

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

BENCH

Ms Susmita Bhattacharya, Joint Commissioner, CGST & CX
Mr Parthasarathi Dey, Senior Joint Commissioner, SGST

Preamble

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

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

Name of the Applicant	Siemens Ltd
Address	43 Shantipally, Kolkata - 700042
GSTIN	19AAAC50764L1Z3
Case Number	22 of 2019
ARN	AD190519000862Y
Date of application	May 24, 2019
Order number and date	18/WBAAR/2019-20 dated 19/08/2019
Applicant's representative heard	Kartik Kumar Gandhi, Authorised Representative

1. Admissibility of the Application

1.1 The Applicant has entered into a contract (hereinafter the Contract) with M/s Kolkata Metro Rail Corporation (hereinafter KMRCL) for 'design, supply, installation, testing and commissioning' of the power supply and distribution system, third rail system and SCADA system for the entire line and depot of the Kolkata East-West Metro Rail Project. It includes the supply of equipment, training of the personnel etc. The Applicant has been awarded onshore scope of work for the contract under an open consortium arrangement with the offshore contractor Siemens AG.

1.2 According to the Contract, the Applicant received Rs 16,33,33,924/- on 24/06/2011 as mobilisation advance, which was 10% of the original contract value. The lump-sum mobilisation amount so received is recoverable as adjustment towards the payment due for the tax invoices that the Applicant raises on attaining contract progress milestones. Of the total lump-sum amount Rs 13,80,74,549/- is stated to be outstanding on 30/06/2017. The Applicant's question relates to the GST implication on the lump-sum so received before the

implementation of GST and its recovery by KMRCL against the Applicant's sales invoices issued post introduction of the GST. More specifically, the Applicant wants to know whether GST shall be charged on the gross amount of the invoice or the net amount after adjusting the lump-sum amount outstanding as on 30/06/2017.

1.3 The question touches upon the issue of time and value of supply - whether and to what extent the lump-sum advance as on 01/07/2017 is taxable and when. Answer to the specific question of charging GST on the gross or the net amount, as mentioned in para 1.2, is dependent on the answer to the issue of time and value of supply, as referred to above.

1.4 The questions raised by the Applicant are, therefore, admissible under section 97(2)(c) of the GST Act. The Applicant also declares that the issues raised in the application are not pending nor decided in any proceedings under any provisions of the GST Act. The officer concerned from the Revenue has not objected to the admission of the Application.

1.5 The Application is, therefore, admitted.

2. Submissions of the Applicant

2.1 In its written submission attached to the Application, the Applicant argues that the lump-sum mobilisation advance is provided at the rate of 10% of the contract value. The Contract stipulates that recovery of the advance shall commence when 20% of the original contract value has been paid and will be completed by the time 85% of the contract value has been paid or the original completion date, whichever is earlier. There is no specific amount to be recovered from each of the invoices, although it is capped at 20% of the account bill. KMRCL has recovered the lump-sum amount at 15.38% of the invoice value once 20% of the original contract value has been paid to the Applicant. The lump-sum amount is, therefore, not attributable to any specific supply of goods or services.

2.2 The Applicant further argues that the lump-sum amount is paid for the requirement of fund for executing the Contract. It cannot be utilised/diverted for any other purpose. It is recoverable from the Applicant as adjustment towards payment due for the tax invoices that the Applicant shall issue after achieving successive contract milestones. A defined contractual milestone includes the supply of goods and services in proportion so required to make a specific level of progress in contract execution.

2.3 The Contract was treated as a divisible works contract under the erstwhile tax regime, and individual items of goods and services were taxed at the applicable rate under the respective tax laws. Under the GST, the contract is being treated as a works contract as defined u/s 2(119) of the CGST Act, 2017. Services provided under the contract qualify for exemption in terms of Entry No. 14(a) of Notification No. 25/2012 – ST dated 20/06/2012 under the Service Tax regime.

2.4 The liability to pay VAT under the previous tax regime arises on transfer of the property in goods. It is not payable at the time of receipt of the lump-sum amount. On the other hand, liability to pay service tax, as laid down under the Point of Taxation Rules, 2011, arises upon receipt of payment towards the provision of services or actual provisioning of service

whichever is earlier. As such, provisioning of service under the Contract, as stated above, was exempt from service tax.

2.5 The Applicant argues that the lump-sum amount received is in the nature of earnest money deposit and not a payment towards the supply of any specific goods and services. No tax, therefore, is payable at the time of receipt of the lump-sum amount. In support of its argument, the Applicant refers to the decisions of CESTAT in the matter of Thermax Instrumentation Ltd [2016(42) STR19(Tri – Mumbai)] and GB Engineering Pvt Ltd [2017(52)STR313(Tri – Chennai)].

2.6 In Thermax Instrumentation Ltd (supra), the Tribunal (Mumbai Bench) has held that advance received for such mobilisation is like a deposit. It is like earnest money that binds the contractee, provided the contractor can forfeit the amount. It is not a charge towards taxable service in terms of section 67(3) of the Finance Act, 1994. It has, therefore, held that the levy of service tax on the advance is premature until the time of the actual provisioning of service. In GB Engineering Enterprises Pvt Ltd (supra) the Tribunal (Chennai Bench) has held a similar view that the incidence and levy of the service tax arise when there is the provision of a taxable service. As the appellant did not make any provision of taxable service to receive the advance, there shall be no levability of service tax on the advance received.

3. Observations & Findings of the Authority

3.1 Section 13(2) of the GST Act provides the “time of supply shall be the earliest of the following dates:

- (a) the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under section 31 or the date of receipt of payment, whichever is earlier; or
- (b) the date provision of service, if the invoice is not issued within the period prescribed under section 31, or the date of receipt of payment, whichever is earlier; or”

3.2 It is, therefore, evident that the date of receipt of payment shall be the time of supply if it precedes the date of issuance of the invoice and the date of provision of service. If the supplier receives any advance payment as consideration, the supply shall be deemed to have been made to the extent covered by the payment [Explanation (i) to section 13(2)]. The Applicant is, therefore, deemed to have supplied works contract service to KMRCL on 01/07/2019 to the extent covered by the lump-sum that stood credited to its account on 01/07/2019 as advance, provided no tax was levied thereon under the VAT or Service Tax Laws in the pre-GST regime, and the advance payment is applied as consideration for the said supply.

3.3 The relevant portion of section 2(31) of the GST Act defines ‘consideration’ as any payment made or to be made in respect of, in response to, or for the inducement of the supply of the goods or services, provided that a deposit given in respect of the supply shall not be considered as payment made for such supply unless the supplier applies it as consideration for the said supply.

3.4 The Applicant has received interest-free ‘mobilisation advance’ against bank guarantee. The primary purpose of such advances is to extend financial assistance within the terms of the contract to enable the contractor to mobilise resources for a smooth take-off of the project. Such advances are invariably ring-fenced with securities like bank guarantees to prevent misuse and misappropriation. The advance shall be recovered as adjustment towards payment due for the tax invoices that the Applicant shall issue after achieving successive contract milestones. In case of delay in recovery for the slow progress of work, the contract provides

KMRCL with the option to charge penal interest. If the advance is misused or diverted, KMRCL, if required, can recover the unadjusted advance with penal interest by means of invoking the bank guarantee.

3.5 In the pre-GST regime, the Contract was divisible for the purpose of taxation as a contract for the sale of goods and a service contract. It appears from the invoices raised in the pre-GST period that some amount of the mobilisation advance was adjusted towards payment of the RA bills raised on the milestones reached. The relevant tax invoices clearly show that the Applicant treated the entire amount as the sale of goods in the course of import in terms of section 5(2) of the Central Sales Tax Act, 1956. As no tax is leviable on the advance payment under either the West Bengal Value Added Tax Act, 2003 or the Central Sales Tax Act, 1956, the unadjusted portion of the advance as on 01/07/2019 has not suffered tax under the pre-GST regime under either of the above Acts.

3.6 The Finance Act, 1994 allowed the contractor to pay service tax on that portion of the works contract, which was attributable to the actual provisioning of service, arrived at applying Rule 2A(i) of the Service Tax (Determination of Value) Rules, 2006. Under this method, the value of the taxable service was the residual amount that remained after deducting from the gross amount charged for the works contract the actual value of the property in goods transferred in the course of executing the contract. The value of the taxable service was, therefore, not ascertainable before the contractor raised the invoice. As the value of the taxable service was not ascertainable before the invoice was raised, no payment received in advance could be included in the gross amount charged for such taxable service except the portion adjusted in the service bills. In *Thermax Instrumentation Ltd (supra)* and *GB Engineering Enterprises Pvt Ltd (supra)*, the Tribunal has followed this principle.

3.7 Therefore, no service tax was leviable on the mobilisation advance except the portion adjusted in the service bills. As the Applicant apparently raised no service bill, the unadjusted part of the advance as on 01/07/2017 has not suffered tax under the pre-GST regime under Finance Act, 1994.

3.8 After the GST comes into force, the works contract is no longer divisible into a contract for the supply of goods and a service contract. It is a service contract and the entire unadjusted mobilisation advance as on 01/07/2017, according to the Contract, applies towards payment of consideration for the works contract service. As discussed in para 3.3 above, 'consideration' includes any payment for the inducement of a supply. Mobilisation advance is meant specifically for inducing the contractor to spend for provisioning the works contract service. The contract provides a mechanism in the form of a bank guarantee that ensures that the advance is not diverted or misappropriated. Its application as payment for inducing the supply is, therefore, direct and unambiguous. It is, therefore, 'consideration,' whether or not in the form of a deposit, for the supply of the works contract service. The Contract makes it amply clear that the entire amount is applied as consideration for provisioning works contract service.

3.9 The Applicant's reference to the decisions of the Tribunal in *Thermax Instrumentation Ltd (supra)* and *GB Engineering Enterprises Pvt Ltd (supra)* is misplaced in this context. The relevance of these decisions in the legal framework of the Finance Act, 1994 is discussed in para 3.6 and need not be repeated. They are not relevant under the GST regime, as the valuation of works contract no longer requires a rule separate from other services. The Contract, therefore, is to be valued as provided under section 15(1) of the GST Act, which does not restrict in any way the scope of time of supply, as provided under section 13(2) of the GST Act. Moreover, 'consideration' under the GST Act has a wider scope and includes deposits if applied as consideration. In that context, whether the mobilisation advance is earnest money or not is of little relevance.

3.10 The Applicant is, therefore, deemed to have supplied works contract service to KMRCL on 01/07/2017 to the extent covered by the lump-sum that stood credited to its account on that date as mobilisation advance. As the supply to the extent of the above amount is deemed to have been made on 01/07/2017 and tax is leviable thereon accordingly, the value of the supply of works contract service in the subsequent invoices as and when raised should, therefore, be reduced to the extent of the advance adjusted in such invoices. To avoid double taxation, the GST should, therefore, be charged on the net amount that remains after such adjustment.

Based on the above discussion, we rule as under:

RULING

The Applicant is deemed to have supplied works contract service to KMRCL on 01/07/2017 to the extent covered by the lump-sum that stood credited to its account on that date as mobilisation advance and GST is leviable thereon accordingly. The value of the supply of works contract service in the subsequent invoices as and when raised should, therefore, be reduced to the extent of the advance adjusted in such invoices. The GST should, therefore, be charged on the net amount that remains after such adjustment.

This Ruling is valid subject to the provisions under Section 103 until and unless declared void under Section 104(1) of the GST Act.



(SUSMITA BHATTACHARYA)

Member

West Bengal Authority for Advance Ruling



(PARTHASARATHI DEY)

Member

West Bengal Authority for Advance Ruling