

# Placement of non-transferable medical instruments in hospitals without consideration, a 'supply of service' – Kerala AAR

10 June 2021



## Summary

The Kerala Authority for Advance Ruling (AAR) observed that the applicant is engaged in placement of specified medical instruments at premises of unrelated customers, such as hospitals and labs, for their use without transfer of ownership and consideration for a specified period. Further, such placement is against an agreement between the applicant and the hospitals for an obligation of minimum purchase of certain products from the applicant. Therefore, the AAR held that such placement constitutes a 'supply of services' and not 'movement of goods otherwise than by way of supply'. Therefore, such transaction shall be taxable under GST.

## Facts of the case

- The applicant<sup>1</sup> is engaged in sale of pharmaceutical products, diagnostic kits, diagnostic instruments, etc.
- The applicant has adopted the business model of placing their own medical instruments at premises of unrelated hospitals or laboratories without any consideration. To execute the placement of instruments, the applicant enters into the Reagent Supply and Instrument Use Agreement. As per the said arrangement, the recipient must purchase minimum quantity of purchase products such as reagents, calibrators and disposables.
- The applicant sought an advance ruling to determine whether the provision of specified medical instruments by the applicant to unrelated parties for use without any consideration, constitutes a "supply" or whether it constitutes "movement of goods otherwise than by way of supply".
- Earlier in year 2018, the Kerala AAR had held that this supply would constitute a "composite supply" and the Appellate Authority for Advance

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<sup>1</sup> M/s Abbott Healthcare Private Limited.

Ruling (AAAR) upheld the ruling of AAR as legally correct and proper.

- However, in 2020, the Hon'ble Kerala High Court quashed the ruling of the AAR as well as the AAAR and rejected the finding that placement of medical instruments to hospitals, laboratories etc., for use without any consideration constitutes a "composite supply". The court remitted the case back to AAR for fresh decision based on the observation made by the Hon'ble High Court in the order.

#### **Kerala AAR observations and ruling<sup>2</sup>**

- **Ingredients of supply:** The Kerala AAR observed that the activity to qualify as 'supply'<sup>3</sup> must satisfy the three essential ingredients of 'supply' i.e., the activity:
  - (i) involves goods or services,
  - (ii) is in the course or furtherance of business, and
  - (iii) is made for a consideration.
- **Involves goods or services:** The AAR observed that the instrument or

machine installed at the premises of hospital/labs by the applicant clearly fall within the definition of goods. Further, the right granted to use the machine squarely gets covered in the scope of term 'transfer'<sup>4</sup>.

- **In the course or furtherance of business:** The AAR observed that the definition of business in GST law is inclusive and wide in scope. Considering the same, the activity of applicant is undoubtedly in the course or furtherance of business.
- **Made for a consideration:** The AAR held that the agreement to purchase agreed value of reagents, calibrators and disposables for use in instrument exclusively from the applicant and obligation to pay in case of deficit purchase constitute a valid consideration<sup>5</sup>.
- **Transaction qualifies as supply:** Thus, the AAR concluded that placement transaction is a 'supply'. Additionally, the AAR observed that the grant of non-transferable right to

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<sup>2</sup> Advance Ruling No. KER/97/2021 dated 7 May 2021

<sup>3</sup> Section 7 of the CGST Act, 2017

<sup>4</sup> Section 7(1)(a) of the CGST Act, 2017

**use the goods for a specified period without transferring title of the goods qualifies to be ‘supply of services’<sup>6</sup>.**

### **Our comments**

**This has been one of the most controversial issues in GST regime for the healthcare and pharmaceutical industry. Most of the businesses were considering it to be ‘movement of goods otherwise than by way of supply’ and were not discharging GST liability.**

**This ruling seems to have made it clear that such transaction would qualify as ‘supply of service’ and not a ‘composite supply’ as held in earlier ruling of Kerala AAR.**

**Considering the above, it is recommended for entities in this industry to revisit their GST positions in this regard. Additionally, it is also imperative to note that the rate of GST would now have to be determined considering this as a separate supply and not composite supply.**

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<sup>5</sup> Section 2(31) of the CGST Act, 2017

<sup>6</sup> Section 7(1A) of the CGST Act, 2017

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<b>NEW DELHI</b> National Office Outer Circle L 41 Connaught Circus, New Delhi 110 001 T +91 11 4278 7070	<b>NEW DELHI</b> 6th floor, Worldmark 2, Aerocity, New Delhi - 110 037 T +91 11 4952 7400	<b>AHMEDABAD</b> 7th Floor, Heritage Chambers, Nr. Azad Society, Nehru Nagar, Ahmedabad - 380 015	<b>BENGALURU</b> 5th Floor, 65/2, Block A, Bagmane Tridib, Bagmane Tech Park, C V Raman Nagar, Bengaluru - 560 093 T+91 80 4243 0700	<b>CHANDIGARH</b> B-406A, 4th Floor, L&T Elante office Building Industrial area, Phase-I, Chandigarh 160 002 T +91 172 4338 000
<b>CHENNAI</b> 7th Floor, Prestige Polygon 471, Anna Salai, Teynampet Chennai - 600 018 T +91 44 4294 0000	<b>DEHRADUN</b> Suite No 2211, 2nd Floor Building 2000 Michigan Avenue, Doon Express Business Park, Subhash Nagar, Dehradun 248 002 T +91 135 264 6500	<b>GURGAON</b> 21st Floor DLF Square Jacaranda Marg, DLF Phase II, Gurgaon 122 002 T +91 124 462 8000	<b>HYDERABAD</b> 7th Floor, Block III White House Kundan Bagh, Begumpet Hyderabad 500 016 T +91 40 6630 8200	<b>KOCHI</b> 7th Floor, Modayil Centre Point, Warriam Road Junction, MG Road, Kochi 682 016 T +91 484 406 4541
<b>KOLKATA</b> 10C Hungerford Street 5th Floor, Kolkata 700 017 T +91 33 4050 8000	<b>MUMBAI</b> 16th Floor, Tower II One International Centre SB Marg, Prabhadevi (W) Mumbai 400 013 T +91 22 6626 2600	<b>MUMBAI</b> Kaledonia, 1st Floor, C Wing (Opposite J&J office) Sahar Road, Andheri East, Mumbai - 400 069 T +91 22 6176 7800	<b>NOIDA</b> Plot No. 19A, 7th Floor Sector - 16A, Noida 201 301 T +91 120 4855 900	<b>PUNE</b> 3rd Floor, Unit No 309- 312, West Wing, Nyati Unitree Nagar Road, Yerwada Pune- 411 006 T +91 20 6744 8800

For more information or for any queries, write to us at [contact@in.gt.com](mailto:contact@in.gt.com)



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