

GUJARAT AUTHORITY FOR ADVANCE RULING GOODS AND SERVICES TAX D/5, RAJYA KAR BHAVAN, ASHRAM ROAD, AHMEDABAD – 380 009.	
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ADVANCE RULING NO. GUJ/GAAR/R/2024/02
(IN APPLICATION NO. Advance Ruling/SGST&CGST/2023/AR/15)

Date: -05.01.2024

Name and address of the applicant	:	Tecnimont Private Limited, 27, Laxmi Chamber, Navjivan Press Road, opp. Old High Court, Ahmedabad, Gujarat- 380 014.
GSTIN of the applicant	:	24AAACI2628B1Z8
Jurisdiction Office	:	Center Commissionerate – Ahmedabad-North Division-VII - S G Highway East Range - I
Date of application	:	04.05.2023
Clause(s) of Section 97(2) of CGST / GGST Act, 2017, under which the question(s) raised.	:	(e)(g)
Date of Personal Hearing	:	29.08.2023
Present for the applicant	:	Shri Sanjeev Nair (Advocate) and Shri Uday Prabhupatkar (General Manager)

Brief facts:

Tecnimont Private Limited, Laxmi Chamber, Navjivan Press Road, Ahmedabad, Gujarat- 380014 [for short 'applicant'] is a wholly owned subsidiary of Tecnimont S.P.A. Milan, Italy and an Engineering, Procurement, and Construction (EPC) company. Their GST registration number is 24AAACI2628B1Z8.

2. The applicant has entered into a **turnkey contract** with Indian Oil Corporation Ltd. (for short - IOCL), vide contract No. 44AC9100-EPCC-1 dated 19.01.2021 [for short 'contract'], for executing EPC work of 'Acrylic Acid Unit (90 KTA) and Butyl Acrylate Unit (150 KTA) of Acrylic/Oxo-Alcohol Project', located at IOCL Dumad Complex, Nr. Gujarat Refinery, Vadodara.

3. The applicant states that in terms of the contract, all imported materials required to be supplied under the contract will be sold by the applicant.



to IOCL on High Seas Sale [HSS] basis by endorsing bill of lading in favour of IOCL who will be filing the bill of entry for warehousing and subsequently for home consumption by paying the applicable customs duty and IGST.

4. The applicant, further states that the contract value is fixed on a lump sum price of Rs. 18,72,00,48,047.50 comprising of- [synopsis para 1.5]

(i) Rs. 14,70,30,56,131/- for domestically sourced material and supply of service;

(ii) Foreign Exchange Euros of € 4,55,18,322 (*ie* converted @ 1 EURO = INR 88.25 as on the date of opening of price bid Rs. 401,69,91,916.5) based on the terms and conditions of the Contract No. 44AC9100-EPCC-1 towards goods imported outside India;

(iii) Rs. 32,89,75,280.89 towards custom Duty & SWS on Foreign Component imported which is reimbursable according to contractual terms.

5. As per the applicant, during the course of importation, before the goods reach the Customs frontier in India, they enter into a HSS agreement with IOCL, transferring the ownership of the goods to IOCL at the price agreed in the contract. The applicant raises a custom invoice with respect to goods sold to IOCL under HSS without charging GST. IOCL then files a bill of entry as the importer of the said goods and discharges customs duty and IGST by clearing the goods for warehousing or home consumption. The applicant treats this as a separate supply of goods distinct from the works contract supplies.

6. The letter of acceptance issued by IOCL to the applicant mentions the specific scope of work to be executed and the Schedule of Rates for identified supplies including goods imported from outside India.

7. It is the applicant's say that the contract No. 44AC9100-EPCC-1 entered into with IOCL, identifies two separate set of supplies for the turnkey project [i] works contract for EPC work pertaining to EPCC-1 project and [ii] supply of imported materials for the same project.

8. With respect to consideration mentioned in para 4(i) *supra*, the applicant informs that they will charge GST @ 18% as work contract services.

9. The applicant further states that in terms of Schedule-III of CGST Act, 2017, no GST is leviable on supply of imported goods on HSS basis.



10. Applicant's submissions to substantiate the argument that supply of goods on HSS basis is neither a supply of good nor supply of services is as under:

- that transaction for sale of goods to IOCL on HSS basis, in terms of contract No. 44AC9100-EPCC-1, is covered under entry No. 8(b) of Schedule III of the CGST Act;
- that u/s 7(2) of the CGST Act, any activity or transaction specified in Schedule III, shall be treated neither as a supply of goods nor a supply of services;
- that entry No. 8(b) of Schedule III, states that supply of goods by consignee to any other person, by endorsing the documents of title of goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption shall neither be considered as supply of goods or supply of service;
- that the goods are imported from outside India, and supplied to IOCL on HSS basis by the applicant under a contract executed while the goods are on high sea. On arrival, IOCL files the bill of entry under its IEC for warehousing and such goods are moved under Custom Bond for depositing in warehouse registered u/s 58 read with section 65 of the Customs Act, 1962 and used in manufacturing of goods. The applicant then raises a custom/pro-forma invoice on IOCL for imported components sold on HSS basis;
- the above proposition has also been clarified by CBIC vide its circular No. 33/2017-Cus., dated 01-08-2017;
- that they also rely on the AAR ruling in the case of M/s. AIE Fiber Resource and Trading (India) Private Limited¹.

11. The next submission is that contract is divisible in nature; that the intent was always to treat supply of imported goods and the remaining EPC services, separately. To substantiate this submission, the applicant has further stated as follows:

- that the contract no. 44AC9100-EPCC-1 is divisible in nature wherein the goods imported and sold on HSS basis can be separately identified from the rest of the EPC contract;
- the minutes of meeting dated 16.6.2022 amends the contract and carves out import of goods as a separate supply;
- the contract evidences separation of supply of imported materials from the rest of the EPC contract in view of the foregoing viz:
 - the bifurcation of the contract value with respect to supply of imported goods into India and sold under HSS basis to IOCL;
 - special conditions of contract with respect to milestone payment of the consideration;
 - the HSS agreement with IOCL;
 - that only the value of goods component is included in the custom invoice;
 - the applicant then issues an invoice on IOCL for supply of goods on HSS basis;

¹ [2021 (12) TMI 1265]



- IOCL files Bill of Entry as an importer of goods and appropriately discharges IGST after taking the transaction value of HSS as its assessable value;
- that the sale of imported goods forms a distinct and separate category of supplies, and is clearly identified from the rest of the EPC work to be performed in terms of the contract; that the intent of the parties is to treat such supplies as distinct and divisible from the rest of the EPC contract;
- that they wish to rely on the case of Power Grid Corporation of India Limited², Gannon Dunkerley & Company³, BSNL⁴, Mahindra and Mahindra⁵, Mirah Exports Pvt. Limited⁶ and Bhopal Sugar Industries Limited⁷.

12. The applicant further submits that the supply of goods in the course of import into India cannot be subject to tax as intra-state supply, in view of the foregoing,

- that under Articles 269-A, 286(1), and 286(2) of the Constitution of India, supply of goods or services or both, in the course of import into India shall be deemed to be in the course of inter-state trade or commerce; that no imposition of tax can be authorized where supply takes place outside the state or territory of India; that Parliament may by law formulate principles for determining when a supply of goods or services or both happens in any of the ways mentioned in Article 286(1);
- that inter-state supply cannot be subjected to tax as an intra-state supply as part of a works contract service;
- the transaction of sale of goods under HSS in terms of the contract cannot be considered as part of overall works contract service;
- that even if the contract is considered indivisible, no tax can be levied on that part of goods which are sold on HSS basis which admittedly forms part of inter-state supply.

13. The applicant further states that sale of goods on HSS basis cannot form part of a composite supply of works contract service, in view of the foregoing;

- that the sale of imported goods and supply of balance EPC work are distinct; that sale of imported goods would not form part of composite supply as defined in the CGST/IGST Act;
- that supply which is neither a supply of goods nor a supply of service, cannot be construed as a taxable supply & hence it cannot form part of a composite supply as well;
- that sale of imported materials in terms of contract cannot be considered as part of a composite supply and hence cannot be part of the overall works contract;
- that if tax is levied on the transaction of sale of goods on HSS basis under works contract service, it would amount to double taxation which is impermissible.
- that value of imported goods supplied on HSS basis cannot form part of the works contract since IOCL, being the last buyer of goods under HSS would be liable to file a bill of entry and pay customs duty along with GST;

² [2007 108 ITD 340 Hyd,]

³ [1958 AIR 560, 1959 SCR 379]

⁴ [2006 (2) STR 161]

⁵ [1995 (76) E.L.T. 481 (SC)]

⁶ [1998 (98) ELT 3 (SC)]

⁷ [1977 AIR 1275, 1977 SCR (3)]



- that since IOCL would be discharging its IGST liability while importing goods, charging GST again on the same transaction as work contract service would lead to double taxation;
- that the applicant relies on the judgement in the case of Mohit Minerals⁸.

14. In view of the above, the applicant has sought advance ruling on the below mentioned questions viz

1. Whether the transaction of sale of goods by Tecnimont Pvt. Ltd. (TCMPL) to Indian Oil Corporation Ltd. (IOCL) on High Seas Sale basis in terms of Contract No. 44AC9100-EPCC-1 would be covered under Entry No. 8(b) of Schedule III of the CGST Act and shall be excluded from the value of work contract service for charging GST?

2. Whether the transaction of sale of goods on high seas sale basis by the Applicant to IOCL in terms of Contract No. 44AC9100-EPCC-1 would be treated as works contract and whether Applicant is liable to charge GST on the goods sold on high seas sale basis to IOCL? If yes, what will be the applicable rate of tax on such goods supplied?

15. Personal hearing in the matter was held on 29.08.2023 wherein the applicant was represented by Shri Sanjeev Nair, Advocate and Shri Uday Prabhupatkar. They reiterated their submission made in the application and further stressed that it was a divisible contract & relied upon the minutes to stress the point that supply of imported component is a separate supply.

Discussion and findings

16. 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.

17. 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.

⁸ [2022 (61) GSTL 257 (SC)]



18. The contract in question is in respect of a turnkey EPC contract. The terms 'turnkey' and 'EPC contract' are not defined under the CGST Act. Now, what constitutes an EPC contract? We find that Engineering, Procurement and Construction ('EPC') contract is a particular form of contracting arrangement wherein the EPC contractor is made responsible for all the activities right from design, procurement, construction, commissioning, and thereafter handover of the project to the end-user or owner. Likewise, Turnkey contracts, places the responsibility for designing, engineering, procurement, and construction of the entire project on a single contractor. Such contracts further ensue that following completion, the client receives a ready-to-use facility. Further these contracts are usually 'fixed price' contracts.

19. Before setting out the contentions and our findings, it would be prudent to reproduce the relevant portion of the contract viz

➤ **Contract No: 44AC9100-EPCC-1** [relevant extracts]

THIS CONTRACT made at New Delhi this 19th day of January 2021; BETWEEN INDIAN OIL CORPORATION LIMITED, a Government of India Undertaking registered in India under the Indian Companies Act, 1956, having its registered office at G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai-400 051 and the Headquarters of its Refineries division at Scope Complex, Core-2, 4th Floor, 7, Institutional Area, Lodhi Road, New Delhi - 110 003 (hereinafter referred to as the "OWNER" which expression shall include its successors and assigns) of the ONE

M/s TECNIMONT PRIVATE LIMITED, a Company registered in India under the Indian Companies Act, 1956, its registered office at Tecnimont House, Chincholi Bunder, 504, Link Road, Malad (W), Mumbai-400 064 India (hereinafter referred to / as collectively referred to as the "CONTRACTOR", which expression shall include his/their/its executors, administrators, representatives and permitted assigns/successors and permitted assign) of the OTHER PART.

WHEREAS

The Owner desires to have executed the work of "EPCC-1 Package for Acrylic Acid & Butyl Acrylate Unit of Acrylic /Oxo-Alcohol Project at IOCL Dumad Complex, Near Gujarat Refinery, Vadodara, Gujarat of INDIAN OIL CORPORATION LTD. (Tender No.: 44AC9100-EPCC-1)" more specifically mentioned and described in the Contract documents (hereinafter called the "WORK", which expression shall include all amendments therein and/ or modifications thereof) and has accepted the tender of the CONTRACTOR for the said work.

ARTICLE-2

WORK TO BE PERFORMED

2.1 The Contractor shall perform the work upon the terms and conditions and within the term specified in the Contract documents.



ARTICLE-3 COMPENSATION

3.1 Subject to and upon the terms and conditions contained in the Contract documents, the Owner shall pay CONTRACTOR compensation as specified in the Contract documents upon the satisfactory completion of the work and / or otherwise as may be specified in the Contract documents.

LETTER OF ACCEPTANCE

Vendor No. : 11916286 Tecnimont P Ltd Tecnimont House, Chincholi Bunder 504, Link Road, Malad (W), Mumbai-400064 India	Tender No. 44AC9100 Work Order No. : 26739294 Work Order Date : 30.12.2020 Work Order Value : INR 19049,023,328.47 Rs. One thousand nine hundred four crore ninety lac twenty thousand three hundred twenty eight.
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➤ DETAILED LETTER OF ACCEPTANCE

Name of Work: Residual Process Engineering, Detailed Design Engineering including HAZOP/HAZID/SIL Study Other Safety Studies as mentioned in Bidding Documents, Project Management, Site enabling jobs including area filling and grading upto FGL, Topography Survey and Soil Investigation, Demolition/dismantling works mentioned in the bid, Total Procurement (including chemicals, catalysts (except proprietary catalyst to be supplied by licensor through IOCL), first fill, consumables, special tools and tackles, Pre-Commissioning Spares, Commissioning Spares, Start-up spares Mandatory spares), Fabrication, Manufacturing, Quality Assurance, Inspection & Expediting, Third Party Inspection, Supplies, Transportation, Insurance, Handlings Storage of all Equipment, Materials, items and other Construction Materials at yard/site, Fabrication, Assembly, Construction, Erection, common control room & substation, interconnection systems, Installation of all plant machinery including civil, Structural, Mechanical, Piping, Electrical and Instrumentation including tie-ins, spares tall type) handed over to IOCL store duly codified, as per IOCL requirement, Testing, Insulation, Painting, First fill of chemicals and lubricants, Obtaining all Statutory Approvals (except for Environment Clearance which will be obtained by M/s IOCL).pre-commissioning Mechanical Completion of Plant, Preparation of plant specific operating manuals, Start-up, Commissioning and Performance Guarantee Test Runs (PGTR), Training of Owner's OLM personnel, consumables (Chemicals & Lubricants) for 6 (six) months operation, Contract closure activities Final invoice/ billing & document hand over and handing over of the facilities with Final and "As Built documentation for EPCC-1 package. of Acrylic/Oxo-Alcohol Project at IOCL Dumad Complex (near Gujarat refinery! comprising of following two units namely: 1. AA UNIT (90KTA) 2. BA UNIT (150 KTA)

1.0 LUMP SUM PRICE

1.1 The Contract value (also termed as 'Contract Price' or 'Lumpsum Price) is fixed Lumpsum price of INR 1872,00,48,047.50 INR Eighteen Hundred Seventy-Two Crore Forty-Eight Thousand Forty-Seven and Paise Fifty only) comprising of:-

1.1.1 INR 1470,30,56,131.00/- (Indian Rupees Forteen Hundred Seventy Crore Thirty Lakh Fifty Six Thousand One Hundred Thirty one only).



1.1.2 Foreign Exchange Component of Euro 45,518,322.00 (Euro Forty Five Million Five Hundred Eighteen Thousand Three Hundred Twenty Two Only (1.6. converted EURO 1 = INR 88.25 as on the date of opening of price bid INR 401,69,91,916.50) based on terms and conditions of the Contract.

1.1.3 Custom Duty & SNS on Foreign Component INR 32,89,75,280.89 (INR Thirty Two Crore Eighty Nine Lakh Seventy Five Thousand Two Hundred Eighty and Paise Eighty Nine Only) which is reimbursable as per contractual terms and conditions.

1.1.4 The Total Price payable under the contract shall be restricted to the quoted Lumpsum Price as in SP-0 and rate of Taxes and Duties as quoted in SP-3.

3.0 PRICE SCHEDULE

3.1 Price Schedule/Schedule of Prices enclosed in the Bidding Document and subsequently modified in Commercial Amendments shall be replaced by "Price Schedule /Schedule of Prices", enclosed as Appendix A to this Detailed Letter of Acceptance.

3.2 The Lumpsum Price mentioned under Sl.No. 1.1 above includes cost of all items included in the scope of work, technical specifications, specific requirements, drawings and/ under any other heads of Contract Documents and to complete the or subject work turnkey basis, irrespective of whether all the items for on Engineering, Supply and Erection elsewhere are categorically listed out/ brought out or not. The Lumpsum Price as mentioned above includes all activities of work such as Design, engineering, manufacturing, assembly, painting, inspection and testing, packing, forwarding, and supply at site, Supply of Mandatory spares, commissioning spares and tools and tackles, and erection, Site activities, Mechanical completion, Pre-Commissioning, Commissioning and Performance Guarantee Test Runs including Total Project Management and Handing Over of complete EPCC-1 package of Acrylic/Oxo-Alcohol Project IOCL Dumad Complex (near Gujarat at refinery) comprising of following two units namely AA UNIT 190KTA)&BA UNIT (150 KTA) on Single Point Responsibility Basis as per the scope of work defined in the Contract.

3.3 The Lumpsum Price includes cost of all works which are required to be performed, executed and supplied by the CONTRACTOR as stipulated in the Contract and the cost thereof has been covered suitably and appropriately assigned to various available heads and categories in the Schedule of Prices. Non-identification of any works in the description of items included in Schedule of Prices and the Schedule of Break-up of Lumpsum prices shall not be considered a reason either for extra claims or not carrying out the work in strict conformity with drawings, specifications and instructions of Enginner-in-Charge.

3.4 The breakup of Lumpsum prices shall be used for preparation and submission of detailed Billing Schedule (Schedule of Activities and Bill of Material for release of progressive payments. Notwithstanding the amounts shown in the Billing Schedule (Schedule of Activities and Bill of Material) under various heads, the total payment to the Contractor for performance of this Contract shall be limited to Lumpsum Price mentioned at para 1.1 above.

4.0 TAXES & DUTIES

4.1 Goods & Service Tax (GST):

Goods & Service Tax (GST) levied on and paid by the Contractor/ Supplier on any Indigenous material sold and supplied by the Contractor to Owner under the



Contract shall be reimbursed by Owner subject to the extent of Input Tax Credit documents furnished by Contractor to Owner for availing Input Tax credit benefits. Contractor's responsibility is only to provide Input Tax documents to Owner.

4.2 CUSTOMS DUTY

a) Clearance at Port, Airport, Demurrage/ Warfage, if any, transportation to the site and loading/unloading will be in the CONTRACTOR's scope as per contract provisions.

b) OWNER's liability towards Custom Duty shall be limited to the C&F value of imported supplies into India for permanent incorporation in the works indicated in FORM SP-1 of Schedule of Prices.

c) The Custom Duties, Social Welfare Surcharge, IGST and Cess be paid extra as per the Terms and Conditions of subject Tender and subject to ceiling prescribed therein. Present rate of IGST in 105. on 1057 111

4.3 Any statutory variation (increase or decrease) in all taxes / duties within the contractual completion period shall be to Owner's account against submission of documentary evidence for substantiation of the variation by way of relevant notification. However, in case of delay in completion of work beyond the contractual completion date, for reasons attributable to contractor, any increase in these rate(s) shall be borne by Contractor, whereas any decrease shall be passed on to Owner.

4.4 Any new or additional taxes / duties or levies imposed during the contractual completion period shall be paid to Contractor on submission of documentary proof. However, in Contractor, case of delay in completion of work, due to reasons attributable to any new or additional taxes, duties levies imposed after the contractual completion date shall be to Contractor's account. However, if the new levy is levied as a substitute of taxes and duties existing on the last bid date. then Implication of new levy shall be worked out and differential amount shall be reimbursed or recovered by Owner.

➤ GENERAL CONDITIONS OF LUMP SUM TURNKEY (LSTK) CONTRACT

3.0.2.0 MATERIALS

3.0.2.1 These General Conditions of Contract shall, on issue of the Letter of Acceptance to the CONTRACTOR, constitute a firm and indivisible contract for the sale and supply, to the OWNER, of all materials required for incorporation in the permanent works as determined by the CONTRACTOR, within the scope of work, to be necessary to establish, commission and operate (so far as concerns mandatory spares) the Plant/ Unit delivered on CIF basis at Indian port of CONTRACTOR's choice in respect of imported materials and delivered ex-factory in respect of other materials, at the price of materials specified in the Price Schedule. It is hereby clarified that the said contract shall include a contract for the sale and supply within the price of materials (and any recoveries in respect thereof under any policy of insurance) of all materials required for the replacement of any defective materials and any materials lost, damaged or destroyed during transit, storage, fabrication, erection or otherwise prior to the issue of the Completion Certificate,

3.0.2.2(a) Supplier's invoices in respect of materials covered within the scope of supply under Clause 3.0.2.1 shall be made out by the Supplier in favour of the



OWNER and the materials shall be consigned to the OWNER. Where the CONTRACTOR is the supplier, the invoices shall be drawn by the CONTRACTOR as the Supplier.

(b) The Supplier's invoices for imported materials shall include the cost of all pre-delivery tests and third party inspections, but shall not include the CONTRACTOR's procurement charges.

(c) The Supplier's invoices for indigenously supplied materials shall include all pre-delivery tests, but shall not include the CONTRACTOR's procurement charges.

(d) The invoices for indigenously supplied materials shall also include the taxes, duties and other levies on the supply which are reimbursable by the OWNER. Reimbursement shall, however, be subject to the satisfaction of the conditions and provision of the documents required to qualify for the reimbursement.

3.0.2.3 The CONTRACTOR shall be responsible at his own cost and initiative within the scope of services, to take delivery of the materials from the port of delivery in India in respect of imported materials and from the factory or ware-house or other place(s) of delivery in respect of indigenous materials and to transport these to the CONTRACTOR's stockpiles, godowns or other places of storage approved by the Engineer-in-Charge, and to transport the same from said godowns or place(s) of storage to the work site for incorporation in the permanent works

MINUTES OF THE MEETING

During meeting held on 07-12-2021, 27-12-2021 and thereafter on 31-01-2022, IOCL (Indian Oil) informed that License under Manufacture and other Operations in Warehouse Regulation, 2019 (hereinafter to be referred as MOOWR, 2019) have been applied by IOCL for Dumad location. Under MOOWR 2019 scheme, a unit can import goods (both inputs and capital goods) and can defer payment of customs duty with no interest liability and IOCL Intends to avail the scheme. To avail MOOWR benefit, import has to be done in the IEC of IOCL and goods to be moved directly from port to IOCL Dumad location.

IOCL also informed that post export EPCG benefit shall be availed for items which cannot be cleared under MOOWR. For this IOCL shall obtain post export EPCG License from DGFT and imported goods shall be cleared in the IEC of IOCL by M/s Tecnimont Private Limited after endorsement of post export EPCG License in the Bill of Entry and on payment of applicable Customs duties and taxes. IOCL also informs that export obligation, Installation certificate and other compliances under EPCG will be complied by IOCL and thereafter BCD refund will be availed by IOCL.

M/s. Tecnimont Pvt Ltd informed that all the imported goods will be directly sent to IOCL Dumad site.

SOP for handling imports in case of LSTK Contractor under MOOWR was also discussed during the meeting. Upon IOCL intimation, LSTK Contractor will execute imports under MOOWR/EPCG under the responsibility of IOCL. After detailed deliberation, it was decided to clear all the imported consignment in the name of IOCL based on the high sea sale agreement to be executed between M/s IOCL and M/s Tecnimont Private Limited.



M/s Tecnimont Private Limited informed to share the list of items to be Imported through email latest by 15th Feb' 2022 specifying the details such as tentative value, port of discharge like Mundra/ Kandla /Nhava Sheva / Mumbai Seaport and/or Ahmedabad / Mumbai International Airport, expected date of goods reaching Indian port etc.

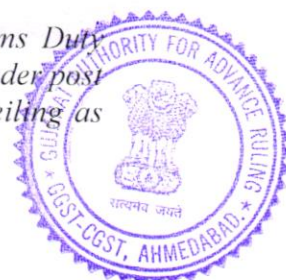
CONTRACTOR has provided the list of items to be imported with requested details vide email dated 16.02.2022.

The price to be indicated in the list of imported items will be as per the value of the imported material to be sold by M/s Tecnimont to IOCL on High Sea Sales agreement. However, at the bidding stage M/s Tecnimont had envisaged imports & clearance in their own name and accordingly the detailed billing break up for imported supplies will now undergo change owing to adoption of MOOWR scheme but the total Value of Imported items will remain same as per SP-1 and approved billing break-up.

IOCL also clarified that Insurance Policy obtained for Oxo project, will also be required to submit to Customs for clearing under MOOWR and hence invoice/bill of lading should be containing some linkage with the Oxo project.

IOCL also informed that GST is exempt on High Sea Sale transaction. M/s Tecnimont Private Limited scope of work as per contract shall remain same, i.e. order placement/payments etc. to vendor, transportation of goods to site warehouse etc. Only following methodology shall be followed:

1. Foreign supply contract will be carved out from the main contract and a separate work order for imported supplies shall be issued by IOCL under the umbrella of existing Contract
 2. High Sea Sale agreement shall be executed between IOCL and M/s Tecnimont Private Limited. This will be used for transferring the ownership from M/s Tecnimont Private Limited to IOCL.
 3. Bill of Entry is to be filed in the IEC of IOCL by the LSTK Contractor (M/s Tecnimont Private Limited). The Contractor shall for the purpose undertake and perform all services and formalities necessary for clearance of the goods/ materials for under bond from customs.
 4. Bill of Entries shall be filed under MOOWR and Import duties (BCD, cess and IGST) payment will be deferred and to be paid by Indian Oil later. But the amount of import duty applicable as on the date of clearance of goods will be subject to the ceiling as mentioned in form SP-3 by the bidders. In case, applicable import duty exceeds the ceiling as per SP-3 form, the same shall be recovered from the Contractor subject to applicable terms and conditions of the Tender.
- Where goods are not cleared under MOOWR, post export EPCG License number shall be endorsed in the Bill of Entry to be filed by M/s Tecnimont in the name of IOCL. For applying the aforesaid EPCG License, requisite information will be provided by M/s Tecnimont.
5. Bill of entry in the name of IOCL is to be filed based on the values given in the high sea sale agreement.
 6. M/s Tecnimont requested IOCL to make the payment of Customs Duty directly wherein goods are not cleared under MOOWR i.e. cleared under post export EPCG. IOCL accepted the same and informed that SP-3 ceiling as mentioned above would be applicable.



7. Existing approved billing breakup will be broken into two parts viz. Imported Supplies and other. Existing approved billing schedule will be effective, and payment shall be governed by existing approved billing schedules till the time imported and remaining billing breakup is not approved and shall not result in delay in payment on account of pending approval of billing schedule.

M/s Tecnimont also requested IOCL to share the list of people signing the High Sea Sale agreement in advance and preferably the person to be based out of Mumbai.

Further, IOCL also clarified that GST TDS will not be applicable on imported supply value as the same is exempt from GST at first place and hence there is no question of deducting GST TDS on it.

This MOM shall be part of amendment to DLOA/Contract.

[emphasis supplied]

20. The applicant's contention primarily is that the contract entered into with IOCL, identifies two separate set of supplies under the turnkey EPC contract, viz

- [i] supply of imported materials for the project; and
- [ii] works contract for EPC work pertaining to EPCC-1 project.

Coupled with the above contention is the next submission that in respect of [i] *supra*, the transaction is exempt under Schedule-III of CGST Act, 2017 and in respect of [ii], *supra*, the applicant will charge GST @ 18% as work contract services.

21. Works contract service, is defined u/s 2(119) of the CGST Act, 2017, as under

(119) "works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;

For a *supply* to fall within the ambit of works contract service, [in terms of the flyer no. 28 dated 1.1.2018], the

- works contract must be in relation to any immovable property;
- composite supply undertaken on goods say fabrication or paint job would per se not fall within the ambit of works contract under GST; such contract would continue to remain composite supplies;
- In terms of Schedule-II, para 6(a), works contract shall be treated as supply of services;



- GST aims to put at rest the controversy by defining what will constitute a works contract (applicable for immovable property only) by stating that a works contract will constitute a supply of service and specifying a uniform rate of tax applicable on same value across India.

22. It would be apt to rely on the judgement of the Hon'ble Supreme Court in the case of Kone Elevator India Private Limited⁹ viz

27. The aforesaid authorities clearly show that a works contract could not have been liable to be taxed under the State sales tax laws and whether the contract was a works contract or a contract for sale of goods was dependent on the dominant intention as reflected from the terms and conditions of the contract and many other aspects. In certain cases, the court has not treated the contract to be a works contract by repelling the plea of the assessee after taking into consideration certain special circumstances. No straitjacket formula could have been stated to be made applicable for the determination of the nature of the contract, for it depended on the facts and circumstances of each case. As the works contract could not be made amenable to sales tax as the State Legislatures did not have the legislative competence to charge sales tax under Entry 48 List II of the Seventh Schedule of the Constitution on an indivisible contract of sale of goods which had component of labour and service and it was not within the domain of the assessing officer to dissect an indivisible contract to distinguish the sale of goods constituent and the labour and service component. The aforesaid being the legal position, the Parliament brought in the Forty-sixth Amendment by incorporating Clause (29A) in Article 366 of the Constitution to undo the base of the Constitution Bench decision in Gannon Dunkerley's-I case.

42. At this juncture, it is condign to state that four concepts have clearly emerged. They are (i) the works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services; (ii) the concept of "dominant nature test" or, for that matter, the "degree of intention test" or "overwhelming component test" for treating a contract as a works contract is not applicable; (iii) the term "works contract" as used in Clause (29A) of Article 366 of the Constitution takes in its sweep all genre of works contract and is not to be narrowly construed to cover one species of contract to provide for labour and service alone; and (iv) once the characteristics of works contract are met within a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract.

63. Considered on the touchstone of the aforesaid two Constitution Bench decisions, we are of the convinced opinion that the principles stated in Larsen and Toubro (supra) as reproduced by us hereinabove, do correctly enunciate the legal position. Therefore, "the dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are really not applicable. If the contract is a composite one which falls under the definition of works contracts as engrafted under clause (29A)(b) of Article 366 of the Constitution, the incidental part as regards labour and service pales into total insignificance for the purpose of determining the nature of the contract.

64. Coming back to Kone Elevators (supra), it is perceivable that the three-Judge Bench has referred to the statutory provisions of the 1957 Act and thereafter referred to the decision in Hindustan Shipyard Ltd. (supra), and has further taken note of the customers' obligation to do the civil construction and the time schedule for delivery and thereafter proceeded to state about the major component facet and how the skill and labour employed for converting the main components into the end-product was

⁹ 2014 (304) E.L.T. 161 (S.C.)



only incidental and arrived at the conclusion that it was a contract for sale. The principal logic applied, i.e., the incidental facet of labour and service, according to us, is not correct. It may be noted here that in all the cases that have been brought before us, there is a composite contract for the purchase and installation of the lift. The price quoted is a composite one for both. As has been held by the High Court of Bombay in *Otis Elevator (supra)*, various technical aspects go into the installation of the lift. There has to be a safety device. In certain States, it is controlled by the legislative enactment and the rules. In certain States, it is not, but the fact remains that a lift is installed on certain norms and parameters keeping in view numerous factors. The installation requires considerable skill and experience. The labour and service element is obvious. What has been taken note of in *Kone Elevators (supra)* is that the company had brochures for various types of lifts and one is required to place order, regard being had to the building, and also make certain preparatory work. But it is not in dispute that the preparatory work has to be done taking into consideration as to how the lift is going to be attached to the building. The nature of the contracts clearly exposit that they are contracts for supply and installation of the lift where labour and service element is involved. Individually manufactured goods such as lift car, motors, ropes, rails, etc. are the components of the lift which are eventually installed at the site for the lift to operate in the building. In constitutional terms, it is transfer either in goods or some other form. In fact, after the goods are assembled and installed with skill and labour at the site, it becomes a permanent fixture of the building. Involvement of the skill has been elaborately dealt with by the High Court of Bombay in *Otis Elevator (supra)* and the factual position is undisputable and irrespective of whether installation is regulated by statutory law or not, the result would be the same. We may hasten to add that this position is stated in respect of a composite contract which requires the contractor to install a lift in a building. It is necessary to state here that if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if separate contract is entered into for installation, that would be a contract for labour and service. But, a pregnant one, once there is a composite contract for supply and installation, it has to be treated as a works contract, for it is not a sale of goods/chattel simpliciter. It is not chattel sold as chattel or, for that matter, a chattel being attached to another chattel. Therefore, it would not be appropriate to term it as a contract for sale on the bedrock that the components are brought to the site, i.e., building, and prepared for delivery. The conclusion, as has been reached in *Kone Elevators (supra)*, is based on the bedrock of incidental service for delivery. It would not be legally correct to make such a distinction in respect of lift, for the contract itself profoundly speaks of obligation to supply goods and materials as well as installation of the lift which obviously conveys performance of labour and service. Hence, the fundamental characteristics of works contract are satisfied. Thus analysed, we conclude and hold that the decision rendered in *Kone Elevators (supra)* does not correctly lay down the law and it is, accordingly, overruled.

[emphasis supplied]

23. The contract dated 19.1.2021, [relevant extracts of which are reproduced *supra*], entered into by the applicant & IOCL, is to execute the work of "EPCC-1 Package for Acrylic Acid & Butyl Acrylate Unit of Acrylic/ Oxo-Alcohol Project". While arguing that the contract entered into identifies two separate set of supplies [i] works contract for EPC work pertaining to EPCC-1 project; & [ii] supply of imported materials for the said project, the applicant ignores a major factor viz that it is a lumpsum turnkey EPC contract. Therefore, to divide a turnkey EPC contract into two parts, is legally not tenable. It is not their case



that they have entered into two different contracts. In-fact, ongoing through the Minutes of the Meeting, reproduced *supra*, we find that post the contract, IOCL and the applicant had a rethink & carved out the foreign supply of goods [HSS] from the turnkey EPC contract, primarily to avail the benefit of Manufacture and other Operations in Warehouse Regulation, 2019 [MOOWR] and EPCG by fictionally dividing an otherwise single turnkey contract into [a] supply of goods and [b] supply of services.

24. Now, we move on to the first question on which the applicant has sought ruling *viz* whether the transaction of sale of goods by Tecnimont Pvt. Ltd. (TCMPL) to Indian Oil Corporation Ltd. (IOCL) on HSS basis in terms of Contract No. 44AC9100-EPCC-1 would be covered under Entry No. 8(b) of Schedule III of the CGST Act and shall be excluded from the value of work contract service for charging GST?

25. Entry No. 8(b) of Schedule III to the CGST Act, 2017, and section 7, *ibid*, states as follows:

- SCHEDULE III
[See section 7]

Activities or transactions which shall be treated neither as a supply of goods nor a supply of services

8. (a) *Supply of warehoused goods to any person before clearance for home consumption;*

(b) *Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption.]*

²[**Explanation 1.**-For the purposes of paragraph 2, the term "court" includes District Court, High Court and Supreme Court.

¹[**Explanation 2.**- For the purposes of paragraph 8, the expression "warehoused goods" shall have the same meaning as assigned to it in the Customs Act, 1962 (50 of 1962).]

- **Section 7. Scope of supply.- [relevant extracts]**

(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;*



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 :-.....;]

(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[****]

(d) ⁴[****].

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.

26. As is evident, in terms of Schedule III, read with section 7(2) of the CGST Act, 2017, supply on High Sea Sale basis, is treated as neither a supply of goods nor a supply of services. Thus, the question of levy of GST on such supply does not arise.

27. Moving on to the second portion of the same question, viz, as to whether sale of goods by Tecnimont Pvt. Ltd. (TCMPL) to Indian Oil Corporation Ltd. (IOCL) on HSS Sale basis in terms of the contract shall be excluded from the value of works contract service for charging GST? Now, additions and inclusion, as far as valuation under CGST is concerned, is governed by section 15 of the CGST Act, 2017, which states as follows: [relevant extract]

Section 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;

(b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;



- (c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;
- (d) interest or late fee or penalty for delayed payment of any consideration for any supply; and
- (e) subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments.

Explanation. -For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.

- (3) The value of the supply shall not include any discount which is given-
 - (a); and
 - (b), if-

What will be included and excluded in the value of supply, is governed by sub-sections 15(2) & (3), *supra*. In terms of sub-section 15(2), *ibid*, the value of supply **shall include** any amount that the supplier is liable to pay in relation to such supply which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both. The EPC contract, we find, encompasses both the supply of goods and services. At the cost of repetition, the contract is for executing EPC work of 'Acrylic Acid Unit (90 KTA) and Butyl Acrylate Unit (150 KTA) of Acrylic/Oxo-Alcohol Project'. Further, a conjoint reading of the contract with the Minutes depicts that the applicant, during the course of importation and before the goods reach the Customs frontier in India, enters into a HSS agreement with IOCL, transferring the ownership of the goods to IOCL at the agreed price in the contract. IOCL files a bill of entry as the importer and discharges customs duty and IGST. As is mentioned in the minutes, this is primarily to avail the benefit of Manufacture and other Operations in Warehouse Regulation, 2019 [MOOWR] and EPCG. The applicant, in terms of the contract, is liable to provide the goods [supplied on HSS basis] and hence the submission that this value is not to be included in the transaction value in respect of works contract service is legally not tenable more so since the applicant is contractually bound/liable to supply both the goods and the services. Therefore, in terms of section 15, *ibid*, the value of such imported goods would form a part of the transaction value for payment of GST.



28. In-fact the issue of whether free supply would form a part of transaction value, is no longer *res integra* having been decided by the Hon'ble Chhattisgarh High Court in the case of M/s. Shree Jeet Transport¹⁰, the relevant extracts of which are reproduced below viz

1. (a) This instant petition is filed to challenge the order dated 28-2-2022 (Annexure - P/5) passed by the Appellate Authority for Advance Ruling, Chhattisgarh (for brevity 'the AAAR') as no decision was rendered in terms of Section 101 (3) of the Central Goods and Service Tax Act, 2017 (for brevity 'the CGST') and the Chhattisgarh Goods and Service Tax Act, 2017 (for brevity 'the CHGST') and the order dated 4-1-2021 (Annexure - P/6) passed by the Authority for Advance Ruling, Chhattisgarh (for brevity 'the AAR') to be illegal wherein it was held that Goods and Services Tax (for brevity 'the GST') would be leviable on the value of diesel provided by the service recipient Free of Cost (for brevity 'FOC').

(c) The petitioner is a Goods Transport Agency (for brevity 'the GTA') service provider, As per the proposed terms of agreement, it was agreed that the petitioner would provide trucks/trailers along with driver for transportation of goods belonging to the service recipient on a day-to-day and non-exclusive basis and further as per Clause 2 of the draft agreement, the service recipient will be responsible for providing fuel in the trucks/trailers supplied by the petitioner on free of cost basis (FOC) thereby it was agreed that component of fuel would not be the responsibility of the petitioner, who is a GTA, in the scope of service recipient.

2.2 It is expressly clarified that the value of fuel which is in the scope of the Company shall by no means be interpreted as additional consideration payable for the transportation service provided by the Transporter or having been provided to the vehicle in lieu of freight. The said fuel would be issued by the Company for exclusive usage, as a consumable, in the underlying transportation only and the ownership of the fuel would at no point be transferred to the Transporter or to the vehicle engaged.....

7. The question falls for consideration is that "whether diesel filled by the service recipient FoC in the truck of the GTA can be added to value of supply being rendered by the GTA for the purpose of levy of GST under the CGST Act, 2017?"

13. The AAR by its order dated 4-1-2021 held that the cost of fuel though is not included in the scope of work of the petitioner and the diesel is provided FOC by the service recipient would nevertheless would be added to the value of taxable service for the purpose of GST on application of Section 15 (1) read with Section 2 (31) of the CGST. It was further held that since fuel was an essential ingredient without which the transport service cannot be rendered, the cost of fuel cannot be ignored.

14. The petitioner having not satisfied with such ruling, filed an appeal before the Appellate Authority i.e. AAAR wherein the AAAR passed an order dated 28-2-2022. The Member of the CGST (Central) upheld the view of the AAR and held that diesel, which is filled FoC by the service recipient in the engaged chartered (dedicated) vehicles as per the proposed draft agreement would form part of value of supply of service charged by the appellant and applicable rate of GST was to be leviable whereas the SGST Member held that considering the provisions of Section 15(2)(b) which provides that any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply does not include FoC diesel for the simple reason that the liability to pay for the diesel as per draft contract is of service recipient.

20(c) In the case in hand, as per the proposed agreement/contract, the fuel (diesel) is not in the scope of the service of the petitioner. The agreement purports that the fuel would be free of cost basis for transportation of the goods and fuel would be filled by the service recipient for transportation.

¹⁰ Writ Petition (T) No. 117/2022 decided on 17.10.2023



21. The very definition and existence of the petitioner who is to provide transportation service, by plain and simple interpretation would point out the entire business and survival is premised and interdependent on the vehicles for transportation of goods. The obvious factor would be the vehicle cannot run without fuel. Therefore, the design of the entire activity of GTA is based on supply of fuel to the respective vehicles. In absence of fuel, the the entire business activity would stand arrested to provide service. Therefore, the need of fuel is glued for survival of a GTA. If the GTA has stitched up to provide service by obtaining fuel on FOC basis by contract with recipient Company, this phenomenon would transcend the activity which reflects a broader shift in name of contract, therefore, the revenue has power to remove the lid to find out the object and purpose.

22. In the instant case, the scope of supply as defined in section 7 of the GST Act purports "all forms of supply of services" made or agreed to be made for consideration "in the course" or "furtherance of business". The words used in Section 7(1)(a), "in course" or "furtherance of business" would point out about service to be provided by the transporter as a GTA. The contention of petitioner that the "consideration" is required to be confined as per the terms of agreement cannot be given a literal interpretation. Section 2(31) of the CGST 2017 mandates that "consideration" in relation to supply of goods or services includes - (a) any payment whether in money or otherwise made or to be made; (b) monetary value of any act or forbearance for the inducement of supply of goods or services. Reading of section 2(31) along with scope of supply as defined u/s 7(1)(a) makes it clear that the petitioner who is a GTA wanted to transport the goods for recipient. The recipient is not a GTA or engaged in business of transport. Consequently it is the petitioner GTA "in course" or "furtherance of business" has agreed to supply the goods or service for consideration. When it is the primary business of the GTA, in order to allow running the vehicles by fuel, it is a potential combination. If that part of responsibility is delegated by way of an agreement to the recipient, in such a case, the recipient would step into the shoes of GTA as its component and would be playing central role in setting narratives.

23. Section 7 of the Act explains that expression "supply" would include all forms of supply made or agreed to be made for consideration in furtherance of business by the supplier. So the nature of business would be the decisive factor and if such consideration is shifted by entering into agreement, it would be encroaching upon turf of G.T.A., and would only be a collective enthusiasm and that statutory liability cannot be evaded. As has been laid down by the Supreme Court in CLP India Pvt. Ltd. Versus Gujarat Urja Vikas Nigam (2020) 5 SCC 185, the parties by agreement cannot over-ride the statutory provisions in relation to matter of tariff.

25. Section 15(2)(b) says that the value of supply shall include any amount that the supplier is liable to pay in relation to such supply but it has been incurred by recipient of supply and not included in the prices actually paid. This section imposes statutory obligation. The very existence of petitioner as GTA is for goods transport. Naturally, it would be the obligation for the GTA to run the vehicles and this factor needs a merited attention. The provision of Section 15(2)(b) has been tried to be by-passed by the agreement wherein the diesel was agreed to be supplied FOC by service recipient to the GTA. If we look into the facts by other angle, the expenses to fill the diesel in vehicle in furtherance of supply of service in normal condition was to be incurred by the GTA and it was his liability to fulfill such supply. However, in this issue, the expense of fuel has been agreed to be incurred by the recipient by agreement and value of diesel is excluded to evaluate the value of supply. The statutory provision of Section 15(2)(b) takes within its sweep to value, which is incurred by recipient. Therefore even by agreement in between the GTA and service recipient, this statutory liability cannot be sidelined and the merited attention of the statute sets a red line. Therefore, in the instant case, the value of service agreed to be provided necessarily will depend on the nature of service and the nature of business. The petitioner who can survive to run the business of goods transport on fuel therefore cannot claim that the diesel is supplied by the service recipient free of cost, as such, it cannot be included as the fuel is an integral part used in providing the Transportation Service and is essential for GTA provider. Without fuel the entire business of GTA cannot survive. Therefore, fuel being an integral part cannot be bifurcated to over come a tax liability.

26. Another submission is made that the model GST law proposed to include in Section 15(2)(b) of CGST Act "the value, apportioned as appropriate, of such goods and/or services



as are supplied directly or indirectly by the recipient of the supply free of charge or at reduced cost for use in connection with the supply of goods and/or services being valued". Therefore by such provision, free supply was included to be valued. However, in the final GST law, the provision of free supply by the service recipient was excluded. It is contended that the transaction value was an inclusive part in the proposed Model GST law under clause (b) Section 15(2) of the CGST Act. The provision to be added as per model GST Law in clause (b) of Section 15 (2) reads as under : "(b) the value, apportioned as appropriate, of such goods and/or services as are supplied directly or indirectly by the recipient of the supply free of charge or at reduced cost for use in connection with the supply of goods and/or being valued...."

The submission that free supply by the service recipient has been excluded as per final GST Law. Therefore, the legislative history in the draft GST Law is required to be seen. It is contended that there is a conscious omission by the Legislature to include value of free supply by recipient to evaluate the entire supply. The reference is made to case law reported in (2022) 10 SCC 700 – Mohit Minerals Pvt. Ltd (supra).

27. However, when we examine the final GST Law, Section 15(2)(b) includes that any amount that the supplier is liable to pay in relation to such supply but has been incurred by the service recipient and not included in the prices paid or to be payable is to be taken into account to value the service answers this query. The Legislature has categorically enveloped such kind of supply within the ambit unless exempted by any provision. Therefore, the emphasis cannot be made at this stage while interpreting the provisions of Section 15(2)(b) of the GST Act, 2017 with the proposed GST Law specially taking into consideration the nature of business by GTA, the service provider.

30. Again when we examine the nature of business of the petitioner, who is a GTA, the nucleus of survival of business shows that the business of petitioner entirely survives on transportation. Since the transportation inter-alia is an inter-dependent on supply of fuel, it would be a crucial component to run the business of GTA. If such integral part of survival of reins are held by service recipient, in such a case, it would be actually doing the substance addition of GTA survival. Therefore, the Circular dated 8th June 2018 on which the petitioner tried to rely upon would not be of any help especially considering the nature of business and the provisions of Section 7(1) (a) and 15(2)(b) of CGST Act.

31..... In view of the observations made in foregoing paragraphs the initial order passed by the AAR on 04.01.2021 shall revive and it is observed that though the diesel was provided free of cost by the service recipient, it would nevertheless be added to the value for the purpose of GST.

In the aforementioned judgement, though the recipient of the supply was legally bound via the agreement to provide for free diesel, yet the Hon'ble High Court, held that the free supply of diesel would form part of the transaction value, for the purpose of GST.

29. Our finding, further stands substantiated, viz

- the detailed letter of acceptance under the name/nature of work, includes the following
 - Residual Process Engineering, Detailed Design Engineering, Other Safety Studies, Project Management, Site enabling jobs, Topography Survey and Soil Investigation, Demolition/ dismantling works.
 - Total Procurement (including chemicals, catalysts (except proprietary catalyst to be supplied by licensor through IOCL), first fill, consumables, special tools and tackles, Pre-Commissioning Spares, Commissioning Spares, Start-up spares Mandatory spares, Fabrication, Manufacturing, Quality Assurance, Inspection & Expediting, Third Party Inspection, Supplies, Transportation Insurance, Handlings Storage of all Equipment.



- Materials, items and other Construction Materials at yard/site, Fabrication, Assembly
- Construction, Erection, common control room & substation, interconnection systems, Installation of all plant machinery including civil, Structural, Mechanical, Piping, Electrical and Instrumentation including tie-ins, spares (all type) handed over to IOCL store duly codified, as per IOCL requirement,
- Testing, Insulation, Painting, first fill of chemicals and lubricants, obtaining all Statutory Approvals (except for Environment Clearance which will be obtained by M/s IOCL), pre-commissioning Mechanical Completion of Plant, Preparation of plant specific operating manuals, Start-up, Commissioning and Performance Guarantee Test Runs (PGTR),
- Training of Owner's OLM personnel, consumables (Chemicals & Lubricants) for 6 (six) months operation, Contract closure activities
- in terms of para 3.2 & 3.3 under the heading *Price Schedule* in the detailed letter of acceptance, reproduced *supra*;
- as per the General Conditions of Lumpsum Turnkey (LSTK) contract, under para 3.0.2.0 Materials, wherein it is clearly mentioned that the general conditions shall on issue of acceptance by the applicant constitute a firm and indivisible contract for the sale and supply to IOCL of all materials required for incorporation in the permanent works as determined by the applicant.

Thus, the argument that it is a divisible contract entailing [a] supply of imported goods and [b] supply of services is not borne out from the reading of the contract and the relevant documents thereof.

30. On going through the minutes of the meeting, it is further observed that the applicant has to undertake and perform all services and formalities necessary for clearance of the imported goods/materials from under bond from Customs. Needless to add, that it is the applicant who is contractually obliged to procure the imported goods in terms of the contract for the said turnkey EPC project.

31. The submission of the applicant as listed in para 11 *supra*, to substantiate that the contract is divisible & further stress about the intent of the parties to the said contract, is *viz*

- the bifurcation of the contract value with respect to supply of imported goods into India and sold under HSS basis to IOCL;
- special conditions of contract with respect to milestone payment of the consideration;
- the HSS agreement with IOCL;
- that only the value of goods component is included in the custom invoice;
- the applicant then issues an Invoice on IOCL for supply of goods on HSS Basis;
- IOCL files Bill of Entry as an importer of goods and appropriately discharges IGST after taking the transaction value on HSS as its AV.



On going through section 15 of the CGST Act, 2017, *supra*, and judgement of the Hon'ble High Court of Chhattisgarh, we do not find any merit in the submission of the applicant. We hold that the value of the imported goods would form a part of the Transaction value under section 15, *ibid*, for computing the value of work contract service for charging GST and that it cannot be excluded under the guise of free supply, as is being canvassed by the applicant.

32. Moving on to the next submission, the applicant has submitted that in terms of Articles 269-A¹¹, 286(1)¹² and 286(2)¹³ of the Constitution of India, supply on HSS basis, is inter-state trade; that inter-state supply cannot be subjected to tax as an intra-state supply as a part of the works contract service. The averment raised is not tenable owing to the fact that in terms of section 12 of the CGST Act, 2017, the liability to pay tax shall arise at the time of supply of goods. In this case the time of supply in respect of imported goods is when the goods land in the customs frontier, primarily owing to the carving out the supply from the contract on account of the minutes. However, as per the turnkey EPC contract, the applicant is providing a works contract service which encompasses the supply of goods and the service in setting up the EPCC-1 Package for Acrylic Acid & Butyl Acrylate Unit of Acrylic /Oxo-Alcohol Project at IOCL Dumad Complex. The liability of the applicant to pay tax on works contract service in respect of this supply of service, shall arise at the time of supply in terms of section 13, *ibid*. Therefore, the argument that the imported goods supplied on HSS basis are subject to tax as intra state supply belies fact,

¹¹ 1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation.—For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under article 246A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as tax levied by a State under article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

¹² 286. Restrictions as to imposition of tax on the sale or purchase of goods

(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India

¹³ 2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1)



what is supplied under the works contract is not the imported goods but Acrylic Acid & Butyl Acrylate Unit of Acrylic /Oxo-Alcohol Project. The argument therefore lacks merit.

33. The applicant has further stated that sale of imported goods cannot form part of a composite supply of works contract service since the sale of imported goods and supply of balance EPC work are distinct; that sale of imported goods would not form part of composite supply as defined in the CGST/IGST Act. The argument is legally incorrect owing to the fact that in terms of Sr. No. 6 of Schedule II to the CGST Act, 2017, viz

6. Composite supply

The following composite supplies shall be treated as a supply of services, namely:-

(a) works contract as defined in clause (119) of section 2; and

(b) supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration.

As is already stated the contract entered into by the applicant with IOCL, is a turnkey EPC contract, to commission an Acrylic Acid & Butyl Acrylate Unit of Acrylic/Oxo-Alcohol Project, which is a composite works contract in terms of section 2(119), *ibid*. In terms of Sr. No. 6 of Schedule II, such composite works contracts, involving transfer of property in goods (whether as goods or in some other form) involved in the execution of the said project is a composite supply & in terms of Schedule II, would be treated as supply of service and leviable to GST accordingly.

34. The next argument that the applicant submits that if tax is levied on the transaction of sale of goods on HSS basis under works contract service it would amount to double taxation which is impermissible. To substantiate his argument, the applicant has relied upon the judgement of Mohit Minerals⁸. The argument we find, is without basis. How it would amount to double taxation is not understood. The imported goods supplied on HSS basis as has already been held, is exempt from GST owing to the findings recorded supra.



35. As far as reliance on the judgement of the Hon'ble Supreme Court in the case of Mohit Minerals⁸ is concerned, it would be prudent to quote the relevant paragraphs viz

D.6) Composite Supply and Issues of Double Taxation

132. Having examined whether the impugned levy is permissible under Section 5 of the IGST Act, we shall now advert to the arguments raised by the respondents regarding the impugned notifications amounting to double taxation. The respondents have submitted before this Court that the transaction between the foreign exporter and the respondents is already subject to IGST under Sections 5 of the IGST Act read with Sections 3(7) and 3(8) of the Customs Tariff Act as "supply of goods". An additional levy of IGST on imported goods, that is on the supply of transportation service, by designating the importer as the recipient would amount to double taxation

145. This Court is bound by the confines of the IGST and CGST Act to determine if this is a composite supply. It would not be permissible to ignore the text of Section 8 of the CGST Act and treat the two transactions as standalone agreements. In a CIF contract, the supply of goods is accompanied by the supply of services of transportation and insurance, the responsibility for which lies on the seller (the foreign exporter in this case). The supply of service of transportation by the foreign shipper forms a part of the bundle of supplies between the foreign exporter and the Indian importer, on which the IGST is payable under Section 5(1) of the IGST Act read with Section 20 of the IGST Act, Section 8 and Section 2(30) of the CGST Act. To levy the IGST on the supply of the service component of the transaction would contradict the principle enshrined in Section 8 and be in violation of the scheme of the GST legislation. Based on this reason, we are of the opinion that while the impugned notifications are validly issued under Sections 5(3) and 5(4) of the IGST Act, it would be in violation of Section 8 of the CGST Act and the overall scheme of the GST legislation. As noted earlier, under Section 7(3) of the CGST Act, the Central Government has the power to notify an import of goods as an import of services and vice versa :

"7. Scope of supply. -

xx

xx

xx

(3) Subject to the provisions of 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."

No such power can be noticed with respect to interpreting a composite supply of goods and services as two segregable supply of goods and supply of services.

147. We are in agreement with the High Court to the extent that a tax on the supply of a service, which has already been included by the legislation as a tax on the composite supply of goods, cannot be allowed.

As is evident, the facts in Mohit Minerals, supra is at complete variance from the facts relating to the applicants case. The reliance therefore is not legally tenable.



36. Lastly, the applicant in his synopsis [refer para 1.5] which is reproduced in paragraph 4, *supra*, has stated that Rs. 14,70,30,56,131/-, out of the lumpsum price of Rs. 18,72,00,48,047.50, is for domestically sourced material and supply of service; that in respect of supply of goods and services, they would be charging GST @ 18% as works contract service. This clearly shows that the applicant is treating the '*domestically procured goods*' and the '*imported goods*' under the same contract, for the purpose of setting up of Acrylic Acid & Butyl Acrylate Unit of Acrylic/Oxo-Alcohol Project on a different footing, without any plausible intelligible differentia. It is trite law that equals cannot be treated as un-equals. Doing so would invite the wrath of holding the process to be manifestly arbitrary. Therefore, the submission of treating both the domestically procured goods and imported goods on different footing, is legally incorrect and fails on merit too.

37. The second question on which the applicant has sought a ruling is whether the transaction of sale of goods on high seas sale basis by the Applicant to IOCL in terms of Contract No. 44AC9100-EPCC-1 would be treated as works contract and whether Applicant is liable to charge GST on the goods sold on high seas sale basis to IOCL? If yes, what will be the applicable rate of tax on such goods supplied? We find that the question stands answered. The transaction of sale of goods on high sea sale basis by the applicant to IOCL in terms of contract No. 44AC9100-EPCC-1 would fall under schedule -III, as mentioned *supra*, at the time of supply of imported goods which as we have already held is not leviable to GST.

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

RULING

1. The transaction of sale of goods by Tecnimont Pvt. Ltd. (TCMPL) to Indian Oil Corporation Ltd. (IOCL) on High Seas Sale [HSS] basis in terms of Contract No. 44AC9100-EPCC-1 is covered under Entry No. 8(b) of Schedule III of the CGST Act. However in terms of the findings



recorded supra, the value of such HSS supply would form a part of the transaction value under section 15, ibid, for computing the value of work contract service for charging GST.

2. The transaction of sale of goods on high seas sale [HSS] basis by the applicant to IOCL in terms of Contract No. 44AC9100-EPCC-1 as has been held supra, is covered under entry 8(b) of Schedule III of the CGST Act, 2017 and is therefore the HSS supply is neither a supply of goods nor a supply of services.



(RIDDHESH RAVAL)
MEMBER (SGST)

(AMIT KUMAR MISHRA)
MEMBER (CGST)

Place: Ahmedabad

Date: 05.01.2024

