



सत्यमेव जयते

आयुक्त (अपील) का कार्यालय,
Office of the Commissioner (Appeal),
 केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
 जीएसटी भवन, राजस्व मार्ग, अम्बावाडी अहमदाबाद ३८००१५.



CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

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DIN- 20230564SW0000096655

रजिस्टर्ड डाक ए.डी. द्वारा

क. फाइल संख्या : File No : GAPPL/ADC/GSTP/3188, 3189 & 3190/2023 -APPEAL

1992 - 97

ख. अपील आदेश संख्या Order-In-Appeal Nos. **AHM-CGST-001-APP-ADC-04 to 06/2023-24**
 दिनांक Date : **28-04-2023** जारी करने की तारीख Date of Issue : **02-05-2023**

श्री मिहिर रायका_अपर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Mihir Rayka, Additional Commissioner (Appeals)

ग. Arising out of Order-in-Original No. **ZM2408220286266 DT. 25.08.2022,**
ZD2408220095455 DT. 08.08.2022 & ZL2408220095944 DT. 08.08.2022 issued by
 The Assistant Commissioner, Division-VI, CGST, Ahmedabad South

घ. अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s.Vijay M Mistry Construction Private limited, 9, Mistry House,
Preyash Society,Ambawadi, Ahmedabad, Gujarat-380006

| | |
|-------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (A) | इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है। Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way. |
| (i) | National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017. |
| (ii) | State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para-(A)(i) above in terms of Section 109(7) of CGST Act, 2017 |
| (iii) | Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand. |
| (B) | Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online. |
| (i) | Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying - (i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant, and (ii) A sum equal to twenty five per cent of the remaining amount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed. |
| (ii) | The Central Goods & Service Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later. |
| (C) | उच्च अपीलीय प्राधिकारी को अपील दायर करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbic.gov.in को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website www.cbic.gov.in . |

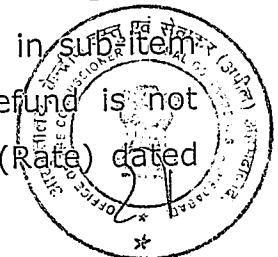


ORDER-IN-APPEAL**Brief Facts of the Case :**

M/s. Vijay M Mistry Construction Private Limited (GSTIN 24AAACV5047K1Z9), 9, Mistry House, Preyash Society, Ambawadi, Ahmedabad - 380 006 (hereinafter referred as '*Appellant*') has filed the appeals against the following Refund Sanction/Rejection orders (hereinafter referred as '*Impugned Orders*') passed by the Assistant Commissioner, CGST, Division - VI, Ahmedabad South (hereinafter referred as '*Adjudicating Authority*').

| Appeal Nos. (All Dated 11.11.2022) | RFD-06 Order Nos. | Amount of Refund Rejected | Refund Claim period |
|------------------------------------|----------------------------------|---------------------------|-------------------------------|
| GAPPL/ADC/GSTP/3189/2022 | ZD2408220095455 dated 08.08.2022 | Rs.77,26,270/- | April 2021 |
| GAPPL/ADC/GSTP/3190/2022 | ZL2408220095944 dated 08.08.2022 | Rs.11,74,877/- | September 2021 |
| GAPPL/ADC/GSTD/3188/2022 | ZM2408220286266 dated 25.08.2022 | Rs.27,96,226/- | January 2022 to February 2022 |

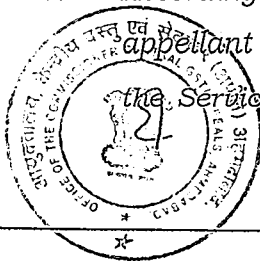
2(i). Briefly stated the facts of the case is that the '*Appellant*' is holding GST Registration - GSTN 24AAACV5047K1Z9 had filed the refund applications on account of "*Refund on account of ITC accumulated due to Inverted Tax Structure*" for the period and amount as mentioned in above table under Section 54 of the CGST Act, 2017 (herein after referred to as the "*said Act*"). The *appellant* is engaged in the business of public works infrastructure mainly related to Highways, Roads & Bridges, Mass transit like Metro projects, Ports etc. The *appellant* has accumulated credit on account of rate of tax on inputs being higher than the rate of tax on output. *Appellant* filed the refund applications under the category of ITC Accumulated due to inverted tax structure, in accordance with Rule 89(5) of CGST Rules, 2017 (herein after referred to as the "*said Rules*") read with Circular No. 125/44/2019-GST dated 18.11.2019, Circular No. 135/05/2020-GST dated 31.03.2020 for the period shown in the above table. After verification of said refund claims, SCNs in Form GST-RFD-08 were issued to the *appellant*. Against the SCNs issued, *appellant* filed defense replies in Form GST-RFD-09. Thereafter, the *adjudicating authority* rejected the above refund claims vide the *impugned orders* on the ground that the *appellant* is providing construction services specified in sub item (b) of item 5 of schedule II of the said Act and thus refund is not admissible in terms of Notification No. 15/2017 Central Tax(Rate) dated



28.06.2017 effective from 01.07.2017. The *appellant* contended that they are supplying "*works contract service*" and not "*construction Service*" and thus are eligible for refund claim.

2(ii). Being aggrieved with the *impugned orders* the *appellant* has filed the present appeals on dated 11.11.2022 on the following grounds :

- i. *They are engaged in public works infrastructure projects mainly related to highways, roads, bridges, mass transit like metro projects, ports etc; that work undertaken by them were :*
 - (i) *Construction of Bridge across Tapi River and along Varacha Creek near Varachha Main Road and Varachha water works (4 lane at Surat)*
 - (ii) *Construction of flyover (Bridge) on ring road/bypass (Dadra Nagar & Haveli) coming in the alignment of newly declared NH 84 8A in UT of Dadra Nagar & Haveli on EPC Mode*
 - (iii) *Construction of underpass. and flyover at Indira Gandhi Choraha, Gumanpura Kota ;*
- ii. *They are engaged in providing works contract services whereas vide impugned orders, the services provided by them has been classified as "construction service"; that para 5(b) of Schedule II of the Central Goods and Services Tax Act intends to classify construction service as supply of service; that Section 2(119) of the CGST Act defines "work contract" as (119) – "works contract" means 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;";*
- iii. *There are two pre-requisites for classification into Works Contract as concluded from the above definitions:*
 - (i) *a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property.*
 - (ii) *transfer in property of goods (whether as goods or in some other form) is involved in the execution of such contract.*
- iv. *According to the rejection order, services provided by the appellant has been classified as "construction Services" whereas the Services provided by them are classified as "works contract*

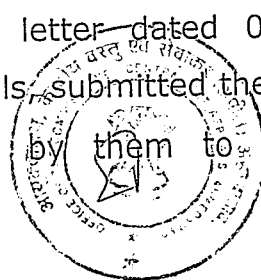


Services". Classification provided in Notification 11/2017-Central Tax(Rate) provides more clarity with to the difference between construction service and works contract service. On careful observation of the Notification No. 11/2017-CT (Rate), following points can be noted:

- (i) The main heading (Entry No. 2) of various services is "Construction Services" which means works contract is a type of construction services that are specifically mentioned.*
- (ii) "construction service" covered by Entry No. 3(i), (ia), (ib), (ic), (id), (ie) is mainly in relation to construction of building, complex (residential or commercial). In contrast, "works Contract" is covered from Entry 3(iii) to (x) which majorly deals with construction of road, bridges, tunnels, monuments etc. for public use or any kind of construction undertaken for the Government.*
- v. Since the appellant is engaged in business of construction of roads, bridges, flyovers etc. , it will fall under Entry No. 3(iv)(a) i.e. composite supply of works contract as defined in clause(119) of Section 2 of the said Act. Their services shall be classified under Para 6(a) of Schedule II of the said Act. Thus Notification No. 15/2017-Central Tax (Rate) dated 28.06.2017 shall not apply in their case and refund of accumulated ITC on account of Inverted Duty Structure is eligible.*
- vi. They relied on case of M/s. A K Bansal & Co. order passed by Commissionerate (Appeals) Chandigarh. They also cited RERA Act 2016 to state that construction of any apartment or building shall fall under the purview of RERA Act 2016 whereas constructing Roads, Bridges, Tunnels remain outside of its scope.*

3. Personal Hearing in the matter was held on 29.12.2022 wherein CA Rashmin Vaja, and CA Disha Barbhaya appeared on behalf of the 'Appellant' as authorized representatives. During P.H. they have submitted written submission dated 29.12.2022 and stated that they have nothing more to add to their written submissions till date.

Further, the appellant vide letter dated 07.03.2023 with reference to their all three present appeals, submitted the copy of Tender for Works Contract Services provided by them to Surat Municipal Corporation.



Discussion and Findings :

4. I have carefully gone through the facts of the case, grounds of appeals, submissions made by the *appellant* and documents available on record. The facts and grounds in all the appeals are same. I find that the main issue to be decided in the instant case is -

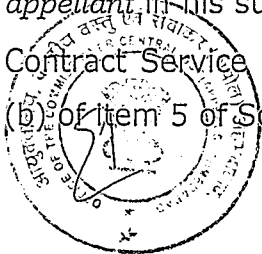
(i) whether the *impugned orders* passed by the *Adjudicating Authority* are legal & proper or not.

(ii) whether the classification of service is "*construction Service (item 5(b) of Schedule II)*" on the basis of which refund claims have been rejected by the *adjudicating authority* or "*Works Contract Services (item 6(a) of Schedule II)*", as contended by the *appellant*.

5. I find that the present appeals were filed to set aside the *impugned order(s)* vide which subject refund claims were rejected on the grounds that the *appellant* has supplied Construction Services within the meaning of sub-item (b) of item 5 of the Schedule II of the CGST Act, 2017 and thus refund is inadmissible in terms of Notification No. 15/2017-Central Tax (Rate) dated 28.06.2017 effective from 01.07.2017. The said Notification reads as under:

In exercise of the powers conferred by sub-section (3) of section 54 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council hereby notifies that no refund of unutilised input tax credit shall be allowed under sub-section (3) of section 54 of the said Central Goods and Services Tax Act, in case of supply of services specified in sub-item (b) of item 5 of Schedule II of the Central Goods and Services Tax Act.

Thus, if the services supplied is the supply of services specified in sub-item (b) of item 5 of Schedule II of the said Act, as decided by the *Adjudicating Authority* in the *impugned orders*, Refund Claims will not be admissible to the *appellant*. Certainly, if the admissibility of refund claims are to be decided, I will have to examine whether the services supplied by the *appellant* is the supply of services as specified in sub-item (b) of item 5 of Schedule II of the said Act, or otherwise. The *appellant* in his submissions has contended that they have supplied Works Contract Service as specified in sub-item (a) of item 6 and not sub-item (b) of item 5 of Schedule II of the said Act.



6. I refer to the sub-item (b) of item 5 of Schedule II of the CGST Act, 2017 which is reproduced as under:

5. Supply of services

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

(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 (20 of 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;

Further, sub-item (a) of item 6 of Schedule II of the CGST Act, 2017 reads as under:

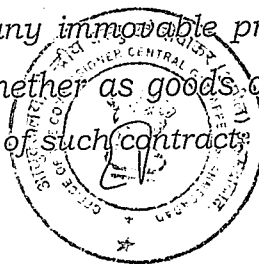
6. Composite supply

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

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

Clause (119) of Section 2 of the CGST Act, 2017 reads as under:

(119) "works contract" means 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;



On perusal of the above provisions, I find that both the items i.e., item 5(b) and 6(a) of Schedule II of the said Act carries the word "construction" and both the activities are to be treated as supply of services. As both the construction activities are in the separate entry in Schedule II, it means that both the construction activities are different. Thus, I must examine in the present case, whether the construction services supplied by the *appellant* is Construction activities of item 5(b) or construction activities within the meaning of Works Contract Service of item 6(a) of Schedule II of the said Act.

7. I find that the scheme of classification of Services is given in Annexure to Notification No. 11/2017-Central Tax (Rate) dated 28th June 2017, wherein Service Description of "*Construction Services*" has been covered under Heading 9954. If we add the 5th digit in the said classification, it become group. Group 99541 covers "*Construction services of buildings*" including therein various types of construction of Residential and Commercial Construction like Construction services of single dwelling or multi dwelling or multi-storied residential buildings(Service Code (Tariff) 995411), Construction services of other residential buildings such as old age homes, homeless shelters, hostels and the like(Service Code (Tariff) 995412), Construction services of industrial buildings (Service Code (Tariff) 995413), Construction services of commercial buildings(Service Code (Tariff) 995413) etc.,. Group 99542 covers "*General construction services of civil engineering works*" wherein '*General construction services of highways, streets, roads, railways and airfield runways, bridges and tunnels*' is covered under Service Code (Tariff) 995421.

I find that the services supplied by the *appellant* is appropriately classified under Service Code (Tariff) 995421. If we see the scheme of classification, it covers all types of activities of construction services under the Heading 954. It has not classified separately the activities of Construction of Item 5(b) and Item 6(a) of Schedule II of the CGST Act. Works contract Service has not been separately classified and is classified under Heading 9954 only. Mere the activity of construction involves, does not mean the Construction activities within the meaning of Item 5(b) of Schedule II only. I find that the *adjudicating authority* has not examined this issue.

Now, if I refer the rate Notification No. 11/2017-Central Tax (Rate) dated 28th June 2017, I find that separate entry has been made for "*Construction of a complex, building, civil structure or a part thereof,*

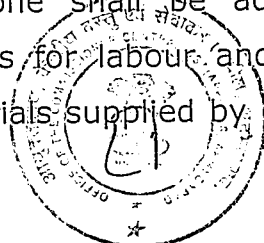


including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier" (i.e. activities of item 5(b) of Schedule II) [Entry No. 3(i) of the Not. No. 11/2017 (CT (Rate); Entry No. 3(i), 3(ia), 3(ib), 3(ic), 3(id), 3(ie) and 3(if) of the Not. No. 03/2019-Central Tax (Rate) dated 29.03.2019 effective from 01.04.2019] and for "composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017" (i.e., activities of item 6(b) of Schedule II) [Entry No. 3(ii) of the Not. No. 11/2017 (CT (Rate); Entry No. 3(ii), 3(iii), 3(iv), 3(v), 3(va) of the Not. No. 03/2019-Central Tax (Rate) dated 29.03.2019 effective from 01.04.2019].

On perusal of the above Rate Notification, I find that the services supplied by the *appellant* is rightly covered under Entry No. 3(iv)(a) of Not. No. 11/2017-CT (rate) amended vide Not. No. 20/2017 - CT(Rate) dated 22.08.2017 and Not. No. 3/2019-CT(Rate) i.e. 'Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax 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 road, bridge, tunnel, or terminal for road transportation for use by General Public.'

8. I have gone through the copy of Tender submitted by the appellant vide their letter dated 07.03.2023. On carefully examining the tender documents, I find that in the said document, it has been mentioned:

- 'Name of work- CONSTRUCTION OF RIVER BRIDGE ACROSS RIVER TAPI JOINING VED-VARIYAV, SURAT. [Page 3]
- Tender Type- On EPC Basis (Design, Engineering, Procurement and Construction)' [Page 3]
- Estimated Cost of Project: Estimated cost of project is revised to Rs. 98,19,42,620/- instead of Rs. 98,58,98,400 (with cost of cement and steel). [Page 11]
- Para 15.4.1- Price variation clause- For (a) Labour, (b) Materials (c) P.O.I.- The amount to be paid/ recoverable to the contractor for the work done shall be adjusted for increase or decrease in the rates for labour and materials excepting the cost of those materials supplied by corporation



or the cost of those materials on which price escalation/star rate difference is being paid separately.[Page 107]

- Para 15.1.2- The Contract Price includes all duties, taxes, royalty, and fees that may be levied in accordance with the laws and regulations in force as on the Base date on the Contractor's equipment, plant, Materials and supplies acquired for the purpose of the Agreement and on the services performed under this Agreement. [Page 107]
- Para 9.2.3- The contractor shall procure all documents, apparatus and instruments, fuel, consumables, water, electricity, labour, Materials, samples, and qualified personnel as are necessary for examining and testing the Project Assets and workmanship in accordance with the Quality Assurance Plan. [Page 94]
- Para 7.0- MATERIALS:
 1. Steel and cement shall not be supplied by Surat Municipal Corporation and same shall be procured by the contractor at his own cost. Procurement of and testing certificates for cement and reinforcement steel round bars or high yield strength steel deformed bars as required shall be arranged by the contractor at his own cost from standard, reputed manufacturers only as per approved list.
 2. The contractor shall submit statement of sources for procurement of materials. The suitability of the same for the required quality, quantity, transport facilities etc. may be ascertained by the tenderer themselves before tendering and rates be quoted accordingly. The source of fine and coarse aggregates given in Table-1 is for general guidance only.
 3. Procurement of all constructional materials as required shall be arranged by the contractor at his own cost from standard, reputed manufacturers / suppliers as may be approved by the client. The Octroi Receipts, royalty receipts, challans etc., shall have to be submitted by the contractor from time to time to the CLIENT
 4. The contractor will have to make his own arrangement for plants, equipment, machineries to be used in the



execution of this work well in time after award of the contract. [Page No. 65]

From the above paras of the said tender document, it is very clear that the supply involves both the supply of goods and services. I am inclined to hold that the work entrusted vide subject tender document/contract awarded to the applicant can be termed as composite supply. The *adjudicating authority* has failed to examine the contract/tender document and thus failed to classify it as Works Contract Service. Thus, I find that this contract of composite supply is nothing but a "Works Contract" within the meaning of Clause (119) of Section 2 of the CGST Act, 2017 and the services supplied by the *appellant* is 'Work Contract Service' in terms of sub-item (a) of item 6 of Schedule II of the CGST Act, 2017.

9. Works contract is treated as supply of services under GST. Under the previous indirect taxes dispensation, there were issues in tax treatment of works contract. Both the Central Government (on the services component of a works contract) & the State Governments (on the sale of goods portion involved in the execution of a works contract) used to levy tax. If we examine the Works contract in the pre-GST era, I see that the taxability of works contract service was brought under the scope of Service Tax net with effect from 1-6-2007 vide Notification No. 23/2007-S.T., dated 22-5-2007 in terms of Section 65(105)(zzzza) of the Finance Act and read with the Finance Act, 2007. With the introduction of Negative list of services with effect from 1st July, 2012, the definition of works contract was defined under Section 65B(44) of the Act as a contract wherein transfer of property in goods involved in the execution of such contract was leviable to tax as sale of goods and such contract was for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alternation of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property. By virtue of Section 66E of Finance Act, 1994, the service portion involved in the execution of works contract was a declared service. Hence, the Service Tax was leviable only on the service element of the works contract. It is very clear from the above definition works contract involves an element of sale of goods and provision of service. In terms of Article 366(29A)(b) of the Constitution of India transfer of property in goods involved in execution of works contract is deemed to be a sale of such goods.

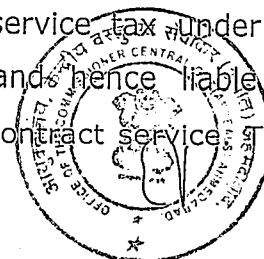


The Constitutional Bench, in the case of State of Madras v. Gannon Dunkerley & Co., 2015 (330) E.L.T. 11 (S.C.) held that the expression 'sale' in nomen juris would only mean and include transfer of property in goods as "Chattle Qua Chattle" and would not cover within its ambit, sale of goods in an indivisible works contract. The Constitutional Bench clearly held that a divisible contract of sale and service can be taxed on the "sale" portion whereas an indivisible works contract cannot be taxed as 'sale'. This necessitated the Forty-Six Constitutional Amendment wherein a new Clause (29A) was introduced to Article 366 of the Constitution.

The provision of 'works contract' in the GST regime has been restricted to any work undertaken for an "Immovable Property" and works contract for movable property is not under scope of GST. The most important thing is that it should always involve transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract."

In the erstwhile service tax regime, "construction of complex service" Construction of Residential Complex Services [Sec 65(105)(zzzh) of Finance Act, 1994], Construction Services – Commercial or industrial [Sec 65(105)(zzq) of Finance Act, 1994] and Works Contract Service [Section 65(105)(zzzza) of Finance Act, 1994] are altogether different services having different scope & taxability. It is a matter-of-fact that same concept has been followed in GST regime also and Construction Services [Clause 5(b) of Schedule II] and Works Contract Service [Clause 6(a) of Schedule II) has been placed differently. In case of any contract of supply, if transfer of property in goods (whether as goods or in some other form) is involved in the execution of construction contract, it will be Work Contract.

Generally, Service provided by builders is taxable in Construction of complex service [Clause 5(b) of Schedule II], since they do not undertake any contract for carrying out any work. They build property on their own and collect advances from the customer. They receive advances from the client that is why are liable for GST otherwise they would not have been liable for tax. By collecting advances from client, they are providing construction service to such clients. On other hand, if such developer/builder give a contract for building the property then such contractor is liable for goods and service tax under works contract. Builders are not works contractor and hence liable under construction of complex service and not works contract service. Thus, in

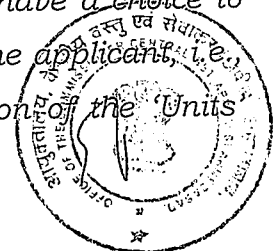


the present case, *appellant* is not supplying Construction of complex service [Clause 5(b) of Schedule II]. In the services supplied by the *appellant*, I do not find any concept of *'construction of a complex, building, civil structure, or a part thereof, including a complex or building intended for sale to a buyer (emphasis added), 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'*. Is the bridge, road or other civil structure is intended to sale to a buyer? Whether taxability was linked to receipt of any consideration before issuance of completion certificate? The answer is big NO and thus I find the Services supplied by *appellant* is certainly not the Construction services within the meaning of Clause 5(b) of Schedule II.

10. I strongly rely upon the advance ruling in case of ASHIANA HOUSING LTD.[2021 (52) G.S.T.L. 365 (A.A.R. - GST - T.N.)-Before the AUTHORITY FOR ADVANCE RULING UNDER GST, TAMIL NADU], wherein it is held that, *"supply of service entered into by applicant with prospective buyer intended for sale to buyer, is a 'Supply of Construction service' classifiable as 'Construction Service under SAC 9954' and not under SAC 9997"*. In this case, the applicant is a real estate developer who has launched a senior-living gated community project called *'Ashiana Shubham'* in Chennai by acquiring development rights from Escapade Real Estate Pvt. Ltd. (Landowner). They initiated the process of acquiring the necessary approvals from Tamil Nadu RERA, for its future project and sought ruling on the following question:

"Whether the activities of construction carried out by the applicant for its customer under the Construction Agreement, being composite supply of works contract are appropriately classifiable under Heading 9997 and chargeable to CGST @ 9% under S. No. 35 of Notification No. 11/2017-C.T. (Rate), dated 28-6-2017".

The authority of Advance Ruling examined the issued and found that –
The applicant is a developer of Residential Real Estate Project for which he has sought the necessary approvals with the relevant authorities. The applicant as a POA of the Landowner, along with the Landowner enters into 'Agreement for Sale' and 'Indenture of Understanding' with the prospective buyer of a Unit of the developed Project and enters into a 'Construction Agreement' with such buyer exclusively. By the clauses of the Construction agreement, it is evident that the prospective buyer does not have a choice to enter into a construction agreement with anyone other than the applicant, i.e., the developer of the project, who undertakes the Construction of the Units



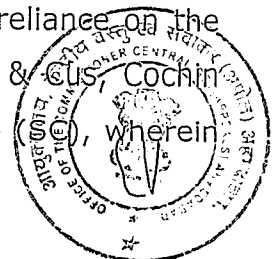
and the infrastructure proposed for the project. The applicant enters into construction agreement with the buyers for their 'Units' in the proposed project along with the agreement for sale and IOU. Having established that the construction of the 'Unit' as per the agreements entered into by the applicant with the prospective customer, is to construct the 'unit', which is a part of the RREP developed by them and the construction is undertaken for 'intended sale' before the issue of completion certificate, the activity is a supply taxable under 'GST.'

This being the fact, the contentions of the applicant that the activity proposed to be undertaken by them under the 'Construction agreement' entered in respect of the 'Unit' of the prospective buyer constitute a composite supply of works contract are taken up for consideration. They submit that the said activity will involve transfer of property in goods such as cement, steel, mortar, etc., to the customer and that the residential unit would qualify as an immovable property without doubt. Thus, they contend that the activity of works contract is by nature a composite supply, involving both goods and service which is a sine qua non for a works contract and hence the subject activity is not a contract for services simpliciter.

the applicant supplies the prospective buyer, the construction service of the 'Unit' intended for purchase by the buyer in the RREP being developed/constructed by the applicant and the contract, i.e., the construction agreement is entered into for construction of the said 'Unit' of the project developed by them. Undoubtedly, construction involves goods such as cement, steel, mortar, etc., as stated by the applicant and for this very reason, 'Construction of a complex or building or a part...' is specifically mentioned to be treated as 'Supply of Service' under Para 5(b) of the Schedule II of the Act. Thus, in the facts of the case, the applicant being a Promoter of the approved RREP, the construction of a 'Unit' in the said RREP is an activity of Construction of part of the building with the intention for sale.

Applying the above ratio of the advance ruling, I find that the "activity of Construction of part of the building with the intention for sale" is only covered under Construction Service within the meaning of Entry No. 5(b) of Schedule II of the CGST Act, 2017. Thus, I have reason to hold that the services supplied by *appellant* is not Construction Service within the meaning of Entry No. 5(b) of Schedule II but is Works Contract Service within the meaning of Entry No. 6(a) of Schedule II.

11. To support my findings that the Services supplied by the *Appellant* is "Works Contract Services", I am also placing reliance on the decision of the Honble Supreme Court in the case of CCE & *Cus. Cochin* vs. Larsen and Toubro Ltd. reported in 2015 (39) STR 916

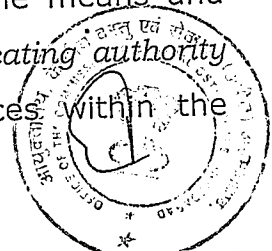


it was held that construction of complex undertaken as a works contract prior to 1-6-2007 and said contract not being vivisectable in view of decision in 2015 (39) S.T.R. 913 (S.C.), service tax is not leviable for such transactions. The Hon'ble Supreme Court in the case of Gannon Dunkerley vs. State of Madras 1958 (9) STC 353 held that an indivisible contract cannot be split up into components artificially; that the Hon'ble Supreme Court in Bharat Sanchar Nigam Ltd vs. UOI - 2006 (2) STR 161 (SC) held that anything on which sales tax is paid is goods and, therefore, service tax cannot be levied. The Apex court has clarified that where the activity involves both transfer of property in goods to the service recipient, which is leviable to tax as sale of goods and also construction service, such activity would be classifiable as "works contract services". The ratio of the aforesaid principle was also followed in the case of Commissioner of Central Excise, Goa Versus R.K. Construction 2016 (41) S.T.R. 879 (Tri. - Mumbai).

12. In view of the above paras, I find that a works contract is essentially a contract of service which may also involve supply of goods in the execution of the contract. It is basically a composite supply of both services and goods and is treated as supply of services in terms of 6(b) of Schedule II of the CGST Act, 2017. Basically, works contract is a contract for work, where supply of material is incidental to the contract for work.

If I compare Section 6(E) of the erstwhile Finance Act, 1994 as amended with Item 5(b) and Item 6(a) of Schedule II of CGST Act, 2017 (i.e. works contract as defined in clause (119) of section 2), I find that both the Act i.e. Finance Act, 1994, and CGST Act, has covered Construction Services and Works Contract Services separately.

Thus, I find that the *adjudicating authority* has just seen the activities of construction and decided the activities of Construction within the meaning of Item 5(b) of Schedule II of CGST Act, 2017. He should have examined whether the activities fall under Works contract Service within the meaning of Item 6(a) of Schedule II of CGST Act, 2017 or not. The *adjudicating authority* has taken the ground of rejection of refund claims the *appellant* has not submitted any documents/invoices evidencing purchase of goods by them and used for providing works contract services. I don't agree with the findings of the *adjudicating authority*. He has erred in not examined whether the activities of the *appellant* falls under Works Contract Services or not. Department has the means and mechanism to verify. Without any verification, the *adjudicating authority* has simply classified the services as construction Services within the



meaning of Item 5(b) of Schedule II. He has not examined why it does not cover under Item 6(a) of Schedule II. I find that if in any contract wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract, it will be Works Contract Services and will be composite services within the meaning of Item 6(a) of Schedule II. I find that contract of the *appellant* involves supply of goods and services and is composite supply and thus their construct activities is Works Contract Services of Item 6(a) of Schedule II of CGST Act. Thus, I find that Not. No. 15/2017- Central Tax (Rate) dated 28.06.2017 will not be applicable.

13. In view of above discussions, the *impugned orders* passed by the *adjudicating authority* are set aside for being not legal and proper and accordingly, I allow the appeals of the "*Appellant*".

14. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

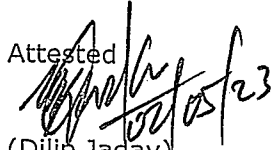
The appeals filed by the appellant stands disposed of in above terms.

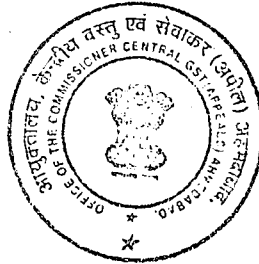

(Mihir Rayka)

Additional Commissioner (Appeals)

Date: 28.04.2023

Attested


(Dilip Jadav)
Superintendent (Appeals)
Central Tax, Ahmedabad



By R.P.A.D.

To,
M/s. Vijay M Mistry Construction Private Limited,
9, Mistry House, Preyash Society, Ambawadi,
Ahmedabad - 380 006

Copy to:

1. The Principal Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner, CGST & C. Ex., Appeals, Ahmedabad.
3. The Commissioner, CGST & C. Ex., Ahmedabad-South.
4. The Dy./Asst. Commissioner, CGST, Division-VI, Ahmedabad South.
5. The Additional Commissioner, Central Tax (System), Ahmedabad South.
6. Guard File.
7. P.A. File



