



BEFORE THE AUTHORITY FOR ADVANCE RULING - ANDHRA PRADESH

Goods and Service Tax

D.No.12-468-4, Adjacent to NH-16 Service Road, Kunchanapalli, Guntur-522501

Present

1. Sri. K. Ravi Sankar, Commissioner of State Tax (Member)
2. Sri. RV Pradhamesh Bhanu, Joint Commissioner of Central Tax (Member)

AAR No.04 /AP/GST/2023 dated:31 .03.2023

1	Name and address of the applicant	M/s. AP Power Development Co. Ltd.,
2	GSTIN	37AAFCA6825R1Z0
3	Date of filing of Form GST ARA-01	09.12.2022
4	Personal Hearing	11.01.2023
5	Represented by	A. Siva Prasad, CA
6	Jurisdictional Authority - STATE	Circle - Nellore-1 Division - Nellore
7	Clause(s) of section 97(2) of CGST/SGST Act, 2017 under which the question(s) raised	(a) classification of any goods or services or both; (g) whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a supply of goods or services or both, within the meaning of that term.

ORDER

(Under sub-section (4) of Section 98 of Central Goods and Services Tax Act, 2017 and sub-section (4) of Section 98 of Andhra Pradesh Goods and Services Tax Act, 2017)

1. At the outset we would like to make it clear that the provisions of CGST Act, 2017 and SGST Act, 2017 are in parimateria 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 would also mean reference to the corresponding similar provisions in the APGST Act.
2. The present application has been filed u/s 97 of the Central Goods & Services Tax Act, 2017 and AP Goods & Services Tax Act, 2017 (hereinafter referred to CGST Act and APGST Act respectively) by M/s. Andhra Pradesh Medical Services and Infrastructure Development Corporation(hereinafter referred to as applicant), registered under the AP Goods & Services Tax Act, 2017.

3. Brief Facts of the case:

3.1 M/s AP Power Development Co. Ltd.,(APPDCL) is a special-purpose vehicle which was originally set up to implement mega power projects in the state of Andhra Pradesh. The company shareholding consists of AP Genco with 51 percent stake and the balance 49 percent being held by the four discoms of erstwhile Andhra Pradesh (together holding 45.04 percent) and the Government of Andhra Pradesh (3.96 percent). APPDCL runs a thermal power project, Sri Damodaram Sanjeevaiah thermal power station, in krishnapatnam, Andhra Pradesh. The assesses are under state jurisdiction, registered in nellore 1 circle, nellore 1 division and having GSTIN 37AAFCA6825R1Z0.

3.2 APPDCL has entered an agreement with Chettinad logistics private limited for supply of certain services which includes liasoning with M/s. MCL, east coast railways, paradip and adani Krishnapatnam ports for coordination and supervision of coal loading, liasoning with east coast Railways for arranging rakes, transportation of raw coal, crushing of boulders to -100 mm size, storage and handling at paradip port, further movement to Sri Damodaram sanjeevaiah thermal power station , handling at Adani krishnapatnam port and from Adani krishnapatnam port to SDSTPS site by dedicated conveyor system and also by ensuring minimum of transit loss.

3.3 In the event of failure in performance of job assigned to the service provider (Chettinad logistics private ltd) , the service receiver (APPDCL) will collect liquidated damages for increase in moisture of raw coal over the loading end, for increase in ash percentage, penalties for late transportation of coal and also penalty for short supply of coal, as per the penalties clause 11 of the contract.

4. Questions :

The applicant seeks advance ruling on the following:

1. Whether liquidated damages collected by the APPDCL from CHETTINAD LOGISTICS PRIVATE LIMITED for non-performing of an act constitute as supply as per Section 7 of GST act.
2. What is the classification under GST for such liquidated damages collected by the service receiver from such service provider for non performing of an act.
3. What is the applicable rate of tax if the answer to the question number 1 is affirmative.

On Verification of basic information of the applicant, it is observed that the applicant is under state jurisdiction i.e, Nellore-I Circle, Nellore Division. Accordingly, the application has been forwarded to the jurisdictional officer and a copy marked to the Central Tax authorities to offer their remarks as per Sec. 98(1) of CGST / APGST Act 2017.

In response, remarks are received from the state jurisdictional officer concerned stating that no proceedings lying pending with the issue, for which the advance ruling sought by the applicant.

5. Applicant's Interpretation of Law:

- 5.1. The applicant submits that, as per Section 73 of the Contract Act, 1972, when a contract has been broken, the party which suffers by such breach is entitled to receive from the other party compensation for any loss or damage caused to him by such breach. The compensation is not by way of consideration for any other independent activity; it is just an event in the course of performance of that contract.
- 5.2. The applicant submits that, Section 74 of the Contract Act, 1972 provides that when a contract is broken, if a sum has been named or a penalty stipulated in the contract as the amount or penalty to be paid in case of breach, the aggrieved party shall be entitled to receive reasonable compensation not exceeding the amount so named or the penalty so stipulated.
- 5.3. The applicant further submits that, as per the provisions laid down under section 7 of the CGST Act, the expression "supply" includes all forms of supply of goods/services for a consideration by a person in the course and furtherance of business .
- 5.4. The applicant submits that, Schedule II Para 5(e) makes it amply clear that in order to invoke the above as taxable activity, there needs to be an agreement to tolerate a situation between APPDCL and CHETTINAD LOGISTICS PRIVATE LIMITED.
- 5.5. The applicant further submits that, these liquidated damages arise on mutual acceptance of both parties on account of an 'unintentional occurrence' which both parties actually intend to avoid. Hence liquidated damages cannot be said to be a consideration received for tolerating the breach or non performance of contract. They are rather payments for not tolerating the breach of contract. The applicant submits that, the clause of liquidated damages in the agreement between APPDCL and Chettinad logistics private limited, provided for with an intent to ensure due performance of an agreement or to further obedience of the law. Payment of liquidated damages is stipulated in a contract to ensure performance and to deter non-performance, unsatisfactory performance or delayed performance. It is an expression of dissatisfaction or a form of penalty resulting from unsatisfactory performance or breach of the contract.

5.7 The applicant submits that, liquidated damages are a measure of loss and damage that the parties agree would arise due to breach of contract. They do not act as a remedy for the breach of contract. They do not retribute the aggrieved person.

5.8. The applicant submits that, such liquidated damages or penalties are not the desired result or intended to be a source of revenue for APPDCL, but are incurred to compensate for loss suffered by APPDCL, upon the occurrence of an unintended event. The very purpose of agreeing to payment of liquidated damages is to ensure performance and not for tolerating non-performance and we reiterate the fact that APPDCL contract with CHETTINAD LOGISTICS PRIVATE LIMITED not with an intent of non-performance or to tolerate non-performance.

5.9. The applicant submits that the 'liquidated damages' is an amount paid only to compensate the loss or damage suffered by APPDCL due to breach of the contract and there is no agreement, express or implied, by the APPDCL receiving the liquidated damages, to refrain from or tolerate an act or to do anything by CHETTINAD LOGISTICS PRIVATE LIMITED. Liquidated damages received by APPDCL is mere a flow of money from the CHETTINAD LOGISTICS PRIVATE LIMITED, who causes breach of the contract to APPDCL, who suffers loss or damage due to such breach. Hence, such payments do not constitute consideration for a supply and are not taxable.

6. Personal Hearing:

The proceedings of Personal Hearing were conducted on 11.01.2023, for which the authorized representative, A. Siva Prasad, Chattered Accountant attended and reiterated the submissions already made. He had also made references to the circular 178/10/2022 and contended that the case is covered by the circular and the circular had provided that the damages collected by the appellant are not taxable as per the said circular.

7. Discussion and Findings:

We have examined the issues raised in the application in light of the facts and arguments submitted by the applicant. We have considered the submissions made by the applicant in their application for advance ruling. We have considered the issues involved, from which advance ruling is sought by the applicant and the relevant facts along with arguments made by the applicant and also their submissions made during the time of the personal hearing.

The applicant submits that, liquidated damages will be collected when the service provider (Chettinad Logistics Private Ltd) fails to perform the job assigned by the service receiver (APPDCL) as per the terms and conditions stipulated in the contract. Service

penalties will collect liquidated damages incurred due to increase in moisture of raw coal over the loading end, for increase in ash percentage, penalties for late transportation of coal and also penalty for short supply of coal. The issue at hand is to determine whether liquidated damages collected by the APPTEL from CHETTINAD LOGISTICS PRIVATE LIMITED for non-performance of an act constitute a supply or not.

At this juncture, I invite attention to the provisions of Indian Contract Act, 1872 which is applicable to the above scenario. A combined reading of the provisions (1) & (3) of Section 35 of the Indian Contract Act, 1872 reveals that a failure to perform the contract at the agreed time renders it voidable at the option of the opposite party and alternatively such party can recover compensation for such loss occasioned by non-performance. Similarly Section 73 & 74 of the Indian Contract Act enables recipient of supplies under a contract to be compensated with damages for breach of any provision of the contract.

In the present case, Liquidated damages are claimed by the applicant from the contractor due to increase in moisture of raw coal over the loading end, for increase in ash percentage, penalties for late transportation of coal and also penalty for short supply of coal.

The moot point here is whether the activity is supply or not or in words whether the said collection in the form of liquidity damages is consideration or not. It is immaterial to decide whether the amount collected by the applicant is for tolerating the act or for not toleration the act

In order to decide the same, we have a closer look into the definition of consideration as per GST Act.

section 2(31) 'consideration' in relation to the supply of goods or services or both includes--

- (a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;
- (b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

As per the above definition, the meaning of the word consideration is very broad. It includes any payment made or to be made, whether in money or otherwise,

- a) in respect of
- b) in response to
- c) for inducement of supply of goods or services.

In the present case the service provider **CHETTINAD LOGISTICS PRIVATE LIMITED** is paying certain amount to the applicant. The amount so paid is neither ad-hoc, unconditional nor at the whims of any service provider nor the appellant. There is a clear mathematical formula as to calculation of such amount and the conditions/scenarios contingent upon which the amounts are payable are clearly narrated in the agreement itself.

It is simply inconceivable that any prudent business person will pay amounts for no merit and benefit. It is certain that the service provider is paying the said amounts only for certain advantage derived or to ward-off any disadvantage incurred. Hence it is only in response to something done by the appellant. It is inconsequential whether the payment is for tolerating the mistake or not-tolerating.

The circular relied upon by the appellant one is not universal and absolute. The circular is only meant to clarify the position of law and shall be applied reasonably having regard to the facts of the case. The circular had clearly mentioned, inter alia, vide para 7.1.6 that "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.

Thus the circular had said payment towards damages are incidental to the main supply and if the main supply is taxable they shall also be taxable and if the principal supply is exempt then the incidental shall also be exempt. Thus the circular shall be understood in the proper context.

Therefore, in the light of section 7 read with definition of consideration u/s 2(31), liquidity damages paid by defaulting party to the non-defaulting party for tolerating the act of non performance or breach of contract have to be treated as consideration for tolerating of an act or a situation under an agreement and hence such an activity constitutes supply of service and the liquidity damages are exigible to tax under CGST and SGST @9% each under the chapter head 9997 at serial no. 35 of Notification No.11/2017- Central/State tax rate.

RULING

(Under Section 98 of Central Goods and Services Tax Act, 2017 and the Andhra Pradesh Goods and Services Tax Act, 2017)

Question 1: Whether liquidated damages collected by the APPDCL from CHEETINAD LOGISTICS PRIVATE LIMITED for non-performing of an act constitute as Supply as per Section 7 of GST act.

Answer : Affirmative

Question 2 : What is the classification under GST for such liquidated damages collected by the Service receiver from such service provider for Non performing of an act

Answer: The activity stated supra would be covered within chapter head 9997-'Other Services'

Question 3: What is the Applicable rate of tax if the answer to the question number 1 is affirmative.

Answer: The activity stated supra is taxable at 18%(9% CGST and 9% SGST)liquidity rate of tax.

Sd/-K.Ravi Sankar
Member

Sd/- RV Pradhamesh Bhanu
Member

//t.c.f.b.o//


Deputy Commissioner (ST)
Registrar
Authority for Advance Ruling
O/o. Chief Commissioner (State Tax)
Andhra Pradesh, Vijayawada.

To
M/s. AP Power Development Co. Ltd., Chief Financial Officer, APPDCL, 2nd Floor APPC Building Vidyut Soudha, Gunadala, Vijayawada-520004 (By Registered Post)

Copy to

1. The Assistant Commissioner of State Tax, Mangalagiri Circle, Guntur Division.
(By Registered Post)
2. The Superintendent, Central Tax, CGST Amaravathi Capital Range, Amaravathi Division. (By Registered Post)

Copy submitted to

1. The Chief Commissioner (State Tax), O/o Chief Commissioner of State Tax, Eedupugallu, Vijayawada, (A.P)
2. The Principal Chief Commissioner (Central Tax), O/o Principal Chief Commissioner of Central Tax & Customs, Visakhapatnam Zone, GST Bhavan, Port area, Visakhapatnam-530035. A.P. (By Registered Post)

Note: Under Section 100 of the APGST Act 2017, an appeal against this ruling lies before the Appellate Authority for Advance Ruling constituted under Section 99 of APGST Act, 2017, with in a period of 30 days from the date of service of this order.