Dhruva Alert for GST ADVANCE RULINGS – 7th Edition

1. Inox Air Products Pvt. Ltd. – Gujarat	
Issues for Consideration	• Whether manufacture of industrial gases by undertaking treatment or process on the goods viz. water, electricity and air, supplied by Essar Steel India Ltd. (Essar) amounts to 'Job Work' as defined under the GST Law? • What should be the value on which the Applicant is liable to pay GST?
Discussion & Ruling	**Discussion:** • As per the commercial arrangement between the parties, Essar is the owner of the land and is required to provide the land along with other inputs, i.e. electricity and water, to the Applicant for manufacture and supply of industrial gases such as Oxygen, Nitrogen, etc. Essar uses these industrial gases to manufacture steel at its plant on a continuous basis. • In this respect, the Authority referred to the Supreme Court's decision in the case of **M.P. Electricity Board, Jabalpur**[1], wherein it was held that merely because electricity is not tangible, it cannot cease to be a moveable property when it has all the attributes of a moveable property. Electricity is capable of abstraction, consumption and use, and can be transmitted, transferred, delivered, stored and possessed like any other moveable property. Accordingly, the Authority held that electricity falls squarely within the definition of goods under the GST Law. • Referring to the Indian Easements Act, 1882, the Authority noted that the ownership of any land includes the ownership of the air passing vertically thereto. Accordingly, the Authority held that Essar, being the owner of the land on which the Applicant processes the industrial gases, owns the atmospheric air used by the Applicant.

[1] 1970 (25) STC 188

	• While examining the first issue, the Authority ruled that since Applicant uses inputs i.e. water, electricity and atmospheric air provided by Essar for manufacture of industrial gases, the said activity amounts to Job Work as defined under Section 2(68) of the CGST Act. • Further, as the Applicant and Essar are not related persons as defined under Explanation to Section 15 of the CGST Act, the value of supply shall be the transaction value, i.e. the job charges paid or payable in terms of Section 15(1) of the Act. **Ruling:** • The activity undertaken by the Applicant amounts to Job Work as defined under Section 2(68) of the CGST Act. • The Applicant is liable to pay GST on the value of supply, i.e. job charges paid or payment as per Section 15(1) of the CGST Act.
Dhruva Comments / Observations	• The ruling has made a specific observation that the ownership of land also includes the ownership of the atmospheric air passing vertically thereto, and the same can be construed to be capable of being provided by a person to another to carry out any process or treatment. • Keeping in mind the above analogy, it would be critical to examine similar contracts of manufacturing gases by a job worker on the land owned by its principal.

2. M/s Rishi Shipping – Gujarat	
Issues for Consideration	• Applicability of GST on storage charges for storing imported agricultural products of the clients in godowns. • Whether the service of providing warehouse/space on rent should be regarded as "storage or warehousing service" or "renting of storage premises service"?
Discussion & Ruling	**Discussion:** • The Applicant is a cargo handling service provider wherein it undertakes loading / unloading of goods, providing space for storage, etc. As a part of its services, the Applicant also provides warehouse / space on rent to its clients for storage of imported agricultural produce. Since the Applicant does not have its own premises, it acquires the premises on rent from Government / Private parties. • The AAR observed that there is difference between "storage or warehousing service" and "renting of storage premises service". • Examining the scope of "storage and warehousing service", AAR observed that in case of storage and warehousing service the service provider normally makes arrangements for space to keep the goods, loading, unloading and stacking of goods in the storage area, keeps inventory of goods, makes security arrangements and provide insurance

	cover etc. However, in the case of renting of storage premise service, the service provider does not render any services such as loading / unloading, stacking, security etc. • Once the storage premise is rented by the Applicant, what use the client makes of such premise shall not have any bearing on the nature of service rendered by the Applicant. **Ruling:** • Mere renting of space cannot qualify as storage or warehousing service. • The nature of the service provided by the Applicant, i.e. mere renting of storage premises, does not qualify as storage or warehousing service. The same shall be classifiable as *"Rental or leasing services involving own or leased non-residential property"*, taxable at 18% (HSN 997212).
Dhruva Comments / Observations	• The issue of appropriate classification of the services rendered by the Applicant arose as the services of storage or warehousing of agricultural produce have been exempted from GST. • The scope of "storage and warehousing service" as described by the Authority is in line with the clarification issued in respect of storage and warehousing service vide **Circular**[2] under the erstwhile service tax regime which also stated that the essential test to determine nature of storage and warehousing service is whether the storage keeper provides for security of goods, stacking, loading/unloading of goods in the storage area. However, during the period when the Circular was issued, the definition of "storage and warehousing service" specifically excluded storage of agricultural produce. • Thus, in order to claim exemption under GST, in respect of storage or warehousing of agricultural produce, one should ensure that the essential characteristics of storage & warehousing service as discussed above are present in the services being rendered. In the absence of the same, the activity would not qualify for such exemption.

3. M/s. R.B. Construction Company – Gujarat	
Issues for Consideration	• Does the work executed and invoice to be raised for the pending event of testing and commissioning by the Applicant after the implementation of GST amounts to supply, and specifically supply of 'works contract'? • Is the Applicant entitled to enjoy proportionate credit worth 10% duty of excise and VAT paid on materials bought vide invoices showing Excise and VAT separately, under the transition provisions, to prevent double taxation i.e. levy of tax on tax is avoided?
Discussion & Ruling	**Discussion:** • The Applicant had received a contract for supply and laying of pipes, testing the pipes for any leakages and then commissioning the project. • The Applicant paid the applicable VAT and Central Excise duty on purchase of pipes.

[2] F.No. B.11/1/2002 – TRU dated August 1, 2002

- The various milestones of the contract and their status was as follows:

Event / Milestone	Status
Supply of pipes at location specified by RMC	Completed in pre-GST era
Laying of pipes	Completed in pre-GST era
Testing and commissioning of network of pipeline	Pending and will now be completed in GST regime

- The Applicant was registered under VAT and was discharging tax liability under the lumpsum scheme without availment of input tax credit (ITC). Under the GST regime, the Applicant was in a dilemma with respect to 1) applicability of tax on the balance of work that was to be executed and 2) availment and carry forward of ITC of Central Excise and VAT paid under the erstwhile law based on records of duty paying documents. Hence, the Applicant filed the present application.

Ruling:

- The answer to the first question mentioned above was ruled in the positive, on the ground that the creation of underground pipeline network results in an immovable property and hence, it is a works contract liable to GST as a service.
- With respect to the availment of ITC of value added tax and excise duty paid on purchase of pipes, it was ruled that Applicant is not entitled to avail such credits, on the ground that post implementation of GST, only testing and commissioning of the pipeline was remaining and the same did not require any input / materials. As per the AAR, the Applicant failed to fulfil the condition that input / goods should be used for making a taxable supply under the GST Law as required under Section 140 (6) of the CGST Act and hence, were not entitled to avail the transition credit.

Dhruva Comments / Observations

- In the instant case, the Authority has held that the contract is *per se* a works contract. However, despite the foregoing, since the portion in relation to which the inputs held in stock, has already been billed and charged to tax under the erstwhile law, claiming credit with respect to the same under the current GST regime would be difficult. Given this, maintaining a bifurcation and correlating the inputs to the works done post the introduction of GST, becomes critical.
- Further, independent of the above ruling, transition credit pertaining to work in progress is anyways under scrutiny by the tax department, whereby they have alleged that the goods used in construction and contained in work in progress are no longer goods / inputs in stock as they already form part of the immovable property.

4. M/s TP Ajmer Distribution limited (TPADL) – Rajasthan	
Issues for Consideration	• Whether non-tariff charges (charges other than by way of transmission or distribution of electricity) charged by the Applicant will be covered under the exemption entry no.25 of Notification no. 12/2017 – Central tax (Rate) bearing description "Transmission or distribution of electricity by an electricity transmission or distribution utility"? • Whether the Applicant qualifies as an electricity transmission or distribution utility?
Discussion & Ruling	**Discussion:** • The Authority observed that as per the definitions given under the exemption notification, electricity transmission or distribution utility includes a distribution or transmission licensee under the Electricity Act, 2003. Being a franchisee of distribution licensee, the Applicant is treated to be electricity transmission or distribution utility. • With regards to non-tariff charges, the Authority observed that department has issued a Circular[3] where it is clarified that only service by way of transmission or distribution of electricity by an electricity transmission or distribution utility is exempt from GST. The other services such as application fee for releasing connection of electricity, rental charges against metering equipment, testing fee for meters/transformers, capacitors, etc., labour charges from customers for shifting of meters, charges for duplicate bill provided by DISCOMS to consumers are taxable. • As regards refundable security deposit for Electricity consumption, the Authority observed that Section 2(31) of CGST Act defines the term "consideration" which excludes deposit given in respect of the supply of goods or services unless the supplier applies such deposit as the consideration of the said supply. Hence, the refundable security deposit against electric consumption and electric meter which are collected from customers will not be treated as consideration of supply unless such security deposits are applied as consideration (such as forfeiture, offsetting against future progress payment, etc.) • With respect to the cheque dishonour fee, the Authority observed that it 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 Clause 5(e) of Schedule II. • For delayed payment charges, the Authority observed that as per Section 15 of CGST Act, value of supply shall include interest or late fee or penalty for delayed payment of any consideration for any supply and hence, it shall be taxable. **Ruling:** • Considering clarification issued under Circular *supra,* the services provided by the Applicant with respect to non-tariff charges recovered from their customer are not eligible for exemption.

[3] Circular No. 34/8/2018-GST dated 01.03.2018

Dhruva Comments / Observations	• An important aspect has not been decided by the AAR whether various non-tariff charges recovered by the Applicant could qualify as composite supply under GST with principal supply being electricity distribution, and hence could be exempt vide Entry no. 25 of Notification no. 12/2017 – Central tax (Rate). • It is also pertinent to note that delayed payment charges are towards delayed payment of charges for supply of electricity. If the supply itself is outside the purview of GST, then the valuation provisions cannot be invoked to charge GST on delayed payment charges.

5. Mr. Dinesh Kumar Agarwal – Andhra Pradesh	
Issues for Consideration	• Whether the following types of contracts related to setting up of solar power plants should be regarded as supply of goods i.e. 'solar power generating system' ('SPGS') under Entry 234 to Schedule I of Notification No. 1/2017- Integrated Tax (Rate) and similar entries in corresponding Notifications under Central Goods and Services tax Act, 2017 (CGST Act) and State Goods and Services Tax Act, 2017 (SGST Act); (collectively referred to as 'Notifications'): a. Turnkey EPC contract – Includes civil works, design, procurement & supply of all equipment / components, assembly, erection and commissioning; b. Other EPC contract – Design, procurement & supply of all equipment / components, assembly, erection and commissioning (excluding civil works); c. Separate contracts for supply of goods and services - Separate contracts for procurement and supply of goods and for erection / commissioning services; d. Pure supply contract - Procurement of goods only and services to be undertaken by third party contractor; e. Balance of Plant Supply Contract – Includes civil works, design, procurement & supply of other equipment / components (except solar panels), assembly, erection and commissioning. • Whether the contract for assembly, erection and commissioning of the plant under a separate contract would be a service contract liable to be taxed under service heading 9954? • Whether the time of supply of power plant shall be determined under Section 31(4) read with Section 12(2) of the CGST Act / SGST Act?
Discussion & Ruling	**Discussion and Ruling:** • Based on facts of each matter, the Authority held as under: a. Turnkey EPC contract – Since the scope of work includes civil works, procurement of goods and erection and commissioning, the same should not be covered as supply of goods i.e. SPGS. b. Other EPC contract – The ruling is on the same lines as Turnkey EPC contract and it is held that such contracts also do not qualify as supply of goods i.e. SPGS.

	c. Separate contracts for supply of goods and services – The Authority held that taxability would depend upon the terms and conditions of the agreements. If the division of the contract is artificial and a colourable device for avoiding tax, then, such supply contract shall not be regarded as supply of goods i.e. SPGS. On the other hand, if the split is not artificial, but meant for better execution, then, supply of goods, to the extent it qualifies under 'devices and parts' of Entry no. 234 to Schedule I of the Notifications *supra,* shall be taxable @ 5% and the supply of services shall be liable to tax at the respective rates specified for such services. d. Pure supply contract – Such contract being for the supply of goods only, attracts GST @ 5% as per Entry 234 to Schedule I of Notifications *supra*, subject to the condition that such supply of goods qualifies as "device and parts" of SPGS. e. Balance of Plant Supply Contract – Since the other goods and services to be supplied are naturally bundled, the transaction qualifies as a composite supply. Further, the principal supply shall be the supply of service with ancillary goods being in conjunction with the services provided. Thus, the entire transaction shall be liable to GST @ 18% (under HSN 9987). • The contract for assembly, erection and commissioning of the plant shall be covered under the service heading of 9987 (Maintenance, repair and installation service) and not under the service heading 9954 (Construction service). • With respect to the time of supply for solar plants, the Authority ruled that since the contract stipulates successive payments against successive statements depending on the milestone in the contract, the time of supply of power plant should be determined under Section 31(4) read with Section 12(2) of the CGST Act / SGST Act.
Dhruva Comments / Observations	• This ruling is an addition to the recent advance rulings pronounced on the issue of taxability of EPC contracts for solar power plants under the GST regime. While the issues are almost similar, the rulings pronounced in several states vary, thus adding perplexity to an already complex issue. • While this ruling seeks to provide answers on taxability under different types of contracts, there is no in-depth discussion / sufficient reasoning in order to arrive at the aforesaid conclusions. We highlight below issues in connection to various questions raised in the advance ruling: • Turnkey EPC contract -. Recently, in an advance ruling pronounced by Maharashtra AAR in the case of **Giriraj Renewables Pvt. Ltd.**[4], in similar facts, the Authority had concluded that such turnkey EPC contract results in an immovable property and thus qualifies as a work contract service. • Other EPC contract – Despite civil works being excluded from the scope of work, the ruling has combined such type of contracts along with turnkey EPC contracts on ad-hoc basis.

[4] GST-ARA-01/2017/B-01 dated February 17, 2018

- Separate contracts for supply of goods and services – The Authority has merely laid down a principle for taxability of such split contracts without deciding whether the specific case is one of artificial split or not. Basis the limited facts mentioned in the ruling, it is seen that the breach of one contract may be deemed to be breach of both. In this connection, reference is made to another recent advance ruling pronounced by West Bengal AAR in the case of **M/s IAC Electricals Pvt. Ltd.**[5], wherein the Authority concluded that the two contracts, though awarded separately, are linked by a cross fall breach clause (breach of one contract leads to breach of another), and hence, are indivisible in nature.
- Balance of Plant Supply Contract – Recently, the Karnataka AAR in the case of **Giriraj Renewables Pvt. Ltd.**[6] also dealt with the similar issue and held that since the owner can procure major equipment, the concept of naturally bundled does not hold good and thus, the transaction does not qualify as a composite supply. However, in the instant case, the Authority have regarded the transaction as composite supply, with principal supply being services. This is one more instance of various state AAR's providing divergent rulings, thereby reinforcing the need for a single centralised Authority.
- As regards the question on time of supply, the ruling very loosely states that time of supply of power plant shall be determined in terms of Section 31(4) read with Section 12 of CGST Act / SGST Act. It does not explicitly provide that the same shall apply only where the transaction qualifies as a supply of goods i.e. SPGS.
- In light of divergent advance rulings being pronounced, the Government should provide appropriate guidelines for taxability of solar power plants, otherwise GST paid by solar power generating companies would increase their procurement cost since their output i.e. electricity is outside the purview of GST.

[5] 05/WBAAR/2018-19 dated May 28, 2018
[6] KAR ADRG 01/2018 dated March 21, 2018

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