<u>No GST on ‘Mobilization Advance’ received in Pre-GST Era</u>

<u>Facts:</u>

Shapoorji Pallonji & Company Private Limited (“**Applicant**”) is engaged in the construction business dealing with various clients under Composite Works Contracts involving supply of both goods & services. They had entered into an agreement, dated November 21st, 2016 with the Christian Medical College, Tamil Nadu (“**CMC**”) for construction of Service & Teaching Facility at CMC. As per the Agreement CMC was required to pay 'Mobilization Advance' to the Applicant, which would be equivalent to 5% of the contract price in two tranches of 2.5% each, totally amounting to Rs.75,83,72,000/- and the same is to be recovered on a time basis in 15 equal instalments on monthly basis against the Running Bill (“**RA Bill**”). Both tranches of 'Mobilization Advance' were paid to them by CMC during the Pre-GST regime & on receipt of 'Mobilization Advance' they had paid Service Tax (“**ST**”) payable under Section 66B read with Section 67 of the Finance Act, 1994. However, no Value Added Tax (“**VAT**”) was paid on Mobilization Advance as VAT would be payable subsequently only at the time of charging RA Bill.

The Applicant had received mobilisation advance amounting to Rs. 15,83,72,000/- which is inclusive of ST & Cess of Rs. 89,64,453/- (on 40% of the mobilisation advance received) i.e, the Applicant had received the Mobilisation Advance which is 5% of the Contract value of Rs.316,74,45,469 amounting to Rs. 15,83,72,000/- to mobilise Materials, Labour, etc., for the execution of works. The said amount consisted of Rs. 14,94,07,548/- as the value and Rs. 89,64,453/- as the ST & Cess components.

The Applicant had received the Tranche 1 of Rs.7,91,86,000/- in the month of December 2016 which is inclusive of ST & Cess of Rs.44,82,227/- (on the 40% of the advance received). They had issued Tax Invoice No. CMC/1349/Mob.Adv.01/16-17/07 dated December 13th, 2016 and paid the ST & Cess of Rs.44,82,227/- on the said amount received under ‘Works Contract Service' for the month of December 2016 as reflected in the ST-3 Returns for the half-year from October 2016 to March 2017.

The Applicant had received Tranche 2 of the advance of Rs.7,91,86,000/- in the month of March 2017, which is inclusive of ST & Cess of Rs. 44,82,227/- (on the 40% of the advance received). They had issued Tax invoice No. CMC/1349/Mob.Adv.02/16-17/16 dated March 4th, 2017 and had paid the ST & Cess of Rs. 44,82,227/- as reflected in the statements. The applicant had paid the ST as per the Point of Taxation in respect of services during Pre-GST Regime. The applicant also issued Tax Invoice as per the ST Law mentioning the advance value and ST with Cess. No VAT was paid on the advance received. However, on the RA bills raised during the Pre-GST regime, the VAT/WCT payable has been raised while the Advance received has been considered against payment for the works executed during the said period.

Issue involved:

1. Whether the Transitional Provisions under Section 142(11)(c) of the Central Goods and Services Tax Act, 2017 ("**CGST Act, 2017**") are correctly applicable for the remaining instalments of "Mobilization Advance', which transitioned into the GST regime and to be adjusted/deducted by the Applicant post the implementation of GST (i.e. Post July 1st, 2017)?

2. Whether, the Applicant would be liable to pay GST, under the provisions of the CGST Act, 2017 and allied laws, on the instalments of the 'Mobilization Advance', which has transitioned into the GST regime and adjusted deducted by the Applicant post the implementation of GST (i.e. post July 1st, 2017)?

3. Whether, the Applicant would be eligible to avail Input tax Credit ("**ITC**") on ST paid which was transferred from Pre-GST period through TRAN-1 Return filed in terms of the section 142(11)(c), under Transitional Provisions of the CGST Act, 2017?

Held:

The Hon'ble Tamil Nadu Authority for Advance Ruling ("**TNAAR**") passed the following order vide **Order No. 03/ARA/2020 dated January 31st, 2020**:

- After GST came into force, the works contract entered into by the Applicant for construction is a 'Supply of Service' as per SI.No. 6 of Schedule-II of the CGST Act, 2017. It is stated that the mobilisation advance is paid to the Applicant for the execution of works. In the case at hand, the entire unadjusted mobilisation advance as on July 1st, 2017, according to the Contract, is paid towards consideration for the said supply of service and therefore is a consideration against supply of service of Works Contract.
- The Applicant has raised the invoice to the full Mobilisation Advance received by them and is, therefore, deemed to have supplied works contract service to CMC prior to July 1st, 2017 to the extent covered by the Mobilisation Advance that stood credited to its account as per Section 13 of the CGST Act, 2017.
- It can be deduced that Section 142(11)(c) is applicable in cases with respect to transactions in which both VAT & ST are paid in the Pre-GST regime and on which GST would be leviable to the extent 'supply' is made after the appointed date i.e. July 1st, 2017 for the recipient who has actually paid the tax. Presently, the Applicant has paid ST on the advance received as per the said statute for which the applicant has raised invoice on their service receiver along with the component of ST but no VAT has been paid/received from their customer on that part of the Mobilisation Advance pertaining to materials and therefore, this provision does not apply to the case at hand.

Accordingly, the transitional provisions under Section 142(11)(c) is not applicable to the case of the Applicant.

- Supply of 'Works Contract' is deemed to be a service under GST. Under the pre-GST regime, ST was leviable on the service portion of the Works Contract, which in the case at hand being original works, was levied on 40% of the value. The applicant on receipt of advance has paid the ST on the 40% of the value as required under the provisions of ST. The like situations are more aptly covered under the transition provisions at Section 142(11)(b) wherein it is stated that no tax is payable on services under the GST Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act. Therefore, it can be concluded that GST is not payable on the Mobilisation Advance which has been received prior to GST implementation as per Section 142(11)(b) of the Act.

In a nutshell, the TNAAR ruled that transitional provisions covered u/s 142(11)(c) are not applicable to the present case of the Applicant and that the mobilization advance received prior to the implementation of GST towards supply of Works Contract Service is not to be subjected to GST as per the provisions of Section 142(11)(b) of the CGST Act, 2017. However, the TNAAR declined to answer on the query pertaining to the eligibility of credit based on transitional provisions since the same is not covered within the scope of Section 97(2) of the CGST Act, 2017.

<u>Comments by A2Z:</u>

In recent past, the West Bengal Appellate Authority of Advance Ruling ("**WBAAAR**") has upheld the decision of West Bengal Advance Ruling Authority ("**WBAAR**") in the case of M/s Siemens Ltd. pertaining to a similar matter of Mobilization Advance vide **Appeal Case No. 11/WBAAAR/APPEAL/2019 dated September 17th, 2019** holding that –

"In the transitional provisions of the CGST Act, 2017; no such provision has been included whereby, the advance outstanding as on July 1st, 2017 can be allowed to be subjected to GST only as and when the bills are raised against supply of goods and services.

The time of supply of services is to be guided by section 13(2) of the GST Act hence, the remaining unadjusted amount as on July 1st, 2017 has to be construed as if it was credited into the account of the appellant on the date of July 1st, 2017 only, which will attract GST on such amount on that date itself. Hence, there is no force in the argument that Section 13(2) of the CGST Act, 2017 will not be applicable. In respect of the goods and services provided by Siemens to the recipient post introduction of GST, the amount of ₹ 13,80,74,549/- can only be considered as advance paid as on July 1st, 2017, and in the absence of any exemption of mobilization advance from tax under GST regime, the entire amount of ₹ 13,80,74,549/- becomes taxable on the said date."

The WBAAAR has relied upon provisions of Section 13(2) of the CGST Act to fasten liability of GST on the Applicant. Importantly, it has been held that the Applicant is deemed to have supplied works contract services to recipient **on July 1, 2017**. The basis for the same lies under Explanation (i) to Section 13(2) of the CGST Act, according to which, if the supplier receives any advance payment as consideration, the supply shall be deemed to have been made to the extent covered by the payment.

Considering supply being made as on July 1, 2017, raises an important question for leviability of interest on such advance amount. As a matter of fact, the WBAAAR has wisely considered the aspect of avoiding double taxation by holding that value of supply of works contract service in the subsequent invoices, as and when raised, should be reduced to the extent of advance adjusted in such invoices, and GST should be charged on the net amount that remains after such adjustment. **But, at first place, can it be said that taxability on such mobilisation advance arose on July 1, 2017?**

At this juncture, it is important to note that the definition of 'consideration' under Section 2(31) of the CGST Act, categorically provides that a **'deposit'** given in respect of the supply of goods or services shall **not** be considered as payment made for such supply **unless the supplier applies such deposit as consideration** for the said supply. Hence, till such time the amount of initial deposit is appropriated towards supply of services, the same may not constitute 'consideration' for chargeability of GST. Accordingly, even in above case, taxability of mobilization advance, ideally, must arise at the time of appropriation of such amount against the estimated expenditure and not on July 1, 2017.

The current ruling on treatment of Mobilization Advance by TNAAR is indeed commendable given that it takes the inference of the law in the right manner. However, a completely stark ruling provided by the WBAAAR does comment on the fact about how the reading & understanding of the provisions is totally opposite by various AARs/AAARs. Formation of National Appellate Authority for Advance Ruling is a must so that taxpayers can get a clear view on contentious matters being decoded in varied manners by various state AARs/AAARs.

Important Provisions:

Section 2(31) of the CGST Act, 2017 : Definition of Consideration

"consideration" in relation to the supply of goods or services or both includes—

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

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient

or by any other person but shall not include any subsidy given by the Central Government or a State Government:

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

Section 13(2) of the CGST Act, 2017: Time of Supply of Services

The time of supply of services shall be the earliest of the following dates, namely:-

(a) the date of issue of invoice by the supplier, if the invoice is issued within the period prescribed under section 31 or the date of receipt of payment, whichever is earlier; or

(b) the date of provision of service, if the invoice is not issued within the period prescribed under section 31 or the date of receipt of payment, whichever is earlier; or

(c) the date on which the recipient shows the receipt of services in his books of account, in a case where the provisions of clause (a) or clause (b) do not apply:

Provided that where the supplier of taxable service receives an amount up to one thousand rupees in excess of the amount indicated in the tax invoice, the time of supply to the extent of such excess amount shall, at the option of the said supplier, be the date of issue of invoice relating to such excess amount.

Explanation.––For the purposes of clauses (a) and (b)––

(i) the supply shall be deemed to have been made to the extent it is covered by the invoice or, as the case may be, the payment;

(ii) "the date of receipt of payment" shall be the date on which the payment is entered in the books of account of the supplier or the date on which the payment is credited to his bank account, whichever is earlier.

Section 142(11) of the CGST Act, 2017 : Miscellaneous Transitional Provisions

(b) notwithstanding anything contained in section 13, no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994; (32 of 1994.)

(c) where tax was paid on any supply both under the Value Added Tax Act and under Chapter V of the Finance Act, 1994, (32 of 1994.) tax shall be leviable under this Act and the taxable person shall be entitled to take credit of value added tax or service tax paid under the existing law to the extent of supplies made after the appointed day and such credit shall be calculated in such manner as may be prescribed.

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