

WEST BENGAL AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX

14 Beliaghata Road, Kolkata – 700015

(Constituted under section 96 of the West Bengal Goods and Services Tax Act, 2017)

Members present:

Mr Brajesh Kumar Singh, Joint Commissioner, CGST & CX

Mr Joyjit Banik, Senior Joint Commissioner, SGST

Preamble

A person within the ambit of Section 100 (1) of the Central Goods and Services Tax Act, 2017 or West Bengal Goods and Services Tax Act, 2017 (hereinafter collectively called 'the GST Act'), if aggrieved by this Ruling, may appeal against it before the West Bengal Appellate Authority for Advance Ruling, constituted under Section 99 of the West Bengal Goods and Services Tax Act, 2017, within a period of thirty days from the date of communication of this Ruling, or within such further time as mentioned in the proviso to Section 100 (2) of the GST Act.

Every such appeal shall be filed in accordance with Section 100 (3) of the GST Act and the Rules prescribed thereunder, and the Regulations prescribed by the West Bengal Authority for Advance Ruling Regulations, 2018.

Name of the applicant	JAYESH POPAT
Address	47A, NALINI SETT ROAD, SONAPATTY, BURRABAZAR, KOLKATA, WEST BENGAL, PIN CODE-700007
GSTIN	19AJQPP3457M1ZA
Case Number	WBAAR 16 of 2022
ARN	AD190622007765Y
Date of application	June 24, 2022
Jurisdictional Authority (State)	Postabazar Charge
Jurisdictional Authority (Central)	Shyambazar Division, Kolkata North Commissionerate
Order number and date	16/WBAAR/2022-23 dated 22.12.2022
Applicant's representative heard	Mr. Aman Harlalka, CA , Authorized Representative

1.1 At the outset, we would like to make it clear that the provisions of the Central Goods and Services Tax Act, 2017 (the CGST Act, for short) and the West Bengal Goods and Services Tax

Act, 2017 (the WBGST Act, for short) have the same provisions in like matter except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the WBGST Act. Further to the earlier, henceforth for the purposes of these proceedings, the expression 'GST Act' would mean the CGST Act and the WBGST Act both.

1.2 The applicant is carrying on business as a proprietor of M/s. Vasant Jewellers and is registered under the GST Act having GSTIN 19AJQPP3457M1ZA. The applicant carries another business under the same trade name as a partner and the said partnership firm is also registered under the GST Act having GSTN 19AAUFV1123F1Z0. It is submitted that the applicant proposes to merge with the partnership firm as a going concern with all assets and liabilities to be transferred to the partnership firm and such transfer of business shall take place without any consideration.

1.3 The applicant has made this application under sub section (1) of section 97 of the GST Act and the rules made there under raising following questions vide serial number 14 of the application in FORM GST ARA-01:

(a) Whether the transaction of transfer of business by way of merger of two registration/distinct person would constitute supply under GST Law?

(b) Whether the transaction would amount as supply of goods or supply of services?

(c) Whether the transaction would be covered under Entry No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017?

(d) If the answer is negative, then whether GST is leviable on the transfer of existing stock (closing stock) assets, others etc. from proprietorship concern to the Partnership concern?

1.4 The aforesaid questions on which the advance rulings are sought for are found to be covered under clause (a), (b), (e) and (g) of sub-section (2) of section 97 of the GST Act.

1.5 The applicant states that the question raised in the application has neither been decided by nor is pending before any authority under any provision of the GST Act.

1.6 The officer concerned from the revenue has raised no objection to the admission of the application.

1.7 The application is, therefore, admitted.

2. Submission of the Applicant

2.1 The applicant submits that the proposed transaction of transfer of business by way of merger will be implemented by entering into an internal Memorandum of Understanding (MOU) between the two parties, which includes the below mentioned clauses:

Transfer of Assets and Liabilities

- That All assets related to the proprietorship concern including fixed assets, closing stock, debtors, deposits cash balance shall get transferred to the partnership concern.
- All liabilities related to the proprietorship concern including the capital, unsecured loan, sundry credit and or, current liabilities shall get transferred under the partnership concern.

Transfer of Employees

- The Employees shall continue to serve in the partnership firm without any interruption or break in service.

Conduct of business - During the period the firm agrees that it shall:

- carry on the business in the Ordinary Course of Business in substantially the same manner as heretofore conducted;
- pay its debts and Taxes when due;
- pay or perform other obligations as and when due;
- preserve intact the Business, keep available the services of its present employees, if the employees do not leave at their own will;
- preserve its relationship with, customers, having business dealing with it, to the end that its ongoing ability to provide services shall be unimpaired at the Closing; and
- Conduct business to ensure continuity

2.2 In terms of the Memorandum of Understanding, all rights, title, ownership, interest in and to the business, assets, and customers including liabilities will get transferred as a going concern. In short, the entire business will be transferred. The proprietorship firm will cease to exist after filing all the necessary returns and all necessary compliance will be undertaken before surrendering the registration.

2.3 The applicant submits that all present and future assets, liabilities, rights, claims, employees, businesses, etc., shall be taken over by M/s Vasant Jewellers partnership firm. All future liabilities of GST, as and when arise, shall be met by transferee, in the normal course of

business without any hindrances or stoppages. After the merger, M/s. Vasant Jewellers (Proprietorship Concern) shall apply for cancellation of registration as prescribed.

2.4 The aforementioned provisions have been provided to ensure that the partnership firm continues to do the same business as it was involved in before the proposed takeover. It is further stated that the very basis of the MOU has been to continue the previous business of the proprietorship concern.

2.5 The applicant contends that since tax under the GST Act is levied on supply of goods or services, it is therefore imperative to analyse whether the transfer of business qualifies as 'supply'. The applicant, in this regard, has placed his reliance on following advance rulings:

- (i) In the case of Cosmic Ferro Alloys Limited [AAR No.02/WBAAR/22-23 Dated 22.04.2022], the West Bengal Authority for Advance Ruling held that the transaction of transfer of business unit of the applicant involved in the instant case shall be treated as a supply of services.
- (ii) In the case of M/s Rajashri Foods Pvt. Ltd, [AAR No. KAR ADRG 06 / 2018 Dated:23.04.2018], the Karnataka Authority for Advance Ruling held that the transaction of transfer of business as a whole of one of the units of the Applicant in the nature of a going concern amounts to supply of service.
- (iii) In the case of M/s Airport Authority of India [ADVANCE RULING NO. GUJ/GAAR/R/46/2021], the Gujarat Authority for Advance Ruling held that the subject supply of 'Transfer of Going Concern service' is supply under Section 7 CGST Act.

2.6 The applicant submits that in the present scenario, there is a permanent transfer of the proprietorship concern to the partnership concern along with all the assets and liabilities. Thus, all the conditions mentioned under the definition of supply as per section 7(1) of GST Act, are getting satisfied and accordingly transaction of transfer of business by way of merger qualifies as supply under GST.

2.7 The applicant, on the question whether the transaction would amount as supply of goods or supply of services, has referred to section 2(52) of the GST Act and contends that as business cannot be said to be movable, transfer of business cannot be said to be a transfer of goods. The applicant, in this context, has relied on the judgement of Hon'ble Madras High Court in the matter of Deputy Commissioner, (CT) v.K. Behanan Thomas, 1977 (39) STC 325 (Madras) wherein the Hon'ble Court held that transfer of business does not constitute sale of goods.

2.8 The applicant further submits that according to him, transfer of business in the form of merger would constitute supply of services and reference may be drawn to the following provisions of the GST Act where the activities of transfer of business has been mentioned:

Section 18(3) GST Act:

Where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilised in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed.

Section 22(3) GST Act:

(3) Where a business carried on by a taxable person registered under this Act is transferred, whether on account of succession or otherwise, to another person as a going concern, the transferee or the successor, as the case may be, shall be liable to be registered with effect from the date of such transfer or succession.

Section 85(1) GST Act:

85. (1) Where a taxable person, liable to pay tax under this Act, transfers his business in whole or in part, by sale, gift, lease, leave and license, hire or in any other manner whatsoever, the taxable person and the person to whom the business is so transferred shall, jointly and severally, be liable wholly or to the extent of such transfer, to pay the tax, interest or any penalty due from the taxable person upto the time of such transfer, whether such tax, interest or penalty has been determined before such transfer, but has remained unpaid or is determined thereafter.

Rule 41(1) GST Rules:

- (1) A registered person shall, in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason, furnish the details of sale, merger, de-merger, amalgamation, lease or transfer of business, in FORM GST ITC-02, electronically on the common portal along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee.

Para 4 of Schedule II:

Transfer of business assets

- (a) where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to

form part of those assets, such transfer or disposal is a supply of goods by the person;

- (b) where, by or under the direction of a person carrying on a business, goods held or used for the purposes of the business are put to any private use or are used, or made available to any person for use, for any purpose other than a purpose of the business, the usage or making available of such goods is a supply of services;
- (c) where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless-
 - (i) the business is transferred as a going concern to another person; or
 - (ii) the business is carried on by a personal representative who is deemed to be a taxable person

The applicant submits that from the construction of the wordings in the aforesaid sections of the GST Act, it appears that 'transfer of business' is more of an event in pursuance to a business arrangement. Moreover, taking the cue from the Sl no. 2 of Notification 12/2017 which has been issued in exercise of powers granted by Section 11(1) of the GST Act, it may be held that business is service and transfer of business is supply of service.

2.9 The applicant submits that 'services by way of transfer of a going concern, as a whole or an independent part thereof' is exempt from payment of tax vide serial number 2 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 which also denotes that any transfer of a going concern is a supply of service. In the present case, it is very much clear that the transaction of transfer of business will be supply of services and there is complete transfer of all present and future assets, liabilities, rights, claims, employees, businesses, etc. that is operating, managing and continuing the business. Hence, it is a permanent transfer of whole of the business.

In the case of state of Tamil Nadu vs. T.M.T. Drill (Private) Limited (1991 (082) STC 0059 Madras), it was held that for a business to be considered as sold as a whole/going concern, it is important that all assets of the business should be transferred.

The concept of transferring a company as a going concern was examined by the Delhi High Court in the landmark judgement of Indo Rama Textile Ltd (2013) 4 Comp 141 (Del). In this case Delhi High Court held that a company is said to be transferred as a going concern when the assets and liabilities being transferred constitute a business activity capable of being run independently for foreseeable future.

The Supreme Court in Allahabad bank versus ARC holding AIR 2000 SC 3098 (Allahabad Bank case) held that if a company sold off as a going concern then along with the assets of the company if there are any liability relevant to the business or undertaking the liabilities to are transferred.

2.10 The applicant finally submits that consequent to transfer of business by way of merger, the proprietorship firm M/s. Vasant Jewellers shall cease to exist and it's all present and future assets, liabilities, rights, claims, employees, businesses, etc., shall be taken over by M/s Vasant Jewellers partnership firm. All future liabilities of GST, as and when arise, shall be met by the partnership firm, in normal course of business. Therefore, on the basis of the above discussions, it can be said that such transfer of business amounts to services by way of transfer as a going concern, as a whole or an independent part thereof which is covered in the entry 2 of the exemption Notification No. 12/2017-Central Tax (Rate) dated 28 June 2017.

3. Submission of the Revenue

The concerned officer from the revenue has not expressed any view on the issue raised by the applicant.

4. Observations & Findings of the Authority

4.1 We have gone through the records of the issue as well as submissions made by the authorised representative of the applicant during the course of personal hearing.

4.2 The fact of the case, as it has been submitted by the applicant, is that a Memorandum of Understanding (MOU) has been made between the applicant being transferor of the proprietorship firm for transfer of business to the partnership firm. It is submitted by the applicant that in terms of the Memorandum of Understanding (MOU), all rights, title, ownership, interest in and to the business, assets, and customers including liabilities will get transferred as a going concern and the proprietorship firm thereafter shall cease to exist. Further, all present and future assets, liabilities, rights, claims, employees, businesses, etc., shall be taken over by the partnership firm and all future liabilities of GST, as and when arise, shall be met by the transferee, in the normal course of business.

4.3 The applicant has submitted that the instant transfer of business pursuance of the MOU can be considered as a supply of services and qualifies for exemption under Sl. No.2 of the

Notification No.12/2017-Central Tax (Rate) dated 28.06.2017. In the instant case, admittedly the proposed transfer of business involves inter alia transfer of goods forming part of the assets of the business. In a standalone manner, such transfer shall be treated as supply of goods in terms of clause (a) of Entry No. 4 of Schedule II. However, here the applicant intends to transfer his entire proprietorship business where the transferee agrees to take over the assets as well as the liabilities of the said transferor concern along with the employees and their benefits. In our view, such transfer of business cannot be treated as supply of goods since business cannot be said to be a movable property so as to qualify as 'goods' as defined in clause (52) of section 2 of the GST Act. Further, anything other than goods, money and securities falls within the meaning of 'services' as defined in clause (102) of section 2 of the GST Act.

4.4 The applicant, in support of his contentions that the instant transfer of his business unit shall be treated as a supply of services, has referred following advance rulings:

- a. Advance Ruling No. KAR ADRG 06 / 2018 dated 23rd April 2018 by the Karnataka Authority for Advance Ruling in the case of Rajashri Foods Pvt. Ltd;
- b. Advance Ruling No. GUJ/GAAR/R/46/2021 dated: 27-08-2021 by the Gujrat Authority for Advance Ruling in the case of Airport Authority of India;
- c. Advance Ruling No. AAR No.02/WBAAR/22-23 dated 22.04.2022 by the West Bengal Authority for Advance Ruling in the case of Cosmic Ferro Alloys Limited.

4.5 In the matter of *Rajashri Foods Pvt Ltd* (Advance Ruling No. KAR ADRG 06 / 2018 dated 23rd April 2018), the Karnataka Authority for Advance Ruling held that the transaction of transfer of business as a whole of one of the units of the applicant in the nature of a going concern amounts to supply of services and is covered under Sl. No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 subject to the condition that the unit is a going concern.

4.6 In the matter of *Airport Authority of India* (Advance Ruling No. GUJ/GAAR/R/46/2021 dated: 27-08-2021), the Gujrat Authority for Advance Ruling held that the subject supply of 'Transfer of Going Concern service' is Supply under Section 7 CGST Act and is covered at Entry No. 2 of Notification 12/2017-CT(R).

4.7 In the matter of *Cosmic Ferro Alloys Limited* (Advance Ruling No. AAR No.02/WBAAR/22-23 dated 22.04.2022), this authority held that the transaction of transfer of business unit of the applicant shall be treated as a supply of services and the transaction would be covered under

serial No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 subject to fulfillment of the conditions to qualify as a going concern.

4.8 The term 'going concern' is not defined under the GST Act or rules framed there under. The concept of going concern has been defined in Accounting Standards – 1 issued by ICAI which states that a fundamental accounting assumption is that of 'Going Concern' according to which "the enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations".

4.9 We also find that in 'Taxation of Service: An Education Guide' published by the Central Board of Excise & Customs, Para 7.11.15 reads as follows:

- *What does the term 'transfer of a going concern' mean?*

Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business, but shall not cover mere or predominant transfer of an activity comprising a service. Such sale of business as a whole will comprise comprehensive sale of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc. Since the transfer in title is not merely a transfer in title of either the immovable property or goods or even both it may amount to service and has thus been exempted.

4.10 In the matter of Innovative Textiles Ltd, the Uttarakhand Authority for Advance Ruling (Ruling No. 20/2018-19 dated 26.03.2019) has observed that 'a transfer of a business as a going concern is the sale of a business including assets. In terms of financial transaction 'going concern' has the meaning that at the point in time to which the description applies, the business is live or operating and has all parts and features necessary to keep it in operation.'

4.11 In the case of *Indo Rama Textile Limited* (2013) 4 Comp LJ 141 (Del), as referred by the applicant, the concept of transferring a company as a 'going concern' was examined by the Delhi High court and in Para 27 of the said judgement, the Hon'ble Court has observed as follows:

"Statement on Standard Auditing Practices (SAP) 16, "Going Concern", issued by the Council of the Institute of Chartered Accountants of India, provides that -- "When a question arises regarding the appropriateness of the Going Concern assumption, the auditor should gather

sufficient appropriate audit evidence to attempt to resolve, to the auditor's satisfaction, the question regarding the entity's ability to continue in operation for the foreseeable future.

4.12 It therefore appears that to qualify as a 'going concern', the business must not have 'intention or necessity of liquidation or of curtailing materially the scale of the operations'. In this context, we like to mention that the applicant has furnished before us copy of 'Audit report under section 44AB of the Income-tax Act, 1961' related to the period from 01.04.2020 to 31.03.2021. However, we do not find any comments from the auditor in respect of the '*entity's ability to continue in operation for the foreseeable future*'. We are, therefore, unable to conclude that the applicant has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations.

In view of the above discussions, we rule as under:

RULING

The transaction of transfer of business of the applicant involved in the instant case shall be treated as a supply of services.

The transaction would be covered under Serial No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 [corresponding West Bengal State Notification No. 1136 F.T. dated 28.06.2017] subject to fulfilment of the conditions to qualify as a going concern.

(BRAJESH KUMAR SINGH)

(JOYJIT BANIK)

Member

Member

West Bengal Authority for Advance Ruling

West Bengal Authority for Advance Ruling

Place: Kolkata

Date: 22.12.2022

To,

JAYESH POPAT

47A, NALINI SETT ROAD, SONAPATTY, BURRABAZAR, KOLKATA, WEST BENGAL, PIN
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Copy to:

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- (3) The Sr. JCCT/JCCT, Postabazar Charge, Jalasampad Bhavan, Block-DF, Sector- I, Salt
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