

AUTHORITY FOR ADVANCE RULING – CHHATTISGARH
3rd & 4th Floor, Vanijyikar GST Bhawan, North Block Sector-19,
Atal Nagar, District-Raipur (C.G.) 492002
Email ID – gst.aar-cg@gov.in

PROCEEDING OF THE AUTHORITY FOR ADVANCE RULING
U/s. 98 OF THE CHHATTISGARH GOODS AND SERVICES TAX ACT, 2017

Members Present are

Smt. Sonal K. Mishra
Joint Commissioner
O/o Commissioner, State Tax
(CGGST), Raipur, Chhattisgarh.

Shri Rajesh Kumar Singh,
Additional Commissioner,
O/o Principal Commissioner,
CGST & Central Excise, Raipur (C.G)

Subject :-Chhattisgarh GST Act, 2017 – Advance Ruling U/s 98 Chhattisgarh GST Act, 2017 –

Advance Ruling U/s 98 sought by M/s Shikhar Commodities, 1st floor, Block No.06, Transport Nagar, Rawabhata, Raipur Chhattisgarh (GSTIN-22BMGPA7790A1Z1) on GST liability on the purchase of Biomass Power Plant (8 MW Capacity) by way of transfer of going concern through e-auction.

Read :-Application dated 02/07/2020 from M/s Shikhar Commodities, 1st floor, Block No.06, Transport Nagar, Rawabhata, Raipur Chhattisgarh (GSTIN-22BMGPA7790A1Z1).

PROCEEDINGS

[U/s 98 of the Chhattisgarh Goods & Services Tax Act, 2017 (herein- after referred to as CGGST Act, 2017)]

No.STC/AAR/07/2020

Raipur Dated/11/2020

M/s Shikhar Commodities, 1st floor, Block No.06, Transport Nagar, Rawabhata, Raipur Chhattisgarh [hereinafter also referred to as the applicant] has filed an application U/s 97 of the Chhattisgarh Goods & Services Tax Act, 2017 seeking advance ruling on :-

GST liability on the purchase of Biomass Power Plant (8 MW Capacity) by way of transfer of going concern through e-auction vide serial no.2 of the Notification No.12/2017-Central Tax (Rate) dated-28/06/2017.

2. Facts of the case:-

Applicant is acquiring biomass power plant of 8 MW capacity situated at Sirgitti Industrial Area, Bilaspur of M/s Vandana Vidyut Limited. Applicant has emerged as successful H1 bidder for the above plant through e-auction conducted on 24.02.2020 by the liquidator appointed by Hon'ble NCLT under Insolvency and Bankruptcy Code'2016.



Liquidator through his sale notice dated 07.02.2020, has declared that as per Regulation 32 of IBBI (Liquidation process) Regulations, 2016, he was directed by Hon'ble NCLT, Cuttack vide order dated 16.12.2019 to endeavour to sell the corporate debtor (M/s Vandana Vidyut Limited) as a going concern.

After emerging as H1 bidder in e-auction conducted on 24.02.2020, applicant received a Letter of Intent on 25.02.2020 from Liquidator in which he has proposed that GST will be charged in addition to the final bid amount. Applicant's replied via letter dated 03.03.2020 that above transaction is considered as supply of service and has been exempted from charge of GST vide Sl.No.2 of Notification No.12/2017- Central tax (Rate) dated 28.06.2017. The relevant portion of the said Notification is as under:-

Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017

G.S.R.....(E).- In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts the intra-State supply of services of description as specified in column (3) of the Table below from so much of the central tax leviable thereon under sub-section (1) of section 9 of the said Act, as is in excess of the said tax calculated at the rate as specified in the corresponding entry in column (4) of the said Table, unless specified otherwise, subject to the relevant conditions as specified in the corresponding entry in column (5) of the said Table, namely:

Sl.No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (percent.)	Condition
(1)	(2)	(3)	(4)	(5)
2	Chapter 99	Services by way of transfer of a going concern, as a whole or an independent part thereof	Nil	Nil

In response to this letter, liquidator had asked for an undertaking from the applicant that applicant has to pay the amount of GST first, which may be kept separately till the applicant obtains an Advance Ruling regarding this issue, hence this application is being submitted.

3. Contentions of the Applicant:- The applicant's contention are as under :-

- 3.1 that, on the issue on which advance ruling has been sought, it is applicants contention that in terms of Sl.No.2 of the Notification No.12/2017- Central Tax (Rate) dated 28.06.2017, acquiring a power plant unit as a going concern is exempted from the levy of GST.



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3.2 Applicants point wise interpretation and view points are as under:-

- (i) Liquidator appointed under Insolvency And Bankruptcy Code' 2016 has published Sale Notice on 07.02.2020 for E-Auction of the Unit to be held on 24.02.2020 in which he has clearly declared that he is under directions of Hon'ble NCLT, Cuttack vide order dated 16.12.2019 to endeavor to sell the unit as a going concern.
- (ii) It was a clear condition in point 1 of the terms and conditions of sale notice that unit will be sold on "AS IS WHERE IS", "AS IS WHAT IS" and "WHATEVER THERE IS BASIS". A single bid amount was to be quoted by every bidder for unit "AS A WHOLE".
- (iii) The basis of taxation under the Goods and Services Tax Act revolves around 'supply'. A slump sale (sale of a unit as a whole) would also be a supply and hence fall under the purview of GST. The supply would be in the nature of 'transfer as a going concern' and such a transfer attracts Nil rate of GST as per Sl.No.2 of the Notification No.12/2017- Central Tax (Rate) dated 28.06.2017.
- (iv) Transfer as a going concern would generally mean that the current business as a whole will be carried on by a different person or that there is a change in the ownership of the business.
- (v) Similar facts has also been established in an recent advance ruling of The Authority for Advance Ruling Karnataka of M/s Rajshri Foods Pvt. Ltd. (Advance Ruling No.- KAR ADRG 06/2018 dated 23.03.2018) wherein the Authority has upheld that transaction of transfer of one of the units of the Applicant as a going concern is covered under Sl. No. 2 of the Notification No.12/2017- Central Tax (Rate) dated 28.06.2017.
- (vi) Further, in the case of M/s Rajeev Bansal & Sudershan Mittal (GST AAR Uttarakhand) Advance Ruling No.10/2019-20, dated 09.01.2020), Authority observed that transfer of a business as a going concern is the sale of a business including assets. 'Transfer of a going concern' in a simple way can be described as transfer of a running business which is capable of being carried on by the purchaser as an independent business. Authority further find that internationally accepted guidelines to treat transfer of business as a going concern are as under:
 - a. The assets must be sold as part of a 'business' as a 'going concern'.
 - b. The purchaser intends to use the assets to carry on the same kind of business as the seller.
 - c. Where only part of a business is sold it must be capable of separate operation.
 - d. There must not be a series of immediately consecutive transfers.
- (vii) The subjected Biomass Power plant has already entered in a power purchase agreement till year 2033 with the Chhattisgarh State Electricity Board. Applicant is in absolute belief that they will run entire business in forthcoming years as it is operating in current scenario and it is their clear intentions to continue all the existing technical and key employees of the unit except occurrence of any unavoidable circumstances with any of the present staff.
- (viii) As per the facts and circumstances cited in the forgoing paragraphs and considering the gravity of the situation Applicant hope and opined that the



case is covered under the exemption Notification No.12/2017- Central Tax (Rate) dated 28.06.2017.

- (ix) It's request to Hon'ble Authority to provide a ruling in applicant's favor that not to charge GST on sale of the unit of M/s Vandana Vidyut Limited under insolvency, which is to be considered under GST Act as a supply of service by way of transfer of a going concern and will be exempt/Nil rated levy from GST.

4. Personal Hearing:-

Keeping with the established principles of natural justice, personal hearing in the matter was extended to the applicant through virtual mode and accordingly their authorized representative Shri Siddhesh Sharma, C.A. appeared online before the authority for hearing on 21/10/2020 and reiterated their contention.

5. The legal position, Analysis and Discussion:-

- 5.1 At the very outset, we would like to make it clear that the provisions for implementing the CGST Act and the Chhattisgarh GST Act, 2017 [hereinafter referred to as "the CGST Act and the CGGST Act"] are similar and thus, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the CGGST Act, 2017. Now we sequentially proceed to discuss the issues involved in the ruling so sought by the applicant and the law as applicable in the present case.
- 5.2 We find that the applicant is seeking advance ruling on the above issues, based on the decision of Hon'ble National Company Law Tribunal, Cuttak bench, Cuttak dated 16.12.2019 in the case of IA no. 82/CTB/2019 arising out of CP(113) no. 219/MB/2018 in the matter of INSOLVENCY AND BANKRUPTCY CODE, 2016 in an application under Section 33 (1) (a) read with Section 33 (2) of the Insolvency and Bankruptcy Code, 2016 and in the matter of Mr. Sanjay Gupta, AAA Insolvency Professional LLP, E-IOA, Kailsah Colony, Delhi-110 04 in the matter of Directors of the M/S. VANDANA VIDHYUT LIMITED i.e. (i) Mr. Prahalad Agarwal, Vandanaa Bhawan, M.G Road, Raipur — 492 001, (ii), Jami Kateshwar Rao, GM Commercial, Room No. 2, Guest House, Vandana Vidhyut Limited Sector- B, Sirigitti Industrial Area, Bilaspur- 495 004, Chhattisgarh. (iii). Ramawtar Agarwal, Vandana Bhawan, M.G. Road, Raipur- 492 001, inter-alia ordering therein liquidation of the Corporate Debtor viz. M/S. VANDANA VIDHYUT LIMITED and further directing the Liquidator to liquidate/sell the Corporate Debtor's assets as "ON GOING CONCERN" as per Regulation 32(1) of the IBBI (Liquidation Process) Regulation, 2016. The order also directs the liquidator to proceed with the process of liquidation in the manner laid down in Chapter In of Part of H of the IBC, 2016.



- 5.3 As per Insolvency and Bankruptcy code, 2016 , once an entity defaults certain threshold amount, Corporate Insolvency Resolution Process ("CIRP") gets triggered and the management of such entity (Corporate Debtor) and its assets vest with an interim resolution professional ("IRP") or resolution professional ("RP"). It continues to run the business and operations of the said entity as a going concern till the insolvency proceeding is over and an order is passed by the National Company Law Tribunal ("NCLT").
- 5.4 On the issues involved, the applicant is of the view that in terms of Sl.No.2 of the Notification No.12/2017- Central Tax (Rate) dated 28.06.2017, acquiring a power plant unit as a going concern is exempted from the levy of GST.
- 5.5 For sake of brevity, the relevant text of Notification No. 12/2017- Central Tax (Rate) New Delhi, the 28th June, 2017 is reproduced hereunder:-

G.S.R.....(E).- In exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts the intra-State supply of services of description as specified in column (3) of the Table below from so much of the central tax leviable thereon under sub-section (1) of section 9 of the said Act, as is in excess of the said tax calculated at the rate as specified in the corresponding entry in column (4) of the said Table, unless specified otherwise, subject to the relevant conditions as specified in the corresponding entry in column (5) of the said Table, namely:-

Sl.No.	Chapter, Section, Heading, Group or Service Code (Tarrif)	Description of Services	Rate (percent.)	Condition
(1)	(2)	(3)	(4)	(5)
2	Chapter 99	Services by way of transfer of a going concern, as a whole or an independent part thereof	Nil	Nil

5.6 CGST (Amendment) Act, 2018 dated 30-08-2018 inseried sub- Section (1A) to Section 7 of the CGST Act, 2017 with retrospective effect 01-07-2017 in place of clause (d) of sub-Section (1) of Section 7, which seeks to levy tax on certain declared "supply" of goods or services referred to in Schedule II of the CGST Act, 2017. Thus SCHEDULE II



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specifies / distinguishes the activities or transactions which are to be treated as supply of goods or supply of services. For ease of reference, the provisions of Section 7 of CGST Act, 2017 and activities excluded as specified under Schedule III to Section 7 supra are reproduced hereunder:-

Section 7 of CGST Act, 2017 defines Scope of supply as under:-

(1) For the purposes of this Act, the expression —supply includes—

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(b) import of services for a consideration whether or not in the course or furtherance of business;[and]

(c) the activities specified in Schedule I, made or agreed to be made without a consideration;[****]

(d) [****] .

[(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]

(2) Notwithstanding anything contained in sub-section (1),— (a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,

shall be treated neither as a supply of goods nor a supply of services

SCHEDULE II to Section 7 of the CGST Act, reads as under:-

Activities or Transactions to be treated as Supply of Goods or Supply of Services

1) Transfer

(a) any transfer of the title in goods is a supply of goods;

(b) any transfer of right in goods or of undivided share in goods without the transfer of title thereof, is a supply of services;

(c) any transfer of title in goods under an agreement which stipulates that property in goods shall pass at a future date upon payment of full consideration as agreed, is a supply of goods.

2) Land and Building

(a) any lease, tenancy, easement, licence to occupy land is a supply of services;



(b) any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services.

3) Treatment or process Any treatment or process which is applied to another person's goods is a supply of services.

4) Transfer of business assets

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

(b) where, by or under the direction of a person carrying on a business, goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, whether or not for a consideration, the usage or making available of such goods is a supply of services;

(c) where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless—

(i) the business is transferred as a going concern to another person; or

(ii) the business is carried on by a personal representative who is deemed to be a taxable person.

5) Supply of services

The following shall be treated as supply of services, namely:—

(a) renting of immovable property;

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Explanation.—For the purposes of this clause—

(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and



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(f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

6) Composite supply

The following composite supplies shall be treated as a supply of services, namely:—

(a) works contract as defined in clause (119) of section 2; and

(b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration.

7) Supply of Goods

The following shall be treated as supply of goods, namely:—

Supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration.

5.7 In the instant case, the applicant is acquiring biomass power plant of 8 MW capacity situated at Sirgilli Industrial Area, Bilaspur of M/s Vandana Vidhyut Limited. Applicant has emerged as successful H1 bidder for the above plant through e-auction conducted on 24.02.2020 by the liquidator appointed by Hon'ble NCLT under Insolvency and Bankruptcy Code '2016.

In this context, it is seen that when a company goes into liquidation its assets are sold to repay creditors. The company name remains live on Companies House but its status switches to 'Liquidation'. Insolvent liquidation occurs when a company cannot carry on for financial reasons.

5.8 For the sake of brevity, we are reproducing herewith the order portion of Hon'ble National Company Law Tribunal, Cuttack bench, Cuttack dated 16.12.2019 in the instant case of IA no. 82/CTB/2019 arising out of CP(113) no. 219/MB/2018 in the matter of INSOLVENCY AND BANKRUPTCY CODE, 2016.

i. This Adjudicating Authority orders for liquidation of the Corporate Debtor viz. M/S. VANDANA VIDHYUT LIMITED.

ii. This Adjudicating Authority appoints the Resolution Professional viz., Mr. Sanjay Gupta as Company Liquidator, who shall issue a public announcement stating therein that the Corporate Debtors is in liquidation, in one of the leading English newspaper as well as one in vernacular newspaper having wide circulation where the registered office of the Corporate Debtor is situated as per Section 33(1) (b) (ii) of the Code read with Reg. 12 (1) of IBBI (Liquidation Process) Regulations, 2016.

iii. The moratorium declared under Section 14 of the IBC Code, 2016, shall cease to have effect from the date of the order of liquidation.

iv. The Liquidator is directed to liquidate/sell the Corporate Debtor's assets as "ON GOING CONCERN" as per Regulation 32(1) of the IBBI (Liquidation Process) Regulation, 2016. The liquidator is directed to proceed with the process of liquidation in the manner laid down in Chapter In of Part of H of the IBC, 2016.

v. Subject to Section 52 of the IBC Code, no suit or other legal proceedings shall be instituted by/or against the Corporate Debtor. However, a suit and other legal proceedings may be instituted by the Liquidator, on behalf of the Corporate Debtor, with the prior approval of this Adjudicating Authority.



vi. This Adjudicating Authority makes it clear that para (iv) hereinabove shall not apply to legal proceedings in relation to such transactions as notified by the Central Government in consultation with any financial sector regulator.

vii. This Order shall be deemed to be a notice of discharge to the officers, employees and workmen of the Corporate Debtor, except when the business of the Corporate Debtor is continued during the liquidation process by the Liquidator.

viii. All the powers of the Board of Directors, Key Managerial Personnel and the Partners of the Corporate Debtor, as the case may be, shall to have effect and shall be vested with the Company Liquidator viz., Mr. Sanjay Gupta.

ix. The personnel of the Corporate Debtor shall extend all assistance and co-operation to the Liquidator as may be required by him in managing the affairs of the Corporate Debtor.

x. The Company Liquidator shall be entitled to charge such fees as stated under para 4 herein above for the conduct of the liquidation proceedings or in such a proportion to the value of the liquidation estate assets as specified under Regulation 4 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.

xi. Copy of this Order shall be sent to the concerned Registrar of Companies, Chhattisgarh, Regional Director of North-western Region, and Registered Office of the Corporate Debtor, by the company Liquidator viz., Mr. Sanjay Gupta for information and compliance.

xii. In terms of the above, IA No. 82/CTB/2019 in TP No. 245/CTB/2019 arising out of CP(IB) No. 219/MB/2018 by the Resolution Professional under Section 33 (1) (a) read with Section 33 (2) of the Insolvency and Bankruptcy Code, 2016 for initiation of the Liquidation Proceedings against the Corporate Debtor viz., M/S. VANDANA VIDHYUT LIMITED stands disposed off.

xiii. The Registry is directed to send a copy of this Order to the Company Liquidator, Financial Creditor and the Corporate Debtor, concerned ROC and to the IBBI, New Delhi by Speed Post as well as by E-mail with immediate effect for information and compliance.

5.9 Accordingly Sale Notice dated 7.2.2020 for sale of assets and properties owned by M/s Vandana Vidhyut Limited (in Liquidation) forming part of Liquidation Estate formed by the Liquidator under Insolvency and Bankruptcy Code, 2016 through e-auction on 24.2.2020, was issued by the said Liquidator appointed by Hon'ble NCLT. Details being as under:-

Assets	Manner of Sale	Block	Reserve Price (In Rs.)	EMD Amount (In Rs.)	Incremental Value (In Rs.)
Company as a whole (Thermal Power Plant- 2x135 MW Capacity)	As going concern	A	607.95 Cr.	30.00 Cr.	5.00 Cr.
Biomass Power Plant (8 MW Capacity)	As a going concern	B	13.60 Cr.	1.40 Cr.	5.00 Lakhs



5.10 Thereafter on acceptance of applicants bid as the H1 Bidder, letter of intent for the sale of assets of M/s Vandana Vidhyut Ltd. was issued by the liquidator inter-alia specifying therein that the sale shall be cancelled if the payment is not received within ninety days as follows:

Sr. No.	Particulars	Amount in Rs.
1	Land Buildings, Plant & Machinery and Stock	17,35,00,000.00
2	Less : EMD Deposited	1,40,00,000.00
	Total Balance	15,95,00,000.00

Note : Applicable GST shall also apply

Further point no. 6 of the said letter of intent supra issued by the said liquidator, specifically mentions that "All applicable transfer charges, taxes, fee, insurance charges, weighment expenses etc. in respect of the aforesaid asset shall be solely borne by you (i.e. applicant) '.

The said letter of intent, also mentioned therein that as per terms and conditions as set out in the E-Auction Process Information Document for acquisition of assets of the M/s Vandana Vidhyut Limited (In Liquidation), the amount submitted as EMD would be adjusted towards bid price for block of asset.

5.11 A letter of possession dated 23rd June 2020 was thereafter issued by the aforesaid liquidator mentioning therein that the liquidator has delivered the actual physical possession of the assets detailed in the schedule as a GOING CONCERN and 'As Is Where Is Basis'. As Is What Is- and - Whatever There Is Basis", to the SHIKHAR COMMODITIES (purchaser), the applicant upon receiving the entire full and final consideration amount of Rs.17,35,00,000/- (seventeen crore thirty five lacs only) from the above named purchaser (applicant).

5.12 Consequent to above, CERTIFICATE OF SALE Dated: 23rd June, 2020 (Under Schedule I of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016) was issued by the said liquidator in respect of assets of Vandana Vidhyut Limited to the effect that the liquidator by the virtue of the liquidation order and powers provided under the Insolvency and Bankruptcy Code, 2016 sold the asset, BLOCK B 'as a GOING CONCERN' i.e. Biomass Power Plant (8 MW Capacity) situated at Sirgitti Industrial Area, Sector B, Bilaspur Chhatisgarh – 495001, including Land, building, plant & machinery, furniture and fixtures (biomass division), tangible fixed assets (electrical installation and office equipment) and stock (and more particularly described herewith in the annexed Schedule) of the Corporate Debtor through e-Auction in favor of the applicant, Shikhar Commodities, ["Purchaser"], which is in the custody of the Liquidator as provided under Section 35(1)(b) of the Code and handed over the delivery and possession of the scheduled property to the purchaser. The Liquidator hereby acknowledges that the above mentioned property has been sold to the Purchaser against receipt of Rs. 17,35,00,000/- (seventeen crore thirty five lacs only) ["sale price"] through RTGS, being the full and final consideration for the aforesaid sale.



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The Schedule to the said certificate detailed the description of the said asset consisting of leasehold land & property, plant, machinery and building thereon, control room, rice husk yard, guest house, administration block workshop, weigh bridge, time office, temple, DM plant, coal shed, automobile shed, service centre, weighing machine, turbine, cooling tower, boiler etc., furniture, cctv, geysers, electrical installation etc. along with stock of coal and rice husk of the said Biomass Division.

5.13 Hon'ble NCLT in its order supra had directed the *Liquidator to liquidate/sell the Corporate Debtor's assets as "ON GOING CONCERN"*. The only difference between "the corporate debtor as a going concern" and "the business(s) of the corporate debtor as a going concern" is that in the former situation, the corporate debtor itself will be retained, will not be dissolved, and will be transferred along with the assets. However, in the latter case, the business will be transferred as a going concern, without transferring the legal entity, and therefore, the legal entity will be taken for dissolution.

5.14 Now we would like to have a look into the provision of law, having relevance to the issues in hand:

As per Section 3(8) of Insolvency and Bankruptcy Code, 2016 (IBC), a corporate debtor is the Corporate Person who owes a debt to any person. The term liquidation in finance and economics is the process of bringing a business to an end and distributing its assets to claimants. A bankrupt business is no longer in existence once the liquidation process is complete. Liquidation can also refer to the process of selling off inventory, usually at steep discounts. Liquidate means to convert assets into cash or cash equivalents by selling them on the open market. Liquidate is also a term used in bankruptcy procedures in which an entity chooses or is forced by a legal judgment or contract to turn assets into a liquid form (cash). If these assets are sold as part of a going concern, it would most definitely fetch more than their scrap value. This, in turn, ensures better returns from the liquidation process, which is in the interest of all the stakeholders in this process. The IBC's objective is to ensure continuity of the corporate debtor as a going concern, to realise maximum value for the creditors and to ensure the welfare of the employees. Liquidation is the process that entails the disposal of the assets of the entity. The liquidator does not undertake the task of managing or overseeing the company; his task is to liquidate and the liquidator may do only such things, and carry only such activities, as are conducive to the immediate objective, viz. liquidation.

The amendments introduced on 28.03.2018 to the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (the "Regulations"), allows the liquidator to sell the "corporate debtor as a going concern". Thereafter, consequent to the amendment dated on 22.10.2018 made to the regulations supra, Regulation 32 reads as under:

The liquidator may-

- (a) sell an asset on a standalone basis;*
- (b) the assets in a slump sale;*
- (c) a set of assets collectively;*
- (d) the assets in parcels;*



- (e) sell the corporate debtor as a going concern; or
(f) the business(s) of the corporate debtor as a going concern:

"Going concern" is an established accounting notion, and one of the fundamental assumptions in preparation of financial statements. "Going concern", as an accounting notion, is defined in Accounting Standard as follows:

The enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations.

To transfer a business as a going concern, there are certain pre-requisites in absence of which such a transfer would amount to a mere sale or transfer of individual assets or liabilities. The conditions are that, the sale must be of the assets put together which constitute an integral business activity or enterprise must be transferred, and the consideration must be for the entire undertaking as a whole, and must not be for each of the assets individually ;If there are any liabilities relevant to the business or undertaking being transferred, the liabilities must also be transferred; The idea of a going concern is normally equated with that of a running business activity ; The idea of the acquirer in case of a sale as a going concern is to run the business, and not to dismantle it ; one of the major features of going concern sales, as noted in several insolvency proceedings is the continuation of employees.

Section 7 of the (Central Goods and Services Tax Act 2017 (CGST Act), defines supply as under :-

(1) *For the purposes of this Act, the expression "supply" includes-- (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*

The word 'transfer' in the above definition of supply attains paramount importance, as it means that transfer of goods or services made for a consideration by a person in the course or further of business is covered under supply.

Thus it is of utmost importance to ascertain whether the said supply constitutes to be goods or services. Goods has been defined under section 2(52) of the CGST Act, 2017 as: "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;". Similarly section 2(102) of the CGST Act, 2017 defines the term service as: "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged."

5.15 As discussed in the preceding para, SCHEDULE II to Section 7 of the CGST Act supra, specifies about the Activities or Transactions which are to be treated as supply of Goods or supply of Services, wherein clause 4(a) categorically stipulates that where goods forming part of the assets of a business are transferred or disposed of by or under



the directions of the person carrying on the business so as no longer to form part of those assets, such transfer or disposal is a supply of goods by the person. Thus disposal of goods forming part of assets have been categorically stipulated under clause 4(a) of Schedule II to Section 7 of CGST Act, 2017 as supply of goods. Whereas, clause 4(c) of the said schedule II to Section 7 of CGST Act, 2017 specifically stipulates that the transfer of a business as a going concern does not constitute a supply of goods. As per the definition of services, anything other than goods is called a service. Hence, only business transferred as a going concern is excluded from the list of supply of goods and not sale / disposal of goods forming part of corporate debtor's assets.

Thus it is of utmost importance to determine, as per the provisions of law, the nature of such supply viz. the supply in question is supply of goods or supply of services. The claimed benefit of tax exemption by the applicant, under Notification No.12/2017-Central Tax (Rate) dated 28.06.2017 is not sustainable as the said Notification provides for exemption to services by way of transfer of business as a going concern, not applicable to the case in hand which is sale of Corporate Debtor's assets as a going concern. Here the business of the corporate debtor is not transferred as a going concern rather the assets (viz. only the said Biomass power plant) of the corporate debtor are sold to the applicant as a going concern, by the liquidator on account of liquidation of the corporate debtor, consequent to the order of Hon'ble NCLT dated 16.12.19 supra. Accordingly, transfer of a business as a going concern is tax-exempt under GST, whereas sale of assets as above being supply of goods will be out of the purview of exemption from tax, eventually having GST implications. Further, as per the Sale notice issued by the appointed Liquidator, for effecting sale of assets and properties owned by M/s Vandana Vidhyut Limited (in Liquidation) under Insolvency and Bankruptcy Code, 2016, in addition to the Biomass Power Plant (8 MW Capacity) in question, sale of Thermal Power Plant- 2x135 MW Capacity was also initiated and it is seen from the letter of intent issued by the liquidator, that the applicant had bid for the said Biomass Power Plant (8 MW Capacity) only of M/s Vandana Vidhyut Ltd.

5.16 Further, whenever there is transfer of business as a going concern, it shall involve transfer of goods and/or services. Whether the instant supply of sale of assets in entirety is to be treated as supply of goods or supply of services can be determined in terms of the definitions of composite supply and mixed supply read with section 8 of the CGST Act 2017.

5.17 As per section 2(30) of CGST Act, 2017 "composite supply" means 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; Illustration.- Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;

Section 2(90) of CGST Act, 2017 stipulates that "principal supply" means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;



Section 2 (74) of CGST Act, 2017 defines "mixed supply" means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.

As per section 8 of CGST Act, 2017, tax liability on a composite or a mixed supply shall be determined in the following manner, namely:- (a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and (b) a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax.

5.18 To decide whether an exemption notification is applicable or not, *inter alia* requires pre-determination as to whether the supply is covered under the classification and description given in the Notification. Thus, the benefit of the said notification as stipulated under Sl.No.2 of the Notification No.12/2017- Central Tax (Rate) dated 28.06.2017 will be eligible to the transfer of business as a going concern, only and only when such transfer is supply of service and not when such supply is sale of goods. Thus it follows from the above that, in case the transfer of business as a going concern involves a supply of sale of assets which deserves treatment as principal supply as defined above and that supply is of goods, then the sale of assets as a going concern will have be treated as supply of goods by virtue of section 8 *ibid* and, therefore, the exemption provided under Notification no. 12/2017- Central Tax (Rate) will not be applicable, the exemption being only eligible to services of transfer of business as a going concern. It would also be not out of place to mention here that, on acceptance of applicants bid as the H1 bidder, in the letter of intent for the sale of assets of M/s Vandana Vidhyut Ltd., issued by the liquidator, apart from mentioning of the schedule of payments to be made by the applicant, it has also been specified that GST as applicable shall also be levied.

5.19 In the instant case of the applicant, as elaborately discussed in the preceding para, it is seen that acquiring of assets viz. Biomass Power Plant (8 MW Capacity) by way of sale of assets and properties owned by the Corporate Debtor, M/s Vandana Vidhyut Limited, in Liquidation forming part of Liquidation Estate formed by the Liquidator under Insolvency and Bankruptcy Code, 2016, through e-auction for a consideration is supply of goods and not supply of services in view of the stipulations under SCHEDULE II of Section 7 of the CGST Act, 2017. Thus, the instant sale of Assets and properties viz. Biomass Power Plant (8 MW Capacity) owned by Vandana Vidhyut Limited (in Liquidation), can in no way be supply of services. The case laws cited by the applicant in support of their contention appears distinguishable to the facts and circumstances of the case in hand, as here the issue involved is sale of assets as discussed above and not supply of services by way of transfer of business as a going concern.

5.20 Notification No. 12/2017- Central Tax (Rate) New Delhi, the 28th June, 2017, *supra* provides for exemption to intra-State supply of services by way of transfer of a going concern, as a whole or an independent part thereof, whereas here in the case of applicant the supply of biomass power plant is supply of goods and not supply of



services in view of the stipulations under schedule II to Section 7 of CGST Act, 2017. In the case of sale of assets as a going concern which is supply of goods, as is the case here, the same is exigible to GST as applicable. Thus, Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 *inter alia* exempts services by way of transfer of business as a going concern, whereas here in applicants case it is sale of assets as a going concern initiated by the liquidator in terms of the orders issued by Hon'ble NCLT, as discussed above. Applicant appears to have misconstrued the sale of Biomass power plant by way of sale as a going concern as supply of services whereas the same is supply of goods by way of transfer as a going concern, and have thus wrongly claimed eligibility towards exemption from GST under serial no.2 of Notification no. 12/2017-Central Tax (Rate) dated 28.6.2017. Thus on the basis of documents furnished by the applicant, we come to the considered conclusion that the instant transaction by the applicant is not eligible to the benefit of Notification No. 12/2017- Central Tax (Rate) New Delhi, the 28th June, 2017 supply of goods, attracting GST at the applicable rate.

6. Having regard to the facts and circumstances of the case and discussions as above, we pass the following order:-

ORDER

(Under section 98 of the Chhattisgarh Goods and Services Tax Act, 2017)

No.STC/AAR/07/2020

Raipur Dated11.2020

The ruling so sought by the Applicant is accordingly answered as under:

RULING

Exemption provided under serial no.2 of the Notification No.12/2017-Central Tax (Rate) dated-28.06.2017 is not applicable to the said intrastate supply of Biomass Power Plant (8 MW Capacity) as a going concern'. GST at the applicable rate is leviable on the said supply.



sd/-
Sonal K. Mishra
(Member)

Place: - Raipur

Date:-

Seal:-

TRUE COPY

[Signature]
MEMBER
ADVANCE RULING AUTHORITY
CHHATTISGARH, RAIPUR

sd/-
Rajesh Kumar Singh
(Member)

TRUE COPY

[Signature] 17/11/2020
MEMBER
ADVANCE RULING AUTHORITY
CHHATTISGARH, RAIPUR