



BEFORE THE AUTHORITY FOR ADVANCE RULING - ANDHRA PRADESH
Goods and Service Tax

D. No. 5-56, Block-B, R.K. Spring Valley Apartments, Eedupugallu, Vijayawada-521151

Present

1. Sri. D. Ramesh, Additional Commissioner of State Tax (Member)
2. Sri. A. Syam Sundar, Additional Commissioner of Central Tax (Member)

AAR No.04/AP/GST/2021 dated: 12.01.2021

1	Name and address of the applicant	M/s. SCV Sky Vision, D.No.18/2/268/15/1A, Abbanna Colony, Abbanna Towers, Tirupati, Chittoor, Andhra Pradesh-517501.
2	GSTIN	37ACPFS9342C2ZQ
3	Date of filing of Form GST ARA-01	06.03.2020
4	Date of Virtual Hearing	22.10.2020
5	Represented by	M/s. Nitya Tax Associates, Bengaluru
6	Jurisdictional Authority - Centre	Superintendent, Tirupathi-3 Range, Tirupathi CGST Division.
7	Clause(s) of section 97(2) of CGST/SGST Act, 2017 under which the question(s) raised	b) applicability of a notification issued under the provisions of this Act; and e) determination of the liability to pay tax on any goods or services or both;

ORDER

**(Under sub-section (4) of Section 98 of Central Goods and Services
Tax Act, 2017 and sub-section (4) of Section 98 of Andhra Pradesh
Goods and Services Tax Act, 2017)**

1. At the outset we would like to make it clear that the provisions of CGST Act, 2017 and SGST Act, 2017 are in pari materia and have the same provisions in like matter and differ from each other only on a few specific provisions.



Therefore, unless a mention is particularly made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the APGST Act.

2. The present application has been filed u/s 97 of the Central Goods & Services Tax Act, 2017 and AP Goods & Services Tax Act, 2017 (hereinafter referred to CGST Act and APGST Act respectively) by M/s. SCV Sky Vision (hereinafter referred to as applicant).

3. Brief Facts of the case:

- The applicant, M/s. SCV Sky Vision, is *inter alia* engaged in cable operation business in and around Tirupati in Chittoor District of Andhra Pradesh.
- The applicant is a Multi-System Operator ('MSO') and purchases digital signals from broadcasters like E-TV, Star TV Sun TV etc. These signals are transmitted through satellite to receiving stations owned by MSOs. MSOs further transmit these signals through cables to the Local Cable Operators ('LCO') who own their last-mile network to individual homes and customer premises.
- As a matter of industry practice, MSO after buying/ receiving the signals of various channels from different broadcasters, turns into a single bouquet or bundle it and transmit to the individual subscribers through various LCOs.
- An individual subscriber is required to subscribe to an LCO who would transmit the signals and also install a Set-Top Box ('STB') at home with a viewing card /smart card in it. STBs help MSOs to encrypt the signals for all the channels and transmit them. STBs convert these signals to analogue mode for viewing on televisions sets.
- M/s. ACN Cable Private Limited ('ACN'/'Company') is *inter alia* engaged in provision of similar services where it receives broadcasting signals and transmits them to individual customers through LCOs.
- ACN has entered into a 'Business Transfer Agreement' dated December 27th, 2018 ('BTA') with the applicant ('Sky Vision'/ Seller'). In terms of the BTA, ACN has agreed to purchase entire cable operation business of seller. All rights, title and interest in and to the business, assets, subscribers/ customers, linked LCOs will get transferred from applicant to ACN as a going concern except the liabilities



which have presently arisen or will arise for the past business relationship/ earlier period and the employees. The relevant clauses of the agreement are discussed as under:

- ♦ 'Business' mean entire cable operation business and includes all rights and powers of any nature except any of the employees or liabilities. (Clause 1.2);
- ♦ 'Excluded liabilities' to mean all debts, liabilities and obligations relating to the Business carried out on or before the closing date (March 31st, 2019) (Clause 1.5);
- ♦ On closing date, the Business of the applicant including all rights, title and interest in the business, assets, subscribers, linked LCOs etc. shall be sold, transferred and conveyed to ACN on a going concern basis. (Clause 3.1);
- ♦ None of the liabilities of any nature arising out of past business relations shall be transferred including but not limited to future payments, claims due and payable, tax liabilities, statutory liabilities. (Clause 3.2);
- ♦ STBs forming asset of the applicant will now be owned by ACN and the applicant shall assist in installing STBs in all its LCOs and subscribers. Applicant will ensure that all their existing LCOs shall now enter into an agreement with ACN to become their linked LCOs. (Clause 3.3 (a));
- ♦ Applicant shall render all possible support prior to the execution of agreement to make the business self-sufficient and transfer the same in a running condition or as a going concern like integration of STBs to purchaser's system and acquisition of new customers. (Clause 3);
- ♦ Applicant shall ensure and assist the purchaser to establish its network with existing subscribers and LCOs through an interconnection agreement who are the last mile connects to deliver the service. (Clause 6.1);
- ♦ Applicant will ensure installation of network cables of the purchaser for provision of cable business service and acquisition of customers in the said area and ensure authorization of all broadcasters in ACNs name. (Clause 7.7)
- ♦ Purchaser will have sole right to decide and collect the subscription fees post transfer of business (clause 7.5)



In lieu of the instant business transfer, the purchaser shall pay applicant an aggregate amount of Rs.12,00,00,000/- on various milestones viz 40% on execution of the BTA and remaining on completion of individual milestones like handing over of customers details, ensuring interconnection of LCOs with purchaser etc.

4. Questions raised before the authority:

Whether Sl.No.2 of the Notification No.12/2017 – Central Tax (Rate) dated June 28th, 2017 ('Service Exemption Notification') granting exemption to 'Services by way of transfer of a going concern as a whole or an independent part thereof' is applicable on the business transfer undertaken in the present instance?

On Verification of basic information of the applicant, it is observed that the applicant falls under Central jurisdiction, i.e. Superintendent, Tirupati Range, CGST Tirupati Division. Accordingly, the application has been forwarded to the jurisdictional officers and a copy marked to the State Tax authorities to offer their remarks as per Sec. 98(1) of CGST /APGST Act 2017.

In response, remark are received from the State Tax authorities concerned stating that no proceedings are lying pending or passed relating to the applicant on the issue, for which the Advance Ruling sought by the applicant.

5. Applicant's Interpretation of Law and Facts:

5.1. The applicant submits that the impugned business transfer undertaken in pursuance of the BTA qualifies to be 'Services by way of transfer of a going concern, as a whole or an independent part thereof' under Sl.No.2 of the (Service Exemption Notification) Notification no.12/2017- CT (Rate) dated June 28th, 2017 granting exemption to services listed therein. Hence, the applicant is not liable to pay any tax in the present instance.

5.2. In the present instance, the underlying issue requires evaluation of the factum of transfer of business as a going concern to consider the same exempt from tax. Accordingly, the relevant extract of the Notification is provided hereunder:

Sl.No	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of services	Rate (percent)	Condition
2	Chapter 99	Services by way of transfer of a going concern as a Whole or an independent part thereof	Nil	Nil



5.3. The transfer of business undertaken in the present instance shall satisfy both the conditions of

(a) a service and

(b) whether such transfer is by way of a 'going concern'.

A. Transfer of business is supply of service:

A.1 Section 7 (1)(a) of the CGST Act provides for an inclusive definition and states that supply includes 'all forms of supply of goods or services such as sale, transfer, barter, exchange made or agreed to be made for a consideration by a person in the course of furtherance of business'. The term 'service' is defined under Section 2(102) of the CGST Act as anything other than goods.

A.2. Entry No.4 (a) of Schedule II of the CGST Act states that where goods forming part of assets are transferred or disposed of under the directions of the person carrying on business (no longer form part of such assets), such transfer or disposal is a supply of goods. Thus, the goods portion in transfer of business is covered under Entry 4(a) of Schedule II.

A.3. Further in the case of **Deputy Commissioner, (CT) v. K. Behanan Thomas, 1977 (39) STC 325 (Madras)**, the Madras High Court held that transfer of business does not constitute sale of goods. Hence, such supply cannot be said to be supply of goods.

A.4. In the case of **Paradise Food Court v. State of Telangana, 2017-VIL-238-AP**, in the context of VAT Laws, the Andhra Pradesh High Court held that business is not movable property and is therefore not goods.

A.5. Accordingly, there are following two supplies in transfer of business:

- Transfer of goods (assets) deemed as supply of goods under Clause 4(a) of Schedule II (supply 1); and
- Transfer of business (other than goods) qualifying as supply of service (Supply 2).

Supply 1 & Supply 2 qualify as 'Composite Supply'

A.6. The applicant submits that Section 2(30) of the CGST Act provides for the concept of composite supply. It stipulates that supply which is made by a person consisting of two or more taxable supplies of goods or services or any



combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.

A.7. As per Section 8 of the CGST Act, composite supply shall be treated as a supply of principal supply and therefore, applicable tax rate on such supply will be of the principal supply itself. Hence, it becomes important to determine as to whether **Supply 1** and **Supply 2** constitute a naturally bundled supply or not.

A.8. The word 'naturally bundled' is not defined under GST law. Therefore, a reference shall be made to the erstwhile service tax law, where a similar concept of naturally bundled services prevailed. The education guide issued by CBIC explains bundled services as a bundle of service wherein an element of provision of one service is combined with an element or elements of provision of any other service.

A.9. As per the Education Guide '*If various elements of a bundled service are naturally bundled in the ordinary course of business, it shall be treated as provision of a single service which gives such bundle its essential character*'. It further provides following indicators to identify a natural bundle:

- The perception of the consumer or the service receiver;
- Majority of service providers in a particular area of business provide similar bundle of services;
- The nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of business. If the nature of services is such that one of the services is the main service and the other services combined with such service are in nature of incidental or ancillary services which help in better enjoyment of a main service.

A.10. In the present case, all the parameters discussed above are satisfied as under:

- Going forward, ACN will undertake the same business which was earlier carried out by the seller with the same customers and LCOs;
- BTA entered into for transferring the business as a going concern, mandates transfer of goods for carrying out the business as it is; and



- Transfer of business is the main service and transfer of asset is incidental or ancillary to such service, which helps in better enjoyment of property i.e. to say carrying out the business effectively.

A.11. Basis the above, it is evident that such supply undertaken by the applicant is a composite supply since a single consideration is being charged for the supply in terms of clause 4.1 of the BTA and the supplies are naturally bundled in the ordinary course of business.

A.12. Further, the intent of the applicant is to transfer the entire business. Transfer of goods is only incidental and undertaken to achieve this objective. Hence, it is the transfer of business as a going concern. Hence, the transaction will be deemed as supply of service in terms of section 8 of the CGST Act.

A.13. In the present instance, transfer of business of provision and distribution of signals to the subscribers, as a going concern for lump sum consideration, will qualify as supply in accordance with Section 7(1) (a) and 7(1) (d) of the CGST Act.

A.14. Further, the intent of ACN is to take over the business of seller. Transfer of goods is only incidental and undertaken to achieve this objective. Hence, transfer of business (service component) will be the principal supply of such composite supply. Hence, the transaction will be deemed as supply of service in terms of Section 8 of the CGST Act.

B. Scope of the term 'Going Concern':

B.1. The entry as reiterated herein above specifies two criteria which must be met simultaneously. Accordingly, in order to fall under Sl.No.2 of service Exemption Notification, the service must be transfer of a going concern and not otherwise.

B.2. The applicant submits that service exemption notification grants exemption to transfer of a 'going concern'. On perusal of the entry extracted herein above, it is relevant to note that the service Exemption notification exempts the service of transfer of business as a going concern irrespective of the fact that such transfer qualifies as a slump sale or not.



B.3 The term 'going concern' is not defined under the CGST Act or rules framed there under. Thus, it is relevant to note the natural meaning of the term which is provided as under:

- In **Prem and Saharay's Judicial Dictionary of Words and Phrases**, the term 'going concern' has been defined to mean 'a business that is in actual operation and working order and transfer of ownership does not interrupt running of business'.
- The **Cambridge English Dictionary** defines the term as '*if a company is sold as a going concern, it is sold when it is operating normally*';

B.4 On perusal of the above, it may be understood that the term 'going concern' means that at the point in time to which this description applies, the business is live or operating and has all parts and features necessary to keep it in operation.

B.5 The applicant submits that similar exemption entry existed under the erstwhile Service Tax law. In the context of 'going concern', Para 7.11.15 of the Education Guide, CBEC (Now 'CBIC') provides that transfer of a running business. The same is extracted hereunder for reference:

"Transfer of a going concern means transfer of a running of business which is capable of being carried on by the purchaser as an independent business but shall not cover mere or predominant transfer of an activity comprising a service."

B.6. Thus, the CBIC itself clarified that business shall be in running condition and capable of being carried out independently for a business to qualify as a going concern.

B.7. The Accounting and Auditing standards by the Institute of Chartered Accountants of India ('ICAI') provides the meaning of 'going concern' as an accounting concept that implies that the business would continue to exist and operate for an indefinite period in the future. Accounting Standard (AS-1), issued by the ICAI explained the concept of a going concern as under:

"The enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity, of liquidation or of curtailing materially the scale of the operations".



- B.8.** In the present instance, the applicant is transferring all its fixed assets, inventories, customer base, existing LCOs and also supporting in transferring all LCOs through an agreement to ACN. All the rights received from broad casters to the applicant is also being transitioned to ACN which would enable ACN to run the business of provision and distribution of signals through various LCOs without any interruption.
- B.9.** The applicant submits that it retains the existing liabilities and liabilities arising in future due to past relationships and employees due to presence of similar expertise and manpower with the purchaser having been in a similar business.
- B.10.** At this juncture, a question arises as to whether non-transfer of liabilities and employees itself will impact the position of business being transferred as a going concern or whether any transfer of business in a running condition without interruption will qualify as a going concern.
- B.11.** The applicant submits that non-passing off of past liabilities and employees will not render the business as not in the nature of a going concern. The parameters as laid down by several authorities discussed herein above is that the concept of transfer of business as going concern does not mandate transfer of all assets and liabilities. The parties are free to choose the assets and liabilities which they wish to transfer but importantly the business must be capable of being carried on the basis of assets transferred.
- B.12** In other words, the most viral factor is the presence of broad casting signals, subscribers/customers, LCOs to transmit the signals at the last mile subscriber and STB devices for a cable operation business to run. Even if in few cases, the liabilities and employees do not get transferred, the businesses can independently function. In the present instance, the basic requirement to run the business is present. Various judicial precedents affirm the above view and are provided in the subsequent paragraphs.
- B.13.** Various Advance Ruling Authorities of different states have taken a view on transfer of business as a going concern to mean transfer of a running business. The AAR, Karnataka in the case of **Rajashri Foods Pvt. Ltd., 2018 (13) GSTL 221 (AAR-GST)** adopted a similar ratio, and held that since the transaction contemplates transfer of fully functional unit with its entire business, there will be a continuity in the business. Therefore, such transfer shall amount to transfer of a going concern and will get covered under entry 2 of the exemption notification.



B.14. The AAR, Uttarakhand in case of **Innovative Textiles Limited, 2019 (24)GSTL 480 (AAR-GST)** also held that, since the applicant is transferring its operational business and the purchaser intends to carry on same kind of business, the applicant is supplying services by way of transfer of business as going concern.

B.15. Basis the above, the transfer of business in the present instance qualifies as 'transfer of a going concern' squarely falling under Sl.No.2 of the Service exemption Notification. The applicant is required to raise a 'Bill of supply' and charge no tax upon it.

6. Virtual Hearing:

The proceedings of Hearing were conducted through video conference on 22nd October, 2020, for which the authorized representatives from, M/s. Nitya Tax Associates, Bengaluru attended and reiterated the submissions which were already made earlier.

7. Discussion and Findings:

We have examined the issues raised in the application. The taxability of the goods and services supplied or to be supplied, as governed under the provisions of respective GST Acts are examined to decide the question involved in the present Ruling.

The applicant intends to sell his cable network operation business as Multi-System Operator in the present operational condition to the buyer M/s ACN Private Limited, Bengaluru. Further the applicant stated that the business including the assets in the form of Set Top Boxes, Local Cable Operators and the end-users connected thereon get transferred to the buyer except the existing liabilities and liabilities arising out of past business and its employees. The following clauses of the business transfer agreement reveal the same.

- Business' mean entire cable operation business and includes all rights and powers of any nature **except any of the employees or liabilities**. (Clause 1.2)
- 'Excluded liabilities' to mean all debts, liabilities and obligations relating to the Business carried out on or before the closing date (March 31st, 2019) (Clause 1.5);



- None of the liabilities of any nature arising out of past business relations shall be transferred including but not limited to future payments, claims due and payable, tax liabilities, statutory liabilities(Clause 3.2);

On perusal of the above facts, it is noticed that the applicant's Business as MSO sought to be sold is in functioning state and the transaction by virtue of the Business Transfer Agreement contemplates the sale of business to the purchaser, except **any of the employees or liabilities** and the purchaser intends to continue the same business.

The term 'going concern' is defined nowhere in the CGST Act. Hence, the term is taken in its common parlance as used in trade. The running business, when sold in its entirety or a branch of the business, it is considered a going concern in lock, stock and barrel.

Going concern is not included in the GAAP (Generally Accepted Accounting Principles) but included in the GAAS (Generally Accepted Auditing Standards). Accounting standards determine what a company disclose on its financial statements if there are doubts about its ability to continue as a going concern. Conditions that lead to substantial doubt about going concern include the following like negative trends in operating results, continuous losses from one period to next, loan defaults, lawsuit against a company, and denial of credit by suppliers. Moreover, transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business. Such transfer of business as a whole will **comprise comprehensive transfer** of immovable property, goods and transfer of unexecuted orders, **employees**, goodwill etc.,

The concept of transferring a company as a 'going concern' was examined by the Delhi High Court in the land mark judgement of *Inre Indo Rama Textile Limited* (2013) 4 Comp LJ 141 (Del). In this case the Delhi High Court held that a company is said to be transferred as a 'going concern' when the **assets and liabilities being transferred** constitute a business activity capable of being run independently for a



foreseeable future. The Supreme Court in *Allahabad Bank Vs. ARC Holding* AIR 2000 SC 3098 (Allahabad Bank case) held that if the company is sold off as a 'going concern', then along with the assets of the company, if there are any liabilities relevant to the business or under taking, the **liabilities too are transferred.**

In view of the judicial precedents as mentioned above it is evidently clear that the transaction of 'transfer of business' in the instant case does not fit in the definition of a 'going concern' in the context of exclusion of liabilities.

Hence, the entry at serial No.2 of the chapter 99 of the Notification No.12/2017-Central Tax (Rate) dated 28.06.2017 prescribing the rate of tax for 'the services by way of transfer of a going concern as a whole or an independent part thereof', as "NIL" rated, is not applicable to the present case.

In view of the observations stated above, the following ruling is issued.

RULING

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

Question: Whether Sl.No.2 of the Notification No.12/2017 – Central Tax (Rate) dated June 28th, 2017 ('Service Exemption Notification') granting exemption to 'Services by way of transfer of a going concern as a whole or an independent part thereof' is applicable on the business transfer undertaken in the present instance?

Answer: Negative.

**Sd/-D. Ramesh
Member**

**Sd/-A. Syam Sundar
Member**

//t.c.f.b.o//

Deputy Commissioner (ST)

DEPUTY COMMISSIONER (ST)

O/o. Chief Commissioner of State Tax,
Government of A.P., Vijayawada

TO

1. M/s. SCV Sky Vision, D.No.18/2/268/15/1A, Abbanna Colony, Abbanna Towers, Tirupati, Chittoor, Andhra Pradesh-517501 **(By Registered Post)**



Copy to

1. The Assistant Commissioner of State Tax, Tirupati-I Circle, Chittoor Division. **(By Registered Post)**
2. The Superintendent, Central Tax, CGST Tirupati-3 Range, Tirupati Division. **(By Registered Post)**

Copy submitted to

1. The Chief Commissioner (State Tax), O/o Chief Commissioner of State Tax, Eedupugallu, Vijayawada, (A.P)
2. The Chief Commissioner (Central Tax), O/o Chief Commissioner of Central tax & Customs, Visakhapatnam Zone, GST Bhavan, Port area, Visakhapatnam-530035.A.P. **(By Registered Post)**

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

