
[2018] 97 taxmann.com 315 (AAR - MAHARASHTRA)

GST : Authority for advance Ruling cannot admit an application where question raised in application is already pending or decided in any proceedings in case of an applicant under any provisions of the Act. Whether thus, where proceedings pertaining to charge of GST on excess length of optical fibre inspite of fact that cost of such excess length was already included in standard price charged to customers was pending before department, as an Anti-Evasion investigation was already under way against applicant on same issue, instant application would not be taken up by authority

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AUTHORITY FOR ADVANCE RULINGS, MAHARASHTRA
Sterlite Technologies Ltd., *In re*
B.V. BORHADE AND PANKAJ KUMAR MEMBER
NO.GST-ARA-41/2018-19/B-112
SEPTEMBER 12, 2018

RULING

1. The present application has been filed under section 97 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by Sterlite Technologies Limited, the applicant, seeking an advance ruling in respect of the following questions :-

- 1.1 Whether the Applicant is required to separately discharge GST on the excess length of OF although the cost of such excess length is already included in the price charged to independent customers?
- 1.2 Whether the Applicant is required to separately discharge GST on the excess length of OF although the cost of such excess length is already included in the price charged to distinct persons in terms of Schedule I provisions?
- 1.3 If GST is not payable separately on the excess length, whether the Company is required to reverse proportionate credit to the extent of supply such excess length?

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST 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 provision under the MGST Act. Further to the earlier, henceforth for the purposes of this Advance Ruling, a reference to such a similar provision under the CGST Act/MGST Act would be mentioned as being under the "GST Act".

2. FACTS AND CONTENTION - AS PER THE APPLICANT

STATEMENT OF THE RELEVANT FACTS HAVING A BEARING ON THE QUESTION(S) ON WHICH THE ADVANCE RULING IS REQUIRED

1. This Application is being preferred by Sterlite Technologies Limited, Maharashtra

("Company"/"Applicant"), a company incorporated in India under the provisions of the Companies Act, 1956 having its registered office at E-1, E-2.E-3, MIDC Waluj, Aurangabad-431136, Maharashtra, India.

- The Applicant is engaged in providing goods and services which qualify as 'supply' as per provisions of the Central Goods and Service Tax Act, 2017 ("CGST Act") and is duly registered thereunder bearing GSTIN 27AAECS8719B1ZC.
- The Company is engaged in manufacturing of products which inter alia includes preform, Optic Fibre ("OF") and Optic Fibre Cable ("OFC"). The process flow for manufacturing OFC involves manufacture of preform which is used for manufacture of OF and such Of is then used for manufacture of OFC. Diagrammatic presentation of OFC manufacturing process is as under



- The OF as manufactured by the Applicant is supplied to its units located in Rakholi and Dadra as well as to third party customers on payment of appropriate GST. Such OF is then further used for manufacture of OFC.
- It is pertinent to note here that owing to global standard practices, OF is strictly required to be used in specified lengths (e.g. in the multiples of 2.1 kilometre/2.2 kilometre). However, due to practical challenges explained herein below it is not feasible to manufacture the OF at the exact length of standard specification:
 - Speed of the machine: - The Of while being manufactured and winded around a spool moves at a higher velocity and identifying the exact length is a technical challenge.
 - Precautionary measures: - The loose ends of the OF are vulnerable to damages and loss of necessary characteristics. Thus, if the Of is manufactured and winded up in exact length, any damage to the loose ends would render entire length OF in the spool unusable owing to shortfall in maintaining standard length.
- To overcome these practical challenges whilst ensuring that of manufactured by STL retains its minimum required length, each lot of OF is manufactured and supplied with marginally surplus length (e.g. 1-2 meter surplus length in a spool that ought to contain Of in multiples of 2.1 kilometre in length). The practice to manufacture and supply of in excess length is a standard practice across industry and all the supplies being made (both to STL's unit in Rakholi and Dadra as well as third party customers).
- Usable length of OF (in multiples of 2.1 km/4.2 km) which is mentioned on the invoice (which the customer has placed an order and agreed to pay) is considered as 'usable quantity' whereas the actually supplied quantity (which is marginally surplus than the standard length-not usable) is known as 'delivered quantity'. Customers of the Company are entitled to avail Input Tax Credit ("ITC") of GST charged on OF which also includes the cost of excess length. The customers sell the non-usable/not marketable OF as scrap on payment of applicable GST.
- It is pertinent to note that the price charged to the customers has been arrived for delivered quantity keeping in mind the usable quantity. That is to say, price for the usable quantity is arrived at by including cost of manufacturing excess length on which the GST liability has been discharged
- However, owing to absence of any consideration earmarked for difference between delivered quantity and usable quantity in case of supplies made to independent customers, dispute may arise

with respect to correctness of the Transaction value and provisions of Central Goods and Services Tax Rules, 2017 ("CGST Rules") concerning valuation of supply to include cost of manufacturing excess length in the Transaction Value to determine assessable value may be invoked.

10. Further, since supply of OF to its own units in Dadra and Nagar Haveli is treated as supply between distinct persons, the assessable value is determined under Rule 28(a) of the CGST Rules based on 'Open Market Value' which is independent of cost incurred for manufacture of excess length. In other words, as long as the open market value is available and is not disputed, cost of manufacturing excess length is immaterial to arrive at the assessable value.
11. However, for the identical reason of absence of any price being earmarked for excess length of OF and in view of the provision of Entry No. 2 of Schedule 1 of the CGST Act which provides to treat a transaction between distinct persons as a 'supply' even in absence of any consideration, there is possibility that the 'open market value' arrived at for delivered quantity, which inter alia includes cost of excess length, would be disputed.
12. Given the above background, present application is being preferred before the Hon'ble Authority for Advance Ruling to clarify whether the cost of excess length of 'OF' is required to be included in the Transaction Value for the purpose of charging GST in spite of the fact that the cost of such excess length is already included in the standard price charged to the customers.

Without going into the detailed submissions of the applicant we find that the department has opposed the admission of the application under section 98 of the GST Act stating that the question raised in the application is already pending before the department as an Anti-Evasion investigation is already underway against the applicant on the same issue.

4. CONTENTION AND OBJECTIONS TO ADMISSION OF THE APPLICATION- AS PER THE CONCERNED OFFICER

The jurisdictional Officer Assistant Commissioner (Preventive) GST & Central Excise, Aurangabad, vide letter dated 12th July, 2018 has submitted factual details before this authority about the investigation being undertaken by them on the same issue as raised by the applicant in their Advance Ruling Application. However the full facts and details of the investigation are not being reproduced here for the sake of confidentiality of investigation proceedings. However only relevant paras with respect to initiation of proceedings is reproduced below:-

"At the outset it is to submit that the issues for determination raised by the taxpayer has been placed before Authority of Advance Ruling, only after initiation of investigation by the preventive officers of GST Commissionerate, Aurangabad on the basis of searches conducted on 02.04.2018 and 03.04.2018 and consequent follow-up actions conducted by the department including statements of the key persons recorded under Section 70 of the CGST Act, 2017.

In this connection, your attention is invited towards proviso to Section 98 of the CGST Act, 2017, (similar provision has been given in proviso to Section 98 of the Maharashtra GST Act, 2017), wherein it is specifically provided that "the Authority for Advance Ruling shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act".

In view of the express provisions given in the CGST Act, 2017 and Maharashtra GST Act, 2017, the application submitted by the taxpayer before the Authority for Advance Ruling, shall not be entertained and deserved to be rejected outrightly at the admission stage only."

Further, during the course of investigation, an intimation under letter dated 23.05.2018 was received from M/s Sterlite, wherein it is mentioned that in continuation to the statement dated 16.05.2018 of Shri C.S. Kali they are submitting a statement of reversal of ITC credit availed wrongly during the period from July 2017 to April 2018. In the said letter, it is mentioned that they have reversed an amount of Rs. 3,14,56,050/- along with interest of Rs. 24,73,379/- and submitted the detailed work-sheet of entries against which they availed irregular ITC.

It is also pertinent to mention here that the taxpayer at nowhere in the invoices issued have mentioned that the cost of excess length is already included in prices charged to customers. The prices charged to the customers are as per purchase orders placed by customers and only towards the invoiced quantity and not for excess lengths.

This is issued with the approval of the Joint Commissioner (Preventive), GST & Central Excise, Aurangabad.

Joint Commissioner (Preventive) GST & Central Excise, Aurangabad has submitted report vide letter dated 24.07.2018

Please refer to this office letter of even number dated 12.07.2018 on the above subject.

At the outset it is to submit that the issues for determination as raised by the taxpayer has been placed before Authority of Advance Ruling, only after initiation of investigation by the preventive officers of GST Commissionerate, Aurangabad on the basis of searches conducted on 02.04.2018 and 03.04.2018 and consequent follow-up actions conducted by the department including statements of the key persons recorded under Section 70 of the CGST Act, 2017.

In this connection, your attention is invited towards proviso to Section 98 of the CGST Act, 2017, (similar provision has been given in proviso to Section 98 of the Maharashtra GST Act, 2017), wherein it is specifically provided that ***"the Authority for Advance Ruling shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act"***.

In view of the express provisions given in the CGST Act, 2017 and Maharashtra GST Act, 2017, the application submitted by the taxpayer before the Authority for Advance Ruling, shall not be entertained and deserved to be rejected outrightly at the admission stage only.

Further, the taxpayers is required to declare before Authority of Advance Ruling, in para 17 of form GST ARA-01 that whether question raised in the application is already pending or decided in any proceedings in applicant's case under any provisions of the Act. The fact that the case has been booked against the taxpayer on the said issue in the month of April 2018 i.e. well before making this application, which is under investigation, needs to be co-related with the declaration submitted by the taxpayer in form GST ARA01. The admissibility of the application may be dealt with accordingly and any mis-declaration made by the taxpayer may be taken up as per provisions of the Act.

It is also pertinent to mention here that the taxpayer at nowhere in the invoices issued have mentioned that the cost of excess length is already included in prices charged to customers. The prices charged to the customers are as per purchase orders placed by customers and only towards the invoiced quantity and not for excess lengths.

It is imperative to mention here that though the taxpayer falls under the administrative control of State of Maharashtra, the searches were conducted on the basis of specific information and necessary investigation is underway. The statements of the key persons in this regard have been recorded under the provisions of CGST Act, 2017 read with Central Excise Act, 1944.

It is also imperative to mention that this office is investigating issues which are pre-GST as well as post GST. As such, the advance ruling authority has no jurisdiction over pre-GST issues.

In the backdrop that the taxpayer has filed application before Authority for Advance Rulings, Mumbai where only the State Tax, Maharashtra has been mentioned as party. It appears that the matter, if decided without the contention, comments of the CGST Aurangabad Commissionerate, i.e. the office which is carrying out investigation on the issue and not yet a party to the issue, may not sound prudent.

In view of the above, it is requested that the Assistant Commissioner (Preventive), CGST Commissionerate, Aurangabad may be made a party to the subject issue and comments/views may be taken before deciding the issue.

This is issued with the approval of the Commissioner, GST & Central Excise, Aurangabad.

Further, Dy. Commissioner of State Tax, Large Tax Unit, (AUR-VAT-E-003) Aurangabad Division, Arangabad has submitted following report.

M/s Sterlite Technologies Ltd (GSTIN 27AAEC58719BIZC) has applied in form GST ARA 01 for Advance Ruling under section 98 (CGST ACT 2017) before Hon. Authority for Advance Pulling, Maharashtra, Mumbai on 19th June 2018. The hearing is sheduled for acceptance or rejection of said application on 17/07/2018. Being the Jurisdictional oflicer (DCST-AUR-VAT-E003. Aurangabad) I am directed to attend for primary hearing and represent the case with Legal submission.

In this regard the Taxpayer, M/s Sterlite Technologies Ltd (GSTIN 27AAEC58719BIZC) was communicated and asked to attend to this office, with relevant record. In response, Mr. Sonwane Revnath Sudhakar (Associate Manager) Indirect laxation, Sterlite Technologies Ltd Aurangabad, attended on 03/07/2018 and briefed about the case. During the hearing, Mr. Sonware submitted that their Waluj & Shendra manufacturing units were searched by the Central GST office Aurangabad during 2/4/2018 to 3/4/2018. Mr. Sonwane explained about the Manufacturing process of optic fiber and optic fiber cable. He also explained the issue of mis-declaring the quantity of goods by under declaring the same in the invoices issued.

As, Mr. Sonwane Associate Manager of Sterlite Technologies Ltd provided the information of search undertaken by Central GST office, Aurangabad: to ascertain the facts, I wrote letter to Hon. Joint Commissioner (Preventive) GST and Central Excise. Aurangabad. In this regard, in the reply, I received a letter from Mr. A.G. Sable, Assistant Commissioner (Preventive) GST and Central Excise, Aurangabad and he furnished the information about the investigation action taken during 02/04/2018 to 03/04/2018 by Central GST office. Hence, it is clear that M/s. Sterlite Technologies Ltd. (GSTIN k7AAEC58719BIZC) has applied in Form GST ARA 01 before Hon. Authority for Advance Ruling only after initiation of investigation by the Preventive officers of CGST office, Aurangabad on basis bf searches conducted on 02/04/2018 and 03/04/2018.

Hon. Sir, in this connection, your attention is invited towards proviso to Section 98 of the CGST ACT 2017 (similar provision has been given in proviso to section of the Maharashtra GST Act 2017) wherein specially provided that "The Authority for Advance Ruling shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act".

In view of provisions given in the CGST Act 2017, and Maharashtra GST Act 2017, the application submitted by M/s. Sterlite Technologies Ltd. Before Hon. Authority for Advance Ruling shall be rejected at the admission stage only.

4. HEARING

The case was taken up for preliminary hearing on dt. 17.07.2018 with respect to admission or rejection of the application when Sh. Rohit Jain, Advocate appeared and stated that he was not completely ready with respect to arguments for admissibility of application and requested for another date of hearing for making oral and written submissions with respect to admissibility. Jurisdictional Officer Sh. Ravinder Jogdand , Dy. Commr. S.T. (AUR-VAT-E-003) Aurangabad appeared and made written submissions. The Preliminary hearing for admission or rejection as requested by the applicant earlier as above is again held on 01.08.2018 wherein Sh. Rohit Jain, Advocate appeared and made oral & written submissions. As per request of Joint Commissioner (Preventive) GST & Central Excise, Aurangabad an opportunity for representation and hearing is granted to them also before deciding the issue with respect to admission or rejection of application.

As requested opportunity to present their side of the case was granted to CGST Commissionerate, Aurangabad wherein Sh. Sandeep Vaichal Supt. Appeared on 28.08.2018 and made written submissions and stated that the department is investigating the matter on the same issue for which advance ruling application is made by the applicant.

5. OBSERVATIONS

We have gone through the facts of the case and the written submissions made by both, the applicant and the departmental authority. We find that

1. The Company is registered person under GST Act and engaged in manufacturing of products which inter alia includes preform, Optic Fibre ("OF") and Optic Fibre Cable ("OFC"). The optical fibre (OF) as manufactured by the Applicant is supplied to its units located in Rakholi and Dadra as well as to third party customers on payment of appropriate GST. Such OF is then further used for manufacture of OFC.
2. The applicant submitted that supply of usable length of OF (in multiples of 2.1 km/4.2 km) which is mentioned on the invoice (which the customer has placed an order and agreed to pay) is considered as 'usable quantity' whereas the actually supplied quantity (which is marginally surplus than the standard length-not usable) is known as 'delivered quantity'. Customers of the Company are entitled to avail Input Tax Credit ("ITC") of GST charged on OF which also includes the cost of excess length. The customers sell the non-usable/not marketable OF as scrap on payment of applicable GST.
3. The applicant submitted that ,it is pertinent to note here that owing to global standard practices, OF is strictly required to be used in specified lengths (e.g. in the multiples of 2.1 kilometre/2.2 kilometre). However, due to practical challenges explained herein below it is not feasible to manufacture the OF at the exact length of standard specification.
4. We find that various hearings with respect to admission or rejection of the application have been held on various dates and details of the same are already produced above.
5. During the course of hearing, we find that jurisdictional officers have raised the objection with regard to admission of this advance ruling application and requested that it is to be rejected as the same issue is pending before the investigation authority on the same questions as raised in the application put forth before ARA Authority. In connection to the same the officers have invited our attention towards proviso to Section 98 of the CGST Act, 2017, (similar provision has been given in proviso to Section 98 of the Maharashtra GST Act, 2017), wherein it is specifically provided that "the Authority for Advance Ruling shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act" and further stating that in view of the express provisions given in the CGST Act, 2017 and Maharashtra GST Act, 2017, the application submitted by the taxpayer before the Authority for Advance Ruling, shall not be entertained and deserved to be rejected out rightly at the admission stage only.
6. We find from submission of jurisdictional authority that applicant's place of business i.e. manufacturing units at Waluj & Shendra were searched by the Central GST office Aurangabad during 2/4/2018 to 3/4/2018. We find that further inquiry and investigation proceedings by the preventive officers of GST Commissionerate, Aurangabad on the basis of searches conducted on 02.04.2018 and 03.04.2018, have also been undertaken in the form of follow-up actions the department including statements of the key persons recorded under Section 70 of the CGST Act, 2017.
7. We find that the applicant in their oral submissions before this authority has admitted to initiation of these proceedings against them by the department and have not denied initiation of these proceedings. However in their oral and written submissions their only contentions is that no proceedings for denial of admission of the ARA application can be stated to be initiated against them until Show Cause Notice in this respect has been issued to them.
8. However the contentions of the applicant are not sustainable in view of there being no difference with regard to the fact that searches were conducted against the applicant on 02.04.2018 and 03.04.2018 on the same issue as raised in the application and consequent follow up actions against them have also been conducted by the department as part of the investigations including recording of statements of key persons under Section 70 of the GST Act, 2017.
9. The contention of the applicant that no proceedings can be stated to have been initiated against

them until Show Cause Notice is issued to them is not tenable in view of the very clear position that Show Cause Notice is a form of charge memo/charge sheet filed which is a culmination of inquiry and investigations that have been undertaken in the case.

10. In view of the detailed factual position in respect of present case put before us it is very clear that proceedings under the relevant provisions of this Act are initiated in respect of the application prior to their filing of this application for Advance Ruling.

11. We find that Section 98 of the CGST Act provided as under:

Section 98- Procedure on receipt of application 98. (1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the concerned officer and, if necessary, call upon him to furnish the relevant records:

Provided that where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the said concerned officer.

(2) The Authority may, after examining the application and the records called for and after hearing the applicant or his authorised representative and the concerned officer or his authorised representative, by order, either admit or reject the application:

provided that the Authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act:

Provided further that no application shall be rejected under this sub-section unless an opportunity of hearing has been given to the applicant:

Provided also that where the application is rejected, the reasons for such rejection shall be specified in the order.

12. Thus the application filed by the applicant is not maintainable as per the provisions of Section 98 of the CGST Act, as proceedings are already initiated against them before the filing of their present application.

13. The various case laws referred to by the applicant in their submissions are in different context and are therefore not relevant in the present proceeding before this authority. The provision in the law is very clear, and intention of the law is that if proceedings are pending before any authority on the same issue the application would not be taken up by this authority.

14. In view of above facts, we are of the opinion and come to the conclusion as per the facts of the case that the applicant's application is liable for rejection as per proviso to section 98 (2) of the CGST Act referred above and therefore cannot be entertained by this authority and is accordingly rejected being non-maintainable

ORDER

For reasons as discussed in the body of the order, the subject application for advance ruling made by the applicant is rejected under the provisions of sub-section 2 of Section 98 of the CGST Act, 2017.

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