

**THE ODISHA APPELLATE AUTHORITY FOR ADVANCE RULING FOR
GOODS AND SERVICE TAX
(CONSTITUTED UNDER SECTION 99 OF THE ODISHA GOODS AND SERVICES TAX ACT, 2017)
ORDER NO. 04/ODISHA-AAAR/2018-19, DATED: 05.03.2019**

BEFORE THE BENCH OF

- (1) **Shri Naresh Penumaka, Member (Chief Commissioner, GST, CX & Customs, Bhubaneswar Zone)**
(2) **Shri Saswat Mishra, Member (Commissioner, Commercial Taxes & GST Odisha)**

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| Legal Name of Appellant | Super Wealth Financial Enterprises Private Ltd. (Appellant) (GSTIN Number-21AAECS9864P1ZN) |
| Details of Appeal | Appeal No-04/2018-19/AAAR-ODISHA filed against Advance Ruling No.04/ODISHA-AAR/2018-19 dated 31.10.2018. |
| Jurisdictional Officer | State Jurisdiction:- Bhubaneswar – I Circle. Centre Jurisdiction: Bhubaneswar - VII Range. |

Present For the Appellant

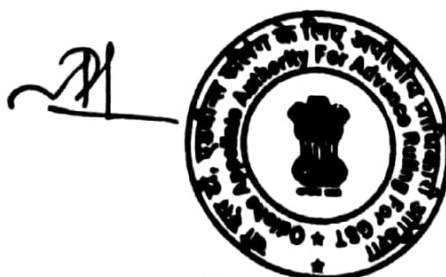
1. Anand Prakash Rai, Director
2. Yash Dev Arya, C.A.

**Matter heard on : 28.02.2019
Date of Order : 05.03.2019**

M/s Super Wealth Financial Enterprises Private Ltd, Plot No.3198/5183, Gauri Vihar, Lewis Road, Bhubaneswar, Dist.-Khurda-752002, (Appellant) has filed an appeal before AAAR, Odisha on 07.12.2018 aggrieved by advance ruling no 04/ODISHA-AAR/2018-19 dated 31.10.2018 pronounced by the Odisha Authority for Advance Ruling, Bhubaneswar (AAR) under Section 100 of the Odisha Goods and Service Tax Act, 2017/CGST Act, 2017.

2.0. The Appellant having GSTN **21AAECS9864P1ZN** is registered in Bhubaneswar and falls within the jurisdiction of State of Odisha and is being administered by Bhubaneswar – I Circle (State jurisdiction). The Appellant is a company engaged in providing Energy Efficient Street Lighting services and is registered under GST vide registration no. 21AAECS9864P1ZN inter-alia for the nature of business activities such as Works Contract and Recipient of Goods or Services.

2.1. The Appellant sought an advance ruling on applicability of entry no. 3 of Notification No 12/2017-Central Tax to the services provided by the applicant by way of providing energy saving street lighting services including operation and maintenance of the street lighting installations to Bhubaneswar Municipal Corporation (BMC).



2.2. The AAR, Odisha has given the following ruling against which the appellant has preferred the instant appeal.

"The service provided by the applicant by way of providing energy efficient street lighting services including OM of the street lighting infrastructure during the contracted period to Bhubaneswar Municipal Corporation (BMC) do not constitute supply of 'pure services' as it involves significant use of goods/materials with stipulation to transfer the total business assets to BMC at the end of the contract period. The benefit of exemption from tax in terms of Sl. No.3 of the notification No.12/2017 - Central Tax (Rate), dated 28.06.2017 is not available to the applicant.

3.0. The appellant is providing street lighting service to Bhubaneswar Municipal Corporation (hereinafter referred to as "BMC") under an 'Energy Performance Contract' dated 05.10.2013. In terms of the aforesaid Energy Performance Contract, the appellant has installed energy saving equipment on existing street light poles in the city of Bhubaneswar and has been operating and maintaining the said infrastructure since 2013. The contract was awarded to the appellant on the basis of their offer of highest energy saving of approx 80% for a period of 10 years. The Street Lighting Services being provided by the appellant to BMC since Oct. 2013 was covered under service tax until introduction of Goods & Services Tax ("GST") in July-2017.

3.1. Under the GST regime, Notification 12/2017-Central Tax (Rate) dated 28.06.2017 provides exemption from the payment of GST to various services specified therein. Serial no. 3 is reproduced below:

| Sl. No. | Chapter, Section, Heading, Group or service code (Tariff) | Description of Service | Rate (per cent) | Condition |
|---------|---|---|-----------------|-----------|
| 3 | Chapter 99 | Pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Central Government, State Government or Union territory or local authority or a Governmental authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution. | NIL | NIL |

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Thus, the exemption under Sl. No. 3 of the aforesaid notification is available for supply of services to Municipal Corporation in respect of functions listed in Article 243 W of the Constitution of India. The said exemption would not be available in respect of contract involving **supply of any goods**. Further, a **composite supply of goods and services or a supply of works contract services are specifically excluded from the scope of Serial no. 3.**

3.2. It is the claim of the Appellant that for the period of 10 years i.e. during the tenure of the contract, there is no transfer of property in energy saving equipment from them to BMC. If any energy saving equipment gets damaged or stops working during the tenure of the contract, they are responsible to repair/replace the said equipment at its own cost. Thus, the risk in the said goods continues to remain with the appellant for entire period/tenure of 10 years and accordingly, it was contended that neither the ownership of equipment or other fixtures nor the control and possession of the energy saving equipment is transferred to BMC during the tenure of the contract.

3.3. The Appellant further submitted that even though the Energy performance contract provides for a separate consideration for – i) installation of Energy saving equipment and its day to day management and ii) Operation and maintenance of said equipment, the said activities effectively constitute a single supply of providing lighting service to BMC for a period of 10 years, by using the Energy saving infrastructure installed by them and accordingly they were of the view that the amounts received by them by way of Energy Performance fees and O&M fees for the period of 10 years, would be a consideration for a single supply of providing lighting service to BMC by use of Energy saving equipment.

3.4. The appellant is of the view that the activity of management, operation and maintenance of energy saving equipment owned and possessed by them under the Energy Performance Contract would not qualify as a 'composite supply' in terms of Section 2(30) of the CGST Act.

3.5. The appellant further submitted that the activity under taken by them would not qualify as 'Works Contract' under Section 2(119) of the CGST Act, since 'Works Contract' would include a contract for construction, erection, installation, improvement, renovation, repairs, maintenance, etc. of an immovable property, where the property in goods involved in execution of such contract is transferred to the recipient. They are only required to install the energy saving equipment, which can be easily dismantled, removed or replaced without any damage to the existing street-light poles and can be moved to any other location for installation. The appellant has also submitted that the activity of installation of energy saving equipment on the existing street-light poles does not amount to installation of an 'immovable property'. Further, upon installation, the property in the energy saving equipment is not transferred to BMC but remains with them.



3.6. Further the appellant submits that the term 'pure service' has not been defined in the act or rules. However, in serial no. 3 of the aforesaid notification itself, the term pure service has been suffixed with exclusions i.e. excluding works contract service or other composite supplies involving supply of any goods. The said phrase clearly indicates that if supply of service does not involve supply of goods in a works contract or in a composite contract, then the service would be treated as pure service. The notification uses words ".....involving supply of any goods." The appellants submitted that merely use of goods in any contract does not mean goods have been supplied and the service is not a pure service. In other words if there is no supply of goods, it would mean that there is a supply of pure service (or supply of only service). It is also submitted that putting any other extension is neither warranted nor intended to and would lead to absurd conclusion not called for and would render the notification entry redundant.

3.7. It was also argued that in their contract the LED lights are being used to provide Street Lighting services, wherein the consideration for the said services are received basing on the Energy saving performance. In case, energy saving is less than the committed savings, it would lead to penalties. Therefore, by installing the LED lights, the appellant is not absolved of its responsibilities and it has to continuously monitor the operations and maintenance of the Energy efficient devices. Accordingly, it was submitted that they have the control and the possession of the devices and at no point of time the control, possession or ownership in the said equipment is transferred to BMC. Therefore, there is no supply of goods under the said contract with BMC.

3.8. The appellant further referred to the contract entered into with BMC in May, 2013 and stated that all replacement of the lights were completed well before end of March 2014 and since then they have been receiving Energy Performance fee and O&M fee for performing services. In other words, even assuming without admitting, the question of supply of LED lights does not arise, since it was done before implementation of GST. It was further submitted that during the O&M of the Street lightings, there may be requirement of use of material for repairs or replacement of a few lights. **However, the same are covered under the newly inserted entry no. 3A in the said Notification No. 12/2017- Central Tax (Rates) dated 28.06.2017 by Notification no. 2/2018 - Central Tax (Rates).** The said entry is reproduced below:

| Sl. No. | Chapter, Section, Heading, Group or service code (Tariff) | Description of Service | Rate (per cent) | Condition |
|---------|---|---|-----------------|-----------|
| 3A | Chapter 99 | Composite supply of goods and services in which the value of supply | NIL | NIL |



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|--|--|---|--|--|
| | | of goods constitutes not more than 25 per cent. of the value of the said composite supply provided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government Entity by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution. | | |
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The value of goods used (and not supplied) is less than 25% of the value of the said composite supply. Therefore, the use of material although neither supplied nor sold to BMC would be exempted under Sr. No. 3A of the Notification no. 12/2017-Central Tax (Rates) dated 28.06.2017 as amended.

3.9. The appellant also relied on the decision of High Court of Meghalaya in case of Tata Consultancy Services Pvt. Ltd. Vs. The State of Meghalaya and Ors. (2014) 69 VST 230 (Megh) where-in, while determining the question of liability of the petitioner to pay VAT on a similar contract under the BOOT basis, Hon'ble High Court have held that the petitioner was not liable to pay VAT under the Meghalaya VAT Act, 2003.

4.0. The AAR, Odisha ruled that as evident from the terms of the contract, the Applicant is contractually bound to replace the existing street light fittings with the energy efficient sets as per the energy conservation measures and such replacement must be of the standard enumerated in the contract (BIS Standard). During the tenure of the contract the applicant is also contractually bound to repair/replace the fittings to ensure illumination at the contracted level. The contract also involves installation of metering device, monitoring system and control system for regulated illumination. The original contract was for illuminating approximately 18000 points which has been reportedly increased to 45000 points by now. Illuminating the whole of BMC area with 45000 lighting points for a long contract period of 10 years is just not possible without substantial involvement of goods. It is also envisaged in the contract that the applicant, at the end of the contract period/on termination of the contract will be contractually bound to hand over the lighting system in working condition. This implies that the total business assets of the applicant will be transferred to BMC without any extra consideration. In other words, the consideration payable to the applicant includes the cost of acquisition of the business assets i.e. the energy efficient street light infrastructure set up by the applicant at the end of the contract period. Such transfer of business assets from the applicant at the end of the contract period. Such transfer of business assets from the applicant to BMC is admittedly not covered

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in clause (c) of Para 1 of Schedule II of the CGST/OGST Acts, but rather covered in clause (a) of Para 4 of Schedule II which reads as follows:-

***4. Transfer of business assets**

- (a) Where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer or disposal is a supply of goods by the person."

4.1.The AAR further states that it is not a case of supply of pure service but rather a case of supply with substantial use of goods. At the time of personal hearing, on a query raised by the authority it was explained by the applicant that during the period from 01.07.2012 till the date of hearing, materials such as Street Lights, Control Panel and LED Bulbs etc. of value Rs.3,89,72,117/- have been moved to Bhubaneswar project from the manufacturing plant. This is a substantial amount and with material movement at this scale, the ultimate supply to BMC cannot be held as a case of supply of pure service. Thus, on this account, the condition is not fulfilled.

4.2.In addition, the contract between the applicant and BMC is essentially a 'works contract' since the terms of the contract clearly fits into the definition in Section 2 (119) of the CGST/OGST Act. To elaborate, the contract envisages, survey and identification of the street light posts, replacing the existing lighting system with the energy efficient lighting system, setting up a monitoring system to ensure regulated illuminations and also setting up the metering device where necessary. In addition the contract also envisages operation and maintenance of the lighting system so installed for the entire contract period of 10 years. With such terms as replacement, fitting out, repair and monitoring of the lighting system in the contract is indisputably a case of works contract. The contracted replacement and fitting out of energy efficient street lights will be in relation to the street light installations which are immovable property. Thus, on this account also the application is failing to meet the requirement of Sl.no.3 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 and matching Notification issued by the State of Odisha.

4.3.The AAR, Odisha in its order further stated that the activities undertaken by the applicant do not constitute supply of pure services as it involves significant use of goods/materials. It is also a case of supply of works contract service by the Applicant to BMC. The benefit of exemption from tax in terms of S 1.3 of the notification No. 12/2017-Central Tax (Rate), dated 28.06.2017 is not available to the applicant. The Hon'ble Apex Court in the case of Commissioner of Customs (Import), Mumbai V, Dilip Kumar & Company [2018]69 GST 239/95 taxman.com327 (SC) has been pleased to held that "Exemption notification should be interpreted strictly, the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject / assessee and it must be interpreted in

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favour of the revenue "Further Entry at Sl No. 3 of the notification No.12/2017 - Central Tax dated 28.06.2017 is unambiguous and it cannot be stretched or constructed otherwise. It has no extension and putting any other extension is neither warranted nor intended to and would lead to absurd conclusion not called for and would render the notification entry redundant.

5.0. The appellant assailed the order of AAR inter-alia on the following grounds.

5.1 The AAR has erred in holding that supply of services made by the Appellants as not a pure service as in terms of serial no. 3 of Notification no. 12/2017- (Central Tax) dated 28.07.2017 read with corresponding notification issued under Odisha GST Act. The "supply of pure service" implies supply of service only and not making any supply of goods, which comes out very clearly from the wordings of the entry 3 **"Pure service (excluding works contract service or other composite supplies involving supply of any goods)"** which is the case of the appellants. The AAR has stated in Para 7.2 (page 8) that

"Pure service has not been defined in the said Notification for which it has to be understood by applying the common parlance test and general understanding. As per dictionary, pure means "unadulterated" and "unmixed". Accordingly, pure service should mean **unadulterated service not mixed with any other element (in this case without any mixture of goods).**"

5.2 The AAR, State of Madhya Pradesh while hearing of application of advance ruling made by EGIS India Consultants Engineers Private Limited reported in 2018 (16) G.S.T.L. 171 (A.A.R. -GST) has ruled in favour of the applicants.

5.3 The AAR has erred in differentiating "supply of goods" and "use of goods" and has issued the ruling by treating use of goods as supply of goods and thereby reaching a wrong conclusion that the supply of services by the appellants is not pure service only because the appellants have used the goods belong to them and accounted as Fixed assets in terms of generally accepted accounting principles and Accounting Standards issued by the Institute of Chartered Accountants of India and accepted by the GST Law and appropriate depreciation under the Companies Act and the Income Tax Act has been claimed by the Appellants in terms of relevant provisions of the statutes and the same has been verified and accepted by the Auditor. The AAR also overlooked the facts that the Appellants have not parted with the control and possession of the equipment and by installing the equipment and setting up a control room in the premises of the BMC, they have always been controlling and monitoring these equipment.



5.4 The AAR has erred in not appreciating the fact that the GST liability is triggered only in case a supply is made in terms of Section 7 of the CGST Act and Odisha Act. Merely use of goods in providing services does not mean those goods are supplied.

5.5 The Ld. AAR also erred in holding that the installation of LED lights are a works contract service hence the supplies made by the appellants are not of pure service and the benefit of exemption under serial no. 3 of the Notification no. 12/2017 (Supra) is not available to them. The above findings of the AAR are devoid of facts of the case, wherein it was clearly mentioned that neither there is any supplies in respect of an immovable property nor there is transfer of ownership in any goods during the tenure of the contract. Therefore, the findings of the Ld. AAR are without any legal basis and untenable.

5.6 In the ruling, Ld. AAR has considered submissions and opinion of the jurisdictional officer of Central Tax and State Tax. The appellants submit that during the personal hearing, neither any oral or written submission made by the jurisdictional authority, nor a copy of their submission was provided to the appellants so that the appellants could get an opportunity to counter the arguments made by the jurisdictional officers before the Ld. AAR. In other words, the AAR has considered the submissions (not sure or written) without affording the appellants any opportunity to place counter arguments.

5.7 The appellants have not made any supply of goods either under a works contract or under a contract for composite service involving supply of goods. There is no transfer of property or effective control or possession in the goods during the execution of the contract for BMC. Therefore, the appellants have made supply of pure service in terms of FAQ issued by CBIC on Government service and are entitled to claim exemption vide serial no. 3 of notification no. 12/2017-Central Tax (Rate) and corresponding notification issued under the provisions of Odisha GST.

6.0. The appellant was given opportunity of personal hearing and on 28.02.2019, Anand Prakash Rai, Director and Yash Dev Arya, C.A appeared before the authority and during the hearing they reiterated the written submissions.

6.1. The appellant sought the rulings seeking their eligibility to exemption in terms of entry sl no 3 of Notification no 12/2017-Central Tax (Rate) dated 28-06-2017, which has been extended to Pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Central Government, State Government or Union territory or local authority or a Governmental authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution. The AAR was of the view that the activities



undertaken by the applicant do not constitute supply of pure services as it involves significant use of goods/materials.

6.1.1. The appellant in their submission referred to question no '25' of FAQ for Government Services which clarifies, to quote;-

Question 25 : What is the scope of 'pure services' mentioned in the exemption notification No. 12.2017 - Central Tax 9Rate), dated 28-06-2017?

Answer: In the context of the language used in the notification, supply of services without involving any supply of goods would be treated as supply of 'pure services'. For example, supply of man power for cleanliness of roads, public places, architect services, consulting engineer services, advisory services, and like services provided by business entities not involving any supply of goods would be treated as supply of pure services. On other hand, let us take the example of a governmental authority awarding the work of maintenance of street lights in a Municipal area to an agency which involves **apart from maintenance, replacement of defunct lights and other spares**. In this case, the scope of the service involves maintenance work and supply of goods, which falls under the works contract services. The exemption is provided to services involves only supply of services and not for works contract services.

6.1.2. The appellant has cited above facts in the grounds of appeal to support their stand. In this FAQ clarification, it is clearly clarified, taking example of governmental authority awarding the work of maintenance of street lights in a Municipal area to an agency which involves apart from maintenance, replacement of defunct lights and other spares. As such activities involves maintenance work and supply of goods, which falls under the works contract services cannot be construed as pure service.

The appellant under Para 6 of the grounds of appeal has stretched the interpretation that they are not supplying any goods in the instant service. Therefore, as per the FAQ clarification, the service would be treated as supply of pure service.

But admittedly, the appellant has mentioned that they are bound by the contract to replacement of the non-fixable fixtures at their own cost during the contract period and they are also installing the LED lights which are under their contract service.

The above facts are clear from the Agreement of Para 6.1, Phase 4 and Para 7.2.1 to substantiate the facts which is reproduced below:-

Para 6.1, Phase 4 Operation & Maintenance Phase

"O&M of switching points and street lighting fixtures covered under the Project, including (but not limited to) the replacement of non-functional fixtures at the Contractor's own cost."

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Para 7.2.1

"The Contractor shall remain the owner of the equipment and systems installed by the Contractor during the Term. The Contractor shall undertake all the procurement of equipment and service necessary for the Project. The Contractor shall hand over any replaced equipment, fittings or other items to BMC with proper documentation for BMC's verification. The replaced equipment shall be free of any lien. At the end of the Term, the Contractor shall submit to BMC a list of all the equipment, fittings or other items that were replaced during the Term."

Therefore, we are of the view that the aforesaid clarification issued by CBIC doesn't negate the findings of AAR, Odisha in as much as it was clarified that maintenance of street lights involves apart from maintenance, replacement of defunct lights and other spares which falls under work contract service. The exemption is only available to pure services which don't involve any supply of goods.

6.2. On the contention advanced by the appellant on the issue of supply, we found that in terms of sub-section 1A to Section 7 of the C.G.S.T Act, 2017 certain activities or transactions as referred in Schedule II shall be treated either as supply of goods or services as referred therein.

6.2.1. In terms of clause (a) of Para '4' of the Schedule II, to quote:-

"4. Transfer of business assets

(a) Where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, such transfer or disposal is a supply of goods by the person;."

In view of the aforesaid specific provision, the contention of the appellant that the transaction does not involve any supply of goods does not hold good.

Para 7.2.2 of the agreement is very well relevant to the above provision which is reproduced below:-

"Para 7.2.2 At the expiry of the Term, all rights and titles to, and interests in, all improvements and equipment constructed or systems installed are vested in BMC, subject to any payments made by BMC to the Contractor in accordance with Article 27.5.4 if applicable, free and clear of all and any liens and encumbrances created or caused by the Contractor. The Contractor shall surrender possession of the said equipment and systems to BMC in good repair and condition, reasonable wear and tear accepted."

On the contract, it is clearly specified that all installed equipments constructed or system installed are transferred to BMC in good condition. Therefore, the activities carried out by the appellant in the instant case will be considered as a supply of



goods in terms of the provisions of Schedule II, Para 4-A of CGST Act, 2017 / SGST Act, 2017. The appellant under the grounds of appeal has not put forth any arguments or legal provisions to negate the applicability. Therefore, the contention of the appellant that the transaction doesn't involve any supply of goods is not sustainable.

6.3. The appellant in their grounds of appeal has also relied upon the decision in the case of EGIS India Consultants Engineers Private Limited reported in 2018 (16) G.S.T.L. 171 (A.A.R. -GST). However, we are of the considered view that the said decision is distinguishable in the facts and circumstances of the case in as much as relied upon case does not involve operation and maintenance of street light but related to consultancy services.

6.4. The Meghalaya High Court's decision in the case of *Tata Consultancy Services Limited Versus The State of Meghalaya [2014(69)VST 230 (Megh)]* as relied upon by the appellant is also of no assistance to the appellant in as much as the said decision is in the context of applicability of VAT and deductibility of Works Contracts tax during the operation stage of BOOT contracts under the provisions of Meghalaya Value Added Tax Act, 2003. Neither the said judgment is in the context of GST nor does it decide on applicability of VAT on eventual transfer of ownership.

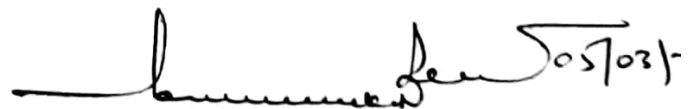
7.0. Thus, the appeal filed by the appellant is rejected. Since, the rulings of the AAR and AAAR are binding on the appellant, they are required to deposit GST as per the rulings.



(Saswat Mishra)

Member

**ODISHA APPELLATE AUTHORITY
FOR ADVANCE RULING**



(Naresh Penumaka)

Member

**ODISHA APPELLATE AUTHORITY
FOR ADVANCE RULING**



Copy:-

1. M/s. Super Wealth Financial Enterprises Pvt. Ltd., Plot No.3198/5183, Gauri Vihar, Lewis Road, Bhubaneswar, Dist.-Khurda-752002.
2. The Authority for Advance Ruling, Odisha.
3. The Commissioner, CGST & Central Excise, Bhubaneswar Commissionerate, Bhubaneswar.
4. The Commissioner of Commercial Taxes & GST, Odisha, Cuttack.
5. The Joint Commissioner of CT & GST, Bhubaneswar-I Circle, Bhubaneswar.
6. The Assistant Commissioner, GST & Central Excise, Bhubaneswar-I Division, Bhubaneswar.
7. The Web Manager, www.gstcouncil.gov.in

