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ABB India Ltd., In re

Date: 20-Mar-2020

Authority for Advance Ruling - West Bengal

Advance Ruling

Order No. 47/WBAAR/2019-20

Applicant	ABB India Ltd
Summary	<p>The Applicant seeks a ruling on whether Entry 3(v) of Notification No. 11/2017 – Central Tax (Rate) dated 28/06/2017 (State Notification No. 1135-FT dated 28/06/2017) is applicable for its supply to RVNL by way of erection, commissioning, installation, completion etc. of SCADA System.</p> <p>The AAR ruled that</p> <ol style="list-style-type: none">1. According to Serial No. 3 (v) (a) of the Rate Notification, the <i>composite supply of works contract</i>, as defined under section 2(119) of the GST Act, supplied by way of construction, erection, commissioning, or installation of <i>original works</i> pertaining to <i>railways</i>, including monorail and metro, is taxable at 12% rate.2. Erection and commissioning of SCADA System involves attaching cables and other electrical equipment to the earth with no intention of removing or shifting them in foreseeable future. Hence it is immovable property and the work qualifies as works contract.3. The Applicant's supply is not in the nature of repair and maintenance of an existing structure, but a new construction. Hence it is "original works"4. SCADA is a power supply and distribution network installed for the purpose of the operation of the metro. It, therefore, is a supply pertaining to railways.5. Hence Entry 3(v) of Notification No. 11/2017 – Central Tax (Rate) is applicable to the applicant
Related SubSections	2(119) - Central Tax

1.1 The Applicant is stated to be engaged in the activity of providing technological and system solutions, including electrification, industrial automation, motion and robotics, data management and production control systems. Rail Vikas Nigam Ltd (hereinafter RVNL) has awarded it the contract for 'extension of SCADA for Noapara – Dakshineswar Metro Corridor' (SCADA stands for Supervisory Control and Data Acquisition). The Applicant seeks a ruling on whether Entry 3(v) of Notification No. 11/2017 – Central Tax (Rate) dated 28/06/2017 (State Notification No. 1135-FT dated 28/06/2017), as amended and hereinafter collectively called the Rate Notification, is applicable for its supply to RVNL by way of erection, commissioning, installation, completion etc. of SCADA System. Advance ruling is admissible on this question under section 97(2) (a) & (b) of the GST Act.

1.2 The Applicant declares that the issue raised in the application is not pending nor decided in any proceedings under any provisions of the GST Act. The officer concerned from the Revenue has raised no objection to the admissibility of the Application.

1.3 The Application is, therefore, admitted.

2. Submissions of the Applicant

2.1 In the context of a metro corridor, SCADA, according to the Applicant, describes a system that controls and monitors the electrical network of the metro system and provides updated data in graphical and other forms of analysis. It also enables the operator to issue suitable commands to be followed in the operation of the metro (refer to para 14 of Annexure A of the Application). Using the SCADA interface, the operator sends instructions to the Remote Terminal Unit (RTU), which accordingly controls the signals, lights and other electrical equipment of the metro.

2.2 The Applicant refers to letter no. RVNL/KOL/EL/Metro/07/SCADA/1225 dated 22/08/2019 of RVNL

awarding the contract for the supply referred to above. Scope of the supply is specified therein as below.

1. Supply, erection and commissioning of RTUs,
2. Supply, laying and connecting of the control cables from RTU to equipment,
3. Supply, erection and commissioning of UPS and batteries for RTU,
4. Supply and installation of slave clocks and antenna,
5. Modification of software at OCC to accommodate new RTUs and installation of software in RTUs at Baranagar and Dakshineswar,
6. System check, testing and commissioning of SCADA for full control, protection, telemetering including data logging,
7. Supply and commissioning of LCD screen with accessories at Remote Control Centre,
8. Freight and insurance.

2.3 The Applicant submits that it is evident from the Technical Offer (refer to Annexure D to the Application) that the supply involves designing, engineering, manufacturing, site installation, cable laying, erection, testing, commissioning etc. The contract, therefore, involves supply of both goods and services. RVNL will release 30% of the payment only after the erection and commissioning are completed. Even the payment for freight and insurance will be made after the erection work is completed. It is clear, therefore, that the contracts for supply of goods and that of services are not divisible and the entire contract for the supply of SCADA is a composite supply of goods and services.

2.4 The Applicant further submits that erection and commissioning of RTUs at a specified location for a metro project is a work of permanent nature. The cables laid cannot be shifted without causing substantial damage. Such shifting will render such cables incapable of further use. In short, SCADA System installed is intended to be permanently attached to earth and cannot be removed without causing substantial damage to the goods attached to earth. Furthermore, the parts are so interlinked to constitute a functioning SCADA System that none can be moved separately. The composite supply, therefore, amounts to erection and commissioning of an immovable property and classifiable as works contract as defined under section 2(119) of the GST Act. In support of its argument the Applicant refers to the apex court's judgments in Solid and Correct Engineering Works [(2010) 252 ELT 481 (SC)], Virdi Brothers [(2007) 207 ELT 321 (SC)], TTG Industries Ltd [(2004) 167 ELT 501 (SC)] and Triveni Engineering & Industries Ltd [(2000) 120 ELT 273 (SC)]. The Applicant also refers to a decision of the Appellate Authority for Advance Ruling, Rajasthan, in the case of RFE Solar Pvt Ltd [(2019) 23 GSTL 378] and several rulings of the Authority for Advance Rulings at different states.

2.5 The Applicant submits that the works contract referred to above is 'original work' within the meaning of clause 2 (zs) (ii) of Notification No. 12/2017 — Central Tax (Rate) dated 28/06/2017, as amended. In support of its argument, the Applicant refers to the ruling of the Authority for Advance Rulings, New Delhi, in the matter of Hyundai Rotem Company [(2016) 46 STR 801 (AAR)] under the service tax regime.

2.6 The Applicant finally submits that the supply of the above composite supply of works contract as 'original work' to RVNL qualifies as a supply to railways and, therefore, eligible for GST under Entry 3 (v) (a) of the Rate Notification.

3. Submission of the Revenue

3.1 The concerned officer from the Revenue agrees that the Applicant's supply is a works contract and qualifies to be called 'original work'. However, he submits that such a supply is taxable under Entry No. 3 (v) of the Rate Notification only if it is supplied to a government entity. He does not offer further comment in this regard.

4. Observations and findings of the Bench

4.1 According to Serial No. 3 (v) (a) of the Rate Notification, the *composite supply of works contract*, as defined under section 2(119) of the GST Act, supplied by way of construction, erection, commissioning, or installation of *original works* pertaining to *railways*, including monorail and metro, is taxable at 12% rate.

4.2 Works contract is defined under section 2(119) of the GST Act as a contract for 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. It is a composite supply treated as

service in terms of para 6 (a) of Schedule II under section 7 (1A) of the GST Act.

4.3 Detailed Performance Specification of the contract (refer to Annexure B to the Application) provides that the Applicant shall design, supply, install, test and commission a computer based SCADA System for smooth operation, monitoring, control, protection and logging of important features of the traction and auxiliary power supply system on the Metro Corridor between Baranagar to Dakshineswar section. The field work involves site survey, concept plan, design and drawing, extensive wiring and laying of cables, civil works as required, and testing and commissioning of the system. It is a composite supply of goods and services. However, such supply will be called works contract only if it amounts to erection and commissioning of an immovable property.

4.4 "Immovable property" is not defined under the GST Act. The term 'goods' is defined under Section 2(52) of the GST Act as all kinds of *moveable properties* other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply.

Property other than goods, money and securities should, therefore, be considered as 'immovable property' under the GST Act.

However, in the absence of a definitive explanation under the GST Act, recourse is being taken to other allied Acts dealing with "property" to determine the definition of "Immovable property".

It is seen that Section 3(26) of the General Clauses Act, 1897 defines "Immovable Property" as to include land, benefits to arise out of the land, and *things attached to the earth, or permanently fastened to anything attached to the earth.*

Section 3 of the Transfer of Property Act, 1882 simply provides that unless there is something repugnant in the subject or context 'immovable property' does not include standing timber, growing crops or grass. The Section, however, defines the term "attached to the earth" to mean (a) rooted in the earth, as in the case of trees and shrubs, (b) embedded in the earth, as in the case of walls or buildings, and (c) attached to what is so embedded for permanent beneficial enjoyment of that to which it is attached.

The essential character of 'immovable property', as emerges from the above discussion and relevant to the present context is that it is *attached to the earth, or permanently fastened to anything attached to the earth, or forming part of the land and not agreed to be severed before supply or under a contract of supply.*

4.5 In Triveni Engineering & Industries Ltd [(2000) 120 ELT 273 (SC)] the apex court observes that while determining whether an article is permanently fastened to anything attached to the earth both the intention as well as the factum of fastening has to be ascertained from the facts and circumstances of each case.

In S/S Triveni N L Ltd [RN — 910, 911 & 912 of 2001 (All)] Allahabad High Court observes that 'permanently fastened to anything attached to the earth' has to be read in the context for the reason that nothing can be fastened to the earth permanently so that it can never be removed. If the article cannot be used without fastening or attaching it to the earth and is not removed under ordinary circumstances, it may be considered permanently fastened to anything attached to the earth.

Furthermore, in the context of the GST Act, if the article attached to the earth is not agreed to be severed before supply or under a contract for supply, it ceases to be goods and, for that matter, a moveable property.

4.6 In the case of Solid & Correct Engineering Works, (supra), the Apex Court when examining whether a machine, fixed with nuts and bolts to a foundation, with no intent to permanently attach it to the earth, is an immovable property or not, has held that such an attachment *without necessary intent to making it permanent* cannot be an immovable property. The emphasis is on the intention of the party. The apex court observes that the specific machine in question can be moved and has indeed been moved after the road construction and repair project, for which it was installed, is completed. However, if a machine is intended to be fixed permanently to a structure embedded in the earth, the moveable character of the machine, according to the Supreme Court, becomes extinct.

4.7 In the present context, erection and commissioning of SCADA System involves attaching cables and other electrical equipment to the earth with no intention of removing or shifting them in foreseeable future. Moreover, the parts are so interlinked to constitute a functioning SCADA System that none can be moved separately or without causing substantial damage to the goods attached to earth. The moveable character of the goods like cables and other equipment, therefore, becomes extinct. The Applicant's supply thus amounts to erection and commissioning of an immovable property involving transfer of property in goods in its execution and, therefore, works contract within the meaning of section 2 (119) of the GST Act. It now needs to be ascertained whether the Applicant's supply is 'original work' within the meaning of clause 2 (zs) of

Notification No. 12/2017-Central Tax (Rate) dated 28/06/2017, as amended.

4.8 Original work, as defined under clause 2 (zs) of Notification No. 12/2017-Central Tax (Rate) dated 28/06/2017, means all new constructions involving (i) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable, and (ii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise. The Applicant's supply is not in the nature of repair and maintenance of an existing structure, but a new construction. As already discussed, it involves installation, erection and commissioning of a network of interlinked equipment and structures attached to earth. It is, therefore, 'original work' within the meaning of clause 2 (zs) of Notification No. 12/2017-Central Tax (Rate) dated 28/06/2017, as amended. The only issue that is left for examination is whether supply to RVNL qualifies as a supply pertaining to railways, including monorail and metro.

4.9 The term "railways" is not defined in the GST Act. It, however, is defined under section 2(31) of the Railways Act, 1989, meaning "a railway, or any portion of a railway, for the public carriage of passengers or goods, and includes

(a) All lands within the fences or other boundary marks indicating the limits of the land appurtenant to a railway;

(b) All lines of rails, sidings, or yards, or branches used for the purpose of, or in connection with, a railway;

(c) All electric traction equipment, power supply and distribution installations used for the purpose of, or in connection with, a railway;

(d) All rolling stock, stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institutes, hospitals, waterworks and water supply installations, staff dwellings and any other works constructed for purpose of, or in connection with, railway;

(e) All vehicles which are used and any road for the purpose of traffic of a railway and owned hired or worked by a railway;

(f) All ferries, ships, boats and rafts which are used on any canal, river, lake or other navigable inland waters for the purpose of the traffic of a railway and owned, hired or worked by a railway administration,

4.10 SCADA, in the context of the Applicant's supply to RVNL, is the system that controls and monitors the electrical network of the metro, enabling the operator to issue suitable commands to be followed in the operation of the metro. Using the SCADA interface, the operator sends instructions to the Remote Terminal Unit, which accordingly controls the signals, lights and other electrical equipment of the metro. It is, therefore, a power supply and distribution network installed for the purpose of the operation of the metro. It, therefore, is a supply pertaining to railways, including metro, as defined under section 2 (31) (c) of the Railways Act, 1989.

Based on the above discussion, we rule as under

RULING

The Applicant is making a composite supply of works contract taxable under Entry No. 3 (v) (a) of Notification No. 11/2017 — Central Tax (Rate) dated 28/06/2017 (State Notification No. 1135-FT dated 28/06/2017), as amended, being erection, commissioning and installation of original work pertaining to railways, including metro.

This Ruling is valid subject to the provisions void under Section 104(1) of the GST Act.