



## Dhruva Alert for GST ADVANCE RULINGS – 4<sup>th</sup> Edition

### 1. M/s Rajashri Foods Pvt. Ltd – Karnataka

#### Issue for Consideration

#### Issue:

- Whether the sale of an independent unit for a lumpsum consideration, comprising the transfer of all of the assets and liabilities will be treated as a supply of goods or services.
- Further, whether the said transaction will fall under Sr.No.2 of Notification No.12/2017 – Central tax (Rate) dated 28.06.2017 “*services by way of transfer of a going concern, as a whole or an independent part thereof*” taxable at NIL rate.

#### Discussion & Ruling

#### Discussion:

- The transfer of an independent unit which is fully functionable, along with the transfer of all the assets and liabilities to a new owner amounts to transfer of a going concern.
- Further, the order states that the term “*transfer of a going concern*” means the transfer of a running business which is capable of being carried on by the purchaser as an independent business. Such a transfer of a business as a whole will comprise of the comprehensive transfer of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc.
- The transfer of a going concern will qualify as supply under section 7 of the CGST Act, 2017, as the scope of supply is wider and goes beyond the meaning of “in the course or furtherance of business”.
- Further, it was observed as per Part 4(c) of Schedule II to the CGST Act, that when a business is transferred as a going concern it does not amount to the supply of ‘goods’; but, on the other hand, Notification No. 12/2017-Central Tax (Rate) covers services by way of the transfer of a going concern as a whole or an independent part thereof. Thus, it was held that the activity of “*transfer of a going concern*” will constitute the supply of a service.



	<b>Ruling</b> <ul style="list-style-type: none"><li>• Transfer of a going concern constitutes a supply of “service”, and the same is exempt per Sr. No. 2 of Notification No. 12/2017- CGST (Rate).</li></ul>
<b>Dhruva Comments / Observations</b>	<ul style="list-style-type: none"><li>• The ruling has held that the transaction of transfer of business / independent unit as a going concern is exempt from the supply of services.</li><li>• The question that remains open is whether the Company undertaking the sale of a unit has to undertake proportionate reversal of input tax credits as the said activity is an exempt supply. A similar quandary existed under the erstwhile Service Tax law and remains unanswered.</li><li>• The intent of the legislature appears solely to ensure that there is no demand of tax on the sale of a business and not to treat it at par with other exempted services for the purpose of the reversal of credit, since provisions for the transfer /reversal transfer of credit with respect to the assets / stocks being transferred are separately envisaged under the law.</li></ul>

## 2. Maharashtra State Power Generation Company Limited – Maharashtra

<b>Issue for Consideration</b>	<b>Issue:</b> <ul style="list-style-type: none"><li>• The applicability of GST on Liquidated Damages for delay/deficiency in the performance of the contract, including Liquidated Damages pertaining to the pre-GST period and the following related aspects:<ul style="list-style-type: none"><li>- The rate of GST;</li><li>- The time of supply;</li><li>- The availability of the credit of GST paid on liquidated damages to the contractor/vendor.</li></ul></li></ul>
<b>Discussion &amp; Ruling</b>	<b>Discussion:</b> <ul style="list-style-type: none"><li>• Liquidated damages will attract the levy of GST as supply of service under the entry “agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act” under 5(e) of Schedule II.</li><li>• Resorting to the mechanism of the deduction of the liquidated damages from the contract price that is payable doesn’t impact the value of contract. Both are independent obligations under the contract. In this context it was held as under:<ul style="list-style-type: none"><li>- The services will be taxable at 18% under HSN 9997;</li><li>- The time of supply will be determined based on the determination of the total delay by the contractor;</li><li>- The advance ruling authority didn’t respond to the question on whether the credit for the GST paid will be available to the contractor/vendor on the grounds that the applicant is not the proper person to raise the question.</li></ul></li></ul> <b>Ruling:</b> <ul style="list-style-type: none"><li>• Liquidated Damages would be subject to GST @ 18% under HSN 9997.</li></ul>



**Dhruva  
Comments /  
Observations**

- The essence of Liquidated damages is essentially retributive and compensatory in nature; also, an expression of intolerance and can't be linked to the taxable entry defeating the very spirit of the imposition itself. Further, it is relevant to note that the law of contract does not provide any measure for computing the damages that can be recovered by the innocent party from the defaulting party. The object of giving the damage is to place the innocent party, as far as money can do it, in the same position as if the contract had been performed. The damage is usually the actual loss suffered by such party. In the alternative the parties are permitted to fix for themselves in the contract the value of their right and the amount that would constitute proper measure of damages. Secondly, the interpretation of entry 5(e) of Schedule II can be very wide, and it can take into its fold any kind of compensation received.
- It is important that appropriate guidance / clarification is issued as to the activities which are intended to be taxed. Else, this could result in substantial litigation. Jurisprudence/ guidance can be drawn from other international laws whereby, there are decisions which have held that liquidated damages is not liable to VAT, as it is not to tolerate an act. Albeit, this would depend upon the factual nature of charges which are recovered as liquidated damages.

**3. M/s Skilltech Engineers & Contractors Private Limited – Karnataka**

**Issue for  
Consideration**

**Issues:**

- Whether entering into three separate contracts, in relation to a single bid process, that contains three distinct activities – the supply of materials, erection and civil work can be said to constitute a “Works Contract”.
- Whether the services that have been provided to Karnataka Power Transmission Corporation Limited (“**KPTSL**”) can be said to have been provided to a Government or a Government Authority, in order to claim the benefit of the concessional rate of 12% tax under Notification No. 24/2017 – Central Tax (Rate).

**Discussion &  
Ruling**

**Discussion:**

- The related activities of the supply of materials, erection, and civil works are provided under three separate contracts respectively, which have been entered by the applicant in relation to a single tender bid awarded are indivisible and cannot be bifurcated into the supply of goods and the supply of services.
- A statutory body, corporation or an authority that has been created by Parliament or by a State Legislature is neither a “Government” nor a “local authority”. Such a statutory body, corporation or an authority is a distinct entity and cannot be regarded as a Central or State Government or “local authority”. Hence, such services cannot be regarded as services that have been provided to a Central/State Government, Union Territory, local authority or a governmental authority.



	<p><b>Ruling:</b></p> <ul style="list-style-type: none"><li>• Activities performed under three separate contracts are indivisible and fall squarely within the definition of a “Works Contract”.</li><li>• The benefit of the concessional rate of tax as notified under Notification No. 24/2017 – Central Tax (Rate) cannot be claimed as the services are not being provided to a Government or local authority.</li></ul>
<p><b>Dhruva Comments / Observations</b></p>	<ul style="list-style-type: none"><li>• With respect to the first part of the decision, the ruling is in line with the Maharashtra AAR dated 03.03.2018 in the case of <i>Fermi Solar Farms Private Limited</i>; however, unlike the ruling in <i>Fermi Solar</i> where the authorities actually analysed the terms of the contract in order to come to the conclusion that, while the applicant had entered into two separate contracts, the intent of the same was to carry out a works contract for the setting up of a solar power generating system, the current Karnataka Ruling was merely based on the premise that since the contracts were awarded in response to a single bid / tender, and as all of the three agreements are to be executed by the Applicant, the same would qualify as a composite works contract.</li><li>• Further, the authorities have failed to consider that the recipient of the supply could qualify as a ‘Governmental Authority’, as the findings acknowledge that the recipient is a body corporate created by Parliament or State legislature. Entry No. 3(vi) of Notification No. 11/2017 – Central Tax (Rate), as it stands today [post various amendments in September and October 2017] includes services that are supplied to a ‘Governmental Authority’, within the scope of the benefit.</li><li>• The various rulings issued around, split contracts being considered as indivisible and to be considered as Works contract, require tax payers to re-look at situations where:<ul style="list-style-type: none"><li>(i) for a contract, separate invoices have been obtained for the purposes of procurement; and</li><li>(ii) for contracts which qualify as ‘works contract’ and may have some elements of construction activities, when awarded to a single entity; particularly in situations where credit for procurement is available, however, credit for works contract is not available in terms of restriction u/s. 17 (5)(c).</li></ul></li><li>• Needless to say, that the aspect of immovability will also have a bearing on the credit eligibility, however, could again be a point of litigation e.g. furniture fixed on the wall.</li></ul>

#### 4. Giriraj Renewables Private Limited – Karnataka

<p><b>Issue for consideration</b></p>	<p><b>Issue:</b></p> <ul style="list-style-type: none"><li>• Whether an EPC contract for construction of solar power plant would be regarded as composite supply of goods, with solar power generating system being the principal supply?</li></ul>
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## Discussion & Ruling

### Discussion:

- The authorities on perusal of the draft contract clauses made certain observations as under:
  - The major equipment i.e. PV modules were transferred by the applicant to the owner by way of High Sea Sales and the ownership / title in goods passed to the owner upon filing the Bill of Entry
  - Imported PV modules were cleared by the owner and later made available to the applicant as “Free issue Equipment” at plant site for installation and commissioning of solar power plant
- Basis the above finding, the authorities concluded that the major portion of the plant i.e. PV modules (around 70% of contract) is supplied by the Owner and not the applicant. Thus, the applicant cannot claim that it has supplied the PV modules. The draft contract also reveals that owner can procure PV modules on their own and applicant may carry supply and service for remaining portion. Thus, such supply by the applicant would not amount to “composite supply”.
- As regards supply made by the sub-contractor, it was held that such supply should be seen as an individual supply and applicable GST rate should be applied depending upon specific nature of supply.

### Ruling:

- Since the major component of project i.e. PV Modules were transferred on high sea sale basis, it cannot be construed to be a principal supply and as such the transaction cannot be regarded as a composite supply.

## Dhruva Comments / Observations

- Recently, an advance ruling<sup>1</sup> was pronounced by Maharashtra AAR in the case of the same Company, wherein the facts and issues involved were similar to that of the present ruling.
- However, the Maharashtra AAR proceeded to analyse the transaction by examining whether it amounts to works contract of immovable property or not and concluded that it is a works contract service.
- On the other hand, in the instant ruling, the Karnataka authorities observed that since the PV modules (being major portion of contract) would be procured directly by the owner on high sea sales basis and then would be made available to the applicant contractor for installation/commissioning at site, it cannot be regarded as ‘composite supply’. The aspect of immovable property and works contract was not considered by the authorities which was the main point of discussion in the Maharashtra advance ruling.
- Despite the fact pattern being similar in both the cases, the authorities have analysed the transaction from different perspectives and accordingly have given divergent rulings.

<sup>1</sup> AAR No. GST-ARA-01/2017/B-01



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