

**GUJARAT AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX
D/5, RAJYA KAR BHAVAN, ASHRAM ROAD,
AHMEDABAD – 380 009.**



ADVANCE RULING NO. GUJ/GAAR/R/2023/ **31**
(IN APPLICATION NO. Advance Ruling/SGST&CGST/2023/AR/06)

Date: - **03.11.2023**

Name and address of the applicant	:	Dedicated Freight Corridor Corporation of India Limited, 4th Floor, Block-A SSNL Building, Narmada Naher Bhawan, Chhani Jakatnaka, Fateh Ganj, Vadodara, Gujarat -390002
GSTIN of the applicant	:	24AACCD4768M1ZB
Date of application	:	25.01.2023
Clause(s) of Section 97(2) of CGST / GGST Act, 2017, under which the question(s) raised.	:	(c)(d)(e)
Date of Personal Hearing	:	08.05.2023 and 29.08.2023
Present for the applicant	:	Anoop Gupta (C.A.), Anmol Gupta(C.A.) , Sanjeev Gupta (G.M.-(F))

Brief facts:

M/s Dedicated Freight Corridor Corporation of India Limited (hereinafter referred as Applicant), a PSU under the ownership and control of Ministry of Railways & incorporated under the Companies Act, 1956, is registered with the department & their registration number is 24AACCD4768M1ZB.

2. Applicant is engaged in the business of construction, maintenance and operation of dedicated freight corridors. To undertake this work, they enter into contract with third party contractors. The agreements so entered into contains **dispute resolution clause** to tackle any eventuality of dispute that may arise between the contractor and the applicant.

3. The applicant adopts the General Conditions for Contract as



defined in FIDC's First Edition 1999. [FIDIC means (Federation Internationale Des Ingenieurs – Conseils) which is an International Standards Organization for Consulting Engineering & Construction Technology]. As per the prevalent Indian practices, applicant has made minor change in sub-clause 20.6 of the bid document dated 14.5.18.

4. A conjoint reading of FIDIC's GCC with applicant's amended sub-clause 20.6, reveals that

- firstly, it provides for an internal dispute resolution mechanism wherein for any dispute a Dispute Adjudication Board (DAB) is constituted;
- DAB after hearing the parties, adjudicates & passes an order;
- in terms of clause 20.8 of GCC, DAB is deemed not to be acting as an Arbitrator;
- if either of the party is not satisfied with the decision of DAB, they may within 28 days after receiving the decision, give notice to the other party of its dis-satisfaction;
- that if such a notice is not given within stipulated time period, decision of DAB will become final & binding upon both the parties;
- that where either of the party has given notice citing dis-satisfaction, dispute then approaches for Arbitration wherein clause 20.5 states that both parties shall try to settle the dispute amicably before the commencement of arbitration;
- arbitration may be commenced on or after the 56th day after the day on which notice of dis-satisfaction was given;
- process of arbitration shall be subject to the provisions of Indian Arbitration and Conciliation Act, 1996 and the rules made thereunder;
- if either party is aggrieved by the order/award passed by Arbitral Tribunal, such party may move an application for setting aside arbitral award in terms of section 34 of the Arbitration and Conciliation Act, 1996;
- NITI Aayog vide its OM dated 5.9.2016, for revival of the construction sector and pursuant thereto, directed that if PSUs are challenging any award/order passed against them by the Arbitral Tribunal, they are required to deposit 75% of the amount directed to be paid in such award/order, in an Escrow Account against bank guarantee (BG) submitted by the contractor for the same amount, without prejudice to the final order of the Court in the matter under challenge; that this deposit of 75% amount into escrow account by the PSU is subject to the fact that the contractor may ask for payment of 75% of the amount awarded in terms of Cabinet Committee of Economic Affairs(CCEA) decision, after justifying the utility of such payment supported with authentic documents;
- vide OM dated 28.11.2019, NITI Aayog further clarified that BG so provided by the contractor should only be for the principal amount and not for the interest;
- the recommendations of the NITI Aayog have been accepted and adopted by the Applicant;
- later, this methodology of depositing 75% of the award amount into an escrow account was extended to adverse DAB decisions also by the applicant.

5. The amount so deposited by the applicant in an escrow account as is evident, cannot be withdrawn by the contractor on his own volition.



As per the Arbitral Award Escrow Account Agreement, the Banker shall act as the trustee of the escrow account and in terms of Clause 5 of the said agreement, the concerned banker shall withdraw and appropriate the amounts from the said escrow account strictly in accordance with the instructions issued by the applicant to the contractor.

6. In case the applicant succeeds in the challenge/appeal, the amount so deposited & utilised by the Contractor, is required to be paid back along with applicable interest. If the contractor fails to do so, the Applicant can en-cash the BG submitted by the contractor.

7. In the event where the challenged order/award is passed in favour of the contractor, the Applicant will be liable to pay the remaining 25% of the amount along with any remaining balance in the escrow account.

8. Even though the applicant has parted away with 75% of the disputed amount required to be paid in terms of the DAB decision/arbitral award, it is the applicant's case that the same has not been finally '**paid**' to the contractor but only '**deposited**' in an escrow account in accordance with directions of NITI Aayog.

9. The applicant further submitted that in terms of section 7 of the CGST Act, 2017, with respect to the transaction in question, it cannot be said that there is any supply of goods/services since there is no sale, transfer, barter, exchange or disposal made or agreed to be made for consideration by a person in the course or furtherance of business.

10. In view of the foregoing, it is the Applicant's claim that he is in complete control of the amount so deposited in the escrow account since the contractor has to obtain his permission to withdraw; that the amount so withdrawn has to be appropriated as per his instruction. Further, to safeguard the Applicant, the contractor is also required to furnish BG of



equivalent amount deposited by the applicant.

11. The applicant further submitted that the amount so 'deposited' in the escrow account does not form part of **consideration** in terms of section 2(31) of the Act; that the subject transaction cannot be considered as 'payment made or to be made' since the amount has been 'deposited' only with the view to revive the construction industry.

12. Further, the amount so deposited is disputed and the same is yet to be finally decided by the appropriate authority, it cannot be said that the 'payment is to be made' by the applicant to the contractor since on account of the pending litigation, there is no liability upon the applicant to pay any amount to the contractor. Further, there may arise a situation where the contractor has withdrawn the amount so deposited by the applicant and has utilised the same for ongoing project/s, however, even in such a situation the transaction is neutral in nature as the contractor has submitted a BG of an equivalent value of the amount deposited in the escrow account.

13. The applicant further relied upon the decision of

- Hon'ble High Court of Orissa in the case of M/s Indian Metal and Ferro Alloys Ltd. v/s Commissioner of Income Tax, Bhubaneswar [ITA No. 20/2014] wherein it was held that an amount deposited in the escrow account which is subject to litigation cannot be considered as 'actual payment' in terms of Section 43B of the Income Tax Act, 1961.
- AAR, Karnataka in Re: Midcon Polymers Pvt. Ltd., cited in 2020(41)GSTL-403(AAR-GST-Kar.)

14. To substantiate his argument, the applicant has given an example of refundable 'security deposit', which he claims is akin to the present dispute. The security deposit is made to the owner by the person



renting the property; that it is made to the owner by guarantee against damage to property or failure to pay rent in future which may or may not be adjusted by the owner of the property; that it forms consideration only when owner of the property adjusts the same with rent proceeds.

15. Lastly, the applicant has tried to supplement his argument by pointing out the consequences in case, the AAR was to rule against him by stating that

- the contractor will have to issue a tax invoice to the applicant to the extent of 75% amount deposited in escrow account, in absence of any actual supply and pending final outcome of litigation;
- if the applicant succeeds in litigation, say after a period of 3 years, contractor will not be able to either cancel the invoice by issuing credit note (as the time limit for issuance of credit note & consequently;
- adjust/reduce GST liability will be lapsed in terms of Section 34(2) of the Act) or seek refund of taxes already paid on 75% amount deposited in escrow account (as time period of claiming refund under Section 54(1) will also lapse by then.

16. In view of the foregoing, vide the aforesaid application, the applicant has sought advance ruling on the below mentioned question viz

1. Whether the amount deposited by the applicant (75%) in escrow account against bank guarantee pending outcome of the further challenge against Arbitral Award or dissatisfaction against DAB decision, is liable to GST under the provisions of CGST Act, 2017?
2. If the answer to first question is in affirmative, then, what shall be the 'time of supply' when tax on such DAB/arbitral award is payable to Government exchequer, i.e., whether tax is payable (a) when part amount (75%) is deposited into escrow account pending litigation, or (b) when complete award amount (100%) is paid to the contractor pursuant to finality of the decision.
3. If answer to Question No. 1 is affirmative, whether the applicant is eligible to claim Input Tax Credit (ITC) thereupon?

17. The applicant vide their additional submission dated 2.6.2023, further stated as follows:

- that present application is filed not for such cases wherein invoice has already been issued by the contractor before issuance of



DAB/arbitration award to the applicant; that the contractor cannot issue invoice till the time work is certified by the Engineer & approved by DFCCIL;

- that present application is filed with respect to decisions/award by DAB/arbitration on disputes, like,
 - Whether escalation (Price variation clause) is applicable or not as per the terms of agreement;
 - In terms of provisions of continuous supply of service, dispute as to whether the terms of contract has been fulfilled by the contractor as regards the quantity of work done;
 - In case of increase in rate of GST [say 18% from erstwhile 12%), whether contractor is eligible for increased GST (6%);
 - In case of shift from erstwhile Indirect tax regime to GST regime, whether contractor is eligible for any increase in contract value due to change in rate of taxes applicable to the contract on advent of GST;
- In addition to the case laws already relied upon, the applicant also relied upon the case of Mugat Dyeing & Printing Mills [TA No. 193, 194/2003 of Gujarat High Court, wherein it was held that furnishing a BG would not tantamount to payment of excise duty.

18. Personal hearing in the matter was held on 8.5.2023 and 29.8.2023 wherein the applicant was represented by Shri Sanjeev Gupta, GM (Finance), Shri Anoop Gupta, CA and Shri Anmol Gupta, CA. Shri Sanjeev Gupta reiterated the submission made in the application.

Revenue's Submission:

19. The Additional Commissioner, CGST & C. Ex. Commissionerate, Vadodara-I vide letter dated 22-03-23 has submitted comments on the question on which Advance Ruling is sought and is as follows :

- (a) Whether the activity/service in respect of which an Advance Ruling has been sought is an 'ongoing activity' or a 'proposed' one.

Reply : The Activity / Service is an ongoing activity as clarified in the Annexure – I of the Application from authorized person of the applicant.



- (b) Report in terms of proviso to sub-section (2) of Section 98 of the Act. Whether the questions/issues raised in the application are already pending or decided on any proceedings in the case of the applicant.

Reply : As per available records, the questions/ issuers raised in the application are neither already decided nor pending against the applicant.

(c) Comments on Merits :

Reply : On the issue of applicability of GST of the amount of deposit of 75 % into escrow account of the applicant, it appears the GST should be applicable on the portion of amount deposited into escrow account till final outcome of the light of Section 7 of GST Act, 2017 within the Scope of Supply; the expression of supply includes – which states as under :

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

In view of the statutory provisions of the laws, the application of the Advance Ruling sought by the applicant for deposit of 75% amount in to escrow account is not taxable does not appears to be sustainable, both on admissibility ground as well as Merits

Discussion and findings

20. At the outset, we would like to state that the provisions of both the CGST Act and the GGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the GGST Act.

21. We have considered the submissions made by the Applicant in their application for advance ruling as well as the submissions made during the course of personal hearing. We have also considered the issue involved.



the relevant facts & the applicant's submission/interpretation of law in respect of question on which the advance ruling is sought.

22. Before dealing with to the submissions made by the applicant, we would like to reproduce the relevant sections for ease of reference:

CENTRAL GOODS AND SERVICES ACT, 2017

(31) "consideration" in relation to the supply of goods or services or both includes-

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

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

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

Section 7. Scope of supply.-

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

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

(b)

¹[(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Explanation .-For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;]

(b) import of services for a consideration whether or not in the course or furtherance of business; ²[and]

(c) the activities specified in Schedule I, made or agreed to be made without a consideration; ³[****]

(c) ⁴[****].

(d)

⁵[(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.]



(2) Notwithstanding anything contained in sub-section (1),-

(a) activities or transactions specified in Schedule III; or

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

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

(3) Subject to the provisions of⁶[sub-sections (1), (1A) and (2)], the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as -

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods.

23. We find that the primary question raised before us is whether the amount deposited in an escrow account which is pending outcome of the further challenge before DAB/Arbitral Tribunal & which can be withdrawn only against a BG, is liable to GST under the provisions of CGST Act, 2017 or otherwise. The main crux of the argument of the applicant in the matter is that there is no supply involved in terms of section 7 of the CGST Act, 2017 and that it would not fall within the ambit of Section 2(31) of the definition of 'consideration'.

24. Section 2(31) and section 7 have been reproduced *supra*. Let us first examine whether it falls within the ambit of consideration. Consideration in relation to supply/goods, as defined in the Act, includes payment made or to be made, in money or otherwise, in respect of/response to, for and the inducement of the supply, whether by the recipient or by any other person. It shall not include any subsidy given by the Central/State Government. Consideration further also includes monetary value of any act/forbearance, whether by the recipient or by any other person. What is significant is however, the proviso to the definition which states that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply.



25. We find that though the amount ie 75% paid into an escrow account is towards the dispute pertaining to the supply, what brings this particular transaction out of the scope of the consideration is the fact is that it is not paid to the contractor [supplier] but is deposited in an escrow account; that it cannot be withdrawn from the account without the explicit approval of the applicant; that the amount can be withdrawn only subject to the condition that the supplier[contractor] provides a BG for the said amount. In-fact, the applicant, though he has deposited the amount in an escrow account, also does not term this as a consideration for the supply since he is agitating his case, feeling aggrieved by the decision rendered against him. In view of the foregoing, we hold it to be outside the scope of 'consideration' as defined under section 2(31) of the CGST Act, 2017.

26. We now examine whether it is a supply. **Supply**, in terms of section 7, includes all forms of supply of goods/services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made /agreed to be made for a consideration by a person in the course or furtherance of business. Surely this payment of 75% into an escrow account would not fall within the ambit of supply to be leviable to CGST in view of our finding in respect of consideration as recorded in the previous paragraph.

27. We find that the dispute here is not whether consequent to the DAB/arbitral award, the change, if any, in the value pertaining to the supply, etc., would be leviable to GST. What is in dispute specifically is whether the 75% amount deposited by the applicant qua the O.M. of NITI Aayog, with an intention to help the construction sector, would be leviable to GST.

28. In their additional submissions, the applicant has made it emphatically clear that present application is filed **not for** such cases wherein invoice has already been issued by the contractor before issuance of DAB/ arbitration award to the applicant. The applicant has stated that the contractor cannot issue invoice till the time work is certified by the Engineer & approved



by DFCCIL. The applicant has further listed that present application is filed with respect to decisions/award by DAB/arbitration on disputes, viz

- Whether escalation (Price variation clause) is applicable or not as per the terms of agreement;
- In terms of provisions of continuous supply of service, dispute as to whether the terms of contract has been fulfilled by the contractor as regards the quantity of work done;
- In case of increase in rate of GST [say 18% from erstwhile 12%), whether contractor is eligible for increased GST (6%);
- In case of shift from erstwhile Indirect tax regime to GST regime, whether contractor is eligible for any increase in contract value due to change in rate of taxes applicable to the contract on advent of GST;

29. Thus, for the sake of repetition, the dispute is not whether there is a GST liability consequent to the decision, which is finally accepted by the parties. The bone of contention herein is limited, meaning thereby that whether the 75% amount deposited before a final conclusion is reached to the dispute, and which is allowed to be withdrawn subject to conditions, is leviable to GST.

30. In this background, ongoing through the definition of consideration and section 7 of the CGST Act, 2017, we find that this 75% deposit made in an escrow account as per the O.M. of NITI Aayog, is neither a **consideration** nor a **supply** till it is finally decided against the applicant and accepted by the applicant.

31. An additional reason for holding the above view is the fact that though the contractor is permitted to withdraw the amount [subject to permission from the applicant], he is bound to submit a BG for the said amount.

32. The aforementioned finding is on account of a specific situation wherein [a] that the amount is not paid to the contractor [supplier] but is deposited in an escrow account; [b] that the amount so deposited in the escrow account cannot be withdrawn by the supplier[contractor] without the consent of the applicant; and [c] that the amount can be withdrawn subject to the condition that the supplier[contractor] provides a BG for the said amount.



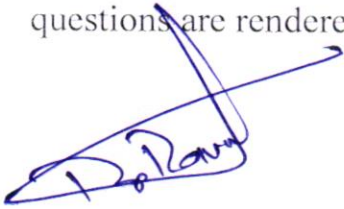
33. The above finding is also subject to a rider that the moment the supplier[contractor] finally succeeds in the dispute/the applicant accepts the adverse decision, this ruling would be rendered infructuous. This finding is in operation only for a limited period when the supplier[contractor] has not succeeded in the litigation/the applicant has not accepted an adverse decision & the supplier uses the amount lying in the escrow account subject to his furnishing a BG. It also goes without saying that the department reserves every right to recover any interest due on such amount for the delay in payment of GST, if any, on account of the non acceptance of adverse decision of the DAB/Tribunal.

34. Since on the first question we hold in negative, the second and the third question is rendered infructuous. We therefore propose to give no findings in that regard.

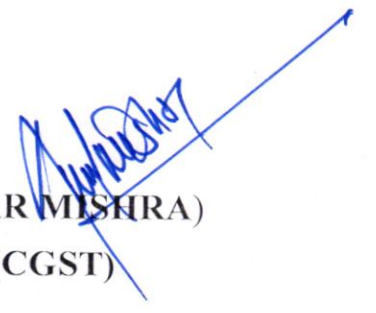
35. In the light of the above, we rule as under:

RULING

1. The amount deposited by the applicant (75%) in escrow account against bank guarantee pending outcome of the further challenge against Arbitral Award or dissatisfaction against DAB decision, is **not** liable to GST under the provisions of CGST Act, 2017.
2. Since the answer to first question is in negative, the **second & third** questions are rendered infructuous.



(RIDDHESH RAVAL)
MEMBER (SGST)



(AMIT KUMAR MISHRA)
MEMBER (CGST)

Place: Ahmedabad

Date: 03.11.2023

