
 सत्यमेव जयते	RAJASTHAN APPELLATE AUTHORITY FOR ADVANCE RULING GOODS AND SERVICES TAX NCR BUILDING, STATUE CIRCLE, C-SCHEME JAIPUR – 302005 (RAJASTHAN)	
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Proceedings under Section 101 of the Central GST Act, 2017 and Rajasthan GST Act, 2017

Before the Bench of

1. Sh. Rakesh Kumar Sharma, Member(Central Tax)
2. Dr. Preetam B. Yashvant, Member(State Tax)



ORDER NO.RAJ/AAAR/06/2018-19 DATED 12.2.2019

Name and address of the Appellants	:	M/s Nagaur Mukundgarh Highways Pvt. Ltd., 80A, Shahi Complex, Hiran Magri, Sector 11, Udaipur, Rajasthan 313002.
GSTIN of the Appellants	:	08AAFCN4743H1ZC
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;
Date of Personal Hearing	:	05.02.2019
Present for the Appellant	:	Sh. Jatin Harjai, CA
Details of Appeal	:	Appeal No. RAJ/AAAR/APP/06/2018-19 dated 16.11.2018 against Advance Ruling No. RAJ/AAR/2018-19/17 dated 15.09.2018

Proceedings

(Under Section 101 of the Central GST Act, 2017 and Rajasthan GST Act, 2017)

At the outset we would like to make it clear that provisions of both the Central GST Act, 2017 and Rajasthan GST Act, 2017 are same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the Central GST Act would also mean a reference to the same provisions under Rajasthan GST Act.

2. The present appeal has been filed under Section 100 of the Central GST Act, 2017 (hereinafter also referred to as 'CGST Act') and Rajasthan GST Act, 2017 (hereinafter also referred to as 'RGST Act') by M/s Nagaur Mukundgarh Highways Pvt. Ltd. against the Advance Ruling No. RAJ/AAR/2018-19/17 dated 15.09.2018.

Brief facts of the Case

3. The Appellant i.e. M/s Nagaur Mukundgarh Highways Pvt. Ltd. having Goods and Service Tax (GST) Registration Number 08AAFCN4743H1ZC is a company incorporated as Special Purpose Vehicle (SPV) under the provisions of Companies Act, 2013 for the purpose of undertaking two



laning/intermediate laning of sections of State Highway (Project) on DBOT (design, built, operate and transfer) basis . The Appellant has been engaged as a 'Concessionaire' wherein the Public Works Department (PWD), Government of Rajasthan has granted concession to construct, operate and maintain the project during :-

1. the Construction Period which shall commence from the appointed date and will end on Commercial Operation Date (COD) and
2. a period of 10 years from the COD (O&M period).

4. The Appellant shall receive 50% of the project cost(i.e. cost of construction) which shall be paid to the applicant in five equal instalments during the construction period on the basis of achievement of milestones i.e. achieving specified percentage of physical progress.

5. The Appellant shall receive the balance 50% of the project cost in bi-annual instalments over the O & M period along with the interest (hereinafter referred to as 'Annuity Payments'). The first instalment shall be due and payable from the 180th day of COD.

6. The Appellant shall also receive bi-annual payments towards O & M expenses calculated at a specified percentage of the project cost during the O & M period.

7. The Appellant had sought advance ruling as to whether they are eligible to:

- (a) claim full ITC pertaining to procurement of goods and services for construction of the project during the Construction Period, as the entire revenue received during the said period is subject to GST; and
- (b) claim ITC pertaining to procurement of goods and services during the O & M period after reversal of ITC as per Section 17(2) of the Central Goods and Services Tax Act, 2017 read with Rule 42 of the Central Goods and Services Tax Rule, 2017 as Annuity Payment received during the said period is exempt whereas O & M payments received are subject to GST.



Findings of the Authority for Advance Ruling (AAR)

8. These supplies are in relation to construction of immovable property like roads and bridges and it can be termed as 'Works Contract' in terms of Section 2(119) of CGST Act, 2017 which is as under:

"(119) 'works contract' means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;"

9. Contention of the Applicant that the annuity is exempted under Entry No. 23A of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 is not tenable as the Entry pertains to SAC 9967 which is for 'support services of transport services' whereas the services provided by the Appellant is classifiable under SAC 9954. Hence the Applicant has to pay GST on full value of cost of project during the period of construction. The annuity received by the applicant is already GST paid during the construction period for which they are also paid the interest by the Government.

10. We agree with the contention of the Applicant for the first question that they are entitled to claim full ITC during the construction period. The applicant is paying applicable GST on full value of the project and they are not supplying any exempted goods and services during the construction period of 2 years, therefore they are entitle to claim full ITC paid on all legible goods and services.

11. We are not agree with the contention of the applicant in respect of second question that they are entitle to claim ITC on procurement of goods and services after reversing the ITC under Section 17(2) of the CGST Act 2017 read with Rule 42 of the Central Goods and Services Tax Rule, 2017 as Annuity Payment received during the period O & M period is exempted and payments received for O&M is subject to GST. The annuity received by the applicant is payment of remaining 50% of cost of the project in biannual equal instalments on which the applicant paid GST during the construction period. As the annuity so received by the applicant is taxable, there is no need to take apportioned credit under Section 17(2) of the CGST Act, 2017.

Grounds of Appeal

12. The Ld. Rajasthan AAR has erred in concluding that the Project Works undertaken by the Appellant under the aegis of the said Concession Agreement is a works contract by failing to appreciate the Employer's object and purpose in awarding the Project Works by means of the said Concession Agreement. By equating said Concession Agreement with an arrangement for construction services simplicitor, the Impugned Advance Ruling has brushed aside the fundamental difference between the two forms of project execution – Toll and Annuity. thenature of 'concession' is for the 'concessionaire' to raise funds and invest in construction as well as maintenance of the State Highways under a Public-Private Partnership Annuity Project.

13. Ld. Rajasthan AAR has erred in applying the principles of composite supply under section 2(30) of the CGST Act. On a careful examination of Article 3, more particularly 3.1.2(b) of the Concession Agreement, it would be immediately evident that the 'principal supply' cannot by any stretch of imagination be 'works contracts'. In fact, the 'principal supply' is clearly and unmistakably to 'finance and construct the Project'.

14. Ld. Rajasthan AAR has proceeded to determine the principal supply involved in the composite supply in the said Concession Agreement de hors the framework under the Rajasthan State Highways Act, 2014 read with the Standard Conditions of Bid, wherein the Project Works remains the property of the Appellant until lapse of ten (10) years from COD. It is evident from the said framework that Project Works are not 'supplied' by the Appellant to the Employer under the said Concession Agreement until lapse of ten (10) years.

15. The Impugned Advance Ruling has failed to examine the scope and applicability of "Heading 9967 – Supporting services in transport" under Notification 12/2017-Central Tax (Rate) dated 28 Jun, 2017 as amended (Hereinafter referred as "Exemption Notification"). Attention ought to be given to Explanatory Notes published by the Government of India for purposes of interpretation of the scope of the Annexure to Classification of Services appended to the Rate Notification but that has been completely ignored. It is submitted that the said Rate Notification is aligned with International practice contained in Central Product Classification (CPC) Version 2.1 published by Department of Economic and Social Affairs of the United Nations Secretariat.

16. Further, the Impugned Advance Ruling operates in isolation of judicial authorities about the nature of property involved in Annuity-based Projects and the event of 'transfer' being subject to registration under section 17 of Registration Act, 1908.

"Upon Termination, the Concessionaire shall comply with and conform to the following Divestment Requirements ...

(vi) executes such deeds of conveyance, documents and other writings as the Authority may reasonably require for conveying, divesting, and assigning all the rights, title and interest of the Concessionaire in the Project Asset, including manufacturers' warranties in respect of any plant or

equipment and the right to receive outstanding insurance claims to the extent due and payable to the authority, absolutely unto the Authority or its nominee;"

17. From above said clause of the concession agreement it is clear that No title vests in the State unless it is duly handed over to the Authority through deed of conveyance by a document that is duly registered. The Concession Agreement makes it abundantly clear about the time and manner of 'transfer' of the Project Works.

18. Further, Project Works involving financing construction of large-scale infrastructure is well documented in the principles of accounting contained in Indian Accounting Standard also since its incorporation into Indian law by Companies Act, 2013. Guidance available to the nature of Annuity-based Project Works undertaken through Public-Private Partnership is established to be asset of the Concessionaire to be amortized over duration of Concession Grant.

19. 'Support services for transport' is the accurate classification applicable to Concession arrangements and this is borne out in the minutes of the deliberations by the 22nd GST Council dated October 6, 2017. NHAIR referring to the amendment made with effect from 13.10.2017 specifically clarified that no GST is applicable on annuity payments made for construction of road.

20. Ld. Rajasthan AAR has grossly erred in ruling that input tax credit is fully available under O&M and Annuity leg of the project as full exemption is available to Annuity by way of "Heading 9967 - Supporting services in transport" under Sl.no.23A under Exemption Notification ibid, wherein "Services by way of access to a road or a bridge on payment of annuity" are fully exempt from GST with effect from 13 Oct, 2017.

21. Adverting to obligation to 'manage, operate and maintain' the Project, the Appellant is enjoined with this responsibility as the 'Concessionaire' of the Project Works and not as a 'Supplier'.

22. Section 19 of the said Act declares the ownership of the State Highways will be determined in terms of the said Concession Agreement. As such, the responsibility of the Appellant to 'manage, operate and maintain' the Project, is for 'self' to be able to handover the Project Works in a manner befitting of the obligation at the time appointed for 'transfer' under the said Concession Agreement. Further, as regards the finding for the Appellant to be eligible to avail input tax credit on a presumption of taxability of activity of Appellant to 'manage, operate and maintain' the Project in its capacity of Concessionaire is illegal for failure to consider facts. For this reason, ruling that input tax credit is fully available in respect of goods and services procured in so far it relates to annuity received is also erroneous and liable for reversal as per provisions of Sec. 17(2) of CGST/SGST Act 2017 read with Rule 42 of CGST/SGST Rules 2017. For this reason, the Impugned Advance Ruling is liable to be set aside as prayed.



Personal Hearing

23. Shri Jatin Harjai, Chartered Accountant appeared on behalf of the Appellant on 05.02.2019 and reiterated the submissions made in their appeal memorandum. He also submitted additional submissions in their support.

Discussion and Findings

24. We have gone through the Appeal papers filed by the Appellant, original application filed before the AAR and Ruling of the AAR . Having gone through all these documents, we find that the Appellant is not satisfied with the ruling of the AAR on these two counts .

1. The AAR has ruled that the annuity payments are not exempted by virtue of Entry No. 23A of the notification No. 12/2017-Central Tax (Rate) dated 28.06.2017. Hence these payments are also taxable in the construction phase itself. The Appellant is not satisfied with this ruling and has raised objection as narrated in the "Grounds of Appeal".
2. The AAR has ruled that full credit is available to the Applicant (Now 'Appellant') in the post construction phase (O&M phase) because the annuity received in this phase was liable to be taxed in the construction phase itself and O&M payments are also liable to be charged GST as and when received . The Appellant is not satisfied with this ruling and has raised objection as narrated in the "Grounds of Appeal".

We are taking both of these issues one by one.

25. Coming to the first issue, we are first reproducing the Entry No. 23A of the notification No. 12/2017-Central Tax (Rate) dated 28.06.2017.

Notification No. 12/2017- Central Tax (Rate) New Delhi, the 28th June, 2017
G.S.R.....(E).- In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts the intra-State supply of services of description as specified in column (3) of the Table below from so much of the central tax leviable thereon under sub-section (1) of section 9 of the said Act, as is in excess of the said tax calculated at the rate as specified in the corresponding Entry in column (4) of the said Table, unless specified otherwise, subject to the relevant conditions as specified in the corresponding Entry in column (5) of the said Table, namely:-



TABLE

Sl. No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (per cent.)	Condition
1	2	3	4	5
23A	Heading 9967	Service by way of access to a road or a bridge on payment of annuity.	Nil	Nil

26. We find that this Entry was not the part of the original notification No. 12/2017-CT(R) dated 28.06.2017. This Entry was introduced, after the deliberations and decisions taken in the

22nd meeting of the GST Council (which took place on 06.10.2017), through notification No. 32/2017-Central Tax (Rate) dated 13.10.2017. To have a look on the background, nature and scope of this Entry, we find it essential to visit the agenda and minutes of the GST Council meeting. The said agenda of the meeting reads as under:

"Agenda Item 13 (iv) - Issue of Annuity being given in Place of Toll Charges to Developers of Public Infrastructure-exemption there on

Toll is exempt from GST. In service tax it was in the Negative List.

2. There is a difference between toll and annuity. While toll is a payment made by users of road to concessionaires for usage of roads, annuity is an amount paid by National Highways Authority of India (NHAI) to concessionaires for construction of roads. In other words, annuity is a consideration for the service provided by concessionaires to NHAI.

3. The works contract services by way of construction of road was exempt from service tax. However, service tax was leviable only on the service component of such works contract (40%). The material or goods component of the works contract was leviable to VAT. However, it was subject to State VAT (composition rate).

4. Construction of roads is now subject to 12% GST. EPC contractor (Engineering, Procurement and Construction) pays 12% GST on the service of road construction to the concessionaire.

5. In view of the above, there is a free flow of ITC from EPC Contractor to the concessionaire and thereafter to NHAI. As a result, the GST of 12% leviable on the service of road construction provided by concessionaire to NHAI would be paid partly from the ITC available with him.

6. A view may be taken for grant of exemption to annuity paid by NHAI/State Highways Construction Authority to concessionaires for construction of roads. This will amount to not taxing the value addition of the concessionaire. The argument for exempting annuity from GST is that the road construction service was exempt from service tax. However, GST would continue to be levied on the road construction service provided by the EPC contractor to the concessionaire."

And the minutes of the meeting reads as under:

"Agenda item 13(iv): Issue of Annuity being given in Place of Toll Charges to Developers of Public Infrastructure - exemption thereon

61. Introducing this Agenda item, the Joint Secretary (TRU-II), CBEC stated that while toll is a payment made by the users of road to concessionaires for usage of roads, annuity is an amount paid by the National Highways Authority of India (NHAI) to concessionaires for construction of roads in order that the concessionaire did not





charge toll for access to a road or a bridge. In other words, annuity is a consideration for the service provided by concessionaires to NHAI. He stated that construction of roads was now subject to tax at the rate of 12% and due to this, there was free flow of input tax credit from EPC (Engineering, Procurement and Construction) contractor to the concessionaires and thereafter to NHAI. He stated that as a result, tax at the rate of 12% leviable on the service of road construction provided by concessionaire to NHAI would be paid partly from the input tax credit available with them. He stated that the Council may take a view for grant of exemption to annuity paid by NHAI/State Highways Construction Authority to concessionaires during construction of roads. He added that access to a road or bridge on payment of toll was already exempt from tax. The Hon'ble Minister from Haryana suggested to also cover under this provision annuity paid by State-owned Corporations. After discussion, the Council decided to treat annuity at par with toll and to exempt from tax, service by way of access to a road or bridge on payment of annuity."

After visiting the agenda and minutes of the 22nd GST Council meeting we concur to find that while toll is a payment made by the users of road to concessionaires for usage of roads, annuity is an amount paid by the National and State Highways Construction Authorities to concessionaires for construction of roads in order that the concessionaire did not charge toll for access to a road or a bridge. A view was taken in the meeting of the Council for grant of exemption to annuity paid by NHAI/State Highways Construction Authority to concessionaires for construction of roads. This amounts to not taxing the value addition of the concessionaire. The argument for exempting annuity from GST was that the road construction service was exempt from service tax. However, GST would continue to be levied on the road construction service provided by the EPC contractor to the concessionaire. After discussion, the Council decided to treat annuity at par with toll and to exempt from tax, service by way of access to a road or bridge on payment of annuity. And hence the abovementioned Entry No. 23A was introduced. Entry No. 23A *ibid* squarely covers the annuity paid to the Concessionaire (i.e. Appellant) by the PWD, Govt. of Rajasthan. The AAR erred in denying the benefit of Entry No. 23A *ibid* to the Appellant on the ground that the Entry No. 23A belongs to SAC 9967 which is meant for support services of transportation while the activity of the appellant is liable to be taxed under SAC 9954. After going through the Scheme of Classification of Services, Explanatory notes to classification of services, Agenda of the GST Council meeting, Minutes of the GST Council meeting and Entry No. 23A *ibid*, we are of the firm view that whole project can be divided into two parts- one is construction phase and second is O&M phase. The activity of the Appellant (i.e. Concessionaire) having nexus with annuity is classifiable under SAC 9967 and activity of the Appellant having nexus with the Construction payments during construction phase is Works Contract which is taxable under Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 under SAC 9954. Hence we have no hitch in providing the benefit of the Entry No. 23A *ibid* to the annuity payments i.e. road construction payments received after COD (during O&M phase). But this benefit does not come free. It comes with a rider that only 50% ITC of the GST paid on the Input and Input service used in the construction phase is available to the Appellant because annuity (50% of the construction payments) is not taxable and the appellant is not having any other non-business and/or exempted supply.

27. Coming to the second issue, we find that the Appellant is receiving two types of payments during O&M phase : (1) O&M related payments, and (2) Construction related Annuity payments. GST is payable on the O&M payments and the appellant has also not disputed this. While annuity payments are exempted from GST, as per discussion hereinabove, our mandate is to pronounce upon the eligibility of the ITC of GST paid on the inputs and input services used in the O&M phase. Contention of the Appellant is that since they are having both taxable supply (O&M payments) and exempted supply (annuity payments), the ITC is admissible as per Section 17(2) of the Act, read with Rule 42 of the Central GST Rules, 2017. Contention of the Appellant is not tenable because annuity payments (exempted supply) are to be taken into consideration for taking proportionate ITC during Construction leg of the project and not during O&M leg of the project.

When such is the case, full ITC of the tax paid on the inputs and input services used in the O&M phase is available to the Appellant if they are having no other outward supply during this phase.

28. In view of above, we rule as under:-

Ruling

1. Annuity payments are exempted by virtue of Entry No. 23A of the notification No. 12/2017-Central Tax (Rate) dated 28.06.2017. However, only 50% ITC of the GST paid on the Input and Input service used in the construction phase is available to the Appellant subject to the provisions of Section 17(5) of the Central GST Act, 2017.
2. Full ITC of the GST paid on the inputs and input services used in the O&M phase is available to the Appellant subject to the provisions of Section 17(5) of the Central GST Act, 2017.



Nakum
12/2/2019
(RAKESH KUMAR SHARMA)
MEMBER (CENTRAL TAX)

ym 12/2/19
(DR. PREETAM B. YASHVANT)
MEMBER (STATE TAX)

dc

To,
M/s Nagaur Mukundgarh Highways Pvt. Ltd.,
80A, Shahi Complex, HiranMagri,
Sector 11, Udaipur, Rajasthan 313002.

F.No. IV(16)AAAR/RAJ/06/2018-19/ *1553 to 1558*

Dated. *13* February, 2019

Copy to :-

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2. The Commissioner of SGST & Commercial Taxes Rajasthan, Kar Bhawan, Bhawani Singh Road, Ambedkar Circle, C-Scheme, Jaipur-302005.
3. Asstt. Commissioner, Work Contract & Leasing Tax, Udaipur, Commercial Taxes Dept, Divisional Kar- Bhawan, Udaipur.
4. Dy/Asstt. Commissioner, CGST Division -A, (Range-1), 142-B, HiranMagri, Sector-11, Udaipur 313001
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(Pramod Kumar Sharma)
Superintendent

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