increased interest from the date of default may be a stipulation by way of penalty."

17. Both, Section 73 and 74, provide for reasonable compensation, but, Section 74 is narrower in scope and limits the compensation to the extent provided for, or stipulated in the contract.

18. It is submitted that the damages in Section 74 may either be in the nature of liquidated damages or penalty. If the sum stipulated in the contract is a genuine pre-estimate of damages likely to flow from the breach, it is called liquidated damages. If it is not a genuine pre-estimate of the loss, but an amount intended to secure performance of the contract, it may be penalty. The question whether a particular stipulation in a contract, is in the nature of penalty has to be determined by the court against the background of various relevant factors, such as the character of the transaction and its special nature.

19. In the present case, the Appellant lends money to the customers/borrowers with one of the conditions in the loan agreement that the customers/borrowers shall make timely repayment of loan instalments on the due dates. The borrower is under a contractual obligation to ensure that sufficient funds are available in his account on the due dates of the EMI. However, in case, the borrower fails to maintain funds in his account on the due date, the cheque/ECS/NACH presented by the Appellant gets dishonoured, resulting into default in payment of loan instalments. This is a clear case of breach of contract by the customer/borrower, and therefore, upon default in payment of the instalments, the Appellant shall be entitled to receive damages in accordance with Section 73 and 74 of the Indian Contract Act, 1872.

20. The damages in the present case are liquidated in the loan agreement, wherein the parties agree in advance that upon dishonour of cheque/ECS/NACH, the customer/borrower shall be liable to pay a fixed amount to the Appellant as stipulated in the agreement (for e.g. Rs.350/- for each dishonour of cheque/ECS). This amount is named in the agreement as Bounce Charges. It is therefore submitted that the such bounce/penal charges are clearly in the nature of liquidated damages, in as much as they are pre-agreed amount of damages payable by the defaulting party on account of breach of the contract. However, the Court may hold such Bounce Charges to be penalty, in case the Court finds it as exorbitant or extravagant.

21. Therefore, in view of the above discussion, it is submitted that the Bounce Charges may either be treated as liquidated damages or penalty, but in any case, the same shall be damages for breach of contract only.

22. It is submitted that payment of liquidated damages or penalty is not a consideration for any service, as they are merely damages for the breach of contract. It is submitted in this regard that the stipulation for payment of damages upon breach of contract does not constitute a separate contract; it is a part of the original contract only. The payment of damages arises on account of breach of the primary contract, and it would be an incorrect interpretation to say that such payment is a consideration for any other contract.

23. In the present case, there is only one contract between the Appellant and the borrower, which is the agreement for loan, for which consideration is payable by the borrower in the form of interest. The bounce charges are payable by the borrower, only upon the breach of such contract, and therefore, such payment does not constitute a second contract. Therefore, the payment of bounce charges by the borrower cannot be treated as a consideration either for the primary contract of loan, or for any other contract.

24. In view of the submissions, it is submitted that the bounce charges are merely damages for the breach of contract, and therefore, the same cannot be treated as a consideration. Hence, in the absence of any consideration, the bounce charges collected by the Appellant do not amount to a supply under Section 7 of the CGST Act, and therefore, the same shall not be leviable to GST.

25. The Ld. AAR has failed to consider the above submissions, and has proceeded on the presumption that the bounce charges are consideration for the toleration of the default committed by the borrowers. However, as explained above, the bounce charges are nothing but damages for the breach of contract committed by the borrowers, and the such damages do not constitute consideration for any supply. Further, the said breach does not constitute toleration of act, as explained in detail in the submissions made below.

C. Bounce Charges collected by the Appellant for the breach of contract by the customer, is not covered under the ambit of clause (e) of Entry 5 of Schedule II to the CGST Act.

26. As submitted above, clause (d) of Section 7(1) of the CGST Act states that the activities specified in Schedule II shall be treated as supply of goods or supply of services. Without prejudice to the above submissions, that the bounce charges collected by the Appellant do not amount to consideration for any supply, it is submitted that even such amount does not fall under the ambit of activities specified in Schedule II to the CGST Act.

27. The Ld. AAR in the impugned AAR order has held that the default committed by the borrowers by way of dishonour of cheque, etc. is being tolerated by the Appellant and is therefore covered under clause (e) of Entry 5 of Schedule II to the CGST Act.

28. For the sake of reference, the above said entry is reproduced herein below:

"5. Supply of services

The following shall be treated as supply of services, namely:

.....

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and"

29. It is submitted that the Ld. AAR has clearly misinterpreted the above clause to allege that any act of tolerating would fall under the ambit of the said clause or the Appellant is doing an act for the customer. The correct interpretation of the law would be to read the above said clause as under:

(i) agreeing to the obligation to refrain from an act;

(ii) agreeing to the obligation to tolerate an act or situation;

(iii) agreeing to the obligation to do an act.

30. It is submitted that the expression "*agreeing to the obligation*" is a prefix to all the three entries, *viz. 'to refrain from an act', 'to tolerate an act or a situation', and 'to do an act'*. Therefore, to attract the above said clause, there must be an agreement to the obligation in respect of any of the three entries. In other words, the act of tolerance requires the wilful agreement of certain situations wherein the party agrees to suffer or restrain from doing something for some pre-fixed consideration.

31. In the present case, there is no agreement between the Appellant and the borrower to tolerate the default committed by the borrowers. The only agreement between the Appellant and the borrower is in respect of agreement for loan, for which consideration is payable by the borrower in the form of interest. The bounce charges

are payable by the borrower, only upon the breach of such contract, and therefore, such payment does not constitute a second contract.

32. However, the Ld. AAR has erroneously recorded various findings in the impugned AAR order that the loan agreements entered into by the Appellant with the customers provide that in case of any breach as mentioned in agreement, the Appellant would tolerate the same subject to receipt of consideration in the form of bounce charges in return.

33. The above findings of the Ld. AAR are completely erroneous, in as much as none of the clauses in the loan agreements entered into by the Appellant with the customers provide that in case of any breach, the Appellant would tolerate the same subject to receipt of consideration in the form of bounce charges in return. As submitted above, the bounce charges are only in the nature of liquidated damages or penalty payable by the borrowers for the breach of the terms of the loan agreement. Such bounce charges do not amount to consideration for any supply.

34. It is further submitted that the above said clause 5(e) of Schedule II uses the word '*obligation*', therefore, it is important to understand its meaning to give correct interpretation to the entry. The said term has not been defined in the GST laws, or the Notifications issued thereunder, therefore, reference is being made to the meaning given to it in other Statutes, and its dictionary meaning, as under:

- ***Section 2(a) of the Specific Relief Act, 1963:***

  "Obligation" includes every duty enforceable by law.

- ***Commentary on Section 2(a) of the Specific Relief Act, 1963, by Pollock & Mulla, at Pg. No. 1837 of Volume II, 14th Edition, reads as under:***

  "Clause (a): Obligation

  An obligation is a bond or tie, which constrains a person to do or suffer something; it implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances*; but in order to be enforceable, it must be an obligation recognised by law; and not merely a moral, social or religious one. An obligation may not be a legal one, where it cannot be reduced to a money value;* ***legal obligation includes every duty enforceable by law so that when a legal duty is imposed on the person in***

respect to another, the other is invested with a corresponding legal right. *This definition is used in its wider juristic sense as covering duties arising ex contractu or ex delicto, and may cover any other enforceable duty under any statute."*

- ***Black's Law Dictionary:***

  "Obligation, (n.)

  ***1.A legal or moral duty to do or not do something**. • The word has many wide and varied meanings. It may refer to anything that a person is bound to do or forbear from doing, whether the duty is imposed by law, contract, promise, social relations, courtesy, kindness, or morality.*

  ***2. A formal, binding agreement or acknowledgement of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons; esp., a duty arising by contract**.*

  ***3.** Civil law. A legal relationship in which one person, the obligor, is bound to render a performance in favor of another, the obligee."*

- ***Oxford Dictionary:***

  "obligation ▶ n.

  ***1. an act or course of action to which a person is morally or legally bound**. ■ the condition of being so bound.*

  ***2.** a debt of gratitude for a service or favour."*

35. In view of the above, it is submitted that the word 'obligation' can be understood to be an act or course of action to which a person is morally or legally bound. It is a bond or tie, which constrains a person to do or suffer something and it implies a right in another person to which it is correlated. As defined in the Specific Relief Act, 1963, 'obligation' includes every duty enforceable by law, so that when a legal duty is imposed on the person in respect to another, the other is invested with a corresponding legal right. Therefore, an obligation comes into existence, only when there is a duty or a liability on the person making the obligation, with a corresponding right to the other person to enforce such obligation.

36. However, in the present case, there is no obligation upon the Appellant to tolerate the act of non-payment or delayed payment by the borrower, in as much as, neither the Appellant has any duty or liability towards the borrower, nor the borrower has any right on the Appellant. The payment of bounce charges neither obligates the Appellant not to take any legal action against the borrower, nor the borrower gains any right to sue the Appellant for any legal action taken by the Appellant. On the contrary, the borrower is under the contractual obligation to make timely repayment of the loan to the Appellant, and upon the breach of such obligation, the Appellant is legally entitled to recover damages for such breach and also sue the borrower for such breach.

37. It is further submitted that a sum which is payable in pursuance of a contractual obligation is different from a sum payable on a breach of contractual obligation. Therefore, the bounce charges payable by the borrower on breach of its contractual obligation cannot be treated as a payment for any obligation on the Appellant towards the borrower.

38. In view of the above discussion, it is submitted that in the absence of an agreement by the Appellant to any obligation to tolerate the act of non-payment or delayed payment of loan instalments by the borrowers, the mere recovery of bounce charges for breach of the contract does not constitute a supply of service by the Appellant to the borrower.

39. It is therefore submitted that the findings of the Ld. AAR that the Appellant has tolerated the act of default of the borrower which falls under clause 5(e) of Schedule II, is based on an incorrect interpretation of the law, without considering the meaning of the expression '*agreeing to an obligation*' used in the said provision.

D. Even internationally, the damages for breach of contract are not taxed.

40. It is further submitted that internationally, the damages received by way of compensation for termination or breach of a contract are not treated as a supply and therefore not subjected to GST/VAT levy.

41. In Australian Law, the GST is levied on supply under 'A New Tax System (Goods and Services Tax) Act, 1999'. The term 'supply' is defined under Section 9(10) of the said Act. Clause (g) of sub-section (2) is *pari materia* the provisions of clause (e) of Entry 5 of Schedule II to the CGST Act, which reads as under;

"9-10 Meaning of Supply

(1) A supply is any form of supply whatsoever.

(2) Without limiting subsection (1), supply includes any of these:

(g) an entry into, or release from, an obligation:

(i) to do anything; or

(ii) to refrain from an act; or

(iii) to tolerate an act or situation."

42. In the above context, reference is made to **GSTR 2001/4**, issued by the Australian Tax Office (ATO), explains the GST treatment of court orders and out-of-court settlements. In the said ruling at Para 73, it has been clarified that the damages are the most common form of remedy arising out of the termination or breach of contract. The damage, loss or injury, being the substance of the dispute, cannot in itself be characterized as a supply made by the aggrieved party. This is because the damage, loss or injury in itself does not constitute a supply under the provision of Australian GST.

43. It is pertinent to bear in mind that the definition of "supply" under the Australian GST legislation includes within its ambit "an obligation to tolerate an act". Thus, when the aforesaid GSTR namely GSTR 2001/4 states that payment of liquidated damages is not towards any supply, it is reasonable to conclude that the GSTR has also considered the clause "an obligation to tolerate an act". In other words, the GSTR impliedly concludes that the acceptance of liquidated damages does not amount to tolerating an act and hence would not fall within the ambit of "supply" for the purposes of GST.

44. Similarly, reference is also made to **GSTR 2003/11**, pertaining to 'payment on early termination of a lease of goods'. It has been clarified therein that a payment received to compensate the lessor for damage or loss flowing from early termination as a result of a default by the lessee is not consideration for a supply, even though the lessor brings the lease to an end by exercising the right to terminate the lease. The Ruling further provides that in such cases, there will be no taxable supply because a payment for genuine damages, which is not consideration for any earlier or current

supply, cannot be said to be made in connection with any supply. The lessor merely exercises his right to terminate and the payment is in the nature of damages for the lessee's breach of the lease which gave rise to the lessor's right to terminate. Thus, in the above Ruling issued under Australian GST, it has been clarified that mere payment of an amount under a damages claim is not a 'supply' and hence, GST is not payable on such supplies.

45. Further, reference is made to **GST Determination No. 2005/6** which has been issued to answer the question as to whether a club, association, trade union, society or co-operative (referred to as "association" in the Determination) makes a supply when it imposes a non-statutory fine or penalty on a member for a breach of the association's membership rules. The said GSTD clarifies that there is no supply made by an association when it imposes a fine or penalty on its member for a breach of its membership rules, and the payment of the fine or penalty is therefore not a consideration for a supply and hence not leviable to GST. It has been clarified in the above GSTD that if the true nature of fine or penalty is a punishment and/or to act as a deterrent, it does not accord with that nature to suggest that there is a supply to the member in return for its payment.

46. Reference is also made to the **New Zealand case S65 (1996) 17 NZTC 7408**, wherein it has been held that an association, in accepting the payment of fine or penalty, does not enter into an obligation with the particular member to tolerate the misconduct, but rather is fulfilling its obligation to all members to enforce the rules. The member does not gain rights additional to those which are already enjoyed by virtue of being a member. That is, upon payment of the fine or penalty, the member continues to enjoy the same rights and privileges and it follows that the association is required to continue to provide the benefits of membership. In this sense, it cannot be said that the association 'makes' a supply where it already has a pre-existing obligation to continue to provide the benefits of membership.

47. Reference is further made to the decision of the European Court of Justice in the case of **Societe Thermale v. Ministere de l'Economie [2007] S.T.I 1866, Celex No. 605J0277**, wherein the issue was whether a sum paid as deposit in a contract related to the supply of hotel services was subject to tax or not. The Court held that where the client exercises the cancellation option available to him and that sum was

retained by the hotelier as a fixed cancellation charge paid as compensation for the loss suffered and which has no direct connection with the supply of any service for consideration, it was not subject to tax.

48. Further, in a decision of the Court of Appeal (UK) in case of **M/s.Vehicle Control Services Limited reported at (2013) EWCA Civ 186**, it has been observed that payment in the form of damages/penalty for parking in wrong places/wrong manner is not a consideration for service as the same arises out of breach of contract with the parking manager.

49. In view of the above discussed rulings, the Appellant would like to submit that the very purpose of liquidated damages / penalty is to restitute or make good, the loss incurred by a person because of a default, non-compliance, etc. of the other person. Such liquidated damages/penalty may be in relation to some other supply of service or goods which would have a separate consideration and would be subject to certain terms and conditions between the borrower and the Appellant. When such terms and conditions are not fulfilled, the defaulting party is obligated to make good the loss by paying liquidated damages. Such liquidated damages/penalty cannot itself become consideration for continuing with the main supply of service/goods by terming the same as towards tolerating the acts of the defaulting party.

50. Thus, liquidated damages/penalty are merely for making good the loss suffered by a contracting party due to breach of terms of the contract by other contracting party. There is no additional benefit given under the main contract of supply of service, in return for the liquidated damages/penalty.

51. The ratio laid down in the above discussed rulings shall be equally applicable for determining the taxability of bounce charges in the present case, as the provisions of Entry 5(e) of Schedule II to the CGST Act are similar to the GST/VAT laws of other countries, and the scope of 'supply' in such laws is wide enough to cover an obligation to tolerate an act or situation.

52. Hence, by applying the above rulings, it can be concluded that the bounce charges collected by the Appellant in the present case, being penalty/liquidated damages for breach of contract, are not taxable, as the same does not amount to consideration for any supply. The impugned AAR order has not dealt with the above submissions, and is therefore, liable to be set aside on this ground alone.

E. The present issue is squarely covered by the Australian GSTD 2013/1.

53. It is further submitted that the present issue of Bounce Charges is squarely covered by the **Australian GSTD 2013/1** which holds that the payment of a 'failed payment fee' is not consideration for a supply. Para 5 of the said GSTD, defines the term 'failed payment' as a dishonored cheque or a declined direct debit request. Further, the term 'failed payment fee' has been defined as the fee charged by the supplier to the recipient in respect of the failed payment. Para 3 of the said GSTD states that in the circumstances described in para 2, which is reproduced herein below, the payment of a 'failed payment fee' does not amount to consideration for either a financial supply or another supply (for example, a supply of administrative services):

"2. This Determination applies where:

- *There is an attempt to make a payment for the underlying supply by way of the supplier presenting a cheque or the supplier attempting a direct debit on the recipient's bank account in accordance with the authority it has from the recipient;*
- *the attempted payment is dishonoured or declined and the supplier's financial institution imposes an 'inward dishonour fee' on the supplier;*
- *the supplier and recipient have agreed or would be taken to have agreed that in utilising direct debit or cheque payment methods the recipient will have available funds to make the payment of the initial consideration amount for the underlying supply (we accept that this would be the case in the absence of contrary arrangements between the supplier and recipient);*
- *the supplier and the recipient have agreed that if the payment fails the recipient will be liable to pay a fee ('failed payment fee'). The obligation to pay the failed payment fee may be included in the agreement or contract for the underlying supply, or in the terms of the Direct Debit Authority for a direct debit, or because the supplier's ability to charge a failed payment fee is specified by statute;*
- *the failed payment fee arises because the recipient of the underlying supply has not fulfilled its obligation to ensure funds were available to honour a cheque, or meet a direct debit request;*

- *the recipient's failure to fulfil its payment obligations causes the supplier to incur additional costs, such as the inward dishonour fee charged by the supplier's financier, or to suffer other loss, such that the failed payment fee is characterised as compensatory for the additional costs or loss incurred; and*
- *there is nothing in the agreement between supplier and recipient that describes the failed payment fee as part of the consideration for anything supplied by the supplier."*

54. Para 21 of the above said GSTD explains the reasoning based on which it is held that the payment of 'failed payment fee' does not amount to consideration for supply. The said para is extracted herein below for reference:

"21. In the circumstances covered by this Determination, the failed payment fee does not have sufficient nexus to any supply. The following matters, in combination, are relevant to this conclusion:

(a) The failed payment fee relates to losses suffered by the supplier when the recipient fails to meet its obligations to have funds available.

(b) The failed payment fee is not an intended consequence of the underlying supply, but arises because the recipient failed to have sufficient funds available.

(c) There is nothing in addition to the underlying supply that the failed payment fee could be described as 'for', even within the broader definition of 'for consideration'."

55. It is relevant to note that the above GSTD has been issued in the context of Australian GST law, wherein the ambit of 'supply' is wide enough to cover an obligation to tolerate an act or situation. Even in such context, the GSTD holds that the payment of 'failed payment fee' does not amount to consideration for supply. The GSTD emphasises on the point that there is no additional supply which is 'for' consideration; the 'failed payment fee' arises due to the failure of the borrower to meet his obligation. The 'failed payment fee' is not for the service to the borrower, but is against the borrower for failing to meet his obligation. Hence, on this basis, the GSTD concludes that there is no supply arising on the payment of 'failed payment fee', and that such payment is not a consideration for any supply.

56. It is submitted that the Bounce Charges collected by the Appellant in the present case is identical to the 'failed payment fee' referred to in the above GSTD, in as much as,

- there is an attempt to make a payment for the loan installment by way of the Appellant presenting a cheque or the Appellant attempting a direct debit on the borrower/customer's bank account in accordance with the ECS or NACH or any other electronic or clearing mandate obtained from the borrower/customer;
- the borrower/customer has agreed that it will have funds available to make the payment of the loan installment;
- the borrower/customer has agreed that if the payment fails, it will be liable to pay the bounce charges as per the terms of the loan agreement;
- the liability to pay bounce charges arise because the borrower/customer has failed to fulfill its obligation to ensure that the funds were available to honour a cheque, or meet a direct debit request;
- the borrower/customer's failure to fulfil its payment obligations causes the Appellant to incur additional costs, such that the bounce charges is characterised as compensation for the additional costs or loss incurred; and
- there is nothing in the agreement between Appellant and the borrower/customer that describes the bounce charges as part of the consideration for anything supplied by the Appellant.

57. In view of the above facts and circumstances, it is submitted that the above **GSTD 2013/1** shall be squarely applicable to the bounce charges in the present case. The Bounce Charges payable by the borrower is not for any service rendered to him, but is against the borrower for the failure to meet his contractual obligation. The bounce charges are merely damages for the breach of contractual obligations, and therefore, the same do not have any connection with provision of service. Hence, the payment of bounce charges does not amount to consideration for any supply.

58. Hence, in absence of any consideration, the bounce charges collected/levied by the Appellant shall not be subjected to GST. The impugned AAR order has not dealt with the above submissions, and is therefore, liable to be set aside on this ground alone.

F. **Without prejudice to the above, penalty for delayed payment of consideration is to be included in the value of the supply in view of clause (d) of sub-section (2) of Section 15 of the CGST Act.**

59. Without prejudice to the above, it is submitted that in view of clause (d) of sub-section (2) of Section 15 of the CGST Act, penalty for delayed payment of consideration for a supply would be included in the value of that supply. The said provision is extracted herein below for reference:

"(2) The value of supply shall include——

(d) interest or late fee or penalty for delayed payment of any consideration for any supply; and"

60. In view of the above provision, the bounce charges levied for delayed payment of loan dues/EMI, being in the nature of penalty, is to be included in the value of loans, which is nothing but interest only.

61. It is relevant to note that sub-section (2) of Section 15 of the CGST Act is applicable for determination of value of 'any supply', both for taxable as well as exempt supply. Therefore, even if the main supply is exempt by way of any exemption notification, still, the provisions of Section 15(2) shall be applicable to determine the value of such exempt supply. It would be incorrect to say that the provisions of Section 15(2) are not applicable for exempt supplies, in as much as, the valuation of exempt supplies is equally important as that of taxable supplies, as the quantum of reversal of input tax credit under Section 17(2) of the CGST Act is determined on the basis of the value of exempt supplies. Hence, the provisions of Section 15(2) are applicable to determine the value of exempt supplies as well.

62. In view of Section 15(2)(d) of the Act, the bounce charges levied for delayed payment of loan dues/EMI, being in the nature of penalty, is to be included in the value of loans, which is nothing but interest only. Therefore, the bounce charges so levied by the Appellant would be treated at par with interest, and any treatment given to the main consideration (i.e. interest) shall also be equally applicable to such amount (i.e. penalty). Hence, the bounce charges would be exempt from GST under Serial No. 27 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017, read with Maharashtra State Notification No. 12/2017-State Tax (Rate) dated 29.06.2017.

Personal Hearing

63. A personal Hearing in the matter was conducted on 07.03.2019, wherein Shri Sandeep Sachdeva, Advocate, representative of the Appellant, reiterated their written submissions. Smt.Harshal Kotale,(Dy Commissioner of State Tax), appearing as jurisdictional officer, reiterated the submissions, which had been made earlier before the Advance Ruling Authority.

Discussions and Findings

64. We have gone through the record, the facts of the case and have also taken on record the written and oral submissions made by the appellant as well as by the department. We have also gone through the impugned order issued by the Advance Ruling Authority, which says that Bounce Charges, collected by the Appellant from their customers/borrowers in the event of dishonouring of the cheques issued by them or the failure of the payment through the ECS and other electronic means due to non availability of the sufficient funds in the borrower's/customer's bank account (as per the terms and conditions of the agreement entered between the Appellant and its borrowers) would attract GST as the Appellant has tolerated the act, or situation of default by the borrowers of the loan, against some fixed amount/charges agreed to be paid by the borrowers. The Advance Ruling Authority has held that this very activity of the Appellant viz. tolerating the act, or situation of the default by the borrowers, is adequately covered under the provisions of the entry 5 (e) of the Schedule II to the CGST Act, 2017 and thus amounts to supply of service in accordance with the provision of Section 7(1)(d) of the CGST Act, 2017.

65. On perusal of the above, the issue before us, to decide is whether the bounce charges collected by the Appellant from their borrowers in lieu of remedies available in the event of the default by the borrowers, occurred in the form of dishonouring of the loan repayment instruments due to the non-availability of the sufficient funds in the borrower's account, is for tolerating any act as envisaged under the entry 5 (e) of the schedule II to the CGST Act, 2017, or otherwise.

66. To decide this issue, first we will go through the entry 5 (e) of the schedule II to the CGST Act, 2017, which has been reproduced herein under:

"(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;"

In the instant case, the Appellant has entered into loan agreement with the borrowers. On perusal of the sample agreement dated 29.06.2015 entered with one such borrower, it is observed that it contains specific clauses namely 'Events of Defaults' and 'Remedies in case of Defaults'. The relevant portion of these clauses from sample auto loan agreement are reproduced herein below:

25. Events of Defaults:

A default shall be deemed to have been committed if the borrower does not comply with its obligation covenants contained in this agreement, and also if:

a. *Any default shall have occurred in payment of Monthly Installment or any part thereof and / or in payment of any amount due and payable to BFL in terms of this agreement .....*

i. ***Any of the PDCs delivered or to be delivered by the borrower to BFL in terms and conditions hereof is not encashed for any reason whatsoever on presentation, or .....***

26. Remedies for Default:

The following are without prejudice to the other as also to other rights and remedies under law or in enquiry or under this agreement:

a. *BFL has full right to recall the entire loan and proceed against the borrower.*

b. *In case of default by reason of PDCs, ECS Mandate / ADM / any other electronic or other clearing mandate transaction being dishonored,* ***BFL shall initiate legal proceeding under section 138 of the Negotiable Instrument Act 1881 for dishonor*** *of cheques issued by borrower or under Payment and Settelement System Act, 2007.*

c. *BFL shall be entitled to take possession of the product without prejudice to any other remedy available with BFL .....*

67. From the above referred clause 25 of the agreement, it is clear that the default in payment of EMIs as also the bouncing or dishonor of the cheque are hereby deemed to be defaults under the provisions of the agreement entered between the appellant

and their customers. On any default or breach of the agreement, the remedies available with the appellant are either to recall loan or cancellation of agreement, or to initiate legal proceedings under the Negotiable Instruments Act or under the Payments and Settlement Act, or taking possession of the product, etc. However, the appellant instead of taking recourse to the remedial provisions in the agreement is tolerating the act or the situation of bounce / dishonor of the cheque / ECS / NACH, tendered by the customers for repayment of EMIs, by imposing / recovering certain amount as 'bounce charges'. Hence, such an activity of tolerance of situation of bounce / dishonor of cheque is adequately covered by entry 5 (e) of Schedule II.

68. Such a tolerance of an activity of cheque / ECS / NACH bounce / dishonor is against the consideration and it is in the form of "bounce charges". The clause related to such bounce charges is as under:

3. BFL is entitled to levy penalty as follow on defaults:

a. Bounce charges up to Rs. 350/- per bounce as per clause B of schedule

b. .....

Thus, as per clause 3 (a) of the said agreement it is also agreed that in case some default in the form of the dishonoring of the repayment instruments, such as cheque, failure of ECS and other electronic payment instruments by the borrower occurs, the Appellant is entitled to recover the bounce charges from such defaulting borrowers. Thus, from the language of the above mentioned clause related to bounce charges, it is adequately clear that there is mutual agreement between the Appellant and the borrower that whenever this event of default occurs, the Appellant can tolerate this event against some fixed agreed amount. Thus, here it can be said that the Appellant has tolerated an act or situation of default by the borrowers, for which they are recovering some amount in the name of the bounce charges, wherever the repayment instruments, discussed above, have been dishonored. Hence, such activity of tolerance is against consideration.

69. The Appellant, inter-alia, submitted in para (31) and (32) above that since there is no separate agreement between the Appellant and the borrower regarding this act of tolerance by the Appellant in case of the default by the borrower, the provision of the entry 5(e) to the Schedule II to the CGST Act, 2017 will not apply in their case. As regard to this argument put forth by the Appellant, we are of the view that though

there is no separate agreement between the Appellant and the borrower, for the said act of tolerance of the default by the borrower, there is clear provision laid out at entry 3 (a) of the above discussed agreement and in this regard, it is the loan agreement itself which clearly proposes the remedy available for the default by the borrower. Thus, this argument of the Appellant is devoid of any rationale or merit, and hence is not worth considering.

70. The appellant further contended that it is relevant to first determine whether a particular activity of the appellant is covered within the scope of clause (a), (b) or (c) of Section 7(1) of the CGST Act as the clause (d) only provides to treat said activity as either supply of goods or as the case may be supply of services. The appellant has made this submission with reference to the provisions of scope of supply. The appellant has submitted that the clause (a), (b) and (c) of section 7 of the CGST Act defines the scope of supply, whereas, clause (d) classifies certain activities specified in Schedule II as supply of goods or supply of services. The said section is reproduced herein below:

"Section 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, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

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

(c) the activities specified in Schedule I, made or agreed to be made without a consideration; and

(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.

From the aforesaid scheme of scope of supply, it is evident that clause (a) covers all kinds of supply of goods or services made or agreed to be made for a consideration by a person in the course or furtherance of business. The wording provided in clause (a) start with "all forms of supply such as ...." It means that the form of supplies enlisted therein are provided by way of examples and it is inclusive of supplies other than those of enlisted. Clause (b) specifically includes import of services for a consideration, whether or not in the course or furtherance of business. Clause (c)

expands the scope of supply by including activities specified in Schedule I, made or agreed to be made without consideration.

71. The wordings of clause (d) of the section 7 (1) of the CGST Act are very clear and provide for inclusion of activities enlisted in Schedule II to be treated as supply of goods or as the case may be supply of services in the scope of supplies. Schedule II of the CGST Act provides the list of activities to be treated as supply of goods or services as provided therein. Clause (a) of section 7 (1) covers in its scope all forms of supplies for consideration. Clause 5 (e) of the Schedule II of the CGST Act includes the activities to be treated as services and it covers the very activity in the form of expression "to tolerate an act or a situation" and thereby an act of tolerating bounce / dishonor of cheque / ECS / NACH are brought into the ambit of supply by treating it as a 'supply of services'. There shall not be any confusion in the mind of anyone that the legislature intentionally brought this activity of tolerating an act in the scope of supply of services. As explained in the above paras the appellant received the consideration and tolerated the act of bounce / dishonor of cheque / ECS / NACH. In view of these facts, on a harmonious and purposive interpretation of the above referred clauses under sub-section (1) of Section 7 of CGST Act it is very clear that they are dependent upon each other and a conjoint reading of Clause (d) and (a) of the section 7 (1) removes all doubt and makes it absolute clear that such an act of tolerating cheque bounce / dishonor is nothing but supply as mandated under 7 of the CGST Act.

72. The Appellant has repeatedly submitted that the bounce charges recovered by them from their borrower cannot be considered as consideration, as the same is not received by them for supplying any specific service to the borrowers. It is rather in nature of damage or compensation for the loss incurred to them on account of the default of the borrower and the borrower is under the contractual obligation to pay the said amount. As regards this contention of the Appellant, it is opined that as long as the Appellant is tolerating the default by the borrower, this act of tolerance would be construed as supply of service in terms of the provision of Section 7 (1) (a) of the CGST Act read with the entry 5 (e) of the Schedule II to the CGST Act, 2017 and the amount recovered from such borrowers would attract GST in accordance with the provision of Section 9(1) of the CGST Act, 2017. We do not find any scope and

requirement as such to discuss the meaning of consideration in such cases, as there is no mention of the term "consideration" anywhere in the description provided in the entry 5 (e) of the Schedule II to the CGST Act, 2017. The bounce charges are recovered by the appellant for tolerating the act of delay and it is nothing but consideration. It is clear from the meaning of the ''consideration'' provided under Section 2(31) that it includes the impugned charges. The definition is reproduced herein:-

"consideration" in relation to the supply of goods or services or both includes—

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:"

The consideration also includes the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both. Here, the bounce charges recovered by the Appellant from their borrower can be construed as the monetary value of the act of the tolerance from the side of Appellant in the case of default by the borrower. Thus, this argument of the Appellant is not tenable.

The appellant has also contended that the clause (e) of Entry 5 of Schedule II to the CGST Act can be made applicable only when there is an agreement to the obligation to tolerate an act or situation, and the word 'obligation' implies a duty or a liability on the person making the obligation, with a corresponding right to the other person to enforce such obligation. However, there is no obligation upon the Appellant to tolerate the act of non-payment or delayed payment by the borrower. The payment of bounce charges neither obligates the Appellant not to take any legal action against the borrower, nor the borrower gains any right to sue the Appellant for any legal action taken by the Appellant. In this respect the appellant in his grounds of appeal has also submitted that the Ld. AAR has misinterpreted the above clause 5 (e) of

Schedule II and interpretation of clause 5 (e) submitted by Appellant in this regard is that it shall be read as under:

(i) agreeing to the obligation to refrain from an act;

(ii) agreeing to the obligation to tolerate an act or situation;

(iii) agreeing to the obligation to do an act.

Being, the expression "*agreeing to the obligation*" is a prefix to all the three entries.

73. We believe that the here the appellant has tried to play with words and coined a new theory of interpretation the law. In common parlance the prefix is a group of letters placed before the root or stem of a word or part of a word that is placed at the beginning of another word to change its meaning. By this logic prefix cannot be said as group of words as stated in submission by appellant. However, the construction of the clause 5 (e) of the Schedule II is very clear in regards to separate expressions mentioned therein and separated by semicolon. It is evident from the construction of the said entry that it contains three expressions and that all three expressions namely *"agreeing to the obligation to refrain from an act; or to tolerate an act or a situation; or to do an act"* are separated with semicolon followed by word "or". It shows that semicolon and "or" separates the above said three expressions showing that they are not inextricably connected. Therefore, the theory of interpretation coined out by the appellant by connecting group of words of first expression *"agreeing to obligation"* with rest of two expressions is not the correct legal interpretation.

74. The relevant extract of Hon. Supreme Court judgment in the case of PIL of Shri. Jayant Verma Vs. Union of India, dated 16/02/2018 related to the expressions separated by semicolon is as under:

"We are afraid we cannot agree for several reasons.

Firstly, purely grammatically, a semicolon separates the two expressions showing that they are not inextricably connected. ..... Entry 5, List III deals with seven completely different subjects, all banded together under Entry 5 and separated by semicolons, making it clear that each subject matter is separate and distinct from what follows each semicolon....."

The first expression *"agreeing to the obligation to refrain from"* is followed by 'semicolon' and word 'or' itself indicates that the legislature intended to read these expressions separately in a disjunctive manner. This has been discussed by the Hon. High Court of Kerala in case of Mr. Vincent Mathew Vs. LIC of India dated 15/01/2013. The relevant portion of said judgment is as under:

".....But, what is more relevant and crucial for the purpose of deciding the issue is that each of the earlier clauses viz., (a) to (bbb) ends up with semicolon. It is to be noted that semicolon (;) is a punctuation mark indicating a greater degree of separation than the 'comma' and it is being used to separate parts of a sentence. It is also worthy to note that in addition to semicolon, the conjunction 'or' is also used immediately after semicolon. Thus, the very syntax of the proviso to Rule 44(1) of the Act carrying different clauses would reveal that the punctuation 'semicolon' and the conjunction 'or' are used in between the clauses carrying different eligibility criteria for renewal commission, not without any purpose. In fact, they would indicate that in troth, they form a single sentence carrying different clauses...."

Therefore, the correct interpretations of expressions separated by "semicolon" followed by word "or" is that they are distinct and carry separate meaning. Thus, the words mentioned in first expression are separate and has limited applicability to the extent of first expression only. The second expression "to tolerate an act or situation" is clearly distinct and separate. In view of this the group of words "agreeing to the obligation" from first expression of clause 5 (e) mandating for agreement and obligation are not applicable to the expression "to tolerate an act or situation". Hence, it is concluded that the vary activity of tolerating act or situation of delay in payment of EMI is covered under clause 5 (e) of the Schedule II without such obligation as contended by the appellant.

75. The Appellant have, inter-alia, contended on the ground that, as per the provision of the Section 15 (2)(d) of the CGST Act, 2017, the bounce charges recovered from the borrower will form part of the value of their main consideration, which in this case is interest, for the supply of their main service, which in the present case is to extend the loans of various nature to the borrowers seeking such loans at the fixed rate of interest as per the agreement entered between them and the borrowers. Further,

since the main consideration, i.e. interest in this case, is exempt from the levy of GST as per the Notification No. 12/2017-C.T. (Rate) dated 28.06.2017, the bounce charges collected from the borrowers, being the part of the main consideration, will eligible for exemption from the levy of GST.

76. As regards this contention, we intend to delve into the entry laid out in above said exemption notification. The same has been reproduced herein under for reference:

""Heading 9971 Services by way of—

(a) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services);"

On perusal of the above entry it is evident that above said notification has exempted from GST, the consideration represented by way of interest or discount other than interest involved in credit card services. The term "interest" has also been defined in said notification. The definition provided therein reproduced as under:

"2. For the purposes of this notification, unless the context otherwise requires, -

(zk) "interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) but does not include any service fee or ***other charge in respect of the moneys borrowed or debt incurred*** *or in respect of any credit facility which has not been utilised;*

Thus, as per said definition the entry includes only the interest payable in respect of the money borrowed or debts incurred, but does not include any service fees or other charges in respect of the money borrowed or debts incurred or in respect of any credit facility which has not been utilized. The "interest" requires to be construed not to include there in its ambit any other charges in respect to the money borrowed or debts incurred. The bounce charges collected by the Appellant is clearly not on account interest for the delayed payment of the consideration for their supply, but for dishonor of the repayment instruments, such as bouncing of the Cheques issued by the borrowers or the failure of the ECS for non-availability of the sufficient fund in the borrower's account. Further, the Appellant is recovering separate amount at the fixed rate of interest under the head of "default interest", as

quoted in the loan agreement, on the delayed payment of the EMI by the borrowers. In view of these facts, we are of the opinion that the "bounce charges" in the present case are not covered in the interest meant for the purpose of the exemption and thereby not entitled for the exemption as claimed by the appellant.

77. The Appellant have also relied upon the various overseas rulings, viz. **GSTR 2001/4, GSTR 2001/4, GSTR 2003/11, GST Determination No. 2005/6,** issued by the Australian Tax Office (ATO), **New Zealand case S65 (1996) 17 NZTC 7408 etc.** to substantiate their contention. As regards these international ruling pronounced in overseas countries, we are of the view that the aforementioned rulings cited by the Appellant are not binding on us. We have interpreted the entire issue on the basis of the provisions laid out in the CGST Act, 2017.

78. In view of the above observations, we are of the opinion that the bounce charges recovered by the Appellant from their borrowers on account of the default of the borrowers, where their repayment instruments get dishonored due to lack of the sufficient fund in their bank account, will attract GST.

Thus, we pass the following order:

ORDER

We do not find any reason to interfere with the ruling pronounced by the Authority for Advance ruling vide their order No. GST-ARA-22/2018-19/B-85 dated 06.08.2018.

(RAJIV JALOTA)
MEMBER

(SUNGITA SHARMA)
MEMBER

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