


<p style="text-align: center;">GUJARAT APPELLATE AUTHORITY FOR ADVANCE RULING GOODS AND SERVICES TAX D/5, RAJYA KAR BHAVAN, ASHRAM ROAD, AHMEDABAD – 380 009.</p>	
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ADVANCE RULING(APPEAL) NO. GUJ/GAAR/APPEAL/2025/02
(IN APPLICATION NO. Advance Ruling/SGST&CGST/2021/AR/25)

Date : 22.01.2025

Name and address of the appellant	:	M/s. GSPC (JPDA) Ltd., GSPC Bhavan, B/h Udyog Bhavan, Sector-11, Gandhinagar.
GSTIN of the appellant	:	24AACCG8398Q1ZQ
Advance Ruling No. and Date	:	GUJ/GAAR/R/50/2021 dated 6.9.2021
Date of appeal	:	14.10.2021
Date of Personal Hearing	:	8.11.2024
Present for the appellant	:	Shri Anil Chauhan

At the outset we would like to make it clear that the provisions of the Central Goods and Services Tax Act, 2017 and Gujarat Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act, 2017' and the 'GGST Act, 2017') are *pari materia* and have the same provisions in like matter and differ from each other only on a few specific provisions. Therefore, unless a mention is particularly made to such dissimilar provisions, a reference to the CGST Act, 2017 would also mean reference to the corresponding similar provisions in the GGST Act, 2017.

2. The present appeal is filed under Section 100 of the CGST Act, 2017 and the GGST Act, 2017 by M/s. GSPC (JPDA) Ltd., (for short – 'Appellant') against the Advance Ruling No. GUJ/GAAR/R/50/2021 dated 6.9.2021.

3. Briefly, the facts are enumerated below for ease of reference:

3.1. M/s. GSPC [JPDA], holding 20% participating interest [PI], along with 5 other concessionaries, entered into a Joint Operating Agreement [JOA]. The appellant along with the concessionaries also entered into a Production Sharing Contract [PSC] with Timor Sea Designated Authority for undertaking exploration activities in Block JPDA 06-103 in the Joint Petroleum Development Area [JPDA]. One amongst the concessionaries, M/s. Oilex Ltd, was appointed as the operator under the JOA.



3.2. JPDA is an area of Timor-Leste & Australia & the petroleum existing within JPDA is a resource exploited jointly by Governments of Timor-Leste and Australia.

3.3. Timor-Leste Government, initiated arbitration proceedings against Government of Australia to have certain Maritime Agreements in Timor Sea Treaty to be declared as *void-ab-initio*. This termination would result in automatic termination of Timor Sea Treaty governing petroleum operations in JPDA & the production sharing contract entered into for JPDA 06-103.

3.4. The six concessionaries in view of the aforementioned arbitration proceedings, requested ANP¹ for termination of the PSC by mutual agreement. ANP, issued a notice of intention to terminate PSC to the operator. ANP thereafter terminated the PSC with a demand of payment of estimated cost of exploration not carried out & damages for breach of its local content obligations in terms of article 4.5(a)(iii) of PSC.

3.5. ANP further filed a request for arbitration; settlement was reached by the parties regarding the amount to be payable by the concessionaries to ANP; the Arbitral Tribunal was thereafter notified of the settlement so arrived; the Arbitral Tribunal, in view of the settlement agreement between the parties, declared the proceedings closed in accordance with the rules.

3.6. The Arbitral Tribunal, directed payment of an amount of USD 80,00,000/- of which the GSPC (JPDA)'s share was 20%.

4. In view of the foregoing facts, the appellant had sought Advance Ruling on the following questions, *viz*:

"Whether payment of settlement fees against demand made by ANP vide letter dated 15.7.2015 attract levy of GST under GST regulations."

5. Consequent to hearing the applicant, the Gujarat Authority for Advance Ruling [GAAR], recorded the following findings *viz*

- that the reason GSPC along with other concessionaries sought termination was due to uncertainty arising out of arbitration initiated by Timore-Leste Government

¹ ANP [Autoridade Nacional do Petroleo E Minerais] is Timor-Leste's regulatory authority for oil, gas and mineral related activities; that this institution is vested with administrative and financial autonomy.

against Government of Australia to have certain maritime agreements in Timor Sea declared as void ab initio;

- that in this case, GSPC is paying the amount to ANP & not the other way round;
- that the amount paid is not an exploration cost/reimbursement as contended by the appellant;
- the appellant is obliged to pay only its proportionate share and not jointly/severally, as is being contended;
- that in pursuance of the deed of settlement & release, there was an agreement between the appellant and ANP; that it was related to ANP agreeing to do an act, tolerate the situation and refraining from pursuing the arbitration proceedings;
- that the payment of USD 80,00,000/- is not arising as a condition to the PSC but is made on account of services provided by ANP to GSPC(JPDA);
- that ANP has supplied the service from non taxable territory to a taxable territory;
- that the subject settlement amount is not due to breach of PSC but due to ANP's obligation to supply said services to GSPC.

6. The GAAR, thereafter, vide the impugned ruling dated 18.10.2021, held as follows:

"GSPC (J) is liable to pay IGST, vide Reverse Charge Mechanism on import of subject supply of service from ANP."

7. Aggrieved by the aforesaid advance ruling, the appellant is before us, raising the following contentions, viz

- the payment to ANP is on account of breach of condition of production sharing contract;
- that the production sharing contract is for a block in JPDA which is in non taxable territory;
- that the amount payable by the appellant to ANP is for a period prior to GST regime;
- that the production sharing contract is not akin to a service contract.

8. Personal hearing in the matter was held on 8.11.2024 wherein Shri Anil Chauhan, appeared and reiterated the submissions made in the appeal. He submitted additional submission during the course of personal hearing, reiterating the submissions already made. In the additional submission, the appellant has enclosed the copies of the following circular, judgements and advance ruling, viz

- Circular No. 178/10/2022-GST dated 3.8.22
- Northern Coalfields²
- Krishnapatnam Port Company Ltd³
- K N Food Industries P Ltd⁴
- Neyveli Lignite Corporation Ltd⁵
- Steel Authority of India Ltd⁶
- Amit Metaliks Ltd⁷

² 2023 (71) GSTL 63 Tri Del

³ 2023 (72) GSTL 259 Tri Hyd

⁴ 2020 (38) GSTL 60 Tri All

⁵ 2021 (53) GSTL 401 Tri-Chennai

⁶ 2021 (55) GSTL 34 Tri-Chennai

⁷ 2021 (41) GSTL 325 Tri Kolkata



- Achampet Solar P Ltd⁸

Sr. No.	Date	Particulars
1	15.11.2006	Production Sharing Contract [PSC]
2	9.1.2007	Joint Operating Agreement [JOA]
3	12.7.2013	Operator Oilex requested for termination of PSC
4	13.5.2015	ANP issued a notice of termination
5	15.7.2015	ANP terminated the PSC with demand of payment of estimated cost of exploration not carried out & damages for breach of its local content obligations.
6	8.10.2018	ANP filed a request for arbitration with the Secretariat of International Court of Arbitration of the International chamber of Commerce [ICC]
7	15.7.2020	Settlement amount agreed between parties vide deed of settlement & release
8	21.8.2020	Parties to arbitration notified the Arbitral Tribunal that settlement had been reached & requested that a final consent award be issued by the Arbitral Tribunal
9	24.8.2020	Arbitral Tribunal declared the proceedings closed.
10	16.9.2020	Arbitral Tribunal passes order by consent

FINDINGS

9. We have carefully gone through and considered the appeal papers, written submissions filed by the appellant, submissions made at the time of personal hearing, the Advance Ruling and other materials available on record.

10. The list of important dates, *qua* this contract is mentioned below for ease of reference:

11. The appellant's primary contention is that ANP vide its notice dated 15.7.2015, terminated the PSC with a demand of payment of penalty on account of breach exploration not carried out and damages for breach of its local content obligations. On the other hand, GAAR vide its impugned ruling has held that the settlement amount payable to ANP is not due to breach of PSC but due to ANP's obligation to supply services to appellant.

12. We would like to reproduce some relevant extracts of the Production Sharing Contract [PSC] for the Joint Development Area JPDA 06-103

⁸ 2023 (4) CENTAX 172 -App. AAR GST Telangana



2.4 Grounds for Termination

- (a) Where a Contractor:
- (i) has not complied with any plan, approval, condition or term to which the Agreement is subject;
 - (ii) has not complied with the Code;
 - (iii) has knowingly provided false information to the Designated Authority in connection with this Agreement;
 - (iv) has not paid any amount payable by it under the Code or under this Agreement within a period of three (3) months after the day on which the amount became payable; or
 - (v) is subject to or commits an Insolvency Event.
- the Designated Authority may, with the approval of the Joint Commission, on that ground, by instrument in writing served on the Contractor terminate this Agreement.
- (b) The Designated Authority shall not terminate this Agreement due to one or more of the relevant grounds identified in sub-paragraphs 2.4(a)(i)-(iv) unless there has been a material breach by the Contractor of one of those grounds.
- (c) Where this Agreement expressly grants the Designated Authority a right to terminate this Agreement, that right shall be exercised in accordance with the requirements of sub-Articles 2.4 and 2.5.

4.5 Consequences of Non-Performance

- (a) If, in a Contract Year, the Contractor carries out less Exploration than is required of it under the Exploration Work Programme and Budget, the Designated Authority may:
- (i) require that the shortfall be added to the Exploration to be carried out in the next Contract Year;
 - (ii) require payment of the estimated cost of the Exploration not carried out in that Contract Year; or
 - (iii) terminate this Agreement and require payment of the estimated cost of the Exploration not carried out in that Contract Year.
- (b) If, in a Contract Year, the Contractor carries out more Exploration than is required of it, the excess shall be credited against Exploration to be carried out in the following Contract Year and, to the extent in excess of that Exploration, shall be further carried forward.
- (c) For the purposes of the foregoing provisions of this Article 4, and of Article 6 and Annex C and except with the consent of the Designated Authority, no work in a Development Area will be regarded as Exploration except to the extent in respect of a formation shallower or deeper than the field concerned and in which no Discovery has been made.

13. On going through the notice of intention to terminate dated 13.5.2015, issued by ANP to the concessionaires, we observe the following viz [relevant extracts]

1. NOTICE OF INTENTION TO TERMINATE

1.2 The ANP's right to terminate the PSC arises in accordance with articles 2.4 & 4.5 (a)(iii) of the PSC of the contractor's material breach of the terms of the PSC, in particular, the contractor's failure to meet the Exploration Work Program by 15.1.2014 & deliver the third well.

2. BASIS FOR ISSUANCE

2.2

A Contractors breach of its Exploration work Program

2.3 As the matter currently stands:

2.3.4 in such circumstances, Article 4.5(a)(iii) provides the ANP with the express right to terminate the PSC & require from the Contractor payment of the estimated cost of the Exploration not carried out in that Contract year.

2.4 For completeness, the relevant terms of Article 4.5(a)(iii) provide:

“(a)

.....

(iii) terminate this Agreement and require payment of the estimated cost of the Exploration not carried out in that Contract year.”

14. A conjoint reading of the extracts reproduced above, leads us to a conclusion, that the payment by the appellant of USD 80,00,000/- to ANP, is a

consequence of breach of PSC and **not** in pursuance of the deed of settlement & release agreement between the appellant and ANP and certainly not related to ANP's obligation to supply services to GSPC viz ANP performing certain obligations towards GSPC such as release of its performance guarantee.

15. We would next examine the taxability of the amount so paid by the appellant to ANP for breach of PSC. The appellant after relying on the circular dated 3.8.2022 and numerous case laws, etc has averred that settlement amount payable by the appellant is not taxable under GST since the payment is towards breach of condition of contract & the liability arises out of the terms and conditions stipulated in the PSC.

16. The circular dated 3.8.2022, relied upon by the appellant, clarifies liquidated damages as under:

7.1.1 It is common for the parties entering into a contract, to specify in the contract itself, the compensation that would be payable in the event of the breach of the contract. Such compensation specified in a written contract for breach of non-performance of the contract or parties of the contract is referred to as liquidated damages. Black's Law Dictionary defines 'Liquidated Damages' as cash compensation agreed to by a signed, written contract for breach of contract, payable to the aggrieved party.

On the question of taxability of liquidated damages, the circular further clarifies as under

7.1.4 In this background a reasonable view that can be taken with regard to taxability of liquidated damages is that where the amount paid as 'liquidated damages' is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages, in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and are not taxable.

7.1.5 The key in such cases is to consider whether the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. If the answer is yes, then it constitutes a 'supply' within the meaning of the Act, otherwise it is not a "supply".

7.1.6 If a payment constitutes a consideration for a supply, then it is taxable irrespective of by what name it is called; it must be remembered that a "consideration" cannot be considered de hors an agreement/contract between two persons wherein one person does something for another and that other pays the first in return. If the payment is merely an event in the course of the performance

of the agreement and it does not represent the 'object', as such, of the contract then it cannot be considered 'consideration'. For example, a contract may provide that payment by the recipient of goods or services shall be made before a certain date and failure to make payment by the due date shall attract late fee or penalty. A contract for transport of passengers may stipulate that the ticket amount shall be partly or wholly forfeited if the passenger does not show up. A contract for package tour may stipulate forfeiture of security deposit in the event of cancellation of tour by the customer. Similarly, a contract for lease of movable or immovable property may stipulate that the lessee shall not terminate the lease before a certain period and if he does so he will have to pay certain amount as early termination fee or penalty. Some banks similarly charge pre-payment penalty if the borrower wishes to repay the loan before the maturity of the loan period. Such amounts paid for acceptance of late payment, early termination of lease or for pre-payment of loan or the amounts forfeited on cancellation of service by the customer as contemplated by the contract as part of commercial terms agreed to by the parties, constitute consideration for the supply of a facility, namely, of acceptance of late payment, early termination of a lease agreement, of pre-payment of loan and of making arrangements for the intended supply by the tour operator respectively. Therefore, such payments, even though they may be referred to as fine or penalty, are actually payments that amount to consideration for supply, and are subject to GST, in cases where such supply is taxable. Since these supplies are ancillary to the principal supply for which the contract is signed, they shall be eligible to be assessed as the principal supply, as discussed in detail in the later paragraphs. Naturally, such payments will not be taxable if the principal supply is exempt.

[emphasis supplied]

17. What the circular contemplates is that liquidated damages paid to compensate for loss or damage due to breach of the contract sans an agreement, express or implied, by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages, and where the liquidated damages are mere flow of money and do not constitute consideration for a supply are not taxable. What needs examination is whether the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. If the answer is yes, then it constitutes a 'supply' within the meaning of the Act, otherwise it is not a "supply".

18. The appellant's liability as worked out in the notice of intention to terminate dated 13.5.2015, is as under

3. CONTRACTOR'S LIABILITY UPON TERMINATION

- 3.1 In light of the matters raised in Section 2 above, it is the ANP's position that, upon termination, the Contractor is liable to the ANP for:
- 3.1.1 the estimated costs of the Exploration not carried out for the Contract Year 2013 (pursuant to Article 4.5(a)(iii) of the PSC) in the amount of US\$ 16,585,789.72; and
 - 3.1.2 damages for breach of its local content obligation in the amount of US\$ 433,000.00;
- thereby making the Contractor's total liability upon termination to be US\$ 17,018,789.72.
- 3.2 As to the calculation of the estimated costs of Exploration not carried out in the Contract Year 2013, these costs have been calculated as follows.
- 3.3 The Exploration Work Programme and Budget for Contract Year 2013 stipulates that a budget of US\$ 18,000,000 was allocated towards the drilling of the third committed well.
- 3.4 The Contractor did not drill the third committed well in Contract Year 2013 but expended the following amounts towards the same:
- 3.4.1 Planning and Supervision US\$ 262,641.37; and
 - 3.4.2 Well 3 US\$ 1,151,569.12.
- 3.5 Therefore, the Contractor's liability for the estimated cost of Exploration not carried out in the 2013 Contract Year is US\$ 18,000,000 - (US\$ 262,641.37 + US\$ 1,151,569.12) is US\$ 16,585,789.72.

19. Thereafter, the 'deed of settlement and release' dated 15.7.2020, signed between ANP and the concessionaires state as follows:

BACKGROUND

- A The Claimant and the Respondents are parties to the PSC.
- B The Claimant commenced the Proceedings.
- C The parties have agreed to settle the Dispute, and discontinue the Proceedings, on the terms set out in this deed.
- D The First Respondent warrants that the First Respondent has authority to sign this deed on behalf of the Third, Fourth and Fifth Respondents.

Settlement Sum means the amount of USD 8,000,000.

2. SETTLEMENT

Payment of Settlement Sum

- 2.1 The parties agree, in full and final settlement of the Dispute and the Proceedings and without admission by any party as to liability in respect of the claims or counterclaims, that the Respondents shall pay to the Claimant the Settlement Sum in accordance with clauses 2.2 to 2.5 of this deed.
- 2.2 The Respondents shall each pay their proportionate share of the Settlement Sum to the Claimant in accordance with the proportions in clause 2.2(a) to (f). The liability of the Respondents to pay the Settlement Sum is several and each Respondent is obliged to pay only its proportionate share of the Settlement Sum as set out in clause 2.2(a) to (f):
- (a) First Respondent – 10% of the Settlement Sum;
 - (b) Second Respondent – 15% of the Settlement Sum;
 - (c) Third Respondent – 20% of the Settlement Sum;
 - (d) Fourth Respondent – 20% of the Settlement Sum;
 - (e) Fifth Respondent – 20% of the Settlement Sum; and
 - (f) Sixth Respondent – 15% of the Settlement Sum.
- 2.3 The First Respondent shall pay its share of the Settlement Sum to the Claimant in instalments, in the amounts and by the dates as set out below:
- (a) \$50,000 to be paid within 28 days of the Execution Date;
 - (b) \$250,000 to be paid within 13 months of the Execution Date;
 - (c) \$250,000 to be paid within 19 months of the Execution Date; and
 - (d) \$250,000 to be paid within 25 months of the Execution Date.
- 2.4 Each of the Second Respondent, the Third Respondent, the Fourth Respondent, the Fifth Respondent and the Sixth Respondent shall pay their share of the Settlement Sum within 14 days of the Execution Date.
- 2.5 Payment shall be made by way of electronic funds transfer into the following account:
- Bank: Australia and New Zealand Banking Group Limited
Timor Branch (ANZ)
- Account Name: Autoridade Nacional do Petroleo e Minerais -TL JPDA
- Account No: 231271



IBN: TL38003000000033127158

and will be taken to have been made upon receipt of cleared funds into the above account.

Resolution of the Proceedings

- 2.6 By signing this deed, the parties agree to the terms of the Consent Award set out in *Annexure A*.
- 2.7 Upon the Execution Date, the Claimant shall promptly seek orders from the Tribunal in the form of the Consent Award.

20. As is evident in this case liquidated damages are paid only to compensate for loss due to breach of PSC in terms of clause 4.5(a)(iii). We have not been in a position to pinpoint any agreement, express or implied between ANP and the six concessionaire that on receiving the liquidated damages, ANP will refrain from or tolerate an act or do an act for the concessionaires [including the appellant] paying the liquidated damages. This being the factual matrix, the liquidated damages, in terms of the aforementioned circular are merely a flow of money and such payments do not constitute consideration for a supply and hence, are not taxable. On going through the documents produced before us, it is difficult to establish that the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. Nonetheless, we also find that the impugned ruling dated 6.9.2021 erred in holding that the settlement amount [liquidated damages] is not due to breach in PSC but due to ANPs obligation to supply services to the appellant.

20.1. We further find that the issue was clarified vide circular no. 178/10/2022-GST dated 3.8.2022 which has been issued consequent to the impugned ruling dated 6.9.2021.

21. The appellant has relied upon numerous case laws. We would like to reproduce the relevant extract from the judgement in the case of Northern Coalfields Ltd, supra, which substantiates our findings above viz

20. In this connection it would also be pertinent to refer to the Circular dated 03.08.2022 issued by the Department of Revenue regarding applicability of goods and service tax on liquidated damages, compensation and penalty arising out of breach of contract in the context of „agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act“. This Circular emphasizes that there has to be an express or implied agreement to do or abstain from doing something against payment of consideration for a taxable supply to exist and such an act or a situation cannot be imagined or presumed to exist merely because there is a flow of money from one party to another. It also mentions that unless payment has been made for an independent activity of tolerating an act under an

independent arrangement entered into for such activity or tolerating an act, such payment will not constitute „consideration“ and such activities will not constitute „supply“. The relevant portion of the Circular is reproduced below:

“ Agreement to do or refrain from an act should not be presumed to exist

There has to be an express or implied agreement: oral or written, to do or abstain from doing something against payment of consideration for doing or abstaining from such act, for a taxable supply to exist. An agreement to do an act or abstain from doing an act or to tolerate an act or a situation cannot be imagined or presumed to exist just because there is a flow of money from one party to another. Unless there is an express or implied promise by the recipient of money to agree to do or abstain from doing something in return for the money paid to him, it cannot be assumed that such payment was for doing an act or for refraining from an act or for tolerating an act or situation. Payments such as liquidated damages for breach of contract, penalties under the mining act for excess stock found with the mining company, forfeiture of salary or payment of amount as per the employment bond for leaving the employment before the minimum agreed period, penalty for cheque dishonour etc. are not a consideration for tolerating an act or situation. They are rather amounts recovered for not tolerating an act or situation and to deter such acts; such amounts are for preventing breach of contract or nonperformance and are thus mere "events" in a contract. Further, such amounts do not constitute payment (or consideration) for tolerating an act, because there cannot be any contract: (a) for breach thereof, or (b) for holding more stock than permitted under the mining contract, or (c) for leaving the employment before the agreed minimum period or (d) for doing something leading to the dishonour of a cheque. As has already been stated, unless payment has been made for an independent activity of tolerating an act under an independent arrangement entered into for such activity of tolerating an act, such payments will not constitute 'consideration' and hence such activities will not constitute "supply" within the meaning of the Act.

(emphasis supplied)

Since we have already ruled in favour of the appellant, we do not wish to discuss the other case laws, rulings etc., relied upon by the appellant, it being a mere academic exercise.

22. In view of the foregoing, we set aside the Advance Ruling No. GUJ/GAAR/R/50/2021 dated 6.9.2021 of the GAAR in the case of M/s. GSPC (JPDA) Ltd. We modify the ruling and hold that GSPC (JPDA) Ltd., is not liable to pay GST on settlement fees against demand made by ANP vide letter dated 15.7.2015, subsequently settled vide Deed of Settlement and Release dated 15.7.2020 in terms of circular no. 178/10/2022-GST dated 3.8.22 since it is liquidated damages.


(Rajeev Topno)
Member (SGST)


(B V Siva Naga Kumari)
Member (CGST)

Place: Ahmedabad

Date: 22.01.2025

