WEST BENGAL APPELLATE AUTHORITY FOR ADVANCE RULING
AT 14, BELIAGHATA ROAD, KOLKATA-700015

Before:
Shri A.P.S Suri, Member
Shri Devi Prasad Karanam, Member

In the matter of

Appeal Case No. 02/WBAAAR/APPEAL/2020 dated 17/08/2020

- And -

In the matter of:

An Appeal filed under Section 100(1) of the West Bengal Goods and Services Tax Act, 2017/ Central Goods and Services Tax Act, 2017, by M/s. IZ Kartex named after P. G. Korobkov Ltd.

Present for the Appellant: 1. Shri Pankaj Jain, FCA
2. Shri Prashant Raizada, FCA
3. Smt. Minal Agarwal, FCA

Present for the Respondent: Shri Dipankar Baidya, Deputy Commissioner, State Tax, Salt Lake Charge, Government of West Bengal.

Matter heard on: 08.10.2020
Date of Order: 10.11.2020

1. This Appeal has been filed by M/s. IZ Kartex named after P. G. Korobkov Ltd. on 17.08.2020 against Advance Ruling No. 04/WBAAR/2020-21 dated 29.06.2020, pronounced by the West Bengal Authority for Advance Ruling (hereinafter referred to as the WBAAR).

2. The appellant IZ-KARTEX named after P.G. Korobkov Ltd., Russian Federation, 196650, Russia, St. Petersburg, Kolpino, Izhorskiy, Zavod entered into a Maintenance and Repair Contract (hereinafter referred to as MARC) with Bharat Coking Coal Ltd., Dhanbad (hereinafter referred to as BCCL) on 15.10.2015 for maintenance of 4 nos. of Electric Rope Shovel, supplied by the appellant. As per para 9.2.1 of the agreement, a foreign MARC-holder shall be entirely responsible for all taxes, duties, licence fees and such other levies imposed outside BCCL's country. The foreign supplier shall also be responsible for all taxes & duties in BCCL's country legally applicable during execution of the contract. The appellant raised invoices against BCCL inclusive of tax. Payment was not made till 2018 owing to

problem in the payment channel which necessitated the appellant to open a branch in India in 2018 and they got registration under the Central Goods and Services Tax Act, 2017/ the West Bengal Goods and Services Tax Act, 2017 (hereinafter referred to collectively as "the GST Act") on 25.10.2018 with GSTIN 19AAFC10569J1Z9. The payment against first batch of invoices raised by them towards BCCL were received at the bank account of the branch, opened in India. The batch of invoices under MARC was raised in May, 2019. However, BCCL required them to revise the invoices by reducing the tax element paid by BCCL under reverse charge mechanism. According to the appellant, as per Notification No. 10/2017-Integrated Tax (Rate) dated 28.06.2017, the recipient of service, i.e. BCCL is liable to pay the IGST on the services imported by them from the appellant under reverse charge mechanism.

3. The appellant company sought advance ruling to specify the person who is liable to pay tax in the aforesaid circumstances and whether it is legally justified by BCCL to deduct GST from payments made to the foreign company.

4. The WBAAR in its Ruling No. 04/WBAAR/2020-21 dated 29.06.2020, has held that supply of service to BCCL in terms of MARC is not import of service. The recipient is not, therefore, liable to pay GST on reverse charge basis in terms of Notification No. 10/2017-Integrated Tax (Rate) dated 28.06.2017. The applicant, being the domestic MARC holder is liable to pay tax as applicable in terms of clause 9.2.2 of the MARC.

5. The Appellant has filed the instant Appeal against the above Advance Ruling with the prayer to set aside the impugned Advance Ruling passed by the WBAAR or pass any such further order (s) as may be deemed fit and proper in facts and circumstances of the case, on the following grounds:

    a) The impugned order has been passed without any application of mind. The Advance Ruling Authority has firstly relied on the fact regarding deputation of human and technical resources at the site of BCCL constitutes "fixed establishment" and therefore concluded that the location of 'supplier' in the present case is in India. It has completely ignored the fact that the MARC was executed between the Appellant and the BCCL. It was also ignored that in furtherance of the said contract, the services were actually rendered by appointing a sub-contractor, DDP-N to execute a part of the obligations under the MARC and by deputing appellant's own supervising and technical employees at the site of BCCL, which are specifically sent by the Appellant from Russia, and in terms of 6.2 of the MARC, the salaries of such employees being borne by the appellant, based in Russia.

    b) The impugned Order fails to appreciate that the invoices for the services rendered under the MARC is directly raised by the Appellant, who is based in Russia, and the said invoices are raised on BCCL. Invoice is a material document under the provisions of GST, and the supplier of service as stated in the invoice ought to have been considered as a concluding document for determining the location of supplier of service.

c) Advance Ruling order has erroneously relied on the terms of clause 9.2.2 of the MARC to conclude that the branch office of the appellant in India is the domestic MARC holder, and therefore be liable to pay tax. It was also ignored that the branch office of the Appellant was operating at the exclusive instructions of the appellant, and was primarily acting as a mere collection and disbursement centre for payment to be received from BCCL and its onward transfer to the appellant in Russia. The opening paragraph of the MARC clearly stipulated the appellant as the MARC holder. Also, the term 'domestic MARC holder' has not been defined anywhere in the MARC, and is only used in clause 9.2.2. It is a settled position of law that the liability to make payment of tax cannot be determined merely on the basis of a clause under an agreement, more so, when the factual position and documentary evidences clearly establish a contrary position. The documentary evidence placed on record along with detailed factual submissions clearly established that the branch office in India does not have human and technical resources to render services contemplated under the MARC, and therefore, it ought not to have been concluded that the branch office of the appellant is the supplier of service in the facts of the present case.

d) The impugned Order completely ignored the existence and appointment of DDP-N as a sub-contractor for performance of services under the MARC. In terms of the sub-contract agreement entered into between the appellant and DDP-N, the latter has been working and operating as per the exclusive instructions of the appellant, and is raising invoices for its services on the appellant. DDP-N is charging GST @18% in its invoices.

e) The Advance Ruling Authority has made a mere assertion that the branch office of the appellant is the supplier of service without adducing or relying on any substantial / material evidence, whatsoever, to establish the actual role of the branch office in the performance of stipulated services under the MARC. Despite an express factual submission that the branch office does not maintain any human or technical resources which are capable of performing the technical services under the MARC, the impugned Order has reached a clearly arbitrary and irrational conclusion without adducing even a shred of evidence in support of the claim made therein.

f) The WBAAR ignored the fact the services under the MARC are supplied by the Appellant who is based in Russia and that conditions specified in Section 2(11) of the IGST Act for a transaction to be classifiable as 'import of service' stands satisfied in the facts of the present case.

g) The Advance Ruling Authority ought to have appreciated that the MARC was entered between the appellant and BCCL on 15.10.2015, whereas the branch office was established in India by the appellant only with effect from 20.06.2018. As the transaction of service under the MARC was ongoing prior to establishment of branch office in India, it is completely illogical and arbitrary to conclude that branch office is the supplier of service under the MARC. There has been no change in the mode of

supply of service even after the establishment of branch office in India. The only change in the factual pattern is that the branch office has started collecting payment on behalf of the appellant after its establishment in India. The said small change in the manner of collection of payment by the appellant cannot be concluded as a material factor for treating branch office as the supplier of service.

6. During the course of hearing the Appellant reiterated their submissions and added that the Branch Office was created only to facilitate and support the Russian company, as the job is in India. No contract was entered between IZ Kartex India and BCCL and thus, BCCL may not accept an invoice issued by IZ Kartex India. They added that the registration is not in the name of IZ Kartex India. The appellant also stated that they are not providing service occasionally to BCCL and hence there was no possibility to take registration as a casual provider of service under GST.

7. The respondent raised a few issues and sought clarification from the appellant which are as follows :

   a) The appellant does oiling and testing of samples in the premises of BCCL. They have taken registration as a 'foreign company' and not as a "casual taxable person" or "non-resident taxable person". The definitions of the casual taxable person and non-resident taxable person is applicable to persons who do not have a fixed place of business in India. This indicates that the appellant has a fixed place of business in India and hence the finding of the WBAAR is correct to that extent. In response to this, the appellant replied that they are not providing service to BCCL occasionally. They are in contract with BCCL since 2015 and the service is provided throughout the year. Hence, it can neither be said that they are casual taxable person and should have taken registration as a casual taxable person or a non-resident taxable person nor that they have a fixed place of business in India.

   b) In one of the Returns submitted by the appellant, it has been mentioned that the subcontractor namely, M/s. DDP-N had supplied to IZ-Kartex office at Kolkata, which indicates that the place of supplier is in India as per Section 12 of The Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as the IGST Act). Thus, the supply cannot be termed as imports. Accordingly, the provisions of payment of GST under reverse charge mechanism as provided under Notification No. 10/2017-Integrated Tax (Rate) dated 28.06.2017 is not applicable in the present case. To this submission of the respondent, the appellant submitted that normally all invoices are issued by DDP-N in the name of IZ-Kartex named after P.G. Korobkov Ltd. The instance mentioned by the respondent was a mistake, which was rectified later on by way of issuance of credit note. In such cases, no ITC has been availed by IZ-Kartex, India. The respondent further submitted that under the present scenario, no conclusion can be drawn that there is a motive to save taxes.

c) The respondent submitted that clause 9.2.2 of the MARC between the appellant and BCCL cannot be ignored. It clearly coined the term "a domestic MARC-holder" and made it responsible for all taxes, duties, license fees, etc. until execution of the contract. The respondent submitted that this clearly proves location of both the supplier and recipient in India. The appellant replied that this clauses of the MARC has nothing to do with the place of supply. It is mentioned only in commercial interest. According to the appellant, the said clauses were part of the bid document, which were copied and pasted in the MARC. Otherwise, according to the appellant, the said clauses have no relevance in the MARC.

d) The respondent further placed reliance on the decision Commissioner of Customs (Import), Mumbai vs. Dilip Kumar and Company & Ors., [C.A. 3327 of 2007] wherein a constitution bench of the Hon'ble Supreme Court has held that *a person claiming exemption, .., has to establish that his case squarely falls within the exemption notification, and while doing so, a notification should be construed against the subject in case of ambiguity*. To this, the appellant submitted that the instant case does not relate to claiming exemption and therefore the cited decision of the Hon'ble Apex Court is not squarely applicable here.

8. The matter is examined and written and oral submissions made before us are considered.

9. It is seen that BCCL, the party to the MARC other than the appellant is already paying GST liabilities. It has been submitted by the appellant in their application for Advance Ruling that the foreign company raised its invoices on BCCL and did not charge any GST on the same. BCCL has made payments after deducting 18% towards GST on the plea that the liability for payment of GST falls on the foreign company. As per the relevant provisions of the GST law, no foreign company is liable to add GST on its invoices and the recipient of such services is liable to pay IGST on his own and claim ITC for the same. Therefore, in case BCCL retains the amount so deducted in the name of GST, then this transaction would lead to unjust enrichment of BCCL. The appellant had claimed that BCCL is liable to pay IGST under reverse charge in terms of Notification No. 10/2017-IT(Rate) dated 28.06.2017.

10. On the other hand, it is seen from the order of advance ruling issued by Authority for Advance Ruling (AAR) that it contains two paragraphs 4.4 in the said order. In the former paragraph 4.4 of the said order, the AAR has pointed out the terms of the agreement and in the latter 4.4, the AAR has concluded that the MARC Holder maintains suitable structures in terms of human and technical resources at the sites of BCCL. It ensures supervision of the equipment, supply of spares and consumable and overheads for 5000 working hours for seventeen years, indicating sufficient degree of permanence to the human and technical resources employed at the sites. From this the AAR concluded that the MARC holder does all these from the fixed establishment as defined under Section 2(7) of the IGST Act and hence the location of the supplier should be in India as per Section 2(15) of the IGST Act.

11. While going through the subject order of Advance Ruling, it is seen that the WBAAR has not considered / discussed the various other terms of the agreement which says, inter alia, that the entire control of the activities would rest with the foreign entity, which had entered into an agreement with BCCL. The WBAAR has observed that the service is ensured from the appellant's domestic entity for seventeen years of the contract. However, it has not taken into consideration the fact that the appellant is providing service to BCCL since 2015, whereas the domestic entity has come into existence in 2018 only.

12. The WBAAR has found that the MARC holder ensures supervision of equipment, supply of spares and consumable and overheads for 5000 annual working hours for seventeen years, indicating sufficient degree of permanence to the human and technical resources employed at the sites and thus the domestic entity of the appellant is a 'fixed establishment' as defined under Section 2(7) of the IGST Act, 2017. Let us have a look at the definition of 'fixed establishment' as referred above :

"fixed establishment means a place (other than the registered place of business) which is characterised by a sufficient degree of performance and suitable structure in terms of human and technical resources to supply services, or to receive and use services for its own needs."

In the above definition, it is clear that the registered place of business cannot be termed a fixed establishment. Here, the domestic entity IZ-KARTEX is registered with GST authorities and hence, going by the definition, it cannot be termed a fixed establishment. In that sense, the decision of the WBAAR does not hold good in legal terms. Also, the WBAAR has not adduced any finding to draw conclusion that IZ-Kartex as registered in India maintains suitable structures in terms of human and technical resources to provide the service for which the MARC has been entered into between the parties. Further, the findings of the WBAAR mentions that "it is evident … that the MARC holder maintains suitable structures in terms of human and technical resources at the sites of BCCL." This finding is somewhat different from what is required to declare the MARC holder a fixed establishment. Here, as per the findings, the suitable structure in terms of human and technical resources is maintained not at the premises of the MARC holder but at the premises of BCCL. This does not comply the definition of the 'fixed establishment'.

The appellant, on the other hand, has claimed that their activity is import of service and the tax is payable by BCCL. The WBAAR has not made any observation on this aspect, while holding that the appellant's domestic entity (domestic MARC holder) is the supplier of the service. Import of service, as defined under Section 2(11) of the IGST Act, 2017, contains supply of service containing of the following three elements:

i. The supplier of service should be located outside India

ii. The recipient of service should be located in India

iii. The service should be provided in India.

From the facts of the case, it is seen that the IZ-Kartex named after Korobkov, the Russian company has entered into the MARC with BCCL. They have deployed DDP-N, an Indian company as the subcontractor. DDP-N in turn, issues invoice to the Russian company. Again, the Russian company is raising bills on BCCL against supply of service. Hence, it is amply clear that the service is being provided by the appellant's foreign entity. Contrary to any material finding in the order of the Advance Ruling, it is clear beyond doubt that the conditions of import as mentioned above are satisfied in the present case.

13. In view of the above findings, we modify the order of Advance Ruling to the extent that the supply of service by the appellant to BCCL qualifies as import of service as defined under Section 2(11) of the IGST Act, 2017 and GST is payable on such import of service by BCCL under reverse charge mechanism in terms of Notification No. 10/2017-Integrated Tax (Rate) dated 28.06.2017.

Send copy of this order to the Appellant and the Respondent for information.

(Devi Prasad Karanam)
Member
West Bengal Appellate Authority
for Advance Ruling

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