

THE APPELLATE AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICE TAX,
UTTAR PRADESH

4, VIBHUTI KHAND, GOMTI NAGAR, LUCKNOW – 226 010.

(Constituted under Section 99 of the Uttar Pradesh Goods and Service Tax Act,
2017)

Appeal Order No. 13/AAAR/_____/ /2021

Date: 2101.2021

Before the Bench of:-

1. **Shri Ajay Dixit,**
Member, Central Tax
2. **Smt. Amrita Soni,**
Member, State Tax

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| Legal name of the Appellant | M/s UTTAR PRADESH POWER CORPORATION LTD |
| Trade Name of the Appellant | M/s UTTAR PRADESH POWER CORPORATION LTD |
| GSTIN Number | 09AAACU5088M4ZM |
| Registered address/Address provided while obtaining user ID | Shakti Bhawan, 14, Ashok Marg, Lucknow, Uttar Pradesh |
| Order of Advance Ruling Against which the appeal is filed | Order No. UP ADRG-64/2020 dated 17.09.2020 issued by the Authority for Advance Ruling, Uttar Pradesh |

(Proceedings under Section 101 of the Central Goods and Service Tax Act, 2017 and Uttar Pradesh Goods and Service Tax Act, 2017)

The present appeal has been filed under Section 100 of the Central Goods and Service Tax Act and Uttar Pradesh Goods and Service Tax Act, 2017 (hereinafter referred to as "the CGST Act and UPGST Act") by M/s. Uttar Pradesh Power Corporation Ltd, Shakti Bhawan, 14, Ashok Marg, Lucknow, Uttar Pradesh (hereinafter referred to as the "Appellant") against the Advance Ruling Order No. UP ADRG-64/2020 dated 17.09.2020 issued by the Authority for Advance Ruling, Uttar Pradesh.

At the outset, we would like to make it clear that the provisions of both the CGST Act and the UPGST 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, 2017 would also mean a reference to the same provisions under the UPGST Act, 2017.

Brief Facts of the Case

1) M/s Uttar Pradesh Power Corporation Limited, Shakti Bhawan, 14, Ashok Marg, Lucknow, Uttar Pradesh - 226020 (the Appellant) is a registered assessee under GST having GSTN: 09AAACU5088M4ZM.

2) The Appellant is a State Government undertaking mainly entrusted with the responsibility of purchase and supply of electricity to the distribution utilities. The Appellant is the holding company of five distribution companies in the State of Uttar Pradesh, namely, MVVNL, DVVNL, PVVNL, PuVVNL and Kesco (collectively referred to as "**DISCOMs**"). The DISCOMs are 100% subsidiaries of the Appellant. The Appellant purchases power in bulk from various sources centrally including thermal, hydro, nuclear, solar, CNEC, electrical trade, power exchange, power banking, etc. and makes bulk supply to DISCOMs for onward supply / distribution to the ultimate consumers.

3). A Memorandum of Understanding was entered into between the Appellant and the DISCOMs, wherein it was agreed that as the Appellant is functioning on 'no profit and no loss basis', the total power procurement cost will be passed on by the Appellant to DISCOMs in ratio of their drawl. Apart from the direct cost of electricity purchased from the generating companies, the Appellant recovers indirect costs also from the DISCOMs, which consists of various operational and management expenses incurred by the Appellant.

4). Accordingly, the Appellant has submitted application for Advance Ruling on 30.04.2020 and sought Advance Ruling on the following issues : –

- I) Whether there is a supply of service by the applicant Corporation in recovery of expenses from DISCOMs as well as UPPTCL and other power companies by way of book entries and hence, liable to GST;
- II) Whether inclusion clause in subsection (2) of Section 15 of CGST Act, 2017 providing for inclusion of incidental expenses in value of supply apply to applicant's case (i.e. recovery, by way of book entries, of O&M expenses from DISCOMs as well as UPPTCL and other power companies) when there is no supply of a service by the Corporation to the DISCOMs as well as UPPTCL and other power companies so as to make the stated recoveries from DISCOMs, UPPTCL and other power companies liable to GST, if answer to question I is negative;
- III) If the answer to I or II is in affirmative, whether recovery against certain expenses such as interest cost, salary, depreciation, etc. which do not attract GST due to either they being exempt or non-taxable will also be liable to GST;
- IV) Whether transfer of miscellaneous incomes of the applicant Corporation to DISCOMs, UPPTCL and other power companies will attract GST;
- V) If the answer to I or II is in affirmative, whether GST paid on all taxable expenditure will be allowed as ITC to the corporation for further adjustment of GST payable on recovery of expenses by way of book entries.

5) The Authority for Advance Ruling, vide Order No. UP ADRG-64/2020 dated 17.09.2020 ruled that:

- I. The Applicant is liable to pay GST on the O & M Expenses charged from its subsidiary companies.
- II. As the supplies have been held as taxable as per 1 above, the question no. 2 becomes infructuous.
- III. With regards to specific heads as mentioned in the question no. 3, the GST would be chargeable.
- IV. Income shared with the subsidiaries by the Applicant would also be chargeable to GST.
- V. While ITC may be availed, in principle, but the admissibility of the same would depend upon the provisions of Section 16 & 17 of the CGST Act read with Rule 36 of the CGST Rules.

6) Being aggrieved with the Order No. UP ADRG-64/2020 dated 17.09.2020, the Appellant filed this appeal application before us.

Grounds of appeal submitted by the Appellant:-

7) The Appellant made the following submissions:

7.1) The Hon'ble AAR has failed to examine all submissions made in the application filed by the Appellant and to provide the reasons as to how the submissions made are not applicable to the facts of the Appellant.

7.2) As per the provisions of UPERA, the Appellant is entrusted with the responsibility of procurement, transmission and supply of electricity and to undertake planning and coordination in regard to transmission.

7.3) The Appellant makes bulk purchase of electricity from various power stations for which it has entered into Power Purchase Agreements. The Appellant draws the electricity as per the contracted capacity from such power stations and makes the payment of electricity charges as determined by Central Electricity Regulatory Commission.

7.4) The Appellant procures and supply electricity to DISCOMs at 'no profit and no loss basis'. The direct cost incurred by the Appellant in purchase of electricity was passed on to the DISCOMs. However, the other indirect costs incurred by the Appellant were not being passed on, as such.

7.5) It is also agreed upon that the DISCOMs will remit all their revenue receipts from sale of power to the Appellant. The arrangement is as such, that the amount received by the Appellant from the DISCOMs i.e. total power purchase cost is proportionate to the receipts of power at the bulk power procurement rate. The entire arrangement is on 'no profit no loss' basis which depicts that there is no retention of any amount as consideration by the Appellant. It has been agreed between the Appellant and DISCOMs that the total power procurement cost of the Appellant shall be passed on to the

DISCOMs. It includes the direct cost incurred by the Appellant, as paid to generating companies, and other costs incurred by it in the form of subject expenses. The consideration for the supply of electricity by the Appellant is, thus, the total power procurement cost, which includes the direct and indirect costs incurred by the Appellant in running its business.

7.6) The subject expenses charged by the Appellant from DISCOMs are paid by the DISCOMs in respect of / in response to/ for the inducement of the supply of electricity, and thus, form part of 'consideration' for the said supply. The Appellant has also placed reliance on decision of Hon'ble Gujarat High Court in *Torrent Power Limited vs. Union of India*, to muster their claim.

7.7) In order to establish taxability of any amount under GST, there should be a nexus between the amount received and the performance of any activity for the recipient of such supply. In the present case, there is no specific activity agreed between the Appellant and the other parties in return of such expenses. Further, the activities, in relation to which such expenses are incurred and later recovered, are undertaken by the Appellant for its own, in furtherance of the supply of electricity by it.

7.8) The main work of the Appellant is to supply electricity to DISCOMs and undertake administrative work in this behalf. Further, the Appellant is the holding company of these DISCOMs and other related companies. In order to fall within the ambit of supply under CGST Act, there must be an activity conducted for another for a consideration and it must be in the course or furtherance of business. The apportionment of expenses in ratio to the power allocated to DISCOMs is a mere adjustment in its books of accounts and is not recovered for provision of any service. There is no agreement between the Appellant and DISCOMs giving rise to an obligation of performance of an activity for DISCOMs in lieu of any consideration. In such a case, the Appellant does not supply any service to DISCOMs.

7.9) Without prejudice to above and assuming without admitting that the subject expenses are for different supplies made by the Appellant, such supplies are naturally bundled with and supplied in conjunction with supply of electricity, with principle supply being that of electricity.

7.10) In the instant case, the alleged activities undertaken against the subject expenses are part and parcel of the process undertaken by the Appellant for supply of electricity to the DISCOMs. The only business of the Appellant, as discussed, is supply of electricity to the DISCOMs and it is in the course of such business, that the Appellant undertakes the alleged activities against the subject expenses.

7.11) Without prejudice to above, and assuming without admitting that GST is payable on the subject amounts, it is submitted that the Appellant is eligible to avail ITC of GST paid on supplies received by it and used in the course or furtherance of its business.

8) The appellant was granted personal hearing on 9th December 2020 through virtual mode. Mr. Narendra Singhvi, Advocate and Mr. Chetan Garg, Accounts Officer, M/s UPPCL, Authorized representatives on behalf of appellant appeared for hearing. During the personal hearing they reiterated their submission already made and also submitted certain citations.

DISCUSSION AND FINDING

9) We have gone through the submissions made by the appellant and examined the detailed explanation submitted by them. We observed that the appeal is mainly based upon the following points viz:-

- A. The amount under consideration charged by the appellant from DISCOMs is consideration for supply of electricity, which is exempt from payment of GST.
- B. There is no supply of service by the appellant in recovery of such expenses by way of book entries.
- C. If these amount to be consideration for different supply, the same is naturally bundled and supplied in conjunction with supply of electricity, with supply of electricity being the principal supply.
- D. If GST is payable on the subject amounts, the appellant is eligible to avail ITC.

10) The views of the Member (CGST) are as under:-

10.1) As regard to the contention of the Appellant that the amount under consideration charged by the Appellant from DISCOMs is consideration for supply of electricity, which is exempt from payment of GST and there is no supply of service by the Appellant in recovery of such expenses by way of book entries, I observe that the scope of supply has been defined in Section 7(1) of the CGST Act, 2017 and the basic ingredients of the supply are (i) that it is made or agreed to be made for a consideration and (ii) it is done in the course of furtherance of business. Further as per clause (a) of subsection 31 of Section 2 of the CGST, Act 2017, "*any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government*".

10.2) I also observe that the Appellant and the DISCOMs are registered as separate business entities. Apart from the supply of electricity, the other activities being carried out the Appellant such as providing training to the employees of DISCOMs, making arrangement for cashless treatment facility for DISCOMs employees,

recovering employee cost that are performing finance, audit related work of DISCOMs etc. Further, as per Schedule III of the CGST Act, 2017, *"Services by an employee to the employer in the course of or in relation to his employment shall be treated neither as a supply of goods nor a supply of service"*. As per Section 2F of the Employee's Provident Fund and Miscellaneous Provisions Act, 1952, the term "employee" has been defined as *"Any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets his wages directly or indirectly from the employer....."*. In this regard I observe that the Appellant and the DISCOMs are two separate business entities and employee of Appellant cannot be treated as employees of DISCOMs. Accordingly, any activity performed by the Appellant for employees of DISCOMs or any activity performed by the employees of the Appellant for DISCOMs cannot be classified under *"employer-employee relationship"*. Further as per the definition of the "Consideration", referred supra, consideration involves money or any other mode of payment which includes book transfer/book adjustment also. Accordingly, even the book adjustment also falls under the definition of consideration. In view of this I am of the opinion that the activities related to Operational & Management Expenses, as mentioned above, squarely meet the twin test laid down under Section 7(1) of the CGST Act, 2017 for the purpose of being identified as Supply and I am in unison with the Advance Ruling Authority that activities would be liable to be charged to GST.

10.3) As regard to the contention of the Appellant that the Services are to be treated as Bundled with the primary service being electricity distribution, I observe that to classify any supply as Composite Supply, the primary conditions for the same, in terms of Section 2(30) of the CGST, Act 2017, would be:-

- a. There should be two or more supplies,
- b. Supplies should be naturally bundled,
- c. Supplied in conjunction with each other in ordinary course of business.

Here the Supply of Electricity is a continuous supply while the other services i.e. Bank Loan, Medical reimbursement to employee, Training institute expenses, O & M expenses etc. are not continuous supplies. Supply of electricity can also be made without provisions of these services. Therefore, I am of the opinion that these services, referred above by the Appellant, are not naturally bundled with the supply of electricity.

10.4) I also observe that for a supply to be considered as a composite supply, its constituent supplies should be so integrated with each other that one cannot be supplied in the ordinary course of business without or independent of the other. In other words they are naturally bundled. The concept of the "Naturally Bundled", used in Section 2(30) of the CGST Act 2017, lays emphasis on the fact that the different element in a composite supply are integral to the overall supply and if one of the

element is removed the nature of supply will be affected. However in the case of Appellant the provision of supply of electricity can be made even in the absence of other services. In view of this, I am of the opinion that both the services are not "Naturally Bundled".

10.5) The appellant has relied upon the Judgment of Hon'ble Gujrat High Court in the case of M/s Torent Power Limited, however I observe that the said judgment has been challenged by the department in the Hon'ble Supreme Court of India and decision in the matter is pending there.

10.6) In view of this I upheld the Advance Ruling Order No. UP ADRG-64/2020 dated 17.09.2020 issued by the Advance Ruling Authority of Uttar Pradesh.

11) Further, the views of the Member (SGST) are as under:-

11.1) I observe that as per the Appellant they purchases electricity from the generating companies under the Power Purchase Agreements and sells further to the DISCOMs. It has been agreed between the Appellant and DISCOMs that the total power procurement cost of the Appellant shall be passed on to the DISCOMs. It includes the direct cost incurred by the Appellant, as paid to generating companies, and other costs incurred by it in the form of subject expenses. Further as per the Memorandum of Understanding dated 20.05.2016 entered into between the Appellant and the DISCOMs, it has been agreed that as the Appellant is functioning on 'no profit and no loss basis', the total power procurement cost will be passed on by the Appellant to DISCOMs in ratio of their drawl. From the above I am of the opinion that the entire arrangement is on 'no profit no loss' basis which depicts that there is no retention of any amount as consideration by the Appellant.

11.2) As regard to the bundled service I observe that in the instant case, there are two activities being taking place i.e. (a) supply of electricity, and (b) the other indirect activities for which expenses is being passed on to the DISCOMs. The Appellant, as per their mandate, is constituted for supply of electricity to the DISCOMs and it is in the course of such business, they undertake the alleged activities against the subject expenses. The DISCOMs cannot avail these supplies separately from the Appellant or any other person. The Appellant cannot supply these services except as a part of the supply of electricity to DISCOMs. The DISCOMs are statutorily bound to receive supply of electricity from the Appellant and as a part of the said supply, that the Appellant undertakes the subject activity. Accordingly, I observe that the subject expenses are part and parcel of the process undertaken by the Appellant for supply of electricity to the DISCOMs.

11.3) Section 2(30) of CGST Act defines 'composite supply' as:-

"Composite supply means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any

combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

Further Section 2(90) of CGST Act defines 'principal supply' as:-

"Principal supply means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary."

11.4) In view of above, I observe that it is the supply of electricity, which provides the essential character to the entire transaction. The intention of the DISCOMs is to receive supply of electricity. If electricity is not supplied, the subject services will not be supplied at all. Accordingly, it is the supply of electricity which will constitute predominant element of the composite supply and accordingly, will be the principal supply in terms of Section 2(90) of the CGST Act. I further observe that in terms of Notification No. 2/2017-Central Tax (Rate) dated 28.06.2017 supply of electrical energy is exempt from payment of GST. In view of this, I am of the opinion that once the principal supply is exempted so will be the ancillary supply.

RULING

In view of difference of opinion between the Members of Appellate Authority for Advance Ruling for Goods and Service Tax, Uttar Pradesh, no ruling can be issued on the questions raised by the Appellant, in terms of the provisions of Sub Section 3 of Section 101 of CGST Act, 2017. Thus the Advance Ruling issued vide Order No. UP ADRG-64/2020 dated 17.09.2020, by the Authority for Advance Ruling, Uttar Pradesh, is deemed to be not in operation.



(Ajay Dixit)
Member AAAR
CGST



(Amrita Soni)
Member AAAR
SGST

To,

M/s Uttar Pradesh Power Corporation Limited,
Shakti Bhawan,
14, Ashok Marg, Lucknow,
Uttar Pradesh – 226020.

APPELLATE AUTHORITY FOR ADVANCE RULING
GOODS & SERVICE TAX
UTTAR PRADESH

Copy to –

1. The Joint Commissioner, CGST & Central Excise, Audit Commissionerate, Lucknow, Member, Authority for Advance Ruling.
2. The Joint Commissioner (Law), Commercial Tax, Uttar Pradesh, Member, Authority for Advance Ruling.
3. The Commissioner, CGST & CX, Lucknow, Uttar Pradesh.
4. Through the Additional Commissioner, Commercial Tax, Lucknow, Uttar Pradesh to jurisdictional tax assessing officers.