

**THE AUTHORITY FOR ADVANCE RULINGS  
IN KARNATAKA  
GOODS AND SERVICES TAX  
VANIJYA THERIGE KARYALAYA, KALIDASA ROAD  
GANDHINAGAR, BENGALURU - 560 009**

**Advance Ruling No. KAR ADRG 77/ 2021**

**Dated : 17-12-2021**

Present:

1. Dr.M.P. Ravi Prasad  
Additional Commissioner of Commercial Taxes . . . . Member (State)
2. Sri. T. Kiran Reddy  
Joint Commissioner of Customs & Indirect Taxes . . . .Member (Central)

1.	Name and address of the applicant	M/s Shapoorji Pallonji and Company Pvt. Ltd., 7 <sup>th</sup> Floor, 124, Surya Chambers, HAL Airport Road, Murugeshpalya, Bengaluru - 560 017.
2.	GSTIN or User ID	29AAACS6994C1Z1
3.	Date of filing of Form GST ARA-01	10/08/2021
4.	Represented by	Sri. S S Gupta, CA & Authorised Representative
5.	<b>Jurisdictional Authority - Centre</b>	The Commissioner of Central Tax, Bangalore East Commissionerate, Bengaluru (Range-EED5)
6.	Jurisdictional Authority - State	LGSTO-45A, Bengaluru.
7.	Whether the payment of fees discharged and if yes, the amount and CIN	Yes, discharged fee of Rs.5,000/- under CGST Act and Rs. 5,000/- under KGST Act vide CIN IBKL21072900178435 dated 12.07.2021.

**ORDER UNDER SECTION 98(4) OF CGST ACT, 2017  
& UNDER SECTION 98(4) OF KGST ACT, 2017**

M/s. Shapoorji Pallonji and Company Pvt. Ltd., (herein after referred as Applicant), 7<sup>th</sup> Floor, 124, Surya Chambers, HAL Airport Road, Murugeshpalya, Bengaluru - 560 017, having GSTIN 29AAACS6994C1Z1, filed an application for Advance Ruling under Section 97 of CGST Act, 2017 read with Rule 104 of the KGST Rules, 2017 and Section 97 of the KGST Act, 2017 read with Rule 104 of KGST Rules 2017 in form GST ARA-01 discharging the fee of Rs.5,000/- each under the CGST Act and the KGST Act.



# : Shapoorji & Pallonji



2. The applicant submitted that they are engaged in the construction business and providing works contracts services to various customers including the Government, Public Sector Undertakings, Government Entities and Private Sector entities. The applicant got the order from M/s Raichur Power Corporation Limited (herein after referred to as 'RPCL'), on winning the tender, for setting up of **Wet Limestone Flue Gas Desulphurisation** (referred as FGD) and operation & maintenance of the said plant. The applicant stated that they have initiated the work for setting up of the FGD plant; received the mobilization advances from M/s RPCL & discharged GST @ 12% on the said advances. In view of this the applicant sought advance ruling in respect of the following questions.

- a) *Whether the combined service of setting up of Wet Limestone FGD plant and operation & maintenance be considered as a composite supply?*
- b) *If answer to question (a) above is yes then, whether the supply provided by the applicant is a composite supply of works contract as per Section 2(30) and Section 2(119) of CGST Act, 2017 and what would be the principal supply?*
- c) *If the supply is considered as a composite supply of works contract services, whether the said supply to be provided by the applicant would fall under the entry no.3(iv)(e) of the Notification No.11/2017-Central Tax (Rate) dated 28.06.2017, as amended time to time?*
- d) *What would be the applicable GST rate and SAC/HSN?*

3. The applicant furnished the following relevant facts having bearing on the questions raised, in Annexure A, which are as under:

3.1 M/s RPCL floated a tender vide NIT No.KPCL/2018-19/PS/WORK\_INDENT8463 dated 09.03.2019 for providing two Wet Limestone Flue Gas Desulphurisation (FGD) plant for Unit-1 and Unit-2 of Yaramarus Thermal Power Station (800MW), Raichur District, Karnataka (herein after referred to as 'Project') and the applicant got the order, on winning the said tender, for setting up and operation & maintenance of the said FGD plant.

3.2 The clients, in general, are not interested only in awarding the contract for installing the plant but also, for smooth running of the plant, want to make the supplier responsible for operation of the plant to achieve the desired results. Therefore, normally the operation & maintenance of the plant for certain period is awarded to the supplier who is setting up the plant.

3.3 The scope of work, as provided in clause 1.0, 2.0 & 3.0 of the Notice inviting Tender and also in the Letter of Award dated 17.08.2020, is to carry out the entire activity of setting up of Wet Limestone FGD plant and operation & maintenance of the said system for three years, although the bid documents specify the period of ten years.





3.4 Clause 1.1 in Section 1 of the Bid document, specifies that the emission limit is laid down in Notification No.S.O.3305, issued by the Ministry of Environment, Forest and climate change and the details of said emission limit are given in Schedule-I of Environment (Protection) Rules, 1986, which are as detailed below:

Pollutant	TPPs(units) installed upto 21.12.2003	TPPs(units) installed after 1.4.2004 upto 31.12.2016	TPPs(units) to be installed from 1.1.2017
Particulate matter	100 mg/Nm3	50 mg/Nm3	30 mg/Nm3
Sulphur Dioxide SO <sub>2</sub>	600 mg/Nm3 (<500MW capacity units)		100 mg/Nm3
	200 mg/Nm3 (>_500MW capacity units)		
Oxides of Nitrogen (NO <sub>x</sub> )	600 mg/Nm3	300 mg/Nm3	100 mg/Nm3
Mercury (Hg)	0.03 mg/Nm3		

It classifies the thermal power project in different categories according to the date of installation of the plant and lays down the emission limit. The above emission limits are required to be achieved within a period of two years from the date of notification which has been extended to the year 2024.

3.5 M/s RPCL has set up the thermal power project after 01.01.2017. The applicant was awarded the LOA by M/s RPCL on 14.08.2020, after the submission of the bid documents. The term of payment is given in para 5.0 of the letter dated 14.08.2020. The applicant has received ten percent of initial advance of contract price and paid the GST at 12%.

3.6 M/s RPCL is already operating the thermal power project located at Yeramarus, Raichur District, Karnataka State. They have vacant land adjacent to the thermal power plant operated by M/s RPCL. The proposed system i.e. Wet Limestone FGD plant is to be installed at land adjacent to existing plant. The drawings giving the location of the existing thermal power plant and the proposed FGD system are also furnished.

3.7 The process of setting up of the Wet Limestone FGD plant can be described in the following steps:

- Ducting system** : The ducts, made of carbon steel, are used for transferring flue gas from existing chimney to the absorber. Further, to maintain the flue gas pressure, booster fans are installed to develop the required pressure for transferring flue gas.





- ii. **Absorber** : Absorber is the main equipment where the Sulphur is removed from flue gas. It is a 41.0 m height shell of 18.0 m diameter, made up of carbon steel, approximate weight of 510 tons. The Limestone slurry is sprayed inside the absorber through headers and nozzles which comes in contact with the flue gas passing through it and removes the Sulphur in it.
- iii. **Wet ball mills system** : The wet ball mills is used for grinding/crushing of limestone up to particle size of 44 micron and for preparation of limestone slurry. The ball mill shall be driven by a motor through a peripheral gear. An auxiliary motor shall also be provided for inching of mills after trip and during maintenance.
- iv. **Limestone Slurry handling system**: The limestone slurry of required fineness available from the wet ball system shall be stored in limestone slurry tanks. From limestone slurry tank, the limestone slurry shall be pumped to individual absorber by means of dedicated limestone slurry transfer pumps.
- v. **Gypsum handling system** : In the de-sulphurisation process, a by-product Gypsum is generated in liquid form. The liquid form of Gypsum generated in the Absorber is pumped into the gypsum handling system to transform it into crystal form. The main equipment includes for Gypsum Handling System is gypsum hydro cyclones, vacuum belt filters, vacuum pumps, filter water system etc.,
- vi. **Wastewater treatment and disposal System** : The FGD system produce a small amount of wastewater. The main task of the wastewater treatment plant is to adjust the pH and to remove the heavy metals and suspended solids. The waste water collected in the waste water tank of FGD system shall be provided with adequate treatment with lime as reagent and then disposed to existing ash handling system.
- vii. **Chimney** : Reinforced Cement Concrete (RCC) Chimney will be of cylindrical in shape with 9.0 m diameter and 125 m height. Treated flue gas from the absorber will flow through chimney and finally released into the atmosphere.
- viii. **Electrical & instrumentation** : Electricity is required to run slurry pumps, limestone ball mills, conveyor belts, wastewater treatment and recycling pumps, lighting of the plant etc., SCADA system will be provided to run FGD plant with automation.

3.8 The scope of operation & maintenance of FGD plant system is provided at page 636 of Technical Specification document-Section-9.0. The relevant paragraph is reproduced below:

#### **9.1.0 Scope – Operation & Maintenance**



5.0 The brief scope of work is as indicated below. The details shall be further elaborated by the bidder in the O&M manual to be submitted to Owner for approval. Items though not specifically mentioned but needed for continuous operation & maintenance of entire FGD plant to meet the intent of specification, shall be deemed to be included in scope of work of Contractor. The scope shall include all supply of spares and consumables and services indicated but not limited to the following:

a) Ensuring successful operation of FGD plant in three shifts for required SO<sub>2</sub> reduction efficiency with optimum energy and limestone consumption and producing good quality of gypsum. Further, maintenance of the entire FGD plant by appointing experienced service engineers, supervisors, operators and technicians round the clock is covered in the scope of Contractor.

b) Carrying out necessary Preventive maintenance and Breakdown maintenance, overhauls, furnishing technical assistance from experts & arranging visit of O&M experts to site from time to time (as & when required and to be discussed mutually by Contractor & Owner) for ensuring smooth operation and maintenance of the plant. Also carrying out maintenance during annual overhauling / capital overhaul of the units.

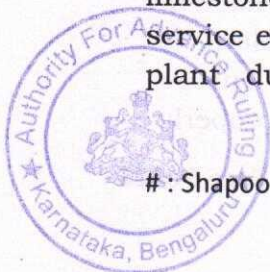
c) Contractor has to ensure that FGD plant is operated and maintained as per "Operation and Maintenance instruction manuals" and in accordance with Engineer in-charge for coordination with operation/maintenance of main plant. Daily work of the operators involves logging the all the important parameters as required and running the FGD plant in most efficient manner. Contractor has to prepare and maintain all documents as per the requirements of ISO standards if required.

d) The Contractor's O&M personnel shall record monthly energy output of each array and transformer and reports shall be prepared on performance of FGD plant.

e) Submission of periodical reports to the owner on the operating conditions of the FGD plant. Contractor has to ensure that adequate measures are initiated in advance to overcome any actual or likely shortfall in performance.

.....

As evident from above, during the O&M period of 3 years the applicant is responsible for achieving emission norms as notified by the Ministry of Forest and Climate Change with the optimum utilization of energy and consumption of limestone. Further, the applicant is also responsible for appointing experienced service engineer, supervisor etc. for proper operation and maintenance of the FGD plant during the O&M period. The Section 9.1.0 i.e. 'Scope-Operation &





Maintenance' of "Technical Specification" document and the copy of contract entered by applicant with M/s ROCL are enclosed.

3.9 Furthermore, as mentioned above, M/s RPCL is required to achieve the emission norms as notified by the Ministry of Forest and Climate Change. The entire process of installing the plant is to achieve the said object.

#### **4. APPLICANT'S INTERPRETATION OF LAW**

4.1 **Scope of Work** : The applicant, quoting the definition of "Composite Supply" defined under Section 2(30) of the CGST Act 2017, submitted that the scope of work covered in the present project is in the nature of composite supply as the supply given under the work order satisfies all the following four criteria.

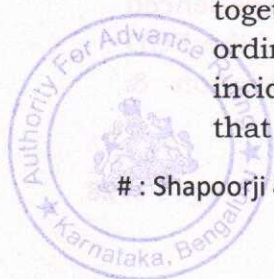
- a) Two or more taxable supply of goods or services or any combination thereof.
- b) Supply is naturally bundled.
- c) Supply in conjunction with each other in ordinary course of business.
- d) One of the supply is Principal Supply.

**a. Two or more taxable supply of goods or services or any combination thereof:**

The setting up of plant requires supply of various items lime mist eliminator, pipe racks, multistage vacuum pumps, wastewater tank and pump, cable racks, nozzles etc., and services of installation and commissioning. The operation and maintenance of the plant inter-alia includes the activities like operation of plant, maintenance to keep the plant in running condition, supply of spares and consumables etc. Thus, both goods and services shall be supplied by the applicant. Hence the first criteria is satisfied.

**b. Supply is naturally bundled:**

Both the supply of setting up of plant and operation & maintenance are naturally bundled, as will be evident from notification of Ministry of Environment as given in bid document itself that the purpose of setting up of the plant is to achieve the emission norms for discharge of gas. The combined supply mainly setting up of plant and operation of plant can achieve the above objective. The operation and maintenance are mainly provided to the person setting up the plant in order to ensure that the objective of the plant is achieved. If one person set up the plant and other person operate the plant, they may blame each other if the desired result is not achieved. The person setting up the plant may blame the operation person and vice versa. Therefore, these activities are generally combined together. Hence, it is submitted that these activities are naturally bundled in ordinary course of business. The activity of maintenance of plant is incidental to operation. It is essential to maintain plant in order to ensure that the plant remains in working condition so that plant can be properly





operated. The fact that the bid document has also combined these services and further substantiates that the activities are naturally bundled. The clause (a) of Section-9 of "Technical Specification" bid document, whose copy is furnished, also substantiates this.

**c. Supply in conjunction with each other in ordinary course of business :**

Please refer to point (b) above.

**d. One of the supply is Principal Supply :**

The treatment in FGD plant between the lime slurry and impurities like SO<sub>2</sub>, SO<sub>3</sub>, HCl and HF is essential to achieve economic objective of discharge of gases without impurities. The above economic objective is achieved through FGD plant. Therefore, the principal supply is FGD plant. The setting up of FGD plant is a works contract as defined in Section 2(119) of the CGST Act, 2017 in as much as the setting up of plant results in immovable property.

**4.2 The services provided by the applicant are covered under entry no.3(iv)(e) of the Notification No.11/2017-CT(R) dated 28.06.2017, as amended from time to time:**

The applicant submits that clause (e) of entry no. 3(iv) of notification 11/2017-CT(R) dated 28.06.2017 i.e. (e) a pollution control or effluent treatment plant, except located as a part of a factory has two limbs.

- The first limb specifies that supply of services should be by way of construction, erection, commissioning, installation etc., resulting in a pollution control device or effluent treatment plant

In this regard the applicant submits as under:

- i. It is submitted that at the time of generation of Thermal Power by the various coal based thermal power plants, the gases like Sulphur dioxide gas, Mercury are also generated which is major air pollutant and has significant impacts upon human health. In order to control air pollution by way of reducing emission of various gases like Sulphur dioxide, Mercury, Nitrogen oxide which coming out of the coal based thermal power plant, the Ministry of Environment, Forest and Climate change had issued Notification No. S.O.3305 which laid down the emission limit of above gases for the thermal power plant. The emission limit given in the notification is reproduced in "Statement of Facts" above.
- ii. It is submitted that for reducing the emission of above gases, FGD techniques are used by operator of Thermal Power plants. The functioning of the FGD plant is given below.
  - a) In order to control air pollution, FGD plants are set up in the existing system to minimize the level of pollutants present in the flue gas coming out of the Chimney.





- b) Flue gas containing above said gases will be tapped from the existing chimney and conveyed through rectangular ducts to the treatment unit i.e. Absorber.
  - c) Lime slurry prepared from the Ball mills and agitators will be conveyed through pipelines to the absorber with high pressure through nozzles and lime slurry will be sprayed over the flue gas continuously.
  - d) Chemical reaction takes place during the above activity and the impurities like SO<sub>2</sub>, SO<sub>3</sub>, HCl and HF will be converted to Gypsum.
  - e) Gypsum initially formed will be in liquid form, it will be processed to solid crystal form which will be used in fertilizer industries etc.,
  - f) After the treatment of above said impurities, remaining gases which are not harmful will be discharged through newly constructed chimney.
- iii. As per the functioning/working of the impugned FGD plant, it is evident that the above FGD plant is mainly used for the purpose of reducing emission of Sulphur Dioxide gas present in the flue gas coming out at the time of generation of thermal power, which is hazardous to the environment. Thus, it is evident that it is one of the types of pollution control device, which is useful for the control of air pollution by reducing emission of Sulphur Dioxide gas generated in the thermal power station.

➤ The second limb of the said clause specifies that such pollution control device or effluent treatment plant is not located as a part of the factory.

In this regard, the applicant submits as under:

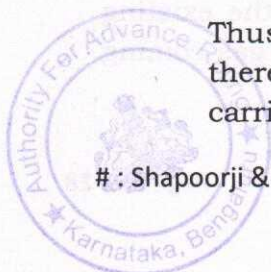
i. Definition of the term "Factory" under the Central Excise Act, 1944

It is submitted that the term "Factory" is not defined under the CGST Act, 2017 but the same is defined under Section 2(e) of the Central Excise Act, 1944. The definition of factory can be adopted under CGST Act also as both the Acts are for levying Indirect taxes on goods. Further, the definition gives popular meaning of the factory. The same is reproduced below:

*(e) "Factory" means any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on;*

As per above definition, the term "factory" means any premises including precincts thereof wherein or in any part of which, excisable goods other than salt are manufactured or any manufacturing process connected with the production of these goods is being carried on.

Thus, it is evident from above that to be called any premises or precincts thereof as "Factory", it is necessary that manufacturing process should be carried on in any part of the said premises.





ii. Meaning of the term “Manufacturing process”:

It is submitted that the term “Manufacturing process” is not defined in the CGST Act but the Hon’ble Supreme Court had discussed the said term on many occasions. In the case of **Collector of Central Excise, Jaipur Vs. Rajasthan Stae Chemical Works, Deedwana, Rajasthan and other** [(1991) 4 SCC 473], this court adverted to the meaning of process as well as manufacture. The relevant extract of judgment is reproduced below:

“12. Manufacture implies a change, but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place.

13. Manufacture thus involves series of processes. Process in manufacture or in relation to manufacture implies not only the production but the various stages through which the raw material is subjected to change by different operations. IT is the cumulative effect of the various processes to which the raw material is subjected (sic that the) manufactured product emerges. Therefore each step towards such production would be a process in relation to manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process manufacture of processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture.

14. That natural meaning of the word ‘process’ is a mode of treatment of certain materials in order to produce a good result, a species of activity performed on the subject matter in order to transform or reduce it to a certain stage. According to Oxford Dictionary one of the meanings of the word ‘process’ is a ‘continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result’. The activity contemplated by the definition is perfectly general requiring only the continuous or quick succession. It is not one of the requisites that the activity should involve some operation on some material in order to (sic effect) to its conversion to some particular stage. There is nothing in the natural meaning of the word ‘process’ to exclude its application to handling. There may be a process which consists only in handling and there may be a process which consists only in handling and there may be a process which involves no handling or not merely handling but use or also use. It may be a process involving the handling of the material and it need





not be a process involving the use of material. The activity may be subordinate but one in relation to the further process of manufacture.”

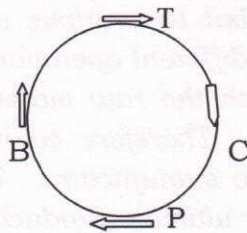
Thus, as per above the word ‘manufacture’ is generally understood to mean as bringing into existence a new substance. It does not mean merely to produce some change in a substance. Further, the word ‘process’ is a mode of treatment of certain materials in order to produce a good result. Thus, with combined reading of above the term manufacturing process means cumulative effect of the various processes through which completely a new and distinct product emerges.

iii. The word ‘manufacture’ has been defined in Section 2(72) of the CGST Act as follows:

*(72) “manufacture” means processing of raw material or inputs in any manner that results in emergence of a new product having a distinct name, character and use and the term “manufacturer” shall be construed accordingly.*

It is evident from the said definition that the process shall result in new product having distinct name, characteristics, and use. The process carried out for generating the electricity is as follows:

➤ A typical Thermal Power Station operates on a Cycle which is shown below:



Where

‘T’ stands for Turbine

‘C’ stands for Condenser

‘P’ stands for pump

‘B’ stands for Boiler

- i. The working fluid is water and steam. This is called the feed water and steam cycle. The ideal Thermodynamic cycle to which the operation of a Thermal Power Station closely resembles is the ranking cycle.
- ii. In a steam boiler, the water is heated up by burning the coal in the air in the furnace and the function of the boiler is to give dry superheated steam at the required temperature. The steam so produced is used in driving the steam Turbines.
- iii. The turbine is coupled to the synchronous generator (usually a three-phase synchronous alternator), which generates electricity.
- iv. The exhaust steam for the turbine is allowed to condense into the water in the steam condenser of turbine, which creates suction at very low pressure and allows the expansion of the steam in the turbine to very low pressure.
- v. The principal advantages of the condensing operation are the increased amount of energy extracted per kg of steam and thereby increasing efficiency,



and the condensate which is fed into the boiler again reduces the amount of fresh feed water.

- vi. The condensate along with some fresh makeup feed water is again fed into the boiler by a pump (called the boiler feed pump). In the condenser, the steam is condensed by cooling water. Cooling water recycles through the cooling tower. This constitutes a cooling water circuit.

The Hon'ble Supreme Court in the case of Union of India Vs. Ahmedabad Electricity Co. Ltd., [2003 (158)ELT 3 (SC)] has decided that the process of burning of coal which produces the heat to produce the steam does not result in the process of manufacture. The observation of the Court is as follows:

*6. An important distinguishing factor is that coal is used in factories as fuel and not as raw material for purposes of manufacturing the end product. The learned ASG appearing for the Union of India submitted that cinder is a by-product of coal. Even if cinder is a by-product of coal, it is not a by-product of the raw material used in a factory for manufacturing the end product. It is a by-product of an item of fuel.*

*26. Can burning of coal be called manufacturing? The locomotive steam engines used to run on coal. Coal was being constantly burnt in the boiler of the engine. The constant burning of coal produced cinder. Could it be said that the engine driver was manufacturing cinder? Is any manufacturing activity involved? Burning of coal for purposes of producing steam cannot be said to be a manufacturing activity. Therefore, neither ash nor cinder can be said to be products of a manufacturing process. From burning coal when you get either cinder or ash, it cannot be said that a new product has emerged. ....*

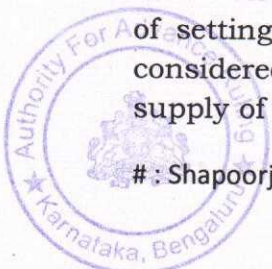
Thus, it is evident from above that the process of generation of the thermal power by the YTPS is not a manufacturing process. Accordingly, the said plant cannot be termed as 'factory'. Further, since the FGD plant is going to be a part of said YTPS plant only. Therefore, it will be considered that FGD plant is not located as a part of the factory.

4.3 Therefore, in view of the above submissions it is submitted that the services to be provided by the applicant will fall under Sl.No.3(iv)(e) of Notification No.11/2017-CT (R) and accordingly, the rate of GST will be 12%.

## **5. JURISDICTIONAL OFFICER'S COMMENTS:**

The Assistant Commissioner of Central Tax, Division-5, Bengaluru East Commissionerate, Bengaluru, being the jurisdictional Assistant Commissioner have furnished their views/comments, question wise, on the questions raised by the applicant, vide their letter dated 06.09.2021, inter alia stating as under:

5.1 The applicant with regard to the first question "whether the combined service of setting up of Wet Limestone FGD plant and Operation & Maintenance to be considered as composite supply" contended that (i) setting up of plant requires supply of various items like mist eliminator, pipe racks, multistage vacuum pumps,





waste water tank and pump, cable racks, nozzles etc., and services of installation and commissioning. The operation & maintenance of the plant includes operation of the plant and supply of spares and consumables for running the plant and hence they are supplying both goods & services and thus they satisfy the first condition of supply of two or more taxable supply of goods or services or any combination thereof; (ii) supply is naturally bundled; (iii) supply is in conjunction with each other in ordinary course of business; and (iv) the principal supply is FGD plant. Also to achieve the desired objective the operation & maintenance need to be done by the same person who sets up the plant. In case of different people, they may blame each other.

This contention of the applicant is not tenable in the light of the bid documents as there is a separate Section C10 built-in, which provides for pre-operational Resting/Start-up performance testing and acceptance procedure.

Performance guarantee testing and acceptance procedures and performance liquidated damages clause of Section C7 reveal that if the demonstrated guarantee/s continue to be beyond the stipulated acceptable shortfall limit, even after the modifications/replacement within 90 days or a reasonable period allowed by the owner, after tests have been completed, the owner will have the right to either (a) reject the equipment / system / plant and recover from the bidder the payment already made or (b) accept the equipment / system / plant after levying applicable liquidated damages.

Thus, it is evident that the objective of the plant is ensured at the completion of construction stage itself vide several clauses and performance guarantee including liquidation damages. Hence, the contention of the applicant that the Operation & Maintenance and construction services together ensure the essential character of the service is not acceptable.

Further, Section A4 clause 13.3 provides for payment schedule and as per clause 13.3.4 payment schedule for O&M of FGD system is on invoice basis raised monthly. Hence it is evident that the contract itself has separated the payment for O&M activity based on the monthly invoice from the construction activity. One indicator, not determinative but indicative of bundling of activities in the ordinary courses of business is that there is a single price, or the customer pays the same amount, no matter how much package they receive or use. However as per the Payment Clause, the amount will vary depending on the number of month of operation.

Further the bid document specified O&M for 10 years however, the final contract awarded for O&M is for 3 years only.

Other indicators like the different elements are not available separately is also not applicable to instant case as separate contracts for civil, structural and architectural works and O&M are separately floated by similar companies like BHEL, NTPC etc.,



Further, whether the different elements are integral to one overall supply i.e. if one or more are removed, the nature of the supply would be effected is also not applicable to the instant application as discussed above.

The definition of mixed supply reveals that a supply can be a mixed supply only if it is not a composite supply i.e. if the transaction consists of supplies not naturally bundled in the ordinary course of business, then it would be a mixed supply. Once the amenability of the transaction as a composite supply is ruled out, it would be a mixed supply, classified in terms of supply of good or services attracting highest rate of tax.

Thus, based on the documents submitted and detailed discussion above, this office is of the view that the said supply is classifiable as mixed supply in terms of Section 2(74) of the CGST Act, 2017.

5.2 The second question becomes redundant as the first question is answered in negative as this office is of the view that the supply of the applicant is not a composite supply but a mixed supply and thus it can't be a composite supply of work contract.

5.3 The third question is also not relevant as the applicant's supply is not a composite supply of works contract.

5.4 The fourth question is about the applicable GST rate & SAC/HSN. The applicable GST rate on the mixed supply is the highest GST rate of the supplies involved. The service of O&M attracts highest rate of 18%.

6. The applicant, vide their letter dated 05.10.2021, furnished additional written submissions, for the personal hearing to be held on 07.10.2021, inter alia stating as under:

6.1 The Assistant Commissioner concluded that the supply shall be considered as mixed supply as defined in Section 2(74) of the CGST Act, 2017. In order to constitute the supply as mixed supply the following two major conditions shall be satisfied.

- a) It should be for a single price.
- b) Such supply should not constitute the composite supply.

It is submitted that both the conditions are not satisfied and the same will be evident for the following submissions:

- i. **Single Price:** The applicant, on page 33 onwards of the application, has enclosed the Annexure to the agreement, which gives price separately for supply of goods, supply of services, civil work, freight, operation & maintenance. The Assistant Commissioner has not referred to the said break-up. Further, the Assistant Commissioner has admitted in para (vii) that the contract has separated the payment of operation & maintenance activity based on the monthly invoices from the construction activity, but





has not referred to break-up given in other supply like goods, civil work mentioned above. It is also admitted that the amount will vary month to month. Therefore it is submitted that the condition of single price has not been satisfied.

- ii. **Composite Supply:** The applicant, in "Applicant's interpretation" has elaborately submitted that the supply is a composite supply as defined in Section 2(30) of the CGST Act, 2017. The principle supply is setting up of FGD plant. No submission has been made by the Assistant Commissioner against the said submission of the applicant. Thus it is submitted that the supply made by the applicant is composite supply and not mixed supply.

6.2 In view of the above, it is submitted that the services will be classified as composite supply under clause 3(iv)(e) of sub-heading 9954 attracting 12% tax shall be approved. Further we also rely upon ruling given by Karnataka AAR, in the case of M/s Arvind Envisol Limited 2021(4) TMI 143 (AAR).

### PERSONAL HEARING

7. Sri S S Gupta, Chartered Accountant and authorized representative of the applicant company, appeared for personal hearing proceedings before this authority on 07.10.2020 and requested for one more additional hearing. Accordingly additional hearing opportunity was given and the aforesaid authorized representative appeared before this authority on 26.11.2021 and submitted the written additional submissions.

### DISCUSSION AND FINDINGS

8. At the outset we would like to make it clear that the provisions of CGST Act 2017 and KGST Act 2017 are in *pari-materia* and have the same provisions in like matters 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 provision in the KGST Act.

9. We have considered the submissions made by the applicant in their application for advance ruling as well as the submissions made by Sri. S S Gupta, CA and authorized representative during the personal hearings. We also considered the issues involved, on which advance ruling is sought by the applicant, relevant facts & the applicant's interpretation of law.

10. The applicant, on receipt of the order from M/s Raichur Power Corporation Limited for setting up of **Wet Limestone Flue Gas Desulphurisation** (referred as FGD) and **Operation & Maintenance** of the said plant, has initiated the work and received the mobilization advances from M/s RPCL & discharged GST @ 12% on the said advances. In view of this the applicant sought advance ruling in respect of the questions mentioned at para 2 supra.





11. The applicant contends that their services of (i) setting up of FGD plant and (ii) Operation & Maintenance of the said plant, together constitute a composite supply and the principal supply is setting up of the FGD plant; their services are covered under SAC 9954 and accordingly entry number 3(iv)(e) of the Notification 11/2017-Central Tax (Rate) dated 28.06.2017 is applicable to them & thereby attract GST @ 12%.

12. In view of the above, the major issue before us to decide is whether the combined service of setting up of Wet Limestone FGD plant and operation & maintenance of the said plant be considered as a composite supply or not. We proceed to examine whether the impugned supply constitutes to be a composite supply, for which we invite reference to the definition of "Composite Supply".

13. "Composite Supply" is defined under section 2(30) of the CGST Act 2017 to mean *"a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply."*

13.1 In view of the aforesaid definition, for a transaction to qualify as composite supply, it needs to satisfy the following conditions:

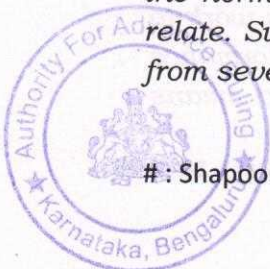
- a. There must be two or more taxable supplies of goods or services or any combination thereof.
- b. Such supplies of goods or services are naturally bundled;
- c. Such supplies of goods or services are made in conjunction with each other; and
- d. One of the supplies of goods or services is principal / predominant

The concept of '**naturally bundled**' supplies is not defined under CGST Act 2017. However Education Guide issued by CBEC (now CBIC) in the year 2012 refers 'Bundled service' to mean a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services. Though this reference is given with respect to bundled service it can be extended to bundled supplies in the GST regime.

13.2 The rule is - 'If various elements of a bundled supply are naturally bundled in the ordinary course of business, it shall be treated as provision of a single supply which gives such bundle its essential character'.

Further, Para 9.2.4 of Education Guide mentions:

*"Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below-*





- Perception of the consumer or the service receiver
- Majority of service providers in the in a particular area of business provide similar bundle of services
- The nature of various services
- Advertised as a single package
- Single Price
- different elements aren't available separately
- different elements are integral to one overall supply

No straight jacket formula can be laid down to determine whether a service is naturally bundled in the ordinary course of business.

14. In the instant case, the applicant contends that the purpose of setting up of the FGD plant is to achieve the emission norms for discharge of gas, which can be achieved only on setting up of the said plant and on operation of the said plant; If the person, other than the one who setup the plant, operates the plant desired result may not be achieved and both the persons may blame each other and therefore the activities are naturally bundled in ordinary course of business. Further the maintenance of the plant is incidental to operation, which is essential to ensure the plant in working condition. Further the Bid document (clause(a) of Section-9 of 'Technical Specification') also substantiates that the activities are naturally bundled. The applicant claims that the principal supply is FGD plant. Thus the applicant conveniently clubbed the operation activity with the supply of setting up of FGD plant and maintenance and operation as the incidental activity.

15. The applicant during the personal hearing while referring to the ruling of the Appellate Authority for Advance Ruling, Karnataka in the case of M/s BEML, Bengaluru, wherein it was held, from para no. 18 to para no. 23, that supply of goods and services from each cost centre namely C, D, E, and G are independent supply; that each supply mentioned in cost centre C, D, E and G are independent supplies and are not interdependent; the price is also separately specified in each cost centre, submitted that the said ruling does not apply to the facts of the present case for the following reasons :

**15.1 Mere providing breakup in annexure to the contract is not sufficient to conclude independent supply.**

It is submitted that the breakup of the price is provided in annexure to the work order only for facilitation of payment purpose and that is not the conclusive evidence of holding that each supply is an independent supply. We rely upon following judgments:

***a. Richardson & Cruddas ( 1972) LTD. 2016 (3) TMI 899 – CESTAT Mumbai***

In para 5 of the said judgement the Tribunal observed as follows:

5. From the records it is apparent that the appellant contracted with M/s MSETCL after following due process of tendering which, admittedly, is work to be executed on turnkey basis. Accordingly, while it may comprise performance of a number of services the actual composition of the service is no means





susceptible to segregation. Admittedly, turnkey contracts also include supply of goods necessary for execution of the projects. It is a normal practice in such a contract to provide a detailed breakup, with invoices raised to mirror the contents of the payments in the contract, for regular payments to be made to the contractor. Such a breakup is a necessary input for management of the finance related to the work itself, especially when a work is executed over a longer period of time. It does not allow for vivisectioning a contract. We, therefore, find that the original and the appellate authority have erred in attempting to classify a portion of the work as 'erection, installation and commissioning service'. Learned Counsel has drawn our attention to the decision of the Tribunal in *Kedar Constructions vs. Commissioner of Central Excise, Nagpur* [ 2015 (37) STR 631 ( Tri- Mumbai)] wherein it was held:

5. We notice that out of the total demand confirmed of Rs. 2,04,14,368/- bulk of the demand of Rs. 1,90,47, 124/- pertains to Commercial or Industrial Construction service rendered to Maharashtra State Electricity Transmission Co. Ltd., Maharashtra State Electricity Distribution Co. Ltd., Sunil Hi- Tech, Suraj Constructions, V.B. Bhike, etc. for transmission of electricity. Vide Notification 45/ 10- ST, all taxable services rendered ' in relation to' transmission and distribution of electricity have been exempted from the purview of service tax. The expression 'relating to' is very wide in its amplitude and scope as held by the Hon'ble Apex Court in *Doypack Systems P. Ltd.* [ 1998 (36) ELT 0201 (SC) ]. Therefore, all taxable services rendered in relation to transmission/ distribution of electricity would be eligible for the benefit of exemption under the said Notification for the period prior to 27.02.2010.

**b. Mumbai Railway Vikas Corporation Ltd. 2021 (11) TMI 18 - CESTAT Mumbai**

The Tribunal in paras 4.10 & 4.11 has referred to the various clauses of the agreement and meaning of 'Divisible Contract' as given in various dictionaries. Observation of the commissioner. The Tribunal in para 4.12 has concluded that it is turnkey contract incorporating all the activity specified in the contract as one complete work. The Tribunal in para 4.13 relied upon the judgement of *Sentinel Rolling Shutters and Engineering Co. (P) Ltd. v. CST 1978 (4) SCC 260*. The Supreme Court has held that the payment of amount due under the contract may be spread over the entire period of the execution of the contract. This cannot have any bearing on the determination of question whether the contract is one for sale or for work and labour.

c. The AAR of Uttar Pradesh in case of M/s. Datamatics Global Service Limited 2018 (12) TMI 1867 and AAR of Karnataka in case of M/s. Arvind Envisol Ltd. 2021 (4) TMI 143 has held that supply shall be classified as work contract when both supply of goods and services are involved.





Therefore, it is submitted that merely because the price breakup has been given in the annexure to the work order it will not constitute as separate supply. The wording of work order needs to be considered for arriving at the conclusion.

### **15.2 Tender Documents provides intention of parties.**

In this case the tender was invited for the following:

“Design, engineering, manufacture, Quality Surveillance, inspection & testing at suppliers works, supply, packing, forwarding to site, transportation, F.O. RYTPS, unloading, storage, preservation, handling at site, all mechanical, C&I Systems, electrical equipment and systems, steel structures, civil works with new chimney, insurance, erection, painting, start-up, trial operation, testing, commissioning, performance guarantee testing and warranty for wet line stone flue gas desulphurization plant for 2 \* 800 MW, units- 1 and 2 of Yeramarus Thermal Power Station of RPCL, Yearmarus, Raichur District, Karnataka and handling over to the Owner an operating plant and Operation & Maintenance of FGD systems including supply of spares & consumables for ten years as per scope identified in the technical specifications of the bid document of YTPS, 2 \* 800 MW project”.

The abstract from the tender is attached as on page 36 to 46 of application.

The wording of the tender clearly specifies that all the work specified in the tender are required to be completed. The words ‘handing over to the Owner an operating plant’ highlighted in the tender document clearly substantiate that M/s. Raichur Power Corporation Limited (“RPCL”) is not interested to receive supply of goods but they require supply, installation, commissioning and testing of the plant before handing over. Thus, the condition of the contract is to complete the plant before handing over. The Tribunal in the case of M/s Mumbai Railway Vikas Corporation Ltd has in para 4.11 extracted the meaning of ‘divisible contract’ from various dictionaries. It is evident from the same that if any part of the contract is separately enforceable it shall be considered as divisible contract. In this case as evident from the tender document that M/s RPCL intend to receive operating plant. Therefore, each part of the contract like supply, erection and commissioning are not separately enforceable. Hence, it is submitted that it is not divisible contract.

### **15.3 Many judgements were not placed before AAAR.**

The above judgement referred in para 15.1 were not placed before AAAR by the applicant. Therefore, AAAR did not have the advantage of the ratio of these judgments.

The AAAR in the case of M/s BEML Limited in para 21 has observed as under:

The concept of the “Naturally Bundled”, as used in Section 2(30) of the CGST Act, 2017, lays emphasis on the fact that the different elements in a composite supply are integral to the overall supply and if one of the elements is removed the nature of supply will be affected. We fail to see this concept in this contract. In this case, although there is only one contract, the different activities done by the Cost



Centers C, D, E and G as part of the contract, are clearly specified and identifiable. The scope of works undertaken by each Cost Centre C, D, E and G are entirely independent and specific to that cost center and is not associated with any other Cost Center. The work undertaken by the Cost Centre D commences only on completion of all the milestone activities of Cost Centre C. Similarly, the work undertaken by Cost Centre E and G commence only on completion of all the milestone activities of Cost Centers D and E respectively. Therefore, it is evident that each Cost Centre is independent and every milestone supply made from the Cost Centre is, an independent transaction.

In the present case the price breakup is given in annexure to the contract which is attached on page no. 33 and 34 of the application. The price breakup is given in five separate heads which are as follows:

- a. Lumpsum Price for Supply ( Ex-works)
- b. Lumpsum Price for Erection and Commissioning
- c. Lumpsum Price for Civil works
- d. Lumpsum Price for O&M
- e. Lumpsum Price for Freight

In the present case FGD Project is an EPC project which includes Design, engineering, manufacture, Quality Surveillance, inspection & testing at supplier's works, supply, packing, forwarding to site, transportation, F.O.R-YTPS, unloading, storage, preservation, handling at site, of all mechanical, C&I systems, electrical equipment and systems, steel structures, civil works, insurance, erection, painting, start-up, trial operation, testing, commissioning.

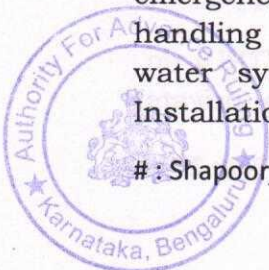
Civil work consists of following units emergency drainage tank, chimney stacks unit, absorber, tanks & silo works, limestone screen feeder house bldg, limestone crusher house bldg, process bldg & staircase block, reagent storage & slurry preparation bldg, gypsum dumping shed, gypsum dewatering building, mill building bldg, mcc building bldg, electrical distribution room (hvd) bldg, limestone stockpile building unit, pipe racks works, conveyor galleries works, trenches, duct works, equipment foundation works, roads & storm water drainage works

Material Procurement for above structures/ units can be planned simultaneously as well as individually.

Similarly Material procurement for Mechanical Installation, Electrical Installation, Control & Instrumentation Installation work can be taken up simultaneously as well as individually.

**15.4 Erection activities can be taken up individually or simultaneously for the followings:**

Mechanical Installation work- booster fans & ducting system, absorber & emergency absorber system, slurry recirculation & oxidation system, limestone handling system, gypsum dewatering system, emergency slurry system, process water system, cranes, hoists & elevators, compressed air system. Electrical Installation work- 6.6 kv ht switchgear panel work, transformer work, emergency





diesel generator set work, it panels (0.415 kv distribution device) work, ups & dc system , lighting work.

Control & Instrumentations installation work- FGD control system work, analysers work, instruments work, actuators with cabinets and boxes work, 400 kv switchyard work, hvac system & water supply work

Finally, structures / Units are to be integrated to form a complete FGD project for testing & commissioning as per tender specifications.

The various activities which are required to be completed for setting up the FGD plant are given in Annexure-1 to this submission. The above method of execution is explained by one example. The item specified in Sr. No. 3, 4 and 5 are Chimney Stacks Unit, Absorber, Tanks & Silo Works. The applicant can commence civil work for setting up of Chimney Stacks Unit, Aborber, Tanks & Silo Works simultaneously. The procurement of material for Chimney Stacks unit for Absorber and Tanks & Silo works can also be procured simultaneously.

The activity of cutting and welding for constructing the tanks & Silo works can go along with installation of Chimney Stacks. So on and so far, each activity can be carried out simultaneously. It is not necessary that chimney stacks unit must be completed before commencing work of Absorber, Tanks & Silo Works. Therefore, on facts the ratio of the judgement in the case of M/s BEML Limited is distinguishable.

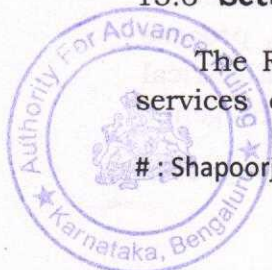
Further, as noted in para 6 of the order of AAAR that the respondent company was raising the support invoices based on the nature of transaction mentioned in different cost centres and accordingly charges GST on separate supplies. At the time of application respondent company was levying tax at 12 per cent on supply of standard gauge intermediate cars and 18 per cent on other supply of service as supplied by the respective cost centre. This practice was not objected by M/s BEML. In the present case the applicant has not paid the GST considering the activity as separate supply. The raising of separate invoice indicates the intention of the parties to treat the supply as the separate supply.

**15.5. Purpose of setting up of FGD plant cannot be achieved if all items are not integrated.**

The purpose of setting up of FGD plant is to control the emission of Sulphur dioxide ( SO<sub>2</sub>), Nitrogen Oxide (NO<sub>x</sub>) and other items. These are specified in the notification dated 07/12/2015 issued under the Environment (Protection Act 1986) copy of which is attached on page no. 47 to 51 of the application. Unless the entire plant is functions in integrated manner the propose of the plant will not be achieved. Therefore, it is submitted that each item mentioned in the annexure to the work order is not the independent but is interdependent.

**15.6 Setting of plant and operation and maintenance are composite supply**

The Railway Board has sought clarification from Tax Research Unit (TRU) on services of haulage and maintenance provided by Indian Railways to private





container train operators. It is clarified by the tax research unit that services of haulage, and maintenance service is composite supply with haulage of wagons as principal supply. The copy of the circular is enclosed.

#### 15.7 Both services are naturally bundled.

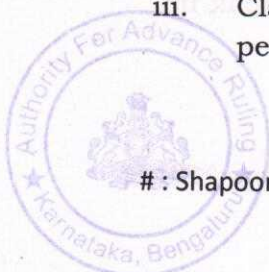
The supply of setting up of FGD plant with operation and maintenance is required to be performed by the applicant. Therefore, it is submitted that operation and maintenance and setting up of plant is composite supply where setting up of plant is principal supply. The operation and maintenance in common parlance is naturally bundled with the setting up of plant as any problems noticed during operation and maintenance is required to be rectified by the person setting up of plant. In case operation and maintenance is done by other person there will be always dispute between the person setting up of plant and person operating and maintaining of the plant. Each one will try to find out fault with other. Therefore, in commercial parlance operation and maintenance generally awarded to person who setting up of the plant.

#### 15.8 Conclusion

It is submitted that the activity of the applicant shall be considered as composite supply of setting up of plant and operation and maintenance with setting up of plant as principal supply.

16. Considering the submissions made by the applicant and the jurisdictional officer, we now proceed to examine the tender documents and the agreement to bring out the substance of agreement and the nature of supplies involved therein with to address the questions raised by the applicant. Following observations are drawn:

- i. The subject portion of the letter of award (job order) dated 14.08.2020 as well as the scope of award clearly specify two distinct parts of the said order i.e. (i) handing over of operating FGD plant to M/s RPCL and (ii) Operation & Maintenance of the said plant including supply of spares and consumables for a period of 3 years. This clearly indicates that the setting up of FGD plant and its Operation & Maintenance are two distinct & separate supplies.
- ii. The job order clearly specifies the payment schedules separately for O&M of the FGD plant at clause 5.4. Further the scope of O&M of FGD plant at clause 7 specifies that the O&M of the said plant commences after handing over / issue of Notice to Proceed, as the case may be. These two clauses indicate that the O&M is a separate supply altogether, which will commence after handing over the operating plant by the applicant to M/s RPCL.
- iii. Clause 10 of the job order specifies that security deposits towards performance guarantee need to be furnished for the FGD plant and for the





O&M of the said plant separately at different periods, which indicates that O&M of the FGD plant is a separate supply.

iv. Clause 11.1 of the job order specifies liquidated damages for the delay in integration of the FGD plant system with the existing power plant. Further clause 11.2 specifies the performance liquidated damages for deficiency in performance of FGD plant, for increase in Limestone consumption, for increase in auxiliary power consumption. Further, if the demonstrated guarantee(s) continue to be beyond the stipulated acceptable shortfall time, even after the modification / replacements within a reasonable period allowed by the owner, after the tests have been completed, the owner will have the right to either of the following:

a) Reject the equipment / system/plant and recover from the bidder the payments already made

or

b) Accept the equipment/system/plant after levying applicable liquidated damages.

In view of the it is clearly evident from the above clause that the setting up of the FGD plant and O&M of the same is not a single contract, but the supply of O&M starts only on completion & handing over of the operating FGD plant integrated with the existing power plant and subject to the fulfillment of performance guarantees. This clearly indicates that the setting up of FGD plant and the O&M of the same are two separate distinguished supplies and the supply of O&M service starts after completion of the setting up of FGD plant. Thus these two supplies are not naturally bundled.

v. Clause 20 of the bid document specifies that "Corporation reserves the right to award whole or part of the work should be the situation so warrant", which indicates that the owner (RPCL) can award the contract to different persons, if situation warrants. Thus it can be construed that the contract is divisible and the activity of setting up of FDG plant and O&M are two separate and independent supplies and are not naturally bundled.

In view of the above, it is clearly evident that the two supplies of setting up of FGD plant and its O&M are separate supplies, not supplied in conjunction with each other but one after the other i.e. after completion of the supply of setting up of FGD plant and hand over of the same only the supply of O&M gets initiated. Further the price for each supply is separately indicated. Thus the impugned supply does not constitute a composite supply.

17.1 Applicant contends that mere break up of price does not constitute separate supplies. In this regard it is observed that the Contract provides for price break up for the following:





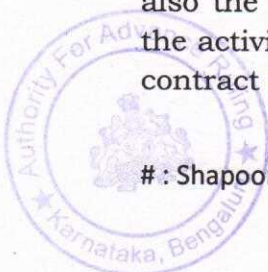
- a. Lumpsum price for supply ( ex-works)
- b. Lumpsum price for erection and commissioning
- c. Lumpsum price for civil-works
- d. Lumpsum price for O&M
- e. Lumpsum price for freight

The supplies in respect of a, b, c and e viz., supply (ex-works), erection and commissioning, civil works and the freight are activities concerned with setting up of FGD plant on a turnkey basis and constitutes a composite supply of works contract. On the other hand the activity of O&M starts post setting up of the plant. Not only from the price break up but also from the terms and conditions of the agreement as brought out in the para 16 supra that the activities of O&M are separately identified. In fact the same can also be derived from the applicants first question *'whether the combined service of setting up of Wet Limestone FGD plant and operation & maintenance be considered as a composite supply?'* wherein the applicant clubbed certain activities (a, b, c & e) as works contract and considered O&M as separate activity.

17.2 Applicant has further contended that O&M is integral to setting up of FGD plant citing that if given to a different entity, they may blame each other for any failures. Thus, it is admitted that the works are clearly divisible and can be given to two, but for the convenience of contracting parties the same have been clubbed into single contract.

17.3 The case laws quoted by the applicant pertain to EPC and turnkey projects wherein the contractor is given full responsibility to construct an operating facility and transfer to the owner. In the instant case facts are different in as much as the applicant in addition to setting up of FGD plant on turnkey basis is given an additional work of operation and maintenance (O&M) of the plant. O&M is not essential part of the turnkey project from the fact that it begins after the plant is set up and can be independently assigned to any other entity as well without having a bearing on the first part of the contract i.e, setting up of FGD plant. In fact in the instant case as well the tender was initially proposed for O&M for 10 years which was later reduced to 3 years period. The flexibility demonstrated by the contracting parties indicates that O&M is not an integral activity to setting up of FGD plant but a separate distinct activity. Thus the said case laws are not applicable to the instant case.

18. When interpreting the nature of a contract, the form of the agreement is not important, it is rather the substance which has to be seen. The parties may use any words they like to suit their intention and it is therefore imperative that the agreement may not be taken as it is but its nature/substance has to be seen to arrive at the correct conclusions. In this case, although a single contract has been made for setting up of Wet Limestone Flue Gas Desulphurisation (FGD) plant, and also the operation & maintenance of the said plant, there is clear demarcation of the activities not only in terms of the price break up, but also from the intent of the contract demonstrated in various provisions as discussed supra. Thus the two





supplies of setting up of FGD plant and its O&M are separate supplies, not naturally bundled and not supplied in conjunction with each other but one after the other.

19. The ruling of the AAAR, Karnataka, in the case of M/s BEML is squarely applicable to the instant case as the impugned supplies are separate independent supplies and the O&M starts after the completion of the setting up of the FGD plant. Further the Office Memorandum, issued by the Tax Research Unit, dated 16.01.2019, with regard to GST on Haulage and Maintenance services provided by Indian Railways to Private Container Train Operators, *clarifying that the services of haulage & maintenance of wagons satisfies all criteria of the definition of composite supply and hence the same should be considered as composite supply with the haulage of wagons as the principal supply*, does not apply to the instant case as haulage & maintenance are akin to Operation & Maintenance which is a composite supply with operation being the principle supply.

## **20. Classification of the services & the rates applicable thereon:**

Now we proceed to examine the classification of the services & the rates of GST applicable thereon, as we have concluded that the applicant is involved in supply two services i.e. Setting up of FGD plant and O&M of the said plant, one at a time.

20.1 Now, we consider the service of Setting up of FGD plant, which is in the nature of turnkey project / EPC contract and examine whether setting up of the said plant qualifies to be a composite supply of works contract or not. In this regard we invite reference to Section 7(1)(d) of the CGST Act, 2017 which specifies that the activities are to be decided as supply of goods or supply of services in terms of Schedule II of the said section 7. Further entry number 6(a) of the said Schedule II specifies that 'composite supply of works contract', as defined under Section 2(119) of CGST Act, 2017, shall be treated as supply of service.

Section 2(119) defines 'works contract' to mean

*"a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract"*

In the instant case, the setting up of FGD plant includes civil works ( tanks & silo works, Mill Building, MCC building etc.), Equipment foundation works, duct works, installation works (mechanical / electrical) etc., Thus the applicant has undertaken erection, installation & commissioning of FGD plant, which is permanently fastened to earth and hence the said plant becomes immovable property. Construction, supply of relevant goods, assembly, commissioning of such immovable structure qualifies as a 'works contract' service.





Further the tender Notification & the Job order reveal that the FGD plant is primarily meant for the control of emission of Sulphur Dioxide, Nitrogen Oxide and other items as per the notification dated issued under the Environment Protection Act, 1986. Thus the said plant is meant for control of emission of hazardous gases.

“Explanatory Notes to the Scheme of Classification of Services” is a guiding tool for classification of services, under which Tariff heading 9954 covers construction services and the heading 995429 specifically covers “Construction services of other civil engineering works not elsewhere covered” which include **plants for treating and processing of hazardous/non-hazardous materials**. The setting up of FGD plant merits classification under this heading 995429, as the said plant is meant for control of emission.

Entry No.3 of Notification No.11/2017-Central Tax (Rate) dated 28.06.2017 covers Construction services falling under Heading 9954; entry 3(iv)(e) covers Composite supply of works contract as defined in clause (119) of section 2 of the CGST Act, 2017 [other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above], supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a pollution control or effluent treatment plant, except located as a part of a factory.

In view of the above, the service of setting up of FGD plant gets covered under the aforesaid entry 3(iv)(e), subject to the condition that the plant has to be a pollution control or effluent treatment plant and should not be located as a part of a factory. In the instant case, the FGD plant is integrated to the thermal power plant and hence we proceed to examine whether the thermal power plant amounts to a factory or not.

The FGD plant is meant for the purpose of reducing emission of Sulphur Dioxide gas present in the flue gas coming out at the time of generation of thermal power, which is hazardous to the environment. Thus, the said plant is a type of pollution control device, which is useful for the control of air pollution by reducing emission of Sulphur Dioxide gas generated in the thermal power station.

Now we proceed to examine whether the FGD plant is not located as a part of the factory or not i.e whether the thermal power plant amounts to be a factory or not. The term “Factory” is not defined under the CGST Act, 2017 and hence we invite the reference to the Central Excise Act, 1944, wherein ‘factory’ is defined under Section 2(e) to mean

*(e) any premises, including the precincts thereof, wherein or in any part of which excisable goods other than salt are manufactured, or wherein or in any part of which any manufacturing process connected with the production of these goods is being carried on or is ordinarily carried on;*

Thus, from the definition ‘factory’ means any premises, including precincts thereof, wherein any excisable goods, other than salt, are manufactured; or manufacturing process connected with the production of said excisable goods is being carried on or is ordinarily carried on. Therefore we need to examine whether



any excisable goods are being manufactured within the premises or precincts of thermal power plant or any manufacturing process is being carried on.

The term "manufacture" is defined under Section 2(72) of the CGST Act, 2017 to mean *"processing of raw material or inputs in any manner that results in emergence of a new product having a distinct name, character and use and the term –manufacturer shall be construed accordingly"*

In the thermal power plant coal is burnt to generate the steam, which in turn is used to rotate the turbine that is attached to a shaft which rotates within the magnetic field and thereby alternate current is generated. Thus no raw material / input is processed to result in a new product having a distinct name, character. Therefore the process involved in the thermal power plant does not amount to "manufacturing process"

The Hon'ble Supreme Court in the case of **Union of India Vs. Ahmedabad Electricity Co. Ltd.**, [2003 (158)ELT 3 (SC)] held that the process of burning of coal which produces the heat to produce the steam does not result in the process of manufacture.

In view of the above, both the conditions i.e. the FGD plant is a pollution control plant and is not located as part of a factory, are fulfilled and hence the applicant's service i.e. setting up of FGD plant, which is a composite supply of works contract service, is squarely covered under tariff heading 995429, is entitled for the benefit of the entry No.3(iv)(e) of the Notification No.11/2017-Central Tax (Rate) dated 28.06.2017, thereby attracting GST at the rate of 12%.

20.2 Now we proceed to consider the classification of the O&M services of the FGD plant and the applicable GST rate thereon.

The Operation & Maintenance of the FGD plant, owned by M/s RPCL, has been undertaken by the applicant to operate & maintain the said plant. The scope of Operation & Maintenance service has been given by the applicant in Annexure 'A' of the application. The silent features of the said scope are as under:

- a) *Items needed for continuous operation & maintenance of entire FGD plant to meet the intent of specification, shall be deemed to be included in scope of O&M. The scope shall include all supply of spares and consumables and services indicated.*
- b) *Ensuring successful operation of FGD plant in three shifts for required SO<sub>2</sub> reduction efficiency with optimum energy and limestone consumption and producing good quality of gypsum. Further, maintenance of the entire FGD plant by appointing experienced service engineers, supervisors, operators and technicians round the clock is covered in the scope of O&M service.*
- c) *Carrying out necessary Preventive maintenance and Breakdown maintenance, overhauls, furnishing technical assistance from experts & arranging visit of O&M experts to site from time to time (as & when required and to be discussed*





*mutually by Contractor i.e. applicant & Owner i.e. M/s RPCL) for ensuring smooth operation and maintenance of the plant. Also carrying out maintenance during annual overhauling / capital overhaul of the units.*

- d) Contractor has to ensure that FGD plant is operated and maintained as per "Operation and Maintenance instruction manuals" and in accordance with Engineer in-charge for coordination with operation/ maintenance of main plant. Daily work of the operators involves logging the all the important parameters as required and running the FGD plant in most efficient manner. Contractor has to prepare and maintain all documents as per the requirements of ISO standards if required.*
- e) The Contractor's O&M personnel shall record monthly energy output of each array and transformer and reports shall be prepared on performance of FGD plant.*
- f) Submission of periodical reports to the owner on the operating conditions of the FGD plant. Contractor has to ensure that adequate measures are initiated in advance to overcome any actual or likely shortfall in performance.*

It is clearly evident from above that the applicant, during the O&M contract period of 3 years, is responsible for achieving emission norms as notified by the Ministry of Forest and Climate Change with the optimum utilization of energy and consumption of limestone. Further, the applicant is also responsible for appointing experienced service engineer, supervisor etc. for proper operation and maintenance of the FGD plant during the O&M period.

M/s RPCL is required to achieve the emission norms as notified by the Ministry of Forest and Climate Change. The FGD plant has to be in operation so as to achieve the said object. The applicant, being the contractor for O&M of the FGD plant, is involved in supporting the running of the said plant and thereby is supporting M/s RPCL to achieve the object and hence is supporting the business of the owner of the plant i.e M/s RPCL. Therefore the O&M of the FGD plant gets covered under the "Business support services", falling under SAC 9985 and more specifically under SAC 998599 as "Other Support Services not elsewhere classified".

The supply of O&M of the FGD plant is the service covered under "Business Support Service", falling under SAC 998599, as "Other Support Services not elsewhere classified". Entry No.23 of the Notification 11/2017-Central Tax (Rate) dated 28.06.2017 covers support services falling under SAC 9985 and the impugned service of O&M of the FGD plant is covered under entry number 23(iii) attracting GST @ 18%.

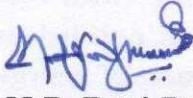




21. In view of the foregoing, we pass the following

**RULING**

- a) The combined service of setting up of Wet Limestone FGD plant and operation & maintenance of the said plant can't be considered as a composite supply.
- b) The question (a) above is answered in negative and hence this question is redundant.
- c) The impugned supply is not considered as a composite supply and hence this question is also redundant.
- d) The setting up of FGD plant merits classification under SAC 995429 and attracts GST at the rate of 12%, in terms of entry No.3(iv)(e) of the Notification No.11/2017-Central Tax (Rate) dated 28.06.2017. Further the Operation & Maintenance of the FGD plant merit classification under SAC 9985, as "Business Support" service and attracts GST at the rate of 18%, in terms of entry No.23(iii) of the Notification No.11/2017-Central Tax (Rate) dated 28.06.2017.



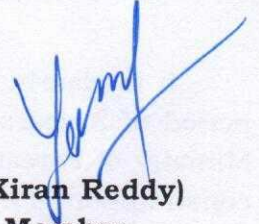
(Dr. M.P. Ravi Prasad)

Member

Karnataka Advance Ruling Authority

Place : Bengaluru - 560 009

Date : 17-12-2021



(T. Kiran Reddy)

Member

MEMBER

Karnataka Advance Ruling Authority

Bengaluru - 560 009

To,

The Applicant

Copy to :

1. The Principal Chief Commissioner of Central Tax, Bangalore Zone, Karnataka.
2. The Commissioner of Commercial Taxes, Karnataka, Bengaluru.
3. The Commissioner of Central Tax, Bangalore East Commissionerate, Bengaluru.
4. The Asst. Commissioner, LGSTO-45A, Bengaluru, for information.
5. Office Folder.



# : Shapoorji & Pallonji