

THE MADHYA PRADESH APPELLATE AUTHORITY FOR ADVANCE RULING

**OFFICE OF THE COMMISSIONER, COMMERCIAL TAX, MOTI BUNGLOW,
MAHATMA GANDHI MARG, INDORE (M.P.) - 452007**

BEFORE THE BENCH OF

- (1) Shri NAVNEET GOEL, MEMBER
(2) Shri RAGHWENDRA KUMAR SINGH, MEMBER

ORDER NO. MP/AAAR/ 05 /2021

DATE 26-07-2021

Name and address of the appellant	M/S SAISANKET ENTERPRISES, 21- ELECTRONICS COMPLEX, GROUND FLOOR, PARDESHIPURA, INDORE MADHYA PRADESH 452003
GSTIN or User ID	23AFYPM0856K1ZW
Order of AAR under Appeal before AAAR	20/2020 dated 10.12.2020

PROCEEDINGS

(Under section 101 of the Central Goods and Services Tax Act, 2017 and the Madhya Pradesh Goods and Services Tax Act, 2017)

1. At the outset, we would like to make it clear that the provisions of both the CGST Act and the MPGST Act are mirror image of each other except for certain specific provisions. Therefore, unless a specific mention is made to such dissimilar provisions, a reference to the CGST Act would mean a reference to the similar provisions under the MPGST Act and vice-versa. At places we may refer it as GST Act.
2. The present appeal has been filed under section 100 of the Central Goods and Service Tax Act, 2017 and the Madhya Pradesh Goods and Services Tax Act, 2017 [hereinafter also referred to as "the CGST Act and MPGST Act"] by M/s Saisanket Enterprise (hereinafter also referred to as the "appellant") against the order of Authority for Advance Ruling No.20/2020 dated 10.12.2020

3. BRIEF FACTS OF THE CASE

- i. The Appellant M/s Saisanket Enterprises is a Works Contractor engaged in executing irrigation related works contracts. He is duly registered under the CGST / SGST Act in various states. In the State of Madhya Pradesh (MP) he is registered holding GSTIN 23AFYPM0856K1ZW.

ii. The Appellant had received a sub contract from M/s Navayuga Engineering Company Ltd (M/s Navayuga) holding GSTIN 23AAAACN7396R1ZP. By virtue of agreement dated 19-08-2015 he is executing certain works contracts pertaining to Narmada Valley Project. The said works is part of the work entrusted to Ms Navayuga Engineering Company Ltd by the Narmada Valley Development Authority of MP Government for executing the work of dam in the State of MP.

iii. On 01-07-2017 GST has been implemented in India replacing excise law, service tax & VAT. By virtue of the enactment the aforesaid contract between the appellant & Ms Navayuga stands governed by GST in the matter of Indirect Taxes. The Government of India has issued certain notifications under the CGST Act which have been co enacted for the State of MP. The relevant notifications are:

Serial No.3 item (iii) of Notification no 11/2017 CT (R) as amended on 22-08-2017 which runs as under:

(iii) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, supplied to the Government, a local authority or a Governmental authority by way of construction, erection, commissioning installation, completion, fitting out, repair, maintenance, renovation, or alteration of, - or	6	-
(a) a historical monument, archaeological site or remains of national importance, archaeological excavation, antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);		
(b) canal dam or other irrigation works:		
(c) pipeline, conduit or plant for (i)water supply (ii)water treatment or (iii)sewerage treatment or disposal,		

iv. M/s Navyuga Engineering Company Ltd was collecting & paying tax @ 12 % as per the above notification on its works contract agreement with the Narmada Valley Development Authority. It had also advised the appellant to follow suit. Hence for the period from 22-08-2017 the appellant has raised his invoices with 12 % tax to M / s Navyuga Engineering Company Ltd. The turnover of invoices issued between September 2017 to January 2018 is Rs 140917374 /- (taxable turnover) Meanwhile another entry number (vi) against Sr. No.3

substituted vide notification no 24/2017 with effect from 21-09-2017 to notification 11/2017 referred to above, that laid down as under:

vi) Services provided to the Central Government, State Government, Union Territory, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out repair, maintenance, renovation, or alteration of (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession; (b) a structure meant predominantly for use as an (I) educational ii) a clinical, or (iii) an art or cultural establishment; or (c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in paragraph 3 of the Schedule III of the Central Goods and Services Tax Act, 2017	6	-
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v. On 25-01-2018 & w.e.f from 25-01-2018 for item ix and entry related therein, the following entries were substituted in notification 11/2017:

“(ix) Composite supply of works contract as defined in clause (119) of section 2 the Central Goods and Services Tax Act, 2017 provided by a sub contractor to the main contractor providing services specified in item (iii) or item(vi) above to the Central Government, state Government, Union territory local authority, a Governmental Authority or a Government Entity	6	Provided that where the services are supplied to a Government Entity, they should have been procured by the said entity in relation to a work entrusted to it by the Central Government, State Government, Union territory or local authority, as the case may be.
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vi. As aforesaid the above entry lays down that the rate of tax applicable to a sub contractor shall be 12 % if the sub contract work is in full or part a work that supplies to a Government & attracts 12 % tax in the hands of the principal contractor. The entry has been made effective from 25-01-2018.

vii. that on 20-03-2020 Officers of DGGSTI visited the place of business of the appellant allegedly by exercising their powers under Section 67 of the Act. It may be noted that the officers have not found any discrepancy till date within the meaning of Section 67(1). Despite the same they have confiscated a pen drive containing commercial data u/s 67(2). The only point raised by the said officers till date, as evidenced by their letters dated 21-05-2020 & 08-06-2020 concerns the tax liability of a sub contractor in respect of works contracts that are liable to tax @ 12 % at the hands of principal contractor.

In view of the above facts the appellant had posed the following question for determination by the Advance Ruling Authority

" What is rate of tax applicable to a sub contractor, where, he executes works contract pertaining to dam, wherein the principal contractor is liable for tax @ 12 %, for the period from 22-08-2017 to 25-01-2018? "

viii. During the course of preliminary hearing the AAR raised a preliminary objection as to why the application should not be treated as being barred as per the proviso to Section 98 (2). The said proviso bars any advance ruling if the question raised is pending or decided in any " proceedings " under any of the provisions of the Act. The appellant argued & submitted that the impugned question is a question of law & therefore cannot be said to be covered under the provisions of Section 67. In support of the contention the appellant gave detailed submission relying on various authorities & principles of law. The Appellant alleges that the AAR has passed a cryptic non speaking order without dealing with any of the submissions made by the appellant.

ix. The appellant is aggrieved over the order of the AAR on the following amongst other grounds of facts & law.

Appellant is filling Appeal against the order of Authority for Advance ruling Madhya Pradesh Goods and Service Tax bearing order number 20/2020 dated 10.12.2020

4. QUESTIONS RAISED BEFORE AUTHORITY FOR ADVANCE RULING (AAR)

"What is rate of tax applicable to a sub contractor, where, he executes works contract pertaining to dam, wherein the principal contractor is liable for tax @ 12 %, for the period from 22-01-2017 to 25-01-2018?"

5. RULING PRONOUNCED BY AUTHORITY FOR ADVANCE RULING (AAR)

- i. The application filed by the applicant under advance ruling under CGST Act 2017 is hereby rejected as per the first proviso of the provision of section 98(2) of CGST Act, 2017
- ii. The ruling is valid subject to the provisions under section 103(2) until and unless declared void under section 104(1) of the GST Act.

6. QUESTIONS RAISED BEFORE THE APPELLATE AUTHORITY FOR ADVANCE RULING (AAAR)

The following question, which is the very same as posed before AAR, have been posed before the Appellate Authority: -

“What is rate of tax applicable to a sub contractor, where, he executes works contract pertaining to dam, wherein the principal contractor is liable for tax @ 12 %, for the period from 22-08-2017 to 25-01-2018?

7. GROUNDS OF APPEAL

Aggrieved by the rejection of the application for advance ruling, the appellant has filed this appeal dated 29-03-2021 under Section 100 of the CGST Act, 2017 and MPGST Act, 2017, on the following grounds:-

i. The appellant submits that the AAR has passed the order without adducing any reasons, whatsoever. The appellant further submits that the Hon'ble Supreme Court has in L & T vs State of Karnataka given a factual finding. It has laid down that in case where a works contract is sub contracted, the property is transferred directly from the sub-contractor to the employer. Now, in view of the said ruling, the appellant cannot be blamed to have followed the ruling & claimed that his supplies are directly to the Government & therefore is covered by notifications dated 22-08-17 or dated 21-09-17.

ii. The appellant submits that, the AAR has sought refuge to proviso to Section 98 (2). The appellant submits that Section 67 does not cover their case. The above provision can be dissected as being applicable only when there is suppression of supply or stock or when ITC in excess of the entitlement is claimed or there is contravention of law in order to evade tax. In the present case, at the cost of repetition, they submitted that the DGGSTI authorities have not found anything close to evasion, suppression. They have simply issued a letter directing the appellant to make payment of tax on their own

under standing of law, to which, the appellant begs to differ. It has been the case of the appellant, that mere issue of such letter cannot be said to be any proceedings within the meaning of proviso to Section 98(2). On the issue that contravention should be with the intent to evade, the appellant has relied on the principle of esjudem generis. The said principle lays down that when general words follow specific words their ambit is necessarily restricted to the specific words.

iii. The appellant further submits that there is a catena of case laws that lays down that if there is difference in interpretation of law, as in the present case, then, the stand taken by the appellant cannot be averred to have been with the intent to evade tax. The appellant was just following the Hon'ble Supreme Court verdict & hence his conduct cannot be alleged to be wrong much less intended to evade tax. The authorities that lay down that no malafides can be attributed in case of bonafide belief are as under:

- a. Indian Institute of Chemical Technology vs CCE (26 VST 198 CESTAT)
- b. Sunil Metal Corporation vs CCE (24 STT 473)
- c. Mundra Port & SEZ vs CCE (33 STT 364)
- d. South City Motors vs CST (34 STT 142)
- e. Vishal Traders (24 STT 260)

The appellant submits that the issue impugned in the present appeal & the AAR proceedings cannot be said to be covered by Section 67. They submitted that Section 67, by definition, excludes, questions involving interpretation of law & therefore mere fact that certain proceedings are ongoing in respect of the appellant u/s 67, does not bar the appellant from raising the present issue before AAR. The appellant says & submits that the AAR has failed to deal with the above point raised by the appellant & has simply disposed of the appeal on cryptic findings.

iv. The appellant submits that the issue raised by the DGGSTI officers does not come within the ambit of Section 67(1) that requires suppression of transaction of supply or stock or excess claim of Input Tax Credit. While fully admitting the authority of DGGSTI to conduct proceedings u/s 67 in the above circumstances, the appellant submits how the issue of rate of tax of sub contractor where the principal contractor is liable @ 12 % falls within Section 67. To claim that the issue falls within the term "contravention of any provisions of Act or Rules to evade tax " would be overreach of powers granted u/s 57 on present facts. The above issue, in the respectful submission of the appellant is a pure issue / dispute on point of law & exercise of powers u/s 67 in the

present facts does not entail any intelligence activity. For the aforesaid reasons the appellant respectfully submits that there is no proceeding pending against the appellant on which an Advance Ruling is sought. The appellant submits that the issue raised in the present Advance Ruling falls outside the ambit of Section 67 (1) because mere issue of letters for payment of differential tax does not amount to a proceeding, such as is contemplated by proviso to Section 98 (2) to prohibit the appellant from seeking the Advance Ruling.

v. The appellant submits that the issue of parity in the rate of tax to be applied to sub contractors where their principal contractors are enjoying concessional rate of tax has been favorably decided by the GST Council in its 25th Council in favor of the Sub contractors & consequently notification no.11/2017 was amended & clause ix reproduced at Para no 5 above was inserted with effect from 25-01-2018. It may be noted that the Council did not deliberate on whether to give a prospective effect or retrospective effect. However, it fully endorsed the view that there ought to be parity of tax between the contractor & sub contractor.

vi. Appellant submits that the issue as to whether the notification referred to above in Para no 5 is clarificatory & hence retroactive before 25-01-2018 has been addressed by quite a few Advance Ruling Authorities namely:

- a . In Re : S P Singla Construction Private Ltd (Punjab AAR dated 06-09-2019)
- b . In Re : NHPC Ltd (Uttarakhand AAR dated 22-10-2018)
- c . In Re : Mary Matha Construction Company (Kerala AAR dated 26-09-2018)
- d . In Re : Shree Construction (Maharashtra AAR dated 11-07-2018)

Appellant submits that in all the above Advance Rulings the Authorities have reiterated that the rate of tax for sub contractor shall be the same as that for the principal contractor right from the date of notification 11/2017 i.e. 22-08-2017.

vii. The appellant respectfully submits that as per Schedule II Para 6, works contract is classified as services & hence notification entry vi inserted with effect from 21-09-2017 shall also apply to the transactions of the appellant. The only conditions laid down for its applicability are supply to Government, original works contract / civil work & non business / commercial use. So far as supply to Government is concerned as per the Hon'ble Supreme Court verdict in the matter of L & T vs State of Karnataka (Civil Appeal No. 2956 of 2007 with Civil Appeal No. 2318 of 2013 and Civil Appeal No. 7241 of 2016, decided on September 5, 2016.) the Hon' ble Supreme Court has given a

finding of fact that in case of works contract the transfer of property occurs from the sub contractor directly to the employer. Therefore, the transaction of the present appellant can very well be construed as being a supply to Government. The appellant specifically relies on the observations of the AAR Maharashtra in the matter of M / s Shree Construction wherein it has observed that the material gets transferred directly from the sub contractor to the employer. The other conditions regarding civil work & non business / commercial use are also fully satisfied by the work done by the appellant.

viii. The appellant submits that the Hon'ble Supreme Court has in a catena of judgments laid down that in the case of works contracts the property is transferred directly to the employer even if there is no privity between the employer & the sub contractor. Kindly see Gannon Dunkerley, Builders Association etc The said observation of the Hon'ble SC comes from M / s L & T vs State of Karnataka (Civil Appeal No. 2956 of 2007 with Civil Appeal No. 2318 of 2013 and Civil Appeal No. 7241 of 2016, decided on September 5, 2016.) where it lays down in para 19 that if one keeps in mind the above quoted observation of this Court in Builders ' Assn. of India the position becomes clear, namely, that even if there is no privity of contract between the contractee and the subcontractor, that would not do away with the principle of transfer of property by the subcontractor by employing the same on the property belonging to the contractee. Appellant submits that in the present case, it must be held that the property got transferred to the employer directly from the appellant & hence all the conditions in the notifications for concessional rate get fulfilled right from 22-08-2017.

xi. The appellant prays that:

- a. the turnover of the appellant shall stand governed by notification entry (iii) for the period from 22-08-2017 to 25-01-2018 till entry (ix) was inserted. OR
- b. the turnover of the appellant shall stand governed by notification entry (vi) for the period from 21-09-2017 to 25-01- 2018 till entry (ix) was inserted. &
- c. the supplies of appellant as a sub contractor are supplies to employer i.e. Narmada Valley Development Authority MP.

8. PERSONAL HEARING

The appellant was given an opportunity of personal hearing on 20.07.2021 through virtual mode. Shri Amit Sheode, CA has attended the personal hearing on behalf of the appellant. After hearing, the appellant has expressed his satisfaction through a letter and asked for decision.

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9. DISCUSSION AND FINDINGS

We have carefully gone through the submissions made by the appellant in his appeal as well as the submission made at the time of personal hearing.

i). The appellant has contended that mere issue of such letter to them by DGGSTI authorities cannot be said to be any proceedings within the meaning of proviso to Section 98(2) of CGST Act, 2017. On going through the records available before us, we find that the Additional Assistant Director, DGGI, Regional Unit, Indore has issued summon dated 10/09/2020 under section 70 of the Central Goods and Services Tax Act, 2017 to the appellant and in the said summon, it is clearly mentioned that the said officer of DGGSTI is making an inquiry in connection with evasion of GST under the Central Goods and Services Tax Act, 2017. Here we will look into Section 70 of the CGST, Act, 2017 which is reproduced below:

Section 70. Power to summon persons to give evidence and produce documents.- (1) The proper officer under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a Civil Court under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(2) Every such inquiry referred to in sub-section (1) shall be deemed to be a "judicial proceedings" within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).

We find that sub-section (2) of Section 70 is very clear that every such inquiry shall be deemed to be a "judicial proceedings" within the meaning of section 193 and section 228 of the Indian Penal Code. Therefore, we do not agree with the appellant's contention that mere issue of such letter to them by DGGSTI authorities cannot be said to be any proceedings within the meaning of proviso to Section 98(2) of CGST Act, 2017.

The Deputy Director, Directorate General of GST Intelligence, Regional Unit, Indore vide letter dated 02.09.2021, informed that they have initiated proceedings of determination of short payment/non-payment of GST against the appellant on the issue of wrong availment of benefit of certain provisions of notification wherein lower rate of GST 12% is prescribed for works contract services pertaining to irrigation work when provided to Government, Governmental authority and local authority for the period July 2017 to January 2018. That the appellant provided the aforementioned services to M/s Navayuga Engineering Company Limited as a sub-contractor for which the applicable rate of GST is 18% in terms of Notification No.11/2017- Central Tax (Rate) dated 28.06.2017 as amended.

For sub-contractors, subsequently the rate of tax for such services got reduced to 12% vide Notification No.1/2018- Central Tax (Rate) dated 25.01.2018. It was also informed that the said investigation in the matter is undergoing. As per the submission of appellant and available records, we find that Directorate General of Goods & Services Tax Intelligence (DGGSTI), Regional Unit, Indore, has already initiated proceeding against the appellant on the same question raised by the appellant before us and the said proceeding is still pending before the DGGSTI, Indore.

Now, we will look into Section 98(2) of the CGST, Act, 2017 which is reproduced below:

(2) The Authority may, after examining the application and the records called for and after hearing the applicant or his authorised representative and the concerned officer or his authorised representative, by order, either admit or reject the application:

Provided that the Authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act:

Provided further that no application shall be rejected under this sub-section unless an opportunity of hearing has been given to the applicant:

Provided also that where the application is rejected, the reasons for such rejection shall be specified in the order.

We find that the first proviso to section 98(2) of CGST Act, 2017 is very clear, that the authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in case of an applicant under any of provisions of this Act. We find that Advance Ruling Authority has rightly rejected the appellant's application as per the first proviso to section 98(2) of CGST Act, 2017 on the grounds that the question raised by the appellant before the Authority is pending with the DGGSTI and proceeding against the appellant is underway by the DGGSTI, Regional Unit, Indore.

ii). Now, we will look into Section 100(1) of the CGST, Act, 2017 which is reproduced below:

(1) The concerned officer, the jurisdictional officer or an applicant aggrieved by any advance ruling pronounced under sub-section (4) of section 98, may appeal to the Appellate Authority.

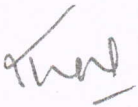
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Here we find that section 100(1) mandates that only a ruling pronounced under sub-section (4) of section 98 of CGST, Act, 2017 can be appealed before the Appellate Authority for Advance Ruling. We find that the Advance Ruling Authority in its Order 20/2020 has rejected the application of the appellant under section 98(2) of CGST, Act, 2017, and it cannot be said to be any advance ruling pronounced under sub-section (4) of section 98 of CGST, Act, 2017, therefore the appellants appeal fails on this count also.


iii). In view of the above, we have no hesitation in concluding that the instant appeal is not maintainable in as much as it is covered in the first proviso to section 98(2) of the CGST, Act, 2017 and not maintainable under section 100(1) of CGST, Act, 2017 as well. Accordingly, without going into the merits of the case, the appeal deserves to be rejected as it is not admissible in terms of first proviso to section 98(2) and section 100(1) of CGST, Act, 2017.

ORDER

We uphold the Order No. 20/2020 dated 10.12.2020 passed by Advance Ruling Authority and appeal filed by the appellant M/s Saisanket Enterprises stands dismissed on all accounts.


NAVNEET GOEL
(Member)

Madhya Pradesh Appellate Authority


RAGHWENDRA KUMAR SINGH
(Member)

Madhya Pradesh Appellate Authority


No. 03../2021/A.A.A.R./06

Indore, dated - 26.07.21

Copy to:-

1. The Appellant
2. The AAR, Madhya Pradesh
3. The Chief Commissioner, CGST & Central Excise, Bhopal Zone, Bhopal
4. The Commissioner of State Tax, Madhya Pradesh
5. Office Copy

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