KARNATAKA APPELLATE AUTHORITY FOR ADVANCE RULING
6TH FLOOR, VANIJIYA THERIGE KARYALAYA
KALIDASA ROAD, GANDHINAGAR, BANGALORE 560009

(Constituted under Section 99 of the Karnataka Goods and Services Tax Act, 2017 vide Government of Karnataka Order No FD 47 CSL 2017, Bengaluru, dated 25-04-2018)

BEFORE THE BENCH OF
Shri. D.P.NAGENDRA KUMAR, Member
Shri. M.S. SRIKAR, Member

ORDER NO:-KAR/AAAR/06/ 2019-20 **Dated:-24.12.2019.**

Name and address of the appellant	M/s Durga Projects & Infrastructure Pvt Ltd, No 125/1-18, GK Arcade, T.Mariyappa Road, 1st Block, Jayanagar, Bengaluru 560011
GSTIN or User ID	29AACCD5554H1Z1
Advance Ruling Order against which appeal is filed	Advance Ruling No KAR ADRG 16/2019 Dated:25.07.2019
Date of filing appeal	23.10.2019
Represented by	Mr. Sanjay M Dhariwal, Chartered Accountant
Jurisdictional Authority – Centre	Commissioner of Central Tax, South Commissionerate
Jurisdictional Authority – State	LGSTO—90, Bengaluru
Whether payment of fees for filing appeal is discharged. If yes, the amount and challan details.	Yes. Payment of Rs. 20,000/- made vide Challan CIN SBIN19102900102023 dated 14.10.2019

PROCEEDINGS

(Under Section 101 of the CGST Act, 2017 and the KGST Act, 2017)

At the outset, we would like to make it clear that the provisions of both the Central Goods and Services Tax Act, 2017 and the Karnataka Goods and Services Tax Act, 2017 (hereinafter referred to as CGST Act, 2017 and KGST Act, 2017) 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 corresponding similar provisions under the KGST Act.

The present appeal has been filed under Section 100 of the CGST Act, 2017 and the KGST Act, 2017 by M/s Durga Projects & Infrastructure Pvt Ltd (hereinafter referred to as 'Appellant') against the Advance Ruling No KAR ADRG 16/2019 dated 25.07.2019 pronounced by the Karnataka Authority for Advance Ruling.

Brief facts of the case:

1. The Appellant is a company engaged in construction and sale of residential apartments. The Appellant has executed projects under JDA with Landowners for an agreed ratio of built up area. Construction was commenced during pre-GST period and continued under GST regime. With the implementation of GST, the appellant filed an application on 25.04.2018 before the Karnataka Authority for Advance Ruling under Section 97 of CGST/KGST Act, 2017 read with Rule104 of CGST / KGST Rules,2017 in form GST ARA-01, seeking a ruling on the following questions

a) *Applicability of GST on partially completed flats having identified customers before GST regime.*
b) *Applicability of GST on partially completed flats, where customers are identified after implementation of GST regime.*
c) *Applicability of GST on partially completed flats where no customers are identified.*

2. On examination of the issue, the Karnataka Authority for Advance Ruling vide Order No KAR ADRG No 16/2019 dated 25.07.2019, gave a ruling on the above three questions as follows:

"a) In respect of partially completed flats having identified customers before GST regime, the Applicant is liable to pay service tax under the Finance Act, 1994 proportionate to the services provided up to 30.06.2017 and from 01.07.2017 onwards, liable to pay GST proportionate to the services provided effective from 01.07.2017, in terms of Section 142(11)(b) of the CGST Act, 2017.

b) In respect of partially completed flats, where customers are identified after implementation of GST, the applicant is liable to pay GST on the transaction value of supply.

c) In respect of partially completed flats where no customers are identified, the applicant is not liable to GST as no supply is involved. However, if the supply is made prior to the issuance of completion certificate then GST is liable to be paid on the transaction value of supply, as answered in 9b) above. "

3. Being aggrieved by the ruling of the Authoritywith respect of the question raised for partially completed flats where customers are identified under GST regime but work commenced prior to GST regime (point (b) above), an appeal was preferred before Appellate Authority for Advance Ruling under section 100 of the CGST Act, 2017 / KGST Act, 2017 on 23.10.2019 on following grounds:

3.1. Appellant submits that the ruling given that the Appellant is liable to pay GST on the entire value in respect of partially completed flats where customers are identified under GST regime but work commenced prior to GST regime, runs contrary to the definition of "works contract" as defined under section 2(119) of GST Law as well as the law declared by the Hon'ble Supreme Court in the case of Larsen and Toubro Limited and Another Vs State of Karnataka and Another reported in [2013] 75 VST 1.

3.2. They submitted that, Section 9 is the main charging section for levy of tax on supply of goods or service or both; that the term "supply" is defined under section 7 of the Act; that Schedule II to the KGST/CGST Act, 2003, deals with activities to be treated as supply of goods or supply of service and Sl.No.5 of the said Schedule reads as under;

Supply of services – The following shall be treated as supply of service, namely-

(a) renting of immovable property

(b) construction of complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion of certificate, where required, by the Competent Authority or after its first occupation, whichever is earlier

3.3. They submitted that on a combined reading of the above provisions it is understood that, construction of building is works contract. Works contract activity is classified as

supply of service. Supply of service falls under the scope of 'supply' as defined under Section 7 of the Act and therefore attracts tax under Section 9 of the Act. They further submitted that the term "works contract" starts with the expressions means a contract for building, construction. The term contract is not defined under GST Law. As per section 2(h) of The Indian Contract Act, 1872, contract means "an agreement enforceable by law". As per section 2(e) of The India Contract Act, 1872 the word "agreement" means "every promise and every set of promises, forming the consideration for each other"

3.4. The Appellant submitted that, in the aspect of law, a contract is a legally binding agreement between two or more parties. Therefore, one of the essential elements of contract / agreement is there must be two or more persons are required. Applying the same principle, an activity of building or construction amounts to works contract only when there is a contract. In other words, there should be person to whom work is executed. If work is executed without being a person, such activity does not fall under the definition of "works contract".

3.5. In support of this the Appellant relies on the Hon'ble Apex Court decision in the case of K Raheja Development Corporation Vs State of Karnataka [2005] 141 STC 298, wherein the court had an occasion to decide whether construction and sale of flats for prospective customers amounts to works contract or not under Karnataka Sales Tax Act, 1957 or not. Accordingly, it was held that, the definition of "works contract" was very vide and was not restricted to a "works contract" as commonly understood, viz., a *contract to do some work on behalf of some else*. They submitted that the expression "works contract" defined under KST Act, 1957 is similar to that of GST Law, hence, the activity of executing work amounts to works contract only when there is a customer.

3.6. They submitted that the Hon'ble Apex Court in the case of Larsen and Toubro Limited and Another Vs State of Karnataka and Another reported in [2013] 75 VST 1, had an occasion to discuss the issues relating to levy of tax on construction and sale of building. Referring to the definition of works contract as defined under Karnataka Sales Tax Act, 1957 and Karnataka Value Added Tax Act, 2005, which was similar to the definition under GST Law, the Apex Court (at para 115) held that, *"It may however, be clarified that activity of construction undertaken by the developer would be works contract only from the stage the developer enters into a contract with the flat purchaser. The value addition made to the*

goods transferred after the agreement is entered into with the flat purchaser can only be chargeable to tax by the State Government"

3.7. They submitted that the principle laid down by the Hon'ble Apex Court (supra) squarely applies to the facts of their case under GST Law, hence, levying tax on the transaction which does not fall under the definition of works contract, runs contrary to the law declared by the Apex Court as well as well as the definition and charging section under GST Law. Therefore, the ruling given by the Authority for Advance Ruling on this aspect, should be set aside.

3.8. Further they relied on the Hon'ble Karnataka High Court decision in the case of Nagarajuna construction Company Limited & Another Vs State of Karnataka and Others [2011] 45 VST 390 (Kar) wherein the court had an occasion to decide whether the levy of tax on advance before transfer of property in goods or sale is valid or not. Dismissing the levy of tax on advances, the Hon'ble High Court held that, *"section 7 of the KVAT Act, which creates a legal fiction that a transaction of sale is completed for the purposes of the Act when payment is received as advance is akin to bringing to tax an agreement to sell goods, even before the property in the goods passes to the buyer. This is plainly contrary to the very definition of "sale" under the Act itself. Therefore, to the said extent, the above said provisions are unconstitutional".*

3.9. In view of the above decisions, they submitted that there cannot be any levy of tax on the transactions which does not fall under the definitions of "sale" or "works contract"; that in their case, where work was executed before identifying the customers, cannot be construed as "works contract", therefore levy of tax on such portion of work, runs contrary to the definition of "works contract" as defined under section 2(119) of the Act.

3.10. The Appellant therefore prayed that the impugned order wherein it was clarified that the Appellant is liable to pay tax on entire value on partially completed flats where customers are identified under GST regime, but work commenced prior to GST regime, may be set aside.

PERSONAL HEARING: -

4. The appellant was called for a personal hearing on 03.12.2019 and was represented by Shri. Sanjay M Dhariwal, Chartered Accountant, who reiterated that submissions made in the grounds of appeal.

DISCUSSION & FINDINGS: -

5. We have gone through the records of the case and taken into consideration the submissions made by the Appellant in their grounds of appeal and at the time of the personal hearing.

6. We find that the appeal is on the limited point of the applicability of GST on partially constructed flats whose construction commenced before the implementation of GST but customers for the flats were identified only after the implementation of GST. The Authority for Advance Ruling had held in the impugned order that until the customer was identified, the appellant was engaged in the activity of construction on his own account. It was only after 01.07.2017 (implementation of GST) that the customer for the flats were identified and agreements were entered into with the customers for sale of the flats. Therefore, in terms of the time of supply provisions under the GST law, the taxable event of supply occurs after 01.07.2017 and hence the entire value is liable to tax under GST.

7. Before we proceed with the main issue in appeal, we find that there has been a delay in filing the present appeal. The order of the Authority of Advance Ruling dated 25.07.2019 was admittedly received by the appellant on 8th August 2019. The appeal was filed before this Appellate Authority on 23rd October 2019 after a period of 77 days from the date of receipt of the order of the AAR.

8. At this juncture it is relevant to take note of Section 100 of the CGST Act which reads as under:

> ***100*** *(1) The concerned officer, the jurisdictional officer or an applicant aggrieved by any advance ruling pronounced under sub-section (4) of section 98, may appeal to the Appellate Authority.*
>
> *(2) Every appeal under this section shall be filed within a period of thirty days from the date on which the ruling sought to be appealed against is communicated to the concerned officer, the jurisdictional officer and the applicant.*
>
> *Provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by a sufficient cause from presenting the appeal within the said period of thirty days, allow it to be presented within a further period not exceeding thirty days.*

(3) Every appeal under this section shall be in such form, accompanied by such fee and verified in such manner as may be prescribed.

9. On a plain reading of the provisions of Section 100 of the said Act, it is apparent that the same mandates that an appeal should be filed within 30 days from the date of communication of the advance ruling order that is sought to be challenged. However, in view of the proviso thereto, the Appellate Authority is empowered to allow the appeal to be presented within a further period of 30 days if it is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the initial period of 30 days. Thus, the Appellate Authority is empowered to extend the period for filing an appeal for a further period of 30 days and no more. In other words, the total limitation period during which an appeal can be preferred before this Authority is 60 days from the date of communication of the advance ruling order, on showing sufficient cause. The proviso does not mean that the appeal can be presented after 60 days. If it is presented beyond the period of 30 days but within the further period of 30 days as stipulated by the proviso, then, the Appellant has to satisfy the Appellate Authority that there was sufficient cause which prevented him from presenting the appeal within the period of 30 days.

10. In the instant case, the appeal filed against the Advance Ruling order dated 25.07.2019 is evidently belated by 77 days. The appellant, however, has not explained the reason for the delay in filing the appeal. Notwithstanding this fact, the question whether this Appellate Authority can entertain an appeal under Section 100 of the CGST Act beyond the period of 60 days does not require much debate and has been answered in the negative by the Supreme Court in the case of *Singh Enterprises vs CCE reported in (2008) 3 SCC 70.* The Supreme Court in the said case interpreted Section 35 of the Central Excise Act, 1944 which is similar to Section 100 of the CGST Act and examined the question whether the Commissioner (Appeals) has the power to condone the delay beyond the period of 30 days from the date of expiry of the period of 60 days prescribed for filing the statutory appeal and also whether the High Court, in exercise of the power conferred under Article 226 of the Constitution of India, can condone the delay. The Hon'ble Supreme Court in Para 8 of its order held thus:

8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of Statute are vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period up to which the prayer for condonation can be accepted is statutorily

provided. It was submitted that the logic of Section 5 of the Indian Limitation Act, 1963 (in short the Limitation Act) can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days period.

11. Section 5 of the Limitation Act, 1963 gives an opportunity to a litigant to file applications beyond the prescribed period of limitation provided, he is able to establish that he was prevented by sufficient cause from approaching the Court within the said period. However, the Supreme Court in the case of *Consolidated Engineering Enterprises vs Principal Secretary, Irrigation Department and Others - (2008) 7 SCC 169*, while considering Section 34(3) of the Arbitration and Conciliation Act, 1996 observed that

"When any special statute prescribes certain period of limitation as well as provision for extension up to specified time limit, on sufficient cause being shown, then the period of limitation prescribed under the special law shall prevail. and to that extent the provisions of the Limitation Act shall stand excluded."

Further, in the case of *Commissioner of Customs and Central Excise vs Hongo India (P) Ltd – (2009) 5 SCC 791*, the Hon'ble Supreme Court considered the question whether Section 5 of

the Limitation Act can be invoked for condonation of delay in filing an appeal or reference to the High Court and observed thus:

> *"As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days."*

12. In view of the above settled legal position, it is evident that this Appellate Authority being a creature of the statue is empowered to condone a delay of only a period of 30 days after the expiry of the initial period for filing appeal. As far as the language of Section 100 of the CGST Act is concerned, the crucial words are "not exceeding thirty days" used in the proviso to sub-section (2). To hold that this Appellate Authority could entertain this appeal beyond the extended period under the proviso would render the phrase "not exceeding thirty days" wholly otiose. No principle of interpretation would justify such a result. Therefore, we hold that we are not empowered to condone the delay of 77 days in filing this appeal.

13. Since the appeal cannot be allowed to be presented on account of time limitation, the question of discussing the merits of the issue in appeal which is the eligibility to GST on partially constructed flats whose construction commenced before the implementation of GST but customers for the flats were identified only after the implementation of GST, does not arise.

14. In view of the above we pass the following order

ORDER

We dismiss the appeal filed by the appellant M/s. Durga Projects & Infrastructure PvtLtd, on grounds of time limitation.

(D.P.NAGENDRAKUMAR)
Member
Karnataka Appellate Authority

(M.S. SRIKAR)
Member
Karnataka Appellate Authority

To,

The Appellant

Copy to:

The Member (Central), Advance Ruling Authority, Karnataka.

The Member (State), Advance Ruling Authority, Karnataka.

The Commissioner of Central Tax, South Commissionerate

The Asst. Commissioner, LGSTO-90, Bengaluru.

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