

DIN-20230251000000666A54

DELHI APPELLATE AUTHORITY FOR ADVANCE RULING
C.R Building, I.P Estate,
New Delhi-110002

**(Constituted under section 99 of the Delhi Goods and Services Tax Act,
2017(Delhi Act 03 of 2017) vide Govt. of NCT of Delhi's Notification No.
F.3(6)/Fin.(Rev.-I)/2018-19/DS-VI/389 dated 03.09.2019)**

BEFORE THE BENCH OF

Smt. Mallika Arya, Member (Centre)

Dr. S. B. Deepak Kumar, Member (State)

Order No. 04/DAAAR/2022-23 / 2981-2986 Date:- 20.02.2023

SI. No.	Name and address of the Appellant	M/s NBCC (India) Limited, NBCC Bhawan, Lodhi Road, New Delhi-110003
1	GSTIN	07AAACN3053B1Z2
2	Advance Ruling Order against which appeal is filed	07/DAAR/2018 dated 05.10.2018
3	Date of filing appeal	14.11.2018
4	Represented by	Sh. P. K. Sahu, Advocate
5	Whether payment of fees for filing, appeal is discharged. If yes, the amount and challan details	Yes CPIN No:- 18110700081417 dated 14.11.2018



1. The present Order is being issued with respect to the appeal filed by M/s NBCC (India) Limited, NBCC Bhawan, Lodhi Road New Delhi-110003 (herein after referred to as Appellant) under Section 100 of the Central Goods and Service Tax Act, 2017 and Delhi Goods and Service Tax Act, 2017 (herein after referred to as CGST Act, 2017 and SGST Act, 2017) against the Advance Ruling No. 07/DAAR/2018 dated 05.10.2018 given by DAAR. The date of communication of Advance Ruling to the appellant was 18.10.2018.

2. At the outset, we would like to make it clear that the provisions of CGST Act, 2017 and Delhi GST Act, 2017 (Herein after called DGST Act, 2017) are pari materia and have the same provisions in like matter and differ from each other only on a few specific provisions. Therefore, unless a mention is particularly made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the DGST Act.

BRIEF FACTS OF THE CASE

3.1 The Appellant is a Government of India enterprise and engaged in project management consultancy, real estate development and EPC contracts. They have signed a memorandum of understanding on 25.10.2016 with Ministry of Housing and Urban Affairs (MoHUA), Government of India, wherein MoHUA has appointed the Appellant as the executing agency for redevelopment of colonies having "General Pool Residential Accommodation" (in short GPRA) and "Government Pool Office Accommodation" (in short GPOA) at Nauroji Nagar, Sarojini Nagar and Netaji Nagar in Delhi. Under this arrangement, the Appellant is required to organise construction of GPRA (i.e. dwelling units), GPOA (i.e. office spaces), commercial space and supporting infrastructure, such as local convenience shopping centre, banquet hall/ community centre, creche, schools, hospital/dispensary. ATM/Banks, parking facilities, parks and play grounds etc. at the specified locations in place of old existing buildings. The Appellant is also required to maintain the constructed buildings for a period of thirty years after construction. The transactions between the Appellant and MoHUA under the said MOU is not a subject matter before this authority.



3.2 As per the MOU dated 25.10.2016, the estimated cost of above mentioned redevelopment work and maintenance thereof for thirty years is Rs. 24,682 crores which shall be met from free-hold sale of specified commercial built-up area. The sale proceeds of commercial built-up area shall be deposited in an escrow account which shall be managed by Capital Management Committee constituted by MoHUA. Capital Management Committee shall review the status of the escrow account on yearly basis, determine the amount, accrued in excess of 20% of the total cost of the said redevelopment work which is required to be deposited in Consolidated Fund of India. MoHUA will be responsible for allotment/handing over of commercial space to the allottees/shopkeepers/schools after completion of the project. L&DO shall be responsible for relocation and rehabilitation of JJ clusters, if any.

3.3 In terms of the MOU dated 25.10.2016, the Appellant has announced sale of commercial super built-up area on behalf of MoHUA through e-auction on MSTC website on 30.05.2017 and 05.12.2017. In the e-auction details are given on MSTC website, inviting bid for sale of proposed built-up area in the buildings to be constructed by the Appellant as part of re-development work. It is mentioned that the Appellant is selling the proposed built-up area on behalf of MoHUA. The terms and conditions of such sale provide that Government of India through nominated officer will sign the agreement to sell and execute the sale deed with the successful bidder.

3.4 The Appellant had applied to Real Estate Regulatory Authority (RERA) on behalf of MoHUA, Government of India, for registration under the Act, but the Regulator had refused to give such registration in its letter dated 11.08.2017. In this letter, it has been stated that application by the present Appellant (i.e. NBCC) for registration of the project considering MoHUA as the promoter cannot be accepted. In these circumstances, the Appellant applied for registration under RERA as per instruction of MoHUA. In the above mentioned factual background, the Appellant had sought advance ruling in respect of any GST liability on sale of built-up area on behalf of MoHUA in the colonies redeveloped by it for MoHUA.

3.5 The details of question on which advance ruling has been requested for are as under :-

- a) Whether the Appellant is liable to pay GST on sale of commercial super built up area on behalf of MoHUA, Government of India, by considering the Appellant also as the supplier of service while selling such commercial built-up space as an agent on behalf



of the Government of India in the colonies under redevelopment.

- b) Whether the MoHUA, Government of India, is liable to pay GST on sale of commercial built-up space, and whether it relates to any function entrusted to a municipality under Article 243W of the Constitution.
- c) Whether the Appellant is liable to pay GST on sale of built-up space for which part of the consideration was received prior to 01.07.2017, and partly on or after 01.07.2017
- d) Whether the Appellant is liable to pay GST on consideration received under an agreement to sell constructed units in a building which is under construction.

3.6 On the application of the appellant, the AAR vide Order No. 07/DAAR/2018 dated 05.10.2018, held that:-

- A. *"The Appellant is covered in the definitions of "Agent" under Section 2(5), "Supplier" under Section 2(105) and "Taxable Person" under Section 2(107) of the CGST Act, 2017 in respect of the said project while providing services on behalf of the Ministry of Housing and Urban Affairs. Hence, they are liable to pay GST under Section 9(1) of the CGST Act, 2017,*
- B. *The MoHUA, Government of India, is not exempted from payment of GST on sale of commercial built-up space, as it does not relates to any function entrusted to a municipality under Article 243W of the Constitution. Hence, the exemption under S. No 4 of Notification No. 12/2017 — Central Tax (Rate) and parallel notifications under SGST and IGST are not admissible. After amendment of S. No 4 of the said Notification by Notification No 14/2018 — Central Tax (Rate) dated 26.07.2018, only services provided by "governmental authority" are exempted which does not cover the MoHUA. Further, MoHUA, Government of India is not a Municipality under Articles 243P and 243Q of the Constitution. Also, since, such services are being provided to business entities, exemption under S. No. 6 of the said Notification is also not admissible.*



C. *The Appellant is liable to pay GST on the services supplied under GST regime i.e. w.e.f 01.07.2017, even if part of the consideration had been received prior to 01.07.2017.*

D. *The Appellant is liable to pay GST on the sale of commercial built-up area which is under construction, as the same is a 'supply of service' under clause 5(b) of Schedule II of the CGST Act, 2017.'''*

SUBMISSIONS OF THE APPELLANT

The appellant, vide appeal filed under section 100 of the Central Goods and Service Tax Act 2017 and Delhi Goods and Service Tax Act 2017 (herein after referred to as CGST Act, 2017 and SGST Act, 2017) against the Advance Ruling No. 07/DAAR/2018 dated 05.10.2018 given by DAAR, has submitted as under:-

4.1 That they are not required to pay GST on sale of built-up space by MoHUA because it is not a supplier of any goods and service in a transaction between the MoHUA and the purchaser of built-up space. The appellant has explained that section 9 of the CGST Act, casts responsibility to pay tax on the supplier of goods or services, except in a situation carved out in section 9(3) and 9(4) of the Act where the receiver of the supply of goods or services is liable to pay tax.

4.2 Appellant has submitted that a combined reading of section 2(107), which defines "taxable person", and sections 2(105), 22 and 24 of the CGST Act, provides that a supplier of goods or services is a taxable person. Hence, ordinarily, supplier of goods or services is liable to pay tax on the consideration received by him. However, DAAR has held that the appellant is acting as an agent of and, therefore, it is supplier of service as defined in section 2(105) of the CGST Act, Hence, the appellant is liable to pay GST on such capacity. Section 2(105) of the Act defines the expression "supplier" as the person supplying the said goods or services or both and shall include an agent of supplier.



4.3 The appellant submits that DAAR has not appreciated that all the agents of a supplier appointed for discharging various business functions, cannot be construed as “supplier” as defined under section 2(105) of the Act. The inclusive part of the definition covers only those agents of a supplier who are supplying the goods and services to the customers on its behalf. To appreciate the proper meaning of the expression “supplier”, it is necessary to consider paragraph 3 of the Schedule 9 of the Act wherein supply of goods and service by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal has been construed as taxable supply. Hence, in case of supply of service or goods to a customer through an agent, the Act envisages two supplies, one between the principle to agent and thereafter, agent to the customer, Under the Act, principal and agent are considered as two distinct persons and, the agent who is making supply on behalf of his principal, have been considered as supplier under the Act independent of his principal.

4.4 In the present case, sale of constructed units has been considered as taxable supply. In paragraph 58 of the order, DAAR has noted the relevant clauses of the MOU signed between the appellant and MoHUA which includes clause 60. It describes the role of the appellant. From a reading of this clause, it can be seen that the appellant is not selling the units to the customers on behalf of MoHUA, though it may be discharging various other responsibilities as an agent of MoHUA. MoHUA is directly selling the constructed units. DAAR failed to appreciate that as per the “Terms and Condition of Sale”, MoHUD through its nominated office/officer is required to sign the “Agreement to Sell” and, thereafter, execute the sale deed in favour of the allottee/buyer.

4.5 In terms of the MOU, the appellant is responsible for development of the area for MoHUA by constructing of dwelling units, commercial space and supporting infrastructure and maintaining thereof for thirty years. the appellant is entitled to receive cost plus 8% of such cost from MoHUA. Further as per MoU Government of India (MoHUD) through its nominated office/officer will sign the “Agreement to Sell” in favour of the Allottee/buyer after payment of 10% of sale consideration, and on receipt of all outstanding dues from the allottees, Government of India (MoHUD) through its nominated office/officer shall execute the Sale Deed in favour of the allottees. From these terms, it is clear that it is MoHUA which is selling such built-up area, not the appellant. In the developed area, the appellant is not acquiring any interest or right and, therefore, there is no question of it selling any built-up commercial area, being constructed by it, on its own account.



4.6 The appellant is merely constructing the buildings for MoHUA. It is not like a promoter or developer who is selling the units in the building constructed by it. Therefore, the appellant cannot be held responsible for payment of GST on sale of commercial space as it cannot be construed as taxable person making any taxable supply to the persons who had booked the space/units in the buildings. The appellant is not liable to pay GST on the amount received from sale of built-up area, irrespective of taxability of the transactions with the bidders. If at all, the Government is the taxable person.

4.7 The appellant has also submitted that it is registered under Real Estate Regulation Act, 2016 as the promoter but it would not lead to a conclusion that the appellant is a supplier. It has taken registration under RERA being a representative of MoHUA. In fact, the appellant cannot be construed as promoter under RERA.

5.1 Appellant has submitted that GST was not applicable on sale of under-construction space by MoHUA, being exempted from payment of tax under the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017, which provides for exemption from tax in respect of certain supplies. A similar exemption has been given for payment of Delhi GST. However, with effect from 27.07.2018, there is an amendment to Sr. No. 4 of Notification No. 14/2018-Central Tax (Rate). The expressions “Central Government, State Government, Union Territory, local authority” have been omitted from the description at Column (3). Accordingly, services by Governmental Authority alone is exempted from tax, when its activity is in relation to any function entrusted to a municipality under Article 243W of the Constitution. But It seems that there was only a rearrangement of the exemption provision in respect of activities undertaken by “Central Government, State Government, Union Territory, local authority”. By inserting these words in Notification No. 14/2017-Central Tax (Rate) dated 28.06.2017, w.e.f 27.07.2018, the same exemption has been ensured i.e. services of any activity in relation to any function entrusted to a municipality under Article 243W of the Constitution has been notified as neither supply of goods nor a supply of service.

5.2 There is no change in the situation after the amendment of the Notification No. 12/2017-CT(Rate) dated 26.07.2017 and Notification No. 14/2017-CT(Rate) dated 28.06.2017. Services by central government for any activity in relation to any function entrusted to a municipality under article 243W of the Constitution would remain non-taxable



under the latter notification. The DAAR has omitted to consider the import of this Notification No.14/2017-CT(Rate), which got amended from the same date i.e. 26.07.2017. MoHUA and its customers are in the nature of a function normally undertaken by municipality under Article 243W of the Constitution. Thus, DAAR's reliance on the amendment of Notification No. 12/2017-CT(Rate) alone, without taking into account the amendment in Notification No. 14/2017-CT(Rate) is not legally sustainable.

5.3 Even if sale of under-constructed flat is held liable to GST, the Central Government is not liable to pay any GST. As per Sl. No. 6 of Notification No. 12/2017-CT (Rate), all services by the Central Government, except those mentioned therein are subjected to Nil rate of tax. But some categories are not entitled to this benefit. The excluded categories are certain services by department of force, services in relation to aircraft/vessel, transportation of goods/passengers and all other services provided to business entities. That means, all services to non-business entities, other than the excluded categories are exempt from tax. Hence, services by way of selling under-constructed commercial space to non-business entities are not taxable. DAAR has referred to Sl. No. 6 of this Notification and has stated that benefit of this is not applicable to services provided to business entities.

5.4. Sl. No. 5 of the Notification No. 13/2017-CT (R) mandates that on services supplied by the Central Government to a business entity, excluding certain activities that does not include sale of under-constructed units, the tax will be paid by business entity under the reverse charge mechanism. Therefore, a combined effect of Sl. No. 6 of Notification No. 12/2017-CT (R) dated 26.07.2017 and Sl. No. 5 of Notification No. 13/2017-CT (R) dated 27.06.2017, in sale of under-constructed commercial space to a non-business entity is exempted from tax, and any such sale to a business entity would be subjected to reverse charge mechanism. Accordingly, the Central Government is not required to pay any tax, even if there is no exemption on activity in relation to a function entrusted to a municipality under Article 243W of the Constitution.

5.5 The appellant has cited the Delhi Municipal Corporation Act, 1957, to point out that construction of markets is a normal function of municipalities. But Hon'ble AAR has observed that construction of huge commercial built-up area for the purpose of sale cannot be considered to be covered under Article 243W of the Constitution, and hence, cannot be



exempt under Sl. No. 4 of Notification No. 12/2017-CT (R) dated 28.06.2017. There is nothing in law that a Municipality cannot construct huge commercial complexes as part of its role under Article 243W. Further, the appellant had cited Maharashtra Regional and Town Planning Act, 1966, which includes development of shopping centres in urban areas.

5.6 DAAR has wrongly distinguished the above mentioned rulings wherein it was held that construction of housing and market complexes is the responsibility of the municipality. DAAR has failed to appreciate that power and responsibility of municipalities are given in Article 243W and, therefore, it is wrong to hold that these rulings are not pertaining to Article 243W when responsibilities and authorities of municipalities have been explained by the Hon'ble Courts. DAAR has wrongly relied upon CCE v. Mormugao Municipal Council, 2017 (7) G.S.T.L. 228 (Tri) wherein Hon'ble CESTAT failed to appreciate that the activities given in Twelfth Schedule quoted above, relevant to the present context, are urban planning including town planning, regulation of land use and construction of buildings and planning for economic & social development. Hence, DAAR has wrongly concluded that MoHUA is liable to pay GST on sale of commercial built-up space, which relates to a function entrusted to a municipality under Article 243W of the Constitution.

5.7 The legality of construction of a commercial complex has been upheld by the Supreme Court of India in G.B. Mahajan and Others vs. Jalgaon Municipal Council and Others, (1991) 3 SCC 91. Here, Jalgaon Municipal Council contemplated erection of an Administrative Building and commercial complex on a piece of its land for better use of the same. The construction of the project was to be done through a developer at his own cost and he was to handover certain constructed space to the municipality free of cost. The developer was free to sell his share of the space and the allottees (buyers) were to be given occupancy rights for a period of 50 year under section 272 (1) of Maharashtra Municipalities Act, 1965. They were expected to pay rent to the Municipal Council for a period of 50 years at the rate prescribed in the scheme. The project was awarded to a real estate developer by the Municipality through competitive bidding. However, this was challenged by the appellants in the Bombay High Court. The High Court however, did not accept the grounds and the appellants moved the Supreme Court. The Supreme Court dismissed the appeals.



5.8 DAAR has also referred to an amendment in the notification no. 12/2017-Central Tax (Rate) w.e.f. 26.07.2018, which confines the exemption to governmental authorities only. The appellant submits this amendment is prospective and will not apply to them for their transactions taking place before this date. In *VVF Ltd. v. Union of India 2017 (349) E.L.T. 20 (Guj.)*, the Hon'ble Gujarat High Court has held that it is by now well settled that the subordinate legislation or a delegated legislation can be made with prospective effect and cannot be made with retrospective effect. Hence, DAAR has wrongly relied upon the subsequent amendment in the exemption notification.

6.1 The appellant had explained to DAAR that some built-up space has already been sold through e-action on 30.05.2017 and, instalment of sale price has been received prior to 01.07.2017, i.e. prior to notification of GST laws. Section 173 of the GST Act, 2017 states that Chapter V of the Finance Act, 1994, which provides for levy of service tax on the services provided or to be provided, shall be omitted. However, section 174(2) saves the liability accrued under the said Chapter V of Finance Act, 1994. Prior to 01.07.2017, service tax was payable on every "service", and included declared service under Finance Act, 1994. Under section 66E(b) of the said Act, construction of building/complex intended for sale to a buyer, where the consideration is received wholly or partly prior to issuance of completion certificate has been enumerated as "declared service". However, there was no legislative mechanism to determine the value of declared service in a composite transaction of sale of constructed flat which includes transfer of land. Hence, no service tax was payable on consideration received under agreements to sell units in a complex prior to completion of construction. The appellant has placed reliance on the decision of the Hon'ble Delhi High Court in *Suresh Kumar Bansal vs. UOI, 2016 (43) S.T.R. 3 (Del.)* wherein it has been held that no service tax was payable on the consideration received from a prospective buyer for sale of a unit in a residential complex being developed by virtue of explanation to section 65(105)(zzzh) as applicable prior to 01.07.2012 on the ground that there is no mechanism under the Act to levy service tax on the service portion of the transaction.

6.2 DAAR has wrongly relied upon the Department's FAQ to reject the appellant's submission that the appellant is not liable to pay GST on sale of built-up space prior to 01.07.2017. It failed to appreciate that the Department's FAQ are not binding when such FAQ is contrary to the established legal principles as enunciated by the Hon'ble Supreme



Court that tax cannot be levied where machinery to determine such tax has not provided in the statute.

6.3 The appellant had also pleaded that GST cannot be levied on a part consideration received for a continuing transaction which was not taxable earlier. It may be noticed that sale of flat is a single supply which is performed over a period of time. Under GST law, tax is payable on supplies made on or after 01.07.2017. But in a composite supply which has already commenced prior to 01.07.2017, the amount received after 01.07.2017 cannot be considered as consideration attributable to any supply taking place after 01.07.2017. It is a cardinal principle of the law that a single supply cannot be vivisected to tax two segments differently. Further, there is no mechanism under the law to segregate the composite transaction and derive the value of supply made after 01.07.2017 in a case, where supply commenced prior to 01.07.2017. Section 13 of the Act cannot be construed as a mechanism to split a composite contract, This section merely provides that the liability to pay tax on a service shall arise at the time of supply as determinable under this section. This section does not prescribe levy of tax on the supply made prior to 01.07.2017.

7.1 DAAR has wrongly rejected the appellant's submission that no GST is payable on consideration received under an agreement to sell constructed units in a building which is under construction on the basis of the Department's FAQ. DAAR failed to notice that the FAQ has lost its significance after the retrospective amendment in section 7 of the Act.

7.2 From a bare reading of the aforesaid provisions, it can be appreciated that DAAR is wrong in holding that sale of commercial built up area has been defined as "supply of service" under clause 5(b) of Schedule-II of CGST Act, 201. The activity specified in clause 5(b) of Schedule-H of CGST Act, 2017 can be considered as supply of service if it is covered within the meaning of supply as given in clause (1) (2) or (3) of section 7. An agreement to sell commercial built-up area is not a supply of service under section 7 of the Act. Further, sale of built-up area has been specifically excluded from the supply as per the paragraph 5 of Schedule III of the Act.

8. In view of the foregoing, the appellant therefore prayed that the Hon'ble Appellate Authority for Advance Ruling Delhi may :-



- (i) set aside/ modify the impugned Advance Ruling No. 07/DAAR/2018 dated 05.10.2018 passed by DAAR and rule that the transaction in question is not taxable;
- (ii) Grant a personal hearing; and
- (iii) pass any such further or other order(s) as may be deemed fit and proper in facts and circumstances of the case.

RECORD OF PERSONAL HEARING

9.1 The matter was posted for Personal Hearing on 18.03.2020. Shri P. K. Sahu, Advocate, appeared before the Appellate Authority and submitted that the Appellant, at the time when the appellate authority was not constituted and Advance Ruling had already been pronounced, moved Hon'ble Delhi High Court in writ. Therefore, Appellate Authority noted that as the matter is sub-judice they were not in a position to proceed further. Appellant was asked to submit a copy of writ petition.

9.2 Appellant vide his email dated 16.06.2020 submitted a copy writ petition No. 358/2019 filed in the Hon'ble High Court of Delhi. However, during the court proceeding it was submitted by the appellant that Appellate authority had got constituted and had heard the appeal filed by the appellant. Therefore, Hon'ble High Court of Delhi vide its order dated 21.10.2021 dismissed the writ petition as withdrawn.

9.3 The matter was posted for Personal Hearing on 10.02.2021, when Shri P. K. Sahu, Advocate appeared before the Appellate Authority and reiterated his written submissions including additional submission made & copy of which was also handed over. He emphasized that their activity i.e. sale of commercial space was squarely covered under non-taxability clause being an act by a Local Authority covered in Article 243W of the constitution of India. He was requested to provide the following documents:

1. Copy of agreement/entered into with Ministry of Housing & Urban Development.
2. Whether Sale proceeds linked to sale price of commercial space or there is a mark-up.
3. Whether the sale proceeds accrued from sale of Commercial space get credited to Consolidated Fund of India.



9.4 Appellant vide their letter dated 03.03.2021 submitted a copy of MOU entered into with Ministry of Housing and Urban Affairs (MoHUA), Government of India. It was also submitted that (i) Sale proceeds are based on sale price fixed by e-auction and reserve sale price decided by the Cabinet. There is no mark-up in sale proceeds (ii) the sale Proceeds are credited/deposited in Escrow account of Ministry of Housing and Urban Affairs directly by customers. The escrow account is a public account under Article 266 (2) of the constitution of India. The Escrow Account is managed/operated by MoHUA, Government of India

9.5 The matter was posted again for Personal Hearing on 30.11.2022. Shri P. K. Sahu, Advocate submitted his submission vide e-mail dated 29.11.2022 and appeared for Personal Hearing on 30.11.2022 before the new member of the Appellate Authority. He submitted as under:-

1. M/s NBCC (India) Limited has been appointed as an executing/ implementing agency by the Ministry of Housing and Urban Affairs (MoHUA), Government of India, for redevelopment of Nauroji Nagar, Sarojini Nagar and Netaji Nagar colonies by demolishing the old existing buildings.
2. M/s. NBCC is only organizing the construction of GPRA, GPOA, commercial built-up space/area and supporting infrastructure but ultimately the sale deeds for the same to the prospective customers has been signed by MoHUA. He further stated that the M/s. NBCC is acting as an agent of the MoHUA.
3. As per the Delhi Municipal Corporation Act, 1957, construction of markets is a normal function of the Municipality. DAAR has wrongly observed that the construction of huge commercial built-up area for the purpose of sale cannot be considered to be covered under Article 243W of the constitution and hence, cannot be exempted under Sl. No.4 of Notification No. 12/2017 CT (R) dated 28.06.2017. Further, there is nothing in law that Municipalities cannot construct huge commercial complexes as part of it's role under Article 243W of the Constitution of India. He strongly argued that the said exemption is applicable to the Central Government also, if it's services can be described as any function entrusted to a municipality under Article 243W of the constitution of India. He further referred to the amendment in the



notification no. 12/2017 CT(R) w.w.f 26.07.2018 thereby removing the term “Central Government” from the scope of the exemption.

4. DAAR has not noticed that even though the words Central Government was removed from the purview of exemption provided at Sl. No. 4 of Notification No. 12/2017-CT(R), w.e.f. 26.07.2017, there was another amendment on the same date in Notification No. 14/2017-CT (R) dated 28.06.2017 issued by the Central Government wherein it was enumerated that by way of any activity in relation to a function entrusted to a municipality under Article 243W of the Constitution, shall be neither a supply of goods nor as supply of service. Therefore, no tax is payable by the Central Government constructing and selling space in commercial complexes at any point of time. The interpretation of DAAR while passing the order that there was an amendment w.e.f. 26.07.2018 removing Central Government from the scope of exemption means that such exemption was applicable prior to this date is incorrect.
5. Even otherwise, the Central Government is not liable to pay GST as Notification No. 13/2017-CT (R) dated 27.06.2017 which requires GST to be paid under reverse charge mechanism (RCM) for any taxable service rendered by the Central Government.

DISCUSSION AND FINDINGS

10. We have carefully gone through the records of the case and taken into consideration the submissions made by the Appellant in their grounds of appeal and at the time of the personal hearing. We have also carefully gone through the additional submissions given by the Appellant.

11.1 The first issue raised by the appellant is regarding liability to pay GST on the sale of commercial super built up area on behalf of MoHUA, Government of India. It is contended that MoHUA itself is selling the constructed units. Therefore, the appellant cannot be considered as their agent while selling these constructed units. As per appellant, the Delhi Authority for Advance Ruling (DAAR) has wrongly construed that the appellant is a supplier of the service being an agent of MoHUA.



11.2 We find that it was held by Authority for Advance Ruling that the appellants are liable to pay GST under Section 9(1) of the CGST Act, 2017 as they are covered under the definition of "Agent" under Section 2(5), "Supplier" under Section 2(105) and "Taxable Person" under Section 2(107) of the CGST Act, 2017, in respect of the said project while providing services on behalf of the Ministry of Housing and Urban Affairs. In the appeal, the appellant has explained that they are not required to pay GST on sale of built-up space by MoHUA because they are not suppliers of any goods and services in a transaction between the MoHUA and the purchaser of built-up space. The appellant has explained that Section 9 of the CGST Act, casts responsibility to pay tax on the supplier of goods or services, except in a situation carved out in Section 9(3) and 9(4) of the Act where the receiver of the supply of goods or services is liable to pay tax.

11.3 Before going into merits of the appeal as to whether or not the appellant is liable to pay GST under the statutory provisions, the activities of the appellant need to be examined first. As per record, the appellant is a Government of India enterprise and is engaged in project management consultancy, real estate development and EPC contracts. They have signed a memorandum of understanding on 25.10.2016 with Ministry of Housing and Urban Affairs (MoHUA), Government of India, wherein MoHUA has appointed them as the executing agency for redevelopment of colonies having "General Pool Residential Accommodation" (in short GPRA) and "Government Pool Office Accommodation" (in short GPOA) at Nauroji Nagar, Sarojini Nagar and Netaji Nagar in Delhi. Under this arrangement, they are required to organise construction of GPRA (i.e. dwelling units), GPOA (i.e. office spaces), commercial space and supporting infrastructure, such as local convenience shopping centre, banquet hall/ community centre, creche, schools, hospital/dispensary. ATM/Banks, parking facilities, parks and play grounds etc. at the specified locations in place of old existing buildings. They are also required to maintain constructed buildings for a period of thirty years after construction. Further, the estimated cost of abovementioned redevelopment work and maintenance thereof i.e. Rs. 24,682 crores shall be met from free-hold sale of specified commercial built-up area. The sale proceeds of commercial built-up area shall be deposited in an escrow account which shall be managed by Capital Management Committee constituted by MoHUA. Capital Management Committee shall review the status of the escrow account on a yearly basis, determine the amount, accrued in excess of 20% of the total cost of the said redevelopment work which is required to be deposited in the Consolidated



Fund of India. MoHUA will be responsible for allotment/handing over of commercial space to the allottees/shopkeepers/schools after completion of the project. L&DO shall be responsible for relocation and rehabilitation of JJ clusters, if any. In terms of the MOU, the appellant has announced sale of commercial super built-up area on behalf of MoHUA through e-auction on MSTC website on 30.05.2017 and 05.12.2017. In the e-auction details given on MSTC website, inviting bid for sale of proposed built-up area in the buildings to be constructed by the appellant as part of re-development work, it is mentioned that the appellant is selling the proposed built-up area on behalf of MoHUA. The terms and conditions of such sale provide that Government of India through a nominated officer will sign the agreement to sell and the sale deed with the successful bidder. The appellant had applied to Real Estate Regulatory Authority (RERA) on behalf of MoHUA, Government of India, for registration under the Act, but the Regulator refused to give such registration in it's letter dated 11.08.2017. In this letter, it has been stated that application by the present appellant (i.e. NBCC) for registration of the project, considering MoHUA as the promotor cannot be accepted. The appellant had reapplied for registration under RERA as per the instructions of MoHUA and they have obtained the said registartion.

11.4 In order to ascertain the appellant's liability to pay GST in respect of the said projects it needs to be decided whether the appellant is covered under the definitions of "agent", "supplier" and "taxable person", as provided under the statute. The relevant provisions of the CGST Act, 2017 in respect of these definitions are reproduced as under:-

Section 2(5) of the CGST Act, 2017

"agent" means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;

Section 2(105) of the CGST Act, 2017

"supplier" in relation to any goods or services or both, shall mean the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied;



Section 2(107) of the CGST Act, 2017

'taxable person' means a person who is registered or liable to be registered under section 22 or section 24;

11.5 Further, we find that it is apparent that the relationship between the appellant and MoHUA is not on the basis of partnership/ joint venture/ collaboration. Moreover, this MOU is not on Principal-to-Principal basis. The appellant is engaged in selling the commercial built up area through e-auction on behalf of MoHUA. The relevant sale deed with the successful bidder will also be signed by the nominated officer of the MoHUA. The role of the appellant shall be that of a facilitator of execution of sale deed. They are not acquiring any right or interest in the project. It is an admitted fact by the appellant that they are constructing and selling the commercial built up space on behalf of MoHUA. It is very clear from the provisions given in para 1.10 and 1.11 of the MoU dated 25.10.2016 signed between the appellant and MoHUA that the Capital Management Committee shall review the status of Escrow Account on yearly basis, and determine the amount, accrued in excess of 20% above the total cost approved by the Cabinet for redevelopment of all the seven GPRA colonies, to be deposited in Consolidated Fund of India (CFI). The appellant shall be paid Project Management Charges (PMC) @ 8% of the approved/ estimated cost or actual cost, whichever is less for redevelopment of areas by them. They are also being paid agency charges and interest @ 12% per annum on cost of capital investment. In addition, 1% of the sale proceeds shall be payable to the appellant on account of expenditure towards appointment of real estate consultant, publicity, e-auction etc., of commercial and residential areas

11.6 From the above it is clear that supplier means any person supplying the goods or services or both and it also includes an agent. The definition of agent includes a commission agent, broker etc. acting as such on behalf of supplier in relation to the goods or services or both. Combined reading of the definitions of both the supplier and the agent as given in section 2(5) and Section 2(105) respectively of the CGST Act, 2017 makes it clear that the appellant is an agent of MoHUA as they are in the business of supply of commercial built-up space on behalf of later. Therefore, he is a taxable person as defined under Section 2(107) of CGST Act, 2017 and is liable to discharge the tax liability as per statutory provisions.



11.7 It is clear from the Explanation (i) to Section 22 and Clause (vii) of Section 24 of the CGST Act, 2017, that the appellant is required to be registered while acting as an agent for supply of services and is a “taxable person” as per Section 2(107) of the CGST Act, 2017. Therefore, the responsibility to collect and/ or deposit GST on the taxable supply of goods or services as an agent of MoHUA lies with the appellant, since he is engaged in the sale of commercial built-up area on behalf of MoHUA.

12.1 The second issue for consideration before us is whether or not MoHUA, Government of India, is liable to pay GST on the sale of commercial built-up space. The appellant has contested that the construction activities and sale thereof are exempted from tax under Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017, being in relation to a function entrusted to Municipality under Article 243W of the Constitution. As per them DAAR has wrongly invoked the amendment w.e.f. 26.07.2018, in the said notification, without appreciating that this amendment is prospective in nature and would not apply to appellant's transactions which have taken place prior to this date.

12.2 We find that exemption was granted vide S. No. 4 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 (as applicable upto 25.07.2018) to the Services by Central Government, State Government, Union territory, local authority or governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution. The said notification was amended vide Notification No. 14/2018-Central Tax(Rate) dated 26.07.2018 and against S. No. 4, in column (3), the words “Central Government, State Government, Union territory, local authority or” have been omitted. It shows that after the above amendment the exemption under the notification is admissible only if such services are provided by a “government authority”.

12.3 Therefore, the test to be able to avail the benefit of exemption from payment of GST under S. No. 4 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 as amended vide Notification No. 14/2018-Central Tax(Rate) dated 26.07.2018 is that the service provider should be “governmental authority”. However, the said notification does not define the expression “governmental authority”. The same has been defined in Explanation to Clause (16) of Section 2 of the IGST Act, 2017 as under:



Explanation.—For the purposes of this clause, the expression "governmental authority" means an authority or a board or any other body,—

(i) set up by an Act of Parliament or a State Legislature; or

(ii) established by any Government,

with ninety per cent. or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution;

From the above explanation it is clear that to be considered as “governmental authority” an entity must have been set up or established specifically to carry out the functions which are entrusted to a municipality under article 243W of the Constitution. The list of functions envisaged under Twelfth Schedule [Article 243W of the Constitution (Seventy-Fourth Amendment) Act, 1992], consists of-

1. Urban planning including town planning;
2. Regulation of land-use and construction of buildings;
3. Planning for economic and social development;
4. Roads and bridges;
5. Water supply for domestic, industrial and commercial purposes;
6. Public health, sanitation conservancy and solid waste management;
7. Fire services;
8. Urban forestry, Protection of the environment and promotion of ecological aspects;
9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded;
10. Slum Improvement and upgradation;
11. Urban poverty alleviation;
12. Provision of urban amenities and facilities such as parks, gardens, playgrounds;
13. Promotion of cultural, educational and aesthetic aspects;
14. Burials and burial grounds, cremation, cremation grounds and electric crematoriums;
15. Cattle ponds; prevention of cruelty to animals;
16. Vital statistics including registration of births and deaths;
17. Public amenities including street lighting, parking lots, bus stops & public conveniences.
18. Regulation of Slaughter houses and tanneries.

It is apparently clear that all these functions are relating to the welfare of general public without any commercial consideration.



12.4 Therefore, we find no force in the claim of the appellant that the functions of Municipalities given in Twelfth Schedule of the Constitution covers construction of commercial built-up space in the redevelopment projects. In the present case, the appellant is selling the commercial built-up space to the private entities and this activity cannot be treated as a function of Municipality, as envisaged under article 243W of the Constitution of India which provides powers, authority and responsibilities of the Municipalities. Moreover, the commercial built-up spaces are for the purpose of sale to individual buyers who will use them for their commercial gain and this by no stretch of imagination this can be termed as a facility meant for use of common public.

13.1 The third issue is, as to whether the appellant is liable to pay GST on the services supplied under GST regime i.e. w.e.f 01.07.2017, even if a part of the consideration had been received prior to 01.07.2017. As per the appellant, DAAR has wrongly relied upon the Department's FAQ to reject the appellant's submission that he is not liable to pay GST on sale of built-up space prior to 01.07.2017.

13.2 We find that the plea of the appellant is not tenable. As per the statutory provisions they are liable to pay GST on the services supplied under GST regime i.e. w.e.f 01.07.2017, even if a part of the consideration had been received prior to 01.07.2017. FAQ on GST in respect of Construction of Residential Complex by Builders/ Developers were issued by the department merely as a clarification.

13.3 The judgments of Hon'ble Supreme Court viz. Govind Saran Ganga Saran vs. Commissioner of Sales Tax, 1985 (155) 1TR 0144 SC and CIT vs. B.C. Srinivasa Selly, 1981 (128) 1TR 294 SC, relied upon by the appellant are not applicable to the facts of this case.

14. The fourth issue in the present appeal relates to the appellant's liability to pay GST on a consideration received under an agreement involving sale of constructed units in a building which is under construction. The appellant has reiterated the plea already advanced before the DAAR and the same have been sufficiently addressed by the authority while passing the impugned Order. Therefore, we do not see any reason to go to this aspect any further.




15. In view of above discussion and findings, it is clear that there is no merit in the appeal filed by M/s NBCC(India) Ltd. against the Order No. 07/DAAR/2018 dated 05.10.2018 passed by Delhi Authority for Advance Ruling. The said Order is proper and legal and there is no reason to interfere with it. We, therefore, pass the following Order:

Order

The Order dated 05.10.2018 of Delhi Authority for Advance Ruling is upheld. The appeal filed by M/s NBCC (India) Ltd., is dismissed being devoid of merit.


(Mallika Arya)
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Member
Appellate Authority for Advance Ruling


(Dr. S. B. Deepak Kumar)
Member (State GST)
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- 4 Sh. C. L. Roy, Assistant Commissioner of State Tax, KCS Branch, Vyapar Bhawan, I.P. Estate, New Delhi-110002, along with a spare copy for jurisdictional Assistant Commissioner of State Tax.

