

KARNATAKA APPELLATE AUTHORITY FOR ADVANCE RULING
6TH FLOOR, VANIJYA THERIGE KARYALAYA, KALIDASA ROAD,
GANDHINAGAR, BANGALORE – 560009

(Constituted under section 99 of the Karnataka Goods and Services Tax Act,
2017 vide Government of Karnataka Order No FD 47 CSL 2017, Bangalore,
Dated:25-04-2018)

BEFORE THE BENCH OF

SHRI. PRAMOD KUMAR AGRAWAL, MEMBER

SMT. SHIKHA C, MEMBER

ORDER NO.KAR/AAAR/02/2024

DATE:06.11.2024

Sl.No	Name and address of the appellant	M/s Chamundeswari Electricity Supply Corporation Limited, No. 29, 2 nd Stage, Vijayanagara, Hinkal, Mysore – 570017.
1	GSTIN or User ID	29AACCC6636P1Z1
2	Advance Ruling Order against which appeal is filed	KAR/ADRG/09/2023 dtd.27.02.2023
3	Date of filing appeal	27.03.2023
4	Represented by	Shri.P.E.Umesh, Advocate and Consultant
5	Jurisdictional Authority- Centre	The Commissioner of Central Tax, Mysore GST Commissionerate, Vijayanagar Division, Gokulam Range, Mysore.
6	Jurisdictional Authority- State	ACCT, LGSTO – 190, Mysuru
7	Whether payment of fees for filing appeal is discharged. If yes, the amount and challan details	Challan CNRB23032900380323 dtd.23.03.23, Rs.20,000=00

PROCEEDINGS

(Under Section 101 of the CGST Act, 2017 and the KGST Act, 2017)

1. At the outset we would like to make it clear that the provisions of CGST Act, 2017 and KGST Act, 2017 are in parimateria 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 KGST Act.

2. The present appeal has been filed under section 100 of the Central Goods and Service Tax Act 2017 and Karnataka Goods and Service Tax Act 2017 (herein after referred to as CGST Act, 2017 and KGST Act, 2017) by M/s Chamundeswari Electricity Supply Corporation Limited, No. 29, 2nd Stage, Vijayanagara, Hinkal, Mysore – 570017 (herein after also referred to as Appellant/Corporation/CESCOM) against the Advance Ruling order No. KAR/ADRG/09/2023 Dated:27.02.2023.

BRIEF FACTS OF THE CASE:

3.1. The Appellant is a public sector company of Government of Karnataka engaged in the distribution of electricity and supply of electric power in the districts of Mysore, Mandya, Kodagu, Chamaranagar and Hassan. The appellant is registered under the provisions of Central Goods and Services Tax Act, 2017 and Karnataka Goods and Services Tax Act, 2017 (herein after referred to as the CGST Act and KGST/ SGST Act respectively) having GSTIN 29AACCC6636P1Z1.

3.2. The Appellant is supplying electricity for housing, irrigation and also for all kinds of commercial and non-commercial purposes, the cliental comprising of individuals, farmers, organisations, hospitals, government organisations, commercial establishments, industries etc, and some of the leading industries and companies located in the said area such as M/s. Infosys Ltd., M/s. J.K.Tyres Ltd., M/s. ITC Ltd., M/s. Wipro Ltd. etc., To meet the huge energy demand and universal supply obligation, it purchases power from central and state generating stations, private power generators which also include generators from non-conventional sources like wind, solar, mini hydel, besides Telangana State Power Generation Corporation Ltd., M/s. Damodar Valley Corporation Ltd., short-term and medium term generators. The retail tariff is determined by the Karnataka Electricity Regulatory Commission, (KERC) as per the Electricity Act, 2003.

3.3. The activity of appellant involves both supply of goods and services. The appellant is not charging GST on the value of supply of electrical energy in terms of exemption under Sl. No.104 of Notification No.2/2017 CT(R). Another main activity of the corporation is "distribution of electricity". The appellant is not charging GST on distribution of electricity as exemption is granted vide Sl. No.25 of Notification No.12/2017 CT(R). The appellant is charging GST on support services such as application fee, registration fee, fee for LT/Temporary application supply of electricity, HT/LT meter testing charges, re-connection fee, augmentation charges, fees for testing of installations/ inspection of installations, fee collected for issuing NOC, facilitation fee towards solar roof top system, name transfer fee, service line charges, ledger abstract, tender application, additional loads, load reduction, disconnection, re-



connection, development charges, calibration charges, penalty recovered from supplier bills, meter burnt out cost, meter testing charges, re-sealing charges, one time maintenance cost from new layouts, line shifting charges etc.

3.4. The appellant entered into **Power Supply Agreement (PSA)** with M/s. JK Tyre Ltd., M/s. Wipro Ltd., M/s. ITC Ltd., etc to supply power. In view of Government policy to encourage private power suppliers especially generators of green energy/renewable energy by way of hydel power, solar, wind mill etc. and sell them in open market, open access is provided in the Electricity Act and the Regulations issued from time to time, to such Industries or companies to buy power from private generators notwithstanding that they have entered into PSA With the Appellant. This mode is called in the trade as "open access" and customers as "**Open Access Consumers**" ("OA Consumers" for short). It is pertinent to note that in order to comply with the obligations created in PSA, the Appellant enters into back-to-back **Power Purchase Agreements (PPA)** with private and state owned energy generators to purchase power as back up for seamless supply of electricity assured to such OA Consumers and therefore, in terms of the PPA, the Appellant has to pay Charges on the agreed units of the electricity supplied every month to its said generators. The purchase/sale tariff, as the case may be, of electrical energy includes two components i.e., capacity charges (fixed charges) and energy charges (Variable) and both are exempt from tax being towards Supply of electricity. It is pertinent to note that both the fixed Charges and variable charges paid by the Appellant on energy purchased under the PPA are part of its variable charges levied by the Appellant on the OA Consumer while OA consumer buys electricity from the Appellant and same is directly linked to number of units of the Appellant's electricity consumed by the OA Consumer. In the present transaction, the purchase cost is nothing but the fixed cost to the Appellant.

3.5. The availability of many private electricity generators paved way for stiff competition in the energy market because of which many, a times the prices quoted by the private generators are lesser than the price agreed in PSA and in such cases invoking open access clause in PSA r/w the Electricity Act, the OA Consumers opt to buy electricity temporarily from the private generators during the term of PSA. PSA entered into with OA Consumers contemplates the energy supply is subject to. "Conditions of Supply" which is defined in the PSA itself as the conditions of Supply of Electricity of Distribution Licensee in the State of Karnataka approved by the Karnataka Electricity Regulatory Commission and as amended from time to time. The clause (5) of the "The condition of supply" of the agreement provides for Tariff and Payment of electricity charges.

3.6. The collection of Additional Surcharge, the subject matter of the appeal, being charged on OA Consumer comes to picture when OA Consumers opt to buy electricity from third party private generators by invoking open access clause. The private generators, who have agreed to supply power to OA Consumers, since they do not have permanent infrastructure to transmit the power from their generating site to the



premises of OA Consumers, enter into separate agreements with various distribution utilities like the Appellant and its counterparts, to use their respective infrastructures on payment of Wheeling Charges. When OA Consumer pays the electricity charges to its third party and not to the Appellant for the said energy purchased/consumed, even then the Appellant has to pay monthly fixed cost to its third-party generators as per the obligation created in the PPA. Since the Appellant is not raising invoices on OA consumer for the variable charges to the extent of units it purchases from the third party generators during open access period, the amount paid by the Appellant to its third party generators as per the obligation created under the PPA will be fixed cost to it and same gets stranded at the end of the Appellant.

3.7. In order to meet the fixed cost stranded in the said transaction arising purely out of Appellant's obligation to supply power to OA Consumers, Sec.42(4) of the Electricity Act, 2003 read with clause 8.5 of the Tariff Policy, 2016; clause 5.8.3 of the National Electricity Policy; Regulation 11(VII) of the Karnataka Electricity Regulatory Commission (Terms and Conditions for open Access) Regulation, 2004; & Regulation 3 of KERC (Electricity Supply) Code, 2004, provides collection of Additional Surcharge from OA consumers on the basis of quantum of energy wheeled from the private generators of OA Consumer.

3.8. The Appellant sought for advance ruling in respect of the following questions:

- i. Since the Government of Karnataka holds 99.99% of equity in the Corporation, whether the Corporation is considered as "Governmental Authority" or "Local Authority"?
- ii. Since the Corporation is fully owned by the Government of Karnataka and audited by the Comptroller and Auditor General of India, whether filing of Annual Return in Form GSTR9 and Form GSTR9C is exempt under the Second Proviso to Section 44 of the CGST and KGST Acts?
- iii. Whether the Corporation is eligible to claim input tax credit on the inward supply of goods and services, which are capitalized in the books of accounts?
- iv. Whether the Corporation is eligible to claim input tax credit on the inward supply of services against output taxable supplies of support and auxiliary services and other supply of taxable goods?
- v. Whether the Corporation is eligible to claim input tax credit (on inputs, input services and capital goods) proportionately on the taxable output supply of support services and goods (scrap etc.) as per the provisions of Rule 42 and 43 of the CGST and KGST Rules?
- vi. Whether the Corporation is eligible to claim taxes paid under RCM, as input tax credit?
- vii. Whether Additional Surcharge collected from Open Access Consumer as per sub section (4) of Section 42 of the Electricity Act, 2003, clause 8.5.4 of the Tariff Policy 2016. Clause 5.8.3 of the National Electricity Policy and Clause 11 (vii) of the KERC (Terms and Conditions for Open Access) Regulations, 2004, is taxable under the GST Acts?



- viii. Whether "Wheeling and Banking Charges allowed by Commission (KERC) as 5% and 2% of the energy input into the distribution system by Open Access consumer is taxable under the GST Acts?

3.9. The Advance Ruling Authority vide impugned order no. KAR ADRG 09/2023 dated 17.02.2023 has given the following Ruling:

- i. Chamundeshwari Electricity Supply Corporation Limited cannot be considered either as "Governmental Authority" or "Local Authority".
- ii. The Applicant is not exempted from filing of Annual Returns in Form GSTR9 and Form GSTR9C under the second Proviso to Section 44 of the CGST and KGST Act.
- iii. The Applicant is eligible to claim input tax credit on the inward supply of goods and services which are capitalized in the books of accounts if they are used or intended to be used in the course or furtherance of business.
- iv. The applicant is eligible to claim input tax credit on the inward supply of services against output taxable supplies of support and auxiliary services and other supply of taxable goods subject to section 17(2) of the CGST Act read with Rule 42 and 43 of CGST Rules.
- v. The Applicant is eligible to claim input tax credit (on inputs, input services and capital goods) proportionately on the taxable output supply of support services and goods (scrap etc.) subject to section 17(2) of the CGST Act read with Rule 42 and 43 of CGST Rules.
- vi. The Applicant is eligible to claim taxes paid under RCM, as input tax credit, subject to section 17(2) of the CGST Act read with Rule 42 and 43 of CGST Rules.
- vii. Additional Surcharge collected from Open Access Consumer as per subsection (4) of Section 42 of the Electricity Act, 2003, clause 8.5.4 of the Tariff Policy 2016, Clause 5.8.3 of the National Electricity Policy and clause 11 (vii) of the KERC (Terms and Conditions for Open Access) Regulations, 2004, is taxable under GST Act.
- viii. The "Wheeling and Banking Charges" collected by the Applicant is exempted from the payment of GST.

4. The Appellant was aggrieved in so far as Ruling No. vii of the Advance Ruling Authority, holding that "additional surcharge collected by the appellant from OA consumers is consideration for tolerating an act which is a taxable supply under Section 7(1) of the CGST Act". Therefore, this Appeal is being preferred before this Appellate Authority praying for

- (i) setting aside the Ruling No. vii of the Advance Ruling &
- (ii) to hold that Additional surcharge being collected by the appellant from OA consumer is neither supply of goods nor supply of service contemplated under Section 7 of the GST Acts; or



- (iii) to hold that the additional surcharge collected from OA consumer is nothing but the charges towards distribution of electricity, which is exempt supply as per Sl. No. 25 of Notification No. 12/2017 – CT (Rate) dated 28.06.2023; or
- (iv) to hold that additional surcharge being collected from OA consumer is ancillary to the main supply of electricity to the OA consumers and the principal supply of electricity being exempted from payment of GST as per entry no. 104 of Notification No.2/2017 CT(R) dated 28.06.2017 read with Section 2(31) and Section 8(a) of the CGST Act, the additional surcharge collected being ancillary to it, is also exempted from payment of GST

on the following grounds.

5. GROUNDS OF APPEAL:

5.1. The additional surcharge collected is not a consideration for supply of goods or services. In fact, supply within the scope of Sec. 7 is not involved in so far as the receipt of additional surcharge is concerned. As per the Electricity Act, 2003, the power corporations have an universal supply obligation and they are required to supply power in their respective areas as and when consumers require them. Considering the forecast approved by the State Electricity Regulatory Commission while determining the annual revenue requirement, power corporations enter into long term PPAs with private energy generators / traders so as to ensure supply of power to OA consumers. Therefore, the power corporations, like the Appellant, have to bear the fixed cost on account of mandatory purchases from them even when there is no off take of energy through such source. Whenever any OA consumer opts for open access and takes intermittent supply by open access route, the Appellant shall continue to incur fixed cost payable to its third-party generators / traders as per the contracted capacity in terms PPAs entered into with them. The fixed costs are being recovered by the Appellant by way of variable charges and variable charges which is one of the components of the tariff on supply of electricity sold (Supplied) by the Appellant, will not come to picture on the units of energy bought by OA consumer from their third party generators during open access period. This leads to the situation where power corporations / licensees are saddled with the stranded fixed cost on account of obligation to OA consumers. Therefore, provision is made under Sec. 42(4) of the Electricity Act which provides that OA Consumers pay additional surcharge on the basis of energy wheeled to OA consumers from their private generators. As per clause 8.5 of the Tariff Policy 2016, the said charge is applicable only if it is conclusively demonstrated that the obligation of the Appellant, in terms of the existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. In the present case, the Appellant has such unavoidable obligation to bear the fixed costs consequent to the PPAs entered into with its private energy generators in order to cater to OA consumers under PSAs. Further, clause 5.8.3 of the National Electricity Policy also envisages such levy. Even clause 6.8.15 of the KERC order



dated 09-06-2005 provides for levy of additional surcharge by the power corporations to meet the fixed cost. The additional surcharge collected is not towards any supply of goods or service and is to meet the fixed cost stranded, therefore, at the first instance, it does not fall within the scope of "supply" contemplated under Sec. 7 of the Act. It is nothing but recovery of stranded fixed cost from the OA Consumer as mandated under the above provisions of the statute. No Supply is involved in such collection made.

5.2. Money received by way of additional surcharge is not given by OA Consumer to refrain the Appellant from doing something in return. The dictionary meaning of the term "stranded" enumerated in clause 8.5 of the Tariff Policy 2016 means "left in a place one cannot get away" and by a conjoint reading of said clause with Sec. 42(4) of the Electricity Charges it can be gathered that the additional surcharge is towards fixed cost conclusively demonstrated as 'stranded' which even does not fall under liquidated damages also. It can therefore be construed that it is not consideration for tolerating an act or situation created by the OA Consumer. They are, in fact, money collected as per statute for 'not tolerating an act or situation of a OA Consumer for drawing power from independent power generators. There is no standalone clause independently agreed by the parties to the contract fixing the said amount at their discretion but is mandated under the statute. Therefore, it is not a consideration simpliciter. Such payments being merely flow of money are not a consideration for any supply and not taxable. It could be seen from the above definition that supply of good or service is sine- -quo-non to form supply to invoke the receipts in the transaction as consideration. The additional surcharge collected by the Appellant having got stranded with fixed cost does not involve any kind of supply of goods or service.

5.3. The CBIC, vide Circular No.178/10/2022-GST, dated 03-08- 2022 has clarified certain issues with regard to applicability of GST on liquidated damages, compensation or penalty arising out of breach of contract or other provision of law wherein legal position in respect of para no. 5(e) of the Schedule-II is also discussed at para 7 of it. Referring to some illustrations, it was clarified that payment of liquidated damages for breach of contract, penalties under mining Act for excess stock found with the mining company do not constitute consideration and are not consideration for tolerating as act or situation but recovered for not tolerating as act which is similar to the situation in the present case.

5.4. Similarly, with reference to fixed capacity charges for power, para 10.2 of the said Circular clarifies that the minimum fixed charges/capacity charges and the variable/energy charges are charged for sale of electricity and are thus not taxable as electricity is exempt from GST. Power purchase agreements may have provisions that the power producer shall not supply electricity to a third party without approval of buyer. Such agreements which ensure assured supply of power to State Electricity Boards/DISCOMS are ancillary arrangements; the contract is essentially for supply of electricity. Accordingly, the PSA is not entered into with OA consumers for permitting it to buy power from private producers. Therefore, additional surcharge received is towards 'not tolerating an act or situation' construing deterrence to such Act.



5.5. In para 10.1 of the said Circular dated 03-08-2022, it has been categorically stated that "the fact that the minimum fixed charges remain the same whether electricity is consumed or not or it is scheduled/consumed below the contracted or available capacity of a minimum threshold, does not mean that minimum fixed charge or part of it is a charge for tolerating the act of not Scheduling or consuming the minimum the contracted or available capacity or a minimum threshold". Additional Surcharge collected squarely covered under this para and hence not collected "for tolerating act" but in fact "collected not to tolerate an act", and hence exempt from GST.

5.6. The Concept to Para 5(e) of Schedule-II of CGST Act is borrowed from Service Tax regime and is identical to clause (e) of Sec. 66E (Declared Service) under the Finance Act, 1994. The department had taken a stand that liquidated damages amounts to consideration in the hands of assessee, under the Finance Act. The various Central Excise and Service Tax Tribunals (CESTATS) have delivered judgments with reference to the said issue wherein the question of liability to tax on liquidated damages' was decided in favour of the assessee. One such case being decision of the Hon'ble CESTAT, Delhi vide order dated 22-12-2020 in STA No. 50567/2019 in the case of M/s South Eastern Coal Fields Ltd., V/s. CCE Raipur. The CBIC has recently issued another Circular No. 214/1/2 023 - Service Tax, dated 28-02-2023 referring to the said Circular dated 03-08 2022 issued under CGST Act, clarifying the said clause and also stated that it has decided not to appeal against the CESTAT decision and also that it has decided not to pursue the Civil Appeal filed before the Supreme Court. In the service tax regime, department has not levied tax on the said additional surcharges collected from OA consumers by the power corporations. Therefore, it would be incorrect to collect tax under CGST Act. just because the Taxation Act is changed as GST Act.

5.7. The Hon'ble CESTAT, Kolkata vide order dated 10-11-2021 in STA No. 75218/2020, Final order no. 75689/2021 in the case of MNH Shakti Ltd. V/s. Commissioner, CGST, Rourkela, setting aside the service tax demand on compensation received under Coal Mines (Special Provision) Act, 2015 enactment pursuant to the Supreme Court order cancelling the coal blocks, towards expenditure incurred for developing coal block earlier, observing that compensation was received by the assessee in terms of statute enacted pursuant to the Supreme Court order and therefore, the assessee cannot be presumed to have tolerated any act in as much as the assessee do not have any option or choice whether to tolerate or not and accordingly, held that the Stand taken by the department was not correct. In the present case also, the additional surcharge is being collected by the Appellant in terms of the said provisions under the Electricity Act, Tariff Policy, 2016 and National Electricity Policy etc., without having any option or choice whether to tolerate or not of the act of OA consumer in opting for open access.

5.8. Assuming but not admitting that additional surcharge is held to be consideration towards supply, then also since the said supply is supplementary to the principal



supply of Electrical Energy, for which the PSAs are entered into, the Additional Surcharge shall also be assessed as the Principal Supply and thus exempted from payment of GST. The said supply being a part of composite supply, within the meaning of Sec. 2(30) read with Section 8 of the GST Acts, and if so, the contract for principal supply being the supply of electrical energy (goods), even the Additional Surcharge collected is also exempt from payment tax in terms of Sec. 8(a) of the GST Acts read with Sl. No. 104 of Notification No.2/2017-Central Tax (Rate), dated 28-06-2017.

5.9. Alternatively, if it is held that the said additional surcharge collected is in relation to supply of service, then also it being in relation to distribution of electricity by the power corporations including the Appellant, from the generation site of third party generators from whom the OA consumer is procuring the electricity to the premises of the OA consumer, it amounts to 'distribution of electricity' by the Appellant and therefore the collection of additional surcharge would be exempted supply as per entry no. 25 of the Notification No.12/2017-Central Tax (Rate), dated 28-06-2017,

PERSONAL HEARING:

6.1. The Personal Hearing was held on 25.10.2024, which was attended by Shri. P.E Umesh, Advocate & Tax Consultant for the Appellant. During Personal Hearing he submitted that the appellant has entered into a Power Supply Agreement (PSA) with Open Access (OA) Consumers i.e Industries or companies who can buy power from private generators also. the Appellant enters into back-to-back Power Purchase Agreements (PPA) with private and state-owned energy generators to purchase power as back up for seamless supply of electricity assured to such OA Consumers. The Appellant has to pay capacity charges (fixed charges) and energy charges (Variable) on the agreed units of the electricity supplied every month to its said generators. Only variable charges are levied by the Appellant on the OA Consumer while OA consumer buys electricity from the Appellant. OA Consumers can opt to buy electricity from third party private generators by invoking an open access clause. Since the Appellant is not raising invoices on OA consumer for the variable charges to the extent of units it purchases from the third-party generators during open access period, obviously the amount paid by the Appellant to its third-party generators as per the obligation created under the PPA will be fixed cost to it and same gets stranded at the end of the Appellant. In order to meet the fixed cost stranded in the said transaction arising purely out of Appellant's obligation to supply power to OA Consumers, Sec.42(4) of the Electricity Act, 2003 read with clause 8.5 of the Tariff Policy, 2016; clause 5.8.3 of the National Electricity Policy; Regulation 11(VII) of the Karnataka Electricity Regulatory Commission (Terms and Conditions for open Access) Regulation, 2004; & Regulation 3 of KERC (Electricity Supply) Code, 2004, provides collection of Additional Surcharge from OA consumers on the basis of quantum of energy wheeled from the private generators of OA Consumer.

6.2. He further submitted that the Authority for Advanced Ruling in their Ruling KAR ADRG 09/2023 dated 27.02.2023 held that additional surcharge collected by the



appellant from OA consumers is consideration for tolerating an act which is a taxable supply under Section 7(1) of the CGST Act. Accordingly, additional surcharge collected from Open Access Consumer as per sub section (4) of Section 42 of the Electricity Act, 2003, Clause 8.5.4 of the Tariff Policy 2016, Clause 5.8.3 of the National Electricity Policy and Clause 11 (vii) of the KERC (Terms and Conditions for Open Access) Regulations, 2004, is taxable under GST Act. The additional surcharge collected is not a consideration for tolerating an act which is a taxable supply. It is nothing but recovery of stranded fixed cost from the OA Consumer as mandated under the above provisions of the statute.

6.3. He further submitted that the additional surcharge cannot be held as consideration towards tolerating an act. He drew reference to the Para 7, 7.1 & 10 of the Board Circular No. 178//10/2022-GST dated 3rd Aug 2022 and submitted that such Additional Surcharge is collected as per statute for 'not tolerating an act or situation of an OA Consumer for drawing power from independent power generators and such payments will not constitute 'consideration' and hence such activities will not constitute independent "Supply" within the meaning of the Act.

6.4. Alternately, he submitted that assuming that the additional surcharge is consideration towards supply of goods and services, in such case also, the main activity of distribution and supply of electricity is exempted activity in terms of entry no. 104 of Notification No. 02/2017 CT(R) as goods and in terms of entry no. 25 of Notification No.12/2017 CT(R) as service.

6.5. He drew attention to the detailed submission made by them vide their letter dated 24.03.2023 and 24.04.2023 and stated that the grounds of appeal made in such submissions are again reiterated today during personal hearing. Further, he stated that they have submitted copies of documents like Tariff Order 2022 and Tariff Order 2024; KERC Order dated 14.05.2018 etc. before commencement of personal hearing.

6.6. He also placed on record that the additional surcharge charged by them is as per the Tariff Orders issued by the Karnataka Electricity Regulatory Commission from time to time. Such Additional Surcharge collected by them is also forming part of the Invoices raised by them to such OA customers. Hence, the additional surcharge collected by them is part of the tariff fixed and does not have any independent activity associated with it. He further submitted that a written submission substantiating the reason why the additional surcharge collected should be considered as part of tariff charges towards sale of electricity which is exempted under Notification No. 02/2017 CT(R) will be made.

6.7. Further, he drew attention to their submission dated 06.02.2024, wherein they have enclosed the Appellate Authority for Advance Ruling Order No.07/18-19/29.03.2019 of Uttarakhand and submitted that the said Ruling held that GST is not applicable on the Additional surcharge.



6.8. Finally, he prayed that in the interest of justice, equality and uniformity in practice, the lower authority order to the extent of holding that the additional surcharge collected by them from their OA customers is taxable under GST may be set aside.

6.9. The Appellant made further submissions on 28.10.2024, wherein while reiterating to their earlier submissions stated that the stranded fixed cost recoverable as determined by KERC, gets the colour of "Additional Surcharge" due to the statutory provisions. It is clear that the collection of 'Additional Surcharge' is also nothing but fixed charges which forms one of the components of price of electricity as per PSA and accordingly exempted under entry No.104 of Notification No.02/2017 CT(R) dated 28.06.2017. Even if it is held that the said 'Additional Surcharge' collected is in relation to supply of service, then also it being in relation to distribution of electricity by the appellant, from the generation site of third party generators of OA consumers to the premises of the OA consumer, it amounts to distributions of electricity and collection of 'Additional Surcharge' is exempted supply as per entry No.25 of the Notification No.12/2017-Central Tax(Rate) dated 28.06.2017.

DISCUSSIONS AND FINDINGS:

7. We have gone through the entire case records including all the written as well as oral submissions made by the appellant. We have also examined the impugned order No. KAR ADRG 09/2023 dtd.17.02.2023 passed by the Authority for Advance Ruling in Karnataka. On careful consideration of the same, the issue to be decided is whether the order passed by the Authority for Advance Ruling to the extent of holding that additional surcharge collected from Open Access Consumer as per sub section (4) of Section 42 of the Electricity Act, 2003, Clause 8.5.4 of the Tariff Policy 2016, Clause 5.8.3 of the National Electricity Policy and Clause 11 (vii) of the KERC (Terms and Conditions for Open Access) Regulations, 2004, is taxable under GST Act, is just and proper under the circumstances or needs any interference.

8. We observed that the appellant entered into Power Supply Agreements to supply power to their Industrial customers. Accordingly, the appellant enters into back-to-back Power Purchase Agreements with private and state-owned energy generators to purchase power. However, Government policy allows such customers to purchase electricity in the open market from private power suppliers. This led to a situation where the appellant is saddled with the stranded cost.

8.1. The Government enacted provisions through Act and Policies empowering the appellant to collect Additional Surcharge from all such Customers. The additional surcharge collected by the appellant from their customers is as per the provision made under Section 42(4) of the Electricity Act; Clause 8.5.4 of the Tariff Policy 2016; Clause 5.8.3 of the National Electricity Policy; Clause 11 (vii) of the KERC (Terms and Conditions for Open Access) Regulations, 2004 and Regulation 3 KERC (Electricity Supply) Code, 2004.



8.2. The relevant portion of Section 42(4) of the Electricity Act, 2003 is reproduced hereunder:

"(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply."

8.2. The clause 8.5.4 of the Tariff Policy, 2016 notified by the Ministry of Power, Government of India provides that:

"The additional surcharge for obligation to supply as per section 42(4) of the Act should become applicable only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. The fixed costs related to network assets would be recovered through wheeling charges."

8.3. Further, clause 5.8.3 of the National Electricity Policy notified by the Ministry of Power, Government of India reads as follows:

"Under sub-section (2) of Section 42 of the Act, a surcharge is to be levied by the respective State Commissions on consumers switching to alternate supplies under open access. This is to compensate the host distribution licensee serving such consumers who are permitted open access under section 42(2), for loss of the cross-subsidy element built into the tariff of such consumers. An additional surcharge may also be levied under sub-section (4) of Section 42 for meeting the fixed cost of the distribution licensee arising out of his obligation to supply in cases where consumers are allowed open access. The amount of surcharge and additional surcharge levied from consumers who are permitted open access should not become so onerous that it eliminates competition that is intended to be fostered in generation and supply of power directly to consumers through the provision of Open Access under Section 42(2) of the Act. Further it is essential that the Surcharge be reduced progressively in step with the reduction of cross-subsidies as foreseen in Section 42(2) of the Electricity Act 2003."

8.4. The Regulation 11(vii) of the Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulation, 2004 is as under:

"According to section 42(4) of the Act, additional surcharge as may be specified by the Commission on charges of wheeling are payable by the consumer seeking open access for receiving supply from a source



other than the distribution licensee of his area of supply to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The open access customer shall be liable to pay such additional surcharge as may be determined by the Commission from time to time. However, in the case of a new open access customer (i.e. if the open access customer was not a consumer of the licensee), no such additional surcharge is payable. The additional surcharge would be determined on a case-to-case basis."

8.5. The relevant portion of Regulation 3 of KERC (Electricity Supply) Code, 2004, is reproduced below:

"3. Recovery of Charges for supply

3.1 The Licensee shall charge a consumer tariff for supply of electricity as approved by the Commission from time to time.

3.2 The Licensee is entitled to charge a consumer the following:

a) Tariff for the supply of electricity as determined by the Commission

b) taxes and duties as notified by the Government

c) In the case of consumers availing supply of electricity under open access, wheeling charge and/or surcharge and additional surcharge applicable as may be determined by the Commission.

d) Other charges such as penal charges for exceeding sanctioned/ contract demand, interest on belated payments and other charges as may be applicable and as approved by the Commission time to time.

....."

8.6. We noticed that the Central Government through Electricity Act empowered State Commissions to levy Additional Surcharge on the charges of wheeling. Further, the Tariff Policy stipulates a condition to levy Additional surcharge only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. As per National Electricity Policy, an additional surcharge be levied for meeting the fixed cost of the distribution licensee arising out of his obligation to supply in cases where consumers are allowed open access. As per Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulation, 2004, the open access customer shall be liable to pay such additional surcharge as may be determined by the Commission from time to time. It is also noticed that Regulation 3 of KERC (Electricity Supply) Code, 2004 empowered the appellant to charge additional surcharge from their open access consumers. Thus, it is apparent that the appellant is collecting **additional surcharge** as per the Electricity Act; Tariff Policy;



National Electricity Policy of Ministry of Power, Government of India and Karnataka Electricity Regulatory Commission (Terms and conditions for open Access) Regulation, 2004, KERC (Electricity Supply) Code, 2004 of Karnataka Electricity Regulatory Commission, Government of Karnataka from the open access customers, and therefore it forms part of tariff for the supply and distribution of electricity.

9. Advance Ruling Authority held that the consideration received towards additional surcharge is nothing but charge levied for tolerating an act which is supply under Section 7(1) of the CGST Act and is taxable under GST Act. We would like to examine whether there was any obligation to refrain from an act, or to tolerate an act or a situation, or to do an act for which appellant agreed to receive consideration in the form of additional surcharge. In this regard we would like to draw attention to the CBIC Circular No.178/10/2022-GST dated 03.08.2022. The relevant extract of CBIC Circular is detailed below:

"Agreement to do or refrain from an act should not be presumed to exist:

7. There has to be an express or implied agreement; oral or written, to do or abstain from doing something against payment of consideration for doing or abstaining from such act, for a taxable supply to exist. An agreement to do an act or abstain from doing an act or to tolerate an act or a situation cannot be imagined or presumed to exist just because there is a flow of money from one party to another. Unless there is an express or implied promise by the recipient of money to agree to do or abstain from doing something in return for the money paid to him, it cannot be assumed that such payment was for doing an act or for refraining from an act or for tolerating an act or situation. Payments such as liquidated damages for breach of contract, penalties under the mining act for excess stock found with the mining company, forfeiture of salary or payment of amount as per the employment bond for leaving the employment before the minimum agreed period, penalty for cheque dishonour etc. are not a consideration for tolerating an act or situation. They are rather amounts recovered for not tolerating an act or situation and to deter such acts; such amounts are for preventing breach of contract or non-performance and are thus mere 'events' in a contract. Further, such amounts do not constitute payment (or consideration) for tolerating an act, because there cannot be any contract: (a) for breach thereof, or (b) for holding more stock than permitted under the mining contract, or (c) for leaving the employment before the agreed minimum period or (d) for doing something leading to the dishonour of a cheque. As has already been stated, unless payment has been made for an independent activity of tolerating an act under an independent arrangement entered into for such activity of tolerating an act, such payments will not constitute



'consideration' and hence such activities will not constitute "supply" within the meaning of the Act."

Fixed Capacity charges for Power:

10. The price charged for electricity by the power generating companies from the State Electricity Boards (SEBs)/DISCOMS or by SEBs/DISCOMS from individual customers has two components, namely, a minimum fixed charge (or capacity charge) and variable per unit charge. The minimum fixed charges have to be paid by the SEBs/DISCOMS/individual customers irrespective of the quantity of electricity scheduled or purchased by them during a month. They take care of the fixed cost of generating/ supplying electricity. The variable charges are charged per unit of electricity purchased and increase or decrease every month depending on the quantity of electricity consumed.

10.1 The fact that the minimum fixed charges remain the same whether electricity is consumed or not or it is scheduled/consumed below the contracted or available capacity or a minimum threshold, does not mean that minimum fixed charge or part of it is a charge for tolerating the act of not scheduling or consuming the minimum the contracted or available capacity or a minimum threshold.

10.2. Both the components of the price, the minimum fixed charges/capacity charges and the variable/energy charges are charged for sale of electricity and are thus not taxable as electricity is exempt from GST. Power purchase agreements may have provisions that the power producer shall not supply electricity to a third party without approval of buyer. Such agreements which ensure assured supply of power to State Electricity Boards/DISCOMS are ancillary arrangements; the contract is essentially for supply of electricity."

We find that collection of Additional Surcharge from OA consumers on the basis of quantum of energy wheeled from the private generators of OA consumers is only to meet the fixed cost of the appellant arising out of this obligation to supply. Such collection mechanism is backed by an Act and policies of Central Government as well State Government. In the instant case, the Appellant has entered into agreements with their customers, basically for supply of electricity. The money is collected by the Appellant in the form of Additional Surcharge, in situations where OA customer is not purchasing the entire requirement of electricity from them. In this case there is no express or implied promise by the Appellant to agree to do or abstain from doing something in return for the money paid to them, rather they are ready to supply electricity as per the agreement. Hence, it cannot be assumed that such payment was for doing an act or for refraining from an act or for tolerating an act or situation. From



the submissions of the appellant, we did not find any independent arrangement entered into by the appellant for tolerating an act against which the consideration is collected as Additional Surcharge. We find that such amounts do not constitute payment (or consideration) for tolerating an act, rather these amounts are collected only to cover the fixed costs the appellant has to incur in terms of power purchase agreements they have entered into with power generating companies.

10. We perused the Karnataka Electricity Regulatory Commission Tariff Order 2022 of CESC dated 04.04.2022 submitted by the appellant during the personal hearing. The relevant extract of the said Tariff Order is extracted hereunder:

"Additional Surcharge (ASC):

Most of the ESCOMs in their tariff application, have submitted that they have tied up sufficient quantum of power, after approval by this commission, by considering the overall growth in sales. However, a large number of its high revenue yielding consumers are buying power under Open Access instead of availing supply from the ESCOMs. As a result, the generation capacity tied up by the ESCOMs remains idle. In this situation, ESCOMs are forced to back down the generation from conventional sources and are also required to pay Fixed Charges (or Capacity Charges) to the Generators, irrespective of actual energy being purchased. Thus, ESCOMs have stated that there is a need for recovery of the part of fixed cost towards the stranded capacity arising from the power purchase obligation through levy of Additional Surcharge.

.....

CESC has worked out Additional Surcharge of Rs.1.29 / unit and has requested the Commission to continue levy of ASC for OA consumers procuring power from power exchanges and RE generators.

.....

CESC in its reply to the preliminary observation has submitted that it has determined the Additional Surcharge of Rs.1.29 per unit as per estimated ARR for FY 23.

.....

Commission's views and decision:

*The Commission in its previous order, considering the provisions of the Electricity Act, 2003, National Electricity Policy, Tariff Policy, KERC Regulations and Orders of Honourable Supreme Court and Honourable APTEL, has held that the **Additional Surcharge can be levied on the open access consumers, to meet the stranded fixed cost***



obligations of the distribution licensee arising out of its obligation to supply power.

.....

The Commission notes that, when a consumer purchases electricity under Open Access, the ESCOMs lose the Fixed Charges embedded in the energy charges for the number of units of energy purchased under Open Access.

.....

Further, out of the fixed charges recovered from EHT and HT consumers in retail supply tariff, the fixed costs allocated to EHT and HT consumers towards transmission and distribution network cost, is deducted on first charge basis. The balance of the fixed charges recovered through retail supply tariff is set off against the total stranded fixed cost attributable to HT/EHT consumers and **the remaining stranded fixed cost has to be recovered from OA consumers by levy of Additional Surcharge.**

.....

Therefore, in order to balance the interest of both OA consumers and the other consumers, the commission decides to levy 55% of uniform Additional Surcharge of Rs.2.15 per unit i.e Rs.1.18 / unit, duly rounding off to the nearest ten paise i.e Rs.1.20 per unit (120 paise per unit) as Additional Surcharge to be recovered from OA consumers for FY 23. The above **Additional Surcharge shall be payable by the HT/EHT open access consumers to the concerned distribution licensee on a monthly basis**, based on the actual energy drawn during the month, through Open Access. Further, to encourage renewable sources of power, the Commission decides to levy Additional Surcharge of 35 paise per unit duly rounding off (30% of 118 paise per unit) for the energy procured under OA from Renewable Energy Sources."

We also perused Karnataka Electricity Regulatory Commission Combined Tariff Order 2024 to ESCOMs dated 28th February, 2024. We find that the Tariff Orders are issued from time to time by the Karnataka Electricity Regulatory Commission based on the powers entrusted to them to determine the Additional Surcharge amount. We notice that as per para 8.5.4 of Tariff Policy, 2016 of Govt. of India, Additional surcharge can be levied only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded. Accordingly, KERC, in its Tariff Order, 2022 dtd.04.04.2022 has fixed the Additional Surcharge @ Rs.1.20 per unit from OA consumers procured from other than Renewable Energy Sources and Rs.0.35 per unit in case of Renewable Energy Sources, for FY 2023. Such Tariff Orders enable the appellants to charge the



Additional Surcharge on monthly basis in the bills raised by them to their open access consumers.

11. We also find that the collection of Additional Surcharge is not towards any independent activity but is incidental levy to the main activity of Supply and distribution of electricity for which they have entered into Power Supply Agreements with their customers. The Additional Surcharge is collected to compensate the "Fixed Charges" which is stranded in the hands of the Appellant. This additional surcharge is a part of "Tariff" fixed by KERC and levied as per various provisions enacted by Central and State Governments. As per Regulation 11(vii) of the Karnataka Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulation, 2004, *in the case of a new open access customer (i.e. if the open access customer was not a consumer of the licensee), no such additional surcharge is payable.* The Appellant is not authorized to collect Additional Surcharge from OA Consumers, who were not their consumers, i.e to whom they had not supplied electricity. Therefore, the Additional Surcharge is nothing but the amount attributable to "Fixed Charges" for supply and distribution of electricity, to OA customers. Thus, such consideration is towards ancillary arrangement to the main agreement and essentially towards supply and distribution of electricity. Thus, Additional Surcharge is also part of the consideration received by the appellant from their customers towards supply and distribution of electricity.

12. The relevant extract of Section 15 of the CGST Act, 2017 is as under:

"15. Value of Taxable Supply.— (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

(2) The value of supply shall include—

(a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;"

13. We find that the Additional Surcharge levied under Electricity Act from their customers who opted for sourcing electricity from open access, over and above the consideration charged towards supply and distribution of electricity should form part of taxable value, determined in terms of Section 15 of the CGST Act, 2017.

14. We find that the supply of electricity as goods and / or distribution of electricity as service are covered under exemption either in terms of entry No.104 of Notification No.02/2017 CT(R) dated 28.06.2017 applicable to goods and /or entry No.25 of the Notification No.12/2017-Central Tax(Rate) dated 28.06.2017 applicable to services.



15. Further, we have also noticed that in a similar issue, the AAAR, Uttarakhand vide Ruling Order No.07/18-19/29.03.2019 has agreed with the Ruling of AAR, Uttarakhand which has held that Additional Surcharge is exempted from payment of GST.

16. Accordingly, we pass the following Order:

ORDER

- (i) We set aside the ruling given vide KAR ADRG 09/2023 dated 17.02.2023 to the extent of holding that "additional surcharge collected from Open Access Consumer as per sub section (4) of Section 42 of the Electricity Act, 2003, Clause 8.5.4 of the Tariff Policy 2016, Clause 5.8.3 of the National Electricity Policy and Clause 11 (vii) of the KERC (Terms and Conditions for Open Access) Regulations, 2004, is taxable under GST Act".
- (ii) We hold that the Additional Surcharge collected by the appellant should form part of the taxable value collected towards supply and distribution of electricity and accordingly exempt from payment of GST.



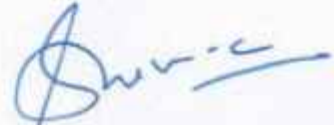
(PRAMOD KUMAR AGRAWAL)

Member

Karnataka Appellate Authority
for Advance Ruling

Member

Appellate Authority for Advance Ruling



(SHIKHA C)

Member

Karnataka Appellate Authority
for Advance Ruling

Member

Appellate Authority for Advance Ruling

To

M/s Chamundeswari Electricity Supply Corporation Limited,
No. 29, 2nd Stage, Vijayanagara, Hinkal,
Mysore – 570017.

Copy to:

1. The Member (Central), Advance Ruling Authority, Karnataka.
2. The Member (State), Advance Ruling Authority, Karnataka
3. The Principal Commissioner of Central Tax, Mysuru Commissionerate.
4. The Assistant Commissioner, LGSTO – 190, Mysuru.
5. Office folder.

