GST ADVANCE RULING

CA. C. B. Thakar, CA. Jinal Maru

Case: M/s COSMIC FERRO ALLOYS LTD [2022-TIOL-50-AAR-GST] (WEST BENGAL AAR)

Facts of the Case:

1. The applicant is stated to be engaged in manufacturing of Ferro alloys and Cold Rolled Formed Sections having its factories at Barjora (hereinafter referred to as the "FERRO Unit") and Singur (hereinafter referred to as the "CRF Unit/ CRF business") respectively.
2. That the entire operations of the applicant are segmented in the said two units i.e. FERRO Unit and CRF Unit and both the units are functional and running independently.
3. The applicant intends to sell its CRF unit to Cosmic CRF Limited (herein after referred to as, the purchaser) as a whole with all assets and liabilities for a lump sum consideration. for which he has entered into a Business Transfer Agreement.

Questions before AAR:

1. Whether the transaction would amount as supply of goods or supply of services or supply of goods and services?
2. Whether the transaction would be covered under Entry No. 2 of the Notification No. 12/2017-CTR?

Arguments by Applicant:

1. The sale of CRF unit owned by the applicant as a whole envisages transfer of the entire business of the CRF unit to the purchaser who is taking over the assets as well as the liabilities of the said CRF unit which includes the employees and their benefits.
2. The business of the CRF unit will continue as it is after the transfer.
3. That the BTA dated 19.01.2022 establishes the intent of the purchaser and seller to conclude the transaction for sale/purchase of one independent self sustained unit of the seller along with its liabilities and employees. The purchaser intends to continue with the same business as the unit is presently involved in i.e. manufacturing of Cold Rolled Forms
4. Transaction contemplated being sale of an independent unit is a supply of service as a going concern and in view of the Entry No 2 of the Notification No. 12/2017-CTR, the said transaction is to be charged at 'NIL' rate of tax.
5. The concept of going concern has been defined in Accounting Standards - 1 issued by ICAI which states that a fundamental accounting assumption is that of 'Going Concern' according to which "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".
6. In re Indo Rama Textile Limited (2013) 4 Comp LJ 141 (Del), 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.
7. The Supreme Court in Allahabad Bank Vs. ARC Holding AIR 2000 SC 3098 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.
8. Further, from the construction of the wordings in section 7(1)(d) defining term "supply" and Schedule II(4)(c), it can be said that an exception has been carved out in the statute with regards sale of business as a going

concern, specifically stating that the same is not a supply of goods and thus as an alternative the sale of going concern can be considered as a supply of service. Also, entry 2 of notification 12/2017 speaks that the services of transfer of a going concern, as a whole or independent part thereof, is covered under 'NIL' rate of GST. Hence, the above transaction is supply of services.

Decision of AAR

1. Admittedly, the applicant has entered into an agreement which inter alia involves transfer of goods forming part of the assets of the business. In a standalone manner, such transfer shall be treated as supply of goods in terms of clause (a) of Entry No. 4 of Schedule II.
2. However, here the applicant intends to sell his entire CRF unit where the purchaser agrees to take over the assets as well as the liabilities of the said CRF unit along with the employees and their benefits. In our view, such transfer of a unit of a business cannot be treated as supply of goods since business cannot be said to be a movable property so as to qualify as 'goods' as defined in clause (52) of section 2 of the GST Act. Further, anything other than goods, money and securities falls within the meaning of 'services' as defined in clause (102) of section 2 of the GST Act.
3. In the matter of Innovative Textiles Ltd, the Uttarakhand AAR observed that "a transfer of a business as a going concern is the sale of a business including assets. In terms of financial transaction 'going concern' has the meaning that at the point in time to which the description applies, the business is live or operating and has all parts and features necessary to keep it in operation."
4. We also find that in 'Taxation of Service: An Education Guide' published by CBEC reads as "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, but shall not cover mere or predominant transfer of an activity comprising a service. Such sale of business as a whole will comprise comprehensive sale of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc. Since the transfer in title is not merely a transfer in title of either the immovable property or goods or even both it may amount to service and has thus been exempted".
5. The BTA further refers that the purchaser shall continue to employ the current employees of CRF Unit even after the takeover of the CRF business. Furthermore, the seller i.e., the applicant has agreed that he shall not be entitled to engage in any business competing with the activities of the purchaser in respect of existing CRF business. Both the clauses indicate that the business will continue by the purchaser with regularity.
6. In re Indo Rama Textile Limited (2013) 4 Comp LJ 141 (Del). Para 27 of the said judgement reads as follows: "Statement on Standard Auditing Practices (SAP) 16, "Going Concern", issued by the Council of the Institute of Chartered Accountants of India, provides that -- "When a question arises regarding the appropriateness of the Going Concern assumption, the auditor should gather sufficient appropriate audit evidence to attempt to resolve, to the auditor's satisfaction, the question regarding the entity's ability to continue in operation for the foreseeable future".
7. In this context, we like to mention that the applicant has not furnished any documentary evidences from the auditor with regard to the 'entity's ability to continue in operation for the foreseeable future" in absence of which we are unable to conclude that the applicant has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations.
8. Thus, we rule as under:

(i) The transaction of transfer of business unit of the applicant involved in the instant shall be treated as a supply of services.

(ii) The transaction would be covered under Entry No. 2 of the Notification No. 12/2017 -CTR subject to fulfillment of the conditions to qualify as a going concern.

Case: M/s CORBETT NATURE RESERVE, RAMNAGAR NAINITAL [2022-TIOL-16-AAAR] (UTTARAKHAND AAAR)

Facts of the Case:

1. The applicant is running a Resort namely "Aahana- The Corbett wilderness" and also runs an independent unit namely "Aahana Naturopathy Centre" (also referred to as "the Centre"), wherein they are providing various services in the form of Nature cure (drugless cure) & Yoga therapies (Health care services), which are not restricted only to the in-house customers, but also open to all.
2. The applicant's unit is registered under the Clinical establishment Act, 2010 as "Naturopathy Centre". Accordingly, applicant contended that the said health care services (Naturopathy) provided by "The Centre" are exempt from the levy of GST under Notification No. 12/2017- Central Tax (Rate) under Entry 74 (SAC Heading 9993).
3. The AAR observed that the supply of services provided by the applicant is a composite supply, s rightly classifiable under sub-heading No. 9963 11 as 'Room or unit accommodation services provided by Hotels, Inn, Guest House, Club and the like'
4. Being aggrieved with the said Ruling, the applicant has filed the present appeal before AAAR.

Questions before AAAR:

(a) Whether "The Centre" of the applicant is eligible to get the benefit of entry No.74 of exemption Notification No. 12/2017-Central Tax (Rate) dated 28.06 2017, classified under SAC Heading 9993 ?

Decision of AAAR

1. In the instant case the applicant has advertised and marketed their accommodation service as their main service and Naturopathy as additional service.
2. Thus, the accommodation service and other services including Naturopathy rendered during the course of said service is covered under composite service and the accommodation service constitutes the predominant element and therefore, becomes the "principal supply" and other services including Naturopathy shall form the part of that composite supply.
3. On true and fair analysis of the aforesaid Notification, the conclusion is compelling that all services provided in relation to or in addition to accommodation service are liable to GST applicable to 'Accommodation Service' in as much as, all such ancillary/additional activities having a proximal nexus with accommodation service.

Case: M/s BARANJ COAL MINES PVT LTD [2022-TIOL-57-AAR] (MAHARASHTRA AAR)

Facts of the Case:

1. The Applicant, M/s. Baranj Coal Mines Pvt. Ltd s a Mine Developer and Operator ("MDO") and is presently engaged in the developing and operating a Coal mine at Kiloni, District Chandrapur, Maharashtra ("the Mine"). This mine has been allotted to Karnataka Power Corporation Limited ("KPCL") by the Govt. Of India, for mining of coal and to be used only for captive purpose in generation of power BY KPCL.
2. Vide an Agreement dated 19.03.2021, the Applicant has been appointed by KPCL as the Operation & Maintenance contractor to undertake development & Operation of above mentioned coal mines for 25 years & are required to excavate coal & deliver it to KPCL's Karnataka power plan
3. The scope of the project includes : Development of Mines on the Sites, Operation & maintenance of Mines ; Excavation, Washing (if required) & Delivery of Coal ; & Performance & fulfilment of all other obligations of the Mine Operator in accordance with provisions of impugned Agreement and matters incidental thereto. For the purposes of the Mines Act, 1952, KPCL shall be the Owner of the Mines. The applicant shall ensure transportation of the Coal to the Delivery Points and undertake all necessary precautions in relation to ensuring the safety and quality of the Coal in transit.

4. As per the Agreement, KPCL shall pay, all Taxes and levies, duties, Royalties including demands, if any, cesses and all other statutory charges payable in respect of excavation and delivery thereof directly to the Government since the entire Coal , is the property of KPCL and the right, title and interest in the Coal vests in KPCL.

5. The first coal was mined & delivered to KPCL in March 2021 & Applicant raised its first invoice for Rs. 77,76,106.71 towards mining of 3944 MT of Coal including IGST of Rs. 2,95,166.99 @ 5% under HSN 27011200 as Supply of Coal , since KPCL informed the Applicant vide its email dated 03.03.2021 that the instant delivery of coal was sale and supply of Coal and the Applicant should raise its invoice as sale of coal under HSN 2701 charging IGST @ 5%.

6. However, in view of applicant the relationship between KPCL & Applicant is of a service recipient & a service provider & not of a buyer-seller in as much as KPCL always remains the owner of the coal and remains in complete contral over the mines and its operations. All that applicant has undertaken is to render service to KPCL in excavating and delivering coal from mines to KCPL's site. Hence, the instant contract may be considered as a contract of service under HSN 9986 - being mining support service chargeable to GST @ 18%.

7. The impugned Agreement is a divisible contract whereby separate considerations are mentioned for different responsibilities of the applicant which are clearly identifiable & distinguishable i.e. Excavation of coal from the mines; Transport of coal from site (in Maharashtra) to loading point (in Maharashtra); Handling Charges in relation to transport of coal from loading point to delivery point; Restoration and Rehabilitation charge (entire work done is in Maharashtra). That the agreement is such that each of the above element has been negotiated separately, separate consideration is mentioned for the same and separate responsibilities are also earmarked for it

8. Applicant is of the view that the instant Agreement be considered as a divisible agreement and all the four components of consideration as laid down in the Agreement may be treated separately under the GST Statute.

9. Also, as per the instruction of KPCL applicant mentions the amount towards Royalty, MMDR, DMF Fund & Reserve Price on the invoices. None of these amounts are paid to Applicant because they are not due to the Applicant. The said amounts are payable to the Govt of Maharashtra by KPCL and are accordingly paid directly by KPCL in view of Article 29.1.2 of the Mining Agreement. Since the aforesaid amounts are neither receivable nor received by the Applicant, there is no charge for the same in the Applicant's books of accounts. Therefore there is no question of GST liability on the Applicant on Royalty, MMDR, DMF Fund and Reserve Price.

10. Hence, the present application.

Questions before AAR:

1. Whether the activity carried out by the Applicant under the Agreement is supply of Goods or is a supply of Service and should accordingly be subject to GST under HSN 2701 (chargeable @ 5% as supply of coal) or under HSN 9986 (chargeable @ 18% as Support Services to Mining)?

2. Whether the applicant should raise an invoice under MGST/CGST or under IGST in as much as the Applicant is of the view that the entire activity takes place in the State of Maharashtra only?

3. Can the present contract be treated as a single consolidated contract or a divisible contract in view of the fact that four components of the contract (viz. Excavation of Coal , Transport Service, Handling Charges (incl. Additional Handling Charges) and Restoration and Rehabilitation charge] are clearly distinguishable and separately identifiable and therefore the tax treatment under GST shall also be different and separate?

4. There are certain other components like Royalty, MMDR, DMF Fund, Cess, Stowing Excise Duty, Reserve Price, etc. which are levied on the coal excavated from the Mine which is payable directly by KPCL to the

Government of India and the State Government of Maharashtra. The Applicant neither has any liability to pay nor does it makes any payment of such amount. Under the circumstances, is the Applicant required to consider such amounts/payments for the purpose of determining the transaction price in any of the situation as enumerated above?

Arguments by Revenue :

1. The applicant's impugned activity is purely in the nature of services or supportive services for mining. Hence the activity carried out by the applicant falls under services with Service Accounting Code 9986, and attracts GST at the rate of 18%.
2. As regards 2nd question , in view of Section 15 (2) of the CGST Act, 2017, the value of supply includes all taxes, to duties, cesses, fees & Charges levied under any law for the time being in force (Excluding SGST, UTGST and the GST (Compensation to States) Act, if charged separately by the supplier;), & hence the Royalty & other charges mentioned under subtotal (B), are part of value of supply & taxable.
3. Applicant being Mine Operator, undertakes actual excavation of coal on behalf of KPCL & possess rights for actual excavation by virtue of the Mining Agreement with KPCL & therefore bears liability to pay royalty & other charge.
4. Clause (b) of subsection (2) of Section 15 provides that any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply whether or not included in the price shall be the part of Value of Supply. Therefore, components like Royalty, MMDR, DMF fund Cess, Stowing Excise duty, Reserve Price, etc. are required to be considered for determining the transaction price.

Decision of AAR

1. As regards question no.1, it is explicit from a detailed reading of the Agreement that the applicant has to perform all services, right from excavation of the coal to the delivery of the same to M/s KPCL. The impugned agreement does not envisage the sale of any goods, including the coal which has been mined by the applicant to KPCL. The coal , as goods, belongs to the Mine Owner i.e. the GOI and GOI has allotted the Mines to KPCL for mining of coal , to be used only for captive purpose in generation of power by the KPCL.
2. Article 5.7.1 of the impugned Agreement which states that, "Subject to the provisions of this Agreement, the Authority (i.e. KPCL) shall be the Owner of the Mines for the purposes of the Mines Act, 1952. Thus, the said Article of the Agreement clearly proves that the owner of the coal is KPCL and not the applicant. Therefore, there is no supply of coal by the applicant, purely because the applicant neither has any ownership rights on the coal nor has any rights to sell the coal that has been excavated by it. Hence, the applicant is involved in supply of services in the instant case (as seen from the 'Scope of Supply" in the Agreement) and there is no supply of coal by the applicant. the impugned activity carried out by the applicant is supply of services and not supply of goods.
3. Further, in view of amendment in entry 24 of notification 11/2017-CTR, we find that the impugned services related to mining of coal , is covered under Sr. No. 24 (iii) "Support services to mining, electricity, gas and water distribution other than (ii) above" w.e.f. the date of the amendment i.e. 25.01.2018, attracting 18% GST
4. Question No. 2 & 3 were withdrawn by the applicant during the course of the Final Hearing held on 29.03.2022.
5. As regards question no.4, we observe that even though the amounts towards Royalty, MMDR, DMF Fund and Reserve Price are shown in the invoices as directed by KPCL, these amounts are not paid to the applicant. We also observe that these amounts are due from KPCL to the concerned Governmental Authority and are accordingly paid by KPCL to the Department of Geology & Mining.
6. From a reading of Articles 6.1.3 and 5.6 of the Agreement it is crystal clear that, GST is payable by KPCL to the applicant while all other taxes are payable and paid by the KPCL to the concerned Governmental Authority.

7. As per Section 15 (1) mentioned above: firstly, the value of a supply of goods or services or both shall be the transaction value; secondly the transaction value is the price actually paid or payable for the said supply of goods or services or both; thirdly the supplier and the recipient of the supply are not related; and fourthly the price is the sole consideration for the supply.

8. That the applicant (supplier of service) and KPCL (recipient of service) are not related persons and price is the sole consideration for the supply.

9. That the amounts towards Royalty, MMDR, DMF Fund and Reserve Price are payable by KPCL directly to Government of Maharashtra and which is being paid accordingly by KPCL. Therefore, the said amounts are not payable by KPCL to the applicant. Thus the amounts towards Royalty, MMDR, DMF Fund and Reserve Price are neither payable nor paid to the applicant by KPCL. Hence the provisions of Section 15 (1) are not satisfied in the subject case.

10. We also find that there is no amount that the supplier i.e the applicant, is liable to pay in relation to the impugned supply which has been incurred by the recipient i.e. KPCL of the supply and not included in the price actually paid or payable for the services.

11. We do not agree with the jurisdictional officer on this count. we hold that the amounts towards Royalty, MMDR, DMF Fund and Reserve Price, payable and paid by KPCL directly to the concerned Governmental Authority of Maharashtra are not includible in the Value of Supply for the purpose of levy of GST. However, in future if it is agreed between the applicant and KPCL to make payable and pay, the amounts towards Royalty, MMDR, DMF Fund and Reserve Price by KPCL to the applicant, in such a case, the amounts will be included in the Value of Supply of the impugned services and will be taxed at 18% GST.