

**GUJARAT AUTHORITY FOR ADVANCE RULING,
GOODS AND SERVICES TAX,
D/5, RAJYA KAR BHAVAN, ASHRAM ROAD,
AHMEDABAD – 380 009.**



ADVANCE RULING NO. GUJ/GAAR/R/50/2021

(IN APPLICATION NO. Advance Ruling/SGST&CGST/2020/AR/52)

Date: 06-09-2021

Name and address of the applicant	:	M/s. GSPC(JPDA)LTD., GSPC Bhavan, B/H Udyog Bhavan, Sector-11, Gandhinagar-382011.
GSTIN of the applicant	:	24AACCG8398Q1ZQ
Date of application	:	15-12-20
Clause(s) of Section 97(2) of CGST/ GGST Act, 2017, under which the question(s) raised.	:	(e)Determination of the liability to pay tax on any goods or services or both.
Date of Personal Hearing	:	30-6-21, 12-8-21
Present for the applicant	:	Shri Anil Chauhan, C.A.

B R I E F F A C T S

The applicant M/s. GSPC(JPDA)LTD., has submitted that petroleum existing within the Joint Petroleum Development Area(JPDA) is a resource exploited jointly by Timor-Leste and Australia; that the applicant along with other concessionaries entered into Production Sharing Contract(PSC) dated 15th November, 2006 with Timor Sea Designated Authority for undertaking the exploration activities in the Block JPDA 06-103 awarded to it, in the Joint Petroleum Development Area(JPDA).

2. The applicant has submitted that Autoridade Nacional do Petroleo E Minerals(ANP) is Timor Leste's institution and is vested with administrative and financial autonomy to act as regulatory authority for the oil, gas and mineral related activities in accordance with the provisions of the Petroleum Activities Law, Interim Petroleum Mining Code, the Timor Sea Treaty and the Diploma Ministerial on mineral activities; that GSPC(JPDA) holds 20% participating interest(PI) in Block JPDA 06-103 and the list of other concessionaries and their participating interest(PI) are as follows:

- Oilex limited: 10% PI (Operator of the Block JPD 06-103).
- Videocon JPDA 06-103 limited: 20% PI.
- Bharat Petro Resources JPDA limited: 20% PI.
- Pan Pacific Petroleum (JPDA 06-103) Pty Limited: 15% PI.
- Japan energy E&P JPDA Pty limited: 15% PI.

3. The applicant has further submitted that PSC provides right to carry on petroleum operations jointly to all the Concessionaries(hereinafter referred to as 'Contractor') on Production Sharing basis which outlines all the rights, responsibilities and other contractual liabilities of all the Concessionaries and Designated Authority in respect of exploration activities in Block JPDA 06-103; that Timor-Leste Government initiated arbitration proceeding against the Government of Australia to have Certain Maritime Agreements in Timor Sea(CMATs) Treaty declared as void ab initio and accordingly, the termination of CMATS would result in automatic termination of Timor Sea Treaty governing petroleum operations in the JPDA, and in effect the PSC entered into for JPDA 06-103; that considering uncertainty arising out of the above mentioned arbitration proceedings, even before the arbitration proceeding attained finality, the concessionaries had submitted request to ANP for termination of PSC by mutual agreement(copy of letter dated 12-7-2013 issued by Operator (Oilex(JPDA 06-103)Ltd.) requesting termination of PSC has been submitted); that in reference to the above request to terminate the PSC, ANP vide letter dated 13-5-2015 issued a Notice of intention to terminate PSC to Operator Oilex(JPDA 06-103)ltd. and the basis for termination of PSC provided in the said notice is reproduced as follows:

“2.2 It is the ANP’s position that the Contractor is in material breach of the terms of the PSC by reason of:

2.2.1 the Contractor’s failure to meet its Exploration Work Program for the Initial Period as required by Article 4.1 of the PSC by failing to deliver the third well by 15th January, 2014 as required under the extended Exploration Work Program; and

2.2.2 the Contractor’s failure to meet its local content obligations as required by Article 5.4 of the PSC and Annex D to the PSC.”

Copy of notice dated 13-5-2015 has been submitted.

4. The appellant has submitted that ANP vide notice dated 15-7-2015 terminated the PSC with a demand of payment estimated cost of exploration not carried out and damages for breach of its local content obligations and a copy of notice of termination and demand for payment dated 15-7-2015 is submitted; that in October, 2018, ANP initiated Arbitration proceeding against all the Concessionaries in the International Chamber of Commerce(ICC) under the provisions of PSC; that Arbitration proceeding have now been concluded and as a result of the Deed of the Settlement and Release dated 15-7-2020, a settlement sum is payable by the concessionaries to ANP, copy of which deed of settlement and release dated 15-7-2020 is submitted. Relevant clauses of the Deed of the Settlement and Release are reproduced as follows:

“2. Settlement

Payment of Settlement Sum.

2.1 The parties agree, in full and final settlement of the Dispute and the Proceedings and without admission by any party as to liability in respect of the claims or counterclaims, that the Respondent shall pay to the Claimant the Settlement Sum in accordance with clauses 2.2 to 2.5 of this deed.

3. Releases

Releases by Claimant

3.1 On receipt of Respondent's proportionate share of the Settlement Sum in accordance with clause 2.2, the Claimant releases:

(a) that Respondent; and

(b) that Respondent's directors, officers, employees and agents and each of them, past and present

From all actions, proceedings, accounts, rights, claims, demands, liabilities, costs and expenses, wherever and however arising, whether known or unknown, whether at law or in equity at the Execution Date, arising out of or relating in any way to the Dispute, the Proceeding and/or the PSC.

3.2 Upon release of a Respondent under this clause 3, that Respondent's respective Parent Company Guarantee shall immediately lapse and shall be returned by the Claimant.

Releases by Respondents

3.3 Subject to the Proceedings being settled on the terms set out in clause 2, the Respondents release:

(a) the Claimant; and

(b) the Claimant's directors, officers, employees and agents, and each of them, past and present,

from all actions, proceedings, accounts, rights, claims, demands, liabilities, costs and expenses, wherever and however arising, whether known or unknown, whether at law or in equity at the Execution Date, arising out of or relating in any way to the Dispute, the Proceedings and/or the PSC."

5. The applicant has submitted that there are no pending proceedings against the applicant or initiated by the applicant in relation to the questions raised herein before any authority, Tribunal or Court. The applicant has asked the following question seeking Advance Ruling:

'Whether payment of settlement fees pursuant to deed of settlement and Release signed for Timor-Leste Oil Block Production Sharing Contract qualifies as a 'supply' under Goods and Service Tax(GST) regulations and thereby attract levy of GST?'

6. The applicant has submitted as follows:

1. Section 9 of the CGST Act provides for levy of CGST on all intra-state supply of goods or services or both on the value determined under Section 15 of the CGST Act.

2. Section 7 of the CGST Act, 2017 defines the term 'supply'. Relevant portion of the same is reproduced as follows:

7. (1) For the purposes of this Act, the expression "supply" includes—

- (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*
- (b) import of services for a consideration whether or not in the course or furtherance of business;*
- (c) the activities specified in Schedule I, made or agreed to be made without a consideration; and*
- (d)**

***[(1A)Where certain activities or transactions constitutes a supply in accordance with the provisions of sub-section(1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II]*

*[*Clause D of Section 7(1) omitted by the Central Goods and Services Tax(Amendment) Act, 2018 with retrospective effect from 1.7.2017.]*

*[**Vide amendment dated 9th August, 2018, a new sub-section (1A) is inserted in section 7 with retrospective effect from 1.7.2017.]*

3. In view of the said amendment, where activities or transactions constitutes a supply in accordance with the provisions of sub-section(1) of section 7, they shall be treated either as supply of goods or supply of services as referred to in Schedule II.
4. Production Sharing Contract is not the contract for providing services. Following are the major differences between PSC and Service Contract:
- In Service Contract, contractor is responsible for providing required services only and not hold ownership in the resulting products whereas in PSC, contractors hold ownership in resulting products.
 - In Service Contract, direction and control of the operation is with Designated Authority of Government whereas in PSC control of operation is jointly by both the parties i.e. Designated Authority of Government and contractor.
 - In Service Contract, role of contractor is service provider whereas in PSC role of contractor is partner.
 - In Service Contract, payment to contractor is fixed fees or buyback priority whereas in PSC, contractor has share in the resulting profit.
 - In Service Contract, contractor is required to bear full operation risk and costs whereas in PSC, operation cost is

recoverable on actual as 'Recoverable Cost' from Designated Authority on commencement of commercial production.

In the instant case, since the contract with Designated Authority is not a service contract, payment of exploration cost to Designated Authority cannot be considered towards supply of services.

5. In terms of PSC for JPDA 06-103 Block, Contractor is required to incur exploration cost as per work program budget. Said expenses of exploration cost are recoverable costs in terms of para 6.2 of PSC. Relevant extract of the said para of PSC is reproduced herein:

In any Calender Year, Recoverable Costs are, subject as further provided in Annex-C, the sum of those of the following that are not ineligible costs:

(a) The sum of:

- (i) Recoverable Exploration Costs;*
- (ii) Recoverable Appraisal Costs;*
- (iii) Recoverable Capital Costs; and*
- (iv) Recoverable Operating Costs.*

(b) Additions to Decommissioning Costs Reserve, if any, allowable in the Calendar Year;

(c) Recoverable Costs in the previous Calendar Year, to the extent in excess of the value of the Contractor's share of Petroleum under sub-paragraphs 7.1(b)(i) in that previous Calendar Year; plus

(d) A Quarterly amount equal to the product of the rate of Uplift and the Quarterly balance of outstanding Recoverable Costs. Less Miscellaneous Receipts and less any deductions pursuant to paragraph 7.4(a)."

6. Further, in terms of para 4.5 of the PSC, if in a contract year, the contractor carries out less exploration that is required of it under the Exploration Work Programme and Budget, the Designated Authority may:
 - (i) Require that the shortfall be added to the Exploration to be carried out in the next contract year.
 - (ii) Require payment of the estimated cost of the Exploration not carried out in that contract year; or
 - (iii) Terminate the agreement and require payment of the estimated cost of exploration not carried out in that contract year.
7. In the instant case, the Designated Authority terminated PSC and demanded payment in terms of para 4.5 of the PSC from the contractor. Said demand was disputed by the contractor and finally as a result of the Deed of the Settlement and Release dated 15.7.2020, a settlement sum towards exploration cost is payable by contractor to ANP.

8. CBIC vide Circular No.32/06/2018-GST dated 12.02.2018 clarified that as per the Production Sharing Contract(PSC) between the Government and the oil exploration and production contractors, in case of a commercial discovery of petroleum, the contractors are entitled to recover from the sale proceeds all expenses incurred in exploration, development, production and payment of royalty. Portion of the value of petroleum which the contractor is entitled to take in a year for recovery of these contract costs is called 'Cost Petroleum'. It was clarified that the cost petroleum is not a consideration for service to Government and thus not taxable under GST regulations.
9. GST Ruling GSTR 2001/4(GSTR), issued by the Australian Tax office explains the GST treatment of court order and out of court settlement. As per the said ruling, if a payment is made under an out of court settlement and there is no earlier or current supply, the payment will not be treated as consideration for a supply at all.
10. Hon'ble Bombay High Court, in the case of Bai Mamubai Trust, VithaldasLaxmidas Bhatia, Smt.InduVithaldas Bhatia vs. Suchitra(109 taxmann.com200), has held that GST is not payable on damages/compensation paid for a legal injury. The principle laid down by the Court is that such payment does not have the necessary quality of reciprocity to make it a 'supply' and, therefore, GST is not payable on such amount.
11. In view of the above analysis, settlement amount payable by the applicant should not be chargeable to GST under RCM due to the reasons summarized as follows:
 - (i) PSC is not the contract for services to Designated Authority.
 - (ii) Settlement payment is towards exploration cost which is Cost petroleum in terms of PSC and not taxable under GST regulation.
 - (iii) Settlement payment could not be said to be in relation to any supply or independent supply either under 'agreeing to obligation to do an act' or any other category of supply and therefore settlement amount payable could not be treated as 'consideration' towards supply.
 - (iv) Termination of PSC has arisen due to an unintended event and has not originated from any obligation on the part of any of the parties to tolerate an act and therefore settlement amount cannot be considered as payment for any kind of supply of services.

7. The applicant vide submission dated 29-6-2021 has mentioned the question raised for Advance Ruling as follows:

‘Whether payment of settlement fees against demand made by Autoridade Nacional do Petroleo E Minerais (ANP) vide letter dated 15.07.2015 attract levy of GST under GST regulations.’

It was submitted that ANP vide notice dated 15-7-2015 terminated PSC dated 15-11-2006 and demanded payment of estimated cost of exploration not carried out and that the said demand raised vide letter dated 15-7-2015 was finally settled concluding a sum payable as settlement amount against said demand.

8. The applicant submits as follows:

- Production Sharing Contract is for block in JPDA which is in non-taxable territory.
- Unincorporated Joint Venture under Joint Operating Agreement(JOA) formed for execution of scope of PSC is in non-taxable territory. Copy of Joint Operating Agreement is enclosed.
- Operator appointed under JOA, Oilex(JPDA 06-103) ltd., Australia who is responsible for the joint operation of the Block under JOA is also in non-taxable territory.
- Since whole operation of the contract, operator of the contract as well as Block allotted to unincorporated JV are in non-taxable territory, payment by applicant towards its share of expenses (exploration cost), which is in the nature of cash call cannot be considered as taxable under GST regulations. In view thereof, settlement amount i.e. committed exploration cost payable to ANP by unincorporated Joint Venture which in turn is payable by applicant to the extent of its share in unincorporated Joint venture is not taxable under GST regulations.
- ANP vide letter dated 15-7-2015 terminated PSC dated 15-11-2006 and raised demand for cost of exploration and therefore demand raised by ANP pertains to period prior to GST regime and accordingly is not taxable under GST regulations.

9. The applicant submits that in view of the above submission, share of settlement amount payable by the applicant as a partner of UJV should not be chargeable to GST under RCM due to the following reasons:

- (i) Amount payable to ANP pertains to period prior to GST regime.
- (ii) Production Sharing Contract is for the block in JPDA which is in non-taxable territory. Unincorporated Joint venture formed under Joint operating Agreement and Operator of the UJV are in non-taxable territory.
- (iii) PSC is not the contract for services to Designated Authority.
- (iv) Share of settlement payment by applicant could not be said to be in relation to any supply or independent supply either under ‘agreeing to obligation to do an act’ or any other

category of supply and therefore settlement amount payable could not be treated as a 'consideration' towards supply.

10. The applicant vide further submission dated 20-7-2021 submitted as follows:

1. Settlement amount was agreed between parties vide Deed of the Settlement and Release dated 15th July 2020 wherein a settlement sum is payable by Concessionaries to ANP.
2. On 21st August 2020 the parties to the Arbitration notified the Arbitral Tribunal that settlement had been reached and requested that a Final Consent Award be issued by the Arbitral Tribunal in accordance with the terms set out in a settlement agreement agreed by the parties.
3. On 24th August 2020 the Arbitral Tribunal declared the proceedings closed in accordance with Art. 27 of the ICC Rules.
4. Pursuant to Art. 33 of the ICC Rules, at the request of the parties, and in accordance with the terms of the Deed of Settlement and Release dated 15th July 2020, the Arbitral Tribunal issued orders by consent on 16th September 2020.

11. The applicant has submitted the location map of JPDA. They submit that in terms of PSC, contractor is unincorporated joint venture of all the concessionaries, obligations and liability of the Contractor under PSC are the obligations and liabilities of them all, jointly and severally; that a Joint Operating Agreement [JOA] dated 9th January 2007 was entered into between Concessionaries for operations under PSC, a copy of which is submitted; that basis for termination of PSC is the notice dated 13th May 2015 issued by ANP to Operator Oilex (JPDA 06-103) Ltd. which is as follows:

“2.2 It is the ANP’s position that the Contractor is in material breach of the terms of the PSC by reason of:

2.2.1 the Contractor’s failure to meet its Exploration Work Program for the Initial Period as required by Article 4.1 of the PSC by failing to deliver the third well by 15 January 2014 as required under the extended Exploration Work Program; and

2.2.2 the Contractor’s failure to meet its local content obligations as required by Article 5.4 of the PSC and Annex D to the PSC.”

“3. CONTRACTOR’S LIABILITY UPON TERMINATION

In light of the matters raised in Section 2 above, it is the ANP’s position that upon termination, the Contractor is liable to the ANP for:

3.1.1 the estimated cost of the Exploration not carried out for the Contract Year 2013 (pursuant to Article 4.5(a)(iii) of the PSC) in the amount of US\$16,585,789.72; and

3.1.2 damages for breach of its local content obligation in the amount of US\$ 433,000.00; thereby making the Contractor’s total liability upon termination to be US\$17,018,789.72”

12. The applicant submitted the sequence of events post issuance

of Notice dated 13th May 2015 by ANP as follows:

1. ANP vide notice dated 15th July 2015 terminated the PSC with a demand of payment estimated cost of exploration not carried out and damages for breach of its local content obligations. They have submitted a copy of the notice.
2. In terms of the said demand notice dated 15th July 2015, the demand for payment of US\$ 17,018,789.51 became due and payable on 14th August 2015.
3. ANP had on 8th October 2018 filed request for Arbitration with the Secretariat of the International Court of Arbitration of the International Chamber of Commerce.
4. Settlement amount was agreed between parties vide Deed of the Settlement and Release dated 15th July 2020 wherein a settlement sum is payable by Concessionaries to ANP. Copy of Deed of the Settlement and Release dated 15th July 2020 is submitted.
5. On 21 August 2020 the parties to the Arbitration notified the Arbitral Tribunal that settlement had been reached and requested that a Final Consent Award be issued by the Arbitral Tribunal in accordance with the terms set out in a settlement agreement agreed by the parties.
6. On 24 August 2020 the Arbitral Tribunal declared the proceedings closed in accordance with Art. 27 of the ICC Rules.
7. Pursuant to Art. 33 of the ICC Rules, at the request of the parties, and in accordance with the terms of the Deed of Settlement and Release dated 15 July 2020, the Arbitral Tribunal makes the following orders by consent on 16th September 2020:

“1. The Respondents shall pay to the Claimant the amount of USD 8,000,000 (the Settlement Sum), in full and final settlement of these ICC Proceedings No 23972/HTG, in the following proportions:

- a. First Respondent – 10%;*
- b. Second Respondent – 15%;*
- c. Third Respondent – 20%;*
- d. Fourth Respondent – 20%;*
- e. Fifth Respondent – 20%; and*
- f. Sixth Respondent – 15%”*

Copy of final award by consent dated 16th September 2020 issued by Arbitration Tribunal, International Court of Arbitration, International Chamber of Commerce is submitted.

13. The applicant has submitted as follows:

(i) Production Sharing Contract is for the block in JPDA which is in non-taxable territory

- a. Applicant submits that –
 - block JPDA is in non-taxable territory.

- Unincorporated Joint Venture under Joint Operating Agreement [JOA] formed for execution of scope of PSC is in non-taxable territory.
 - Operator appointed under JOA, Oilex (JPDA 06-103) Ltd., Australia who is responsible for the joint operation of the Block under JOA is also in non-taxable territory.
 - Concessionaries including Applicant obtained registration under GST regulation of Australia for performance of PSC
- b. Since, whole operation of the contract, operator of the contract as well as Block allotted to unincorporated JV are in non-taxable territory, payment by Applicant towards its share of expenses (exploration cost), which is in the nature of cash call, cannot be considered as taxable under GST regulations.
- c. In view thereof, settlement amount (committed exploration cost) payable to ANP by unincorporated Joint venture which in turn is payable by Applicant to the extent of its share in unincorporated Joint venture is not taxable under GST regulations in India.

(ii) Amount payable to ANP pertains to period prior to GST regime

a. ANP vide letter dated 15.07.2015 terminated PSC dated 15.11.2006 and raised demand for cost of exploration. Applicant submits that demand raised by ANP pertains to period prior to GST regime and accordingly is not taxable under GST regulations.

b. In the present case settlement of original demand is made between the Concessionaries and after that the case in the international chamber of commerce is withdrawn. In view thereof, in terms of GST regulation, the time of supply would be the date immediately following sixty days from the date of Issuance of invoice or any other document, by whatever name called, in lieu thereof by the supplier. In the instant case ANP has issued a letter dated 15.07.2015 for demanding cost of exploration not performed. Said date and sixty days from the said date are covered under the period prior to implementation of GST. Accordingly, since time of supply is prior to GST regime, GST cannot be applicable on the said payment.

c. Further, as per Section 142(11)(b) of CGST Act, the levy of tax under GST would inter alia, not apply on services to the extent it was leviable under service tax law and services were completed in pre-GST period. Transitional provision under Section 142(11)(b) read as under.

“Section 142(11) b) : Notwithstanding anything contained in Section 13 no tax shall be payable on the services under this Act to the extent tax was leviable on the said services under Chapter V of Financial Act, 1994”.

d. Section 142(10) allows the levy of tax on goods or services under GST Act, that are supplied only after appointed day i.e. 1-7-2017. In the instant case exploration work under PSC was

undertaken and completed during Service Tax regime and accordingly settlement payment for the said work under PSC against demand letter of ANP dated 15.07.2015 does not pertain to supply of goods or services or both undertaken or proposed to be undertaken by it as held by Advance Ruling Authority in the case of Woodkraft India Limited [2020 (39) G.S.T.L. 110 (A.A.R. - GST - Mah.)], copy of which is enclosed.

e. Section 9 of the Central Goods and Service Tax Act 2017 [CGST Act] provides for levy of Central Goods and Service Tax on all intra-state supply of goods or services or both on the value determined under Section 15 of the CGST Act.

f. Section 7 of the CGST Act, 2017 defines the term 'supply' and where activities or transactions constitute a supply in accordance with the provisions of sub-section (1) of Section 7, they shall be treated either as supply of goods or supply of services as referred to in Schedule II.

(iii) Production Sharing Contract is not a Service Contract

Production Sharing Contract is not the contract for providing services. The major differences between PSC and Service Contract has been discussed in para-4. In the present case, applicant is required to pay an amount of exploration cost in terms of Production Sharing Contract. Said payment transaction cannot be covered under scope of 'Supply' under Section 7 of the CGST Act, 2017.

(iv) The applicant has relied upon the following case laws to support their contention:

(a) Hon'ble Tribunal in the case of K.N. Food Industries Pvt. Ltd. vs. Commissioner of CGST and C.Ex. Kanpur [2020 (38) G.S.T.L. 60 (Tri. - All.)] [Copy enclosed herewith as Annexure-10] has examined a situation when the capacity of the assessee was not fully utilized by M/s. Parley, ex gratia charges were claimed so as to compensate the assessee from financial damage or injury. The Department invoked the provisions of [Section] 66E(e) to levy tax on the amount so received. The Tribunal held that the ex gratia charges were for making good the damages due to the breach of the terms of the contract and did not emanate from any obligation on the part of any of the parties to tolerate an act or a situation and cannot be considered to be towards payment for any services. Relevant extract of the decision is reproduced herein:

"In the present case apart from manufacturing and receiving the cost of the same, the appellants were also receiving the compensation charges under the head ex-gratia job charges. The same are not covered by any of the Acts as described under Section 66E(e) of the Finance Act, 1994. The said sub-clause proceeds to state various active and passive actions or reactions

which are declared to be a service namely; to refrain from an act, or to tolerate an act or a situation, or to do an act. As such for invocation of the said clause, there has to be first a concurrence to assume an obligation to refrain from an act or tolerate an act etc. which are clearly absent in the present case. In the instant case, if the delivery of project gets delayed, or any other terms of the contract gets breached, which were expected to cause some damage or loss to the appellant, the contract itself provides for compensation to make good the possible damages owing to delay, or breach, as the case may be, by way of payment of liquidated damages by the contractor to the appellant. As such, the contracts provide for an eventuality which was uncertain and also corresponding consequence or remedy if that eventuality occurs. As such the present ex-gratia charges made by M/s. Parle to the appellant were towards making good the damages, losses or injuries arising from “unintended” events and does not emanate from any obligation on the part of any of the parties to tolerate an act or a situation and cannot be considered to be the payments for any services.”

- (b) Hon'ble Tribunal in the case of M.P. PoorvaKshetra Vidyut Vitran Co. Ltd. Vs. Principal Commr., CGST & C.Ex., Bhopal [2021 (46) G.S.T.L. 409 (Tri. - Del.)] held that merely because the service recipient has to fulfil conditions contained in contract would not mean that this value would form part of the value of the taxable services that are provided. Demand of Service Tax on the amount collected towards liquidated damages and theft of electricity cannot be sustained.
- (c) GST Ruling GSTR 2001/4 (GSTR), issued by the Australian Tax office explains the GST treatment of court order and out of court settlement. As per the said ruling, if a payment is made under an out of court settlement and there is no earlier or current supply, the payment will not be treated as consideration for a supply at all.
- (d) Hon'ble Bombay High Court, in the case of Bai Mamubai Trust, VithaldasLaxmidas Bhatia, Smt. InduVithaldas Bhatia vs. Suchitra (109 taxmann.com 200), has held that GST is not payable on damages/compensation paid for a legal injury. The principle laid down by the Court is that such payment does not have the necessary quality of reciprocity to make it a 'supply' and, therefore, GST is not payable on such amount.
- (e) Applicant refer herewith Hon'ble CESTAT decision in the case of Ruchi Soya Industries Limited v. Commissioner of Customs, Central GST and Excise, Indore [TS-301-CESTAT-2021-ST].(copy submitted). In this decision, the Hon'ble Tribunal Delhi has examined the taxability (service tax) of the amount received by the service recipient as payment (compensation) for a service provider's failure to provide quality services, as specified in the agreement. In this case Ruchi Soya Industries

Limited, which is engaged in the business of generation of wind energy, purchased and used wind turbine generators to generate wind energy. Operation and maintenance of these wind turbine generators was outsourced to Suzlon Global Services Ltd. Suzlon is the service provider and the Ruchi Soya the service recipient in this case. According to the agreement between the Ruchi Soya and Suzlon, Suzlon would maintain the wind turbine generators in working condition so that they would be available for use by the Ruchi Soya. It is further provided in the 'Machine availability clause' of the agreement that if the availability of the wind turbine generators dropped between 92.5% and 95.5%, then Suzlon would have to compensate Ruchi Soya an amount equal to 3% of the annual operation and maintenance charges for every 1% of shortfall below 95.5% of average machine availability, subject to an overall maximum of 50% of the annual operation and maintenance charges payable by Ruchi Soya. As the wind turbine generators broke down and were so unavailable for use by Ruchi Soya, Suzlon issued a credit note to Ruchi Soya for Rupees one crore and thirty-three lakhs. During the course of the service tax audit conducted on the Appellant, for the FY 2015-16 the service tax authorities raised an objection that service tax should be discharged by Ruchi Soya on the amount received from Suzlon. The authorities reasoned this amount is taxable under Section 65B(44) of Finance Act, 1944, ("the Act") as it is a service of "agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act", which is a 'Declared Service' as defined in Section 66(E)(e) of the Act. The demand in a show cause notice issued to Ruchi Soya was confirmed in the order in original and the issue was brought before the CESTAT. The CESTAT examined whether the machine availability clause of the agreement cast a service tax liability on the service recipient in this case. After considering the submissions made by both sides the CESTAT held that the Appellant, in this case, was not liable to pay service tax. The analysis undertaken is as follows:

- *It is essential to establish that the basic elements for levy service tax exist, i.e. service provider, service receiver, payment of consideration from the services recipient to the service provider, services etc. In Section 67 of the Act pertaining to valuation, the words "for such service provided" are used, which clearly indicates that there must be an underlying provision of services for which the consideration is charged.*
- *Reference was made to the Supreme Court decision of Bhayana Builders and Intercontinental Consultants to highlight two points: (i) that consideration for the taxable service provided should be from the service recipient to the service provider and (ii) that there is a difference between 'conditions to a contract' and 'considerations for the contract' and that payment made as a condition to contract would not necessarily form a part of taxable value. Basis the judgment of*

the Supreme Court, it was held that the payment made by Suzlon to the Ruchi Soya was a condition of the contract to provide services and maintain the wind turbine generator in way that it is available for use by Ruchi Soya for more than 95.5% of the time. The said clause sets out that Ruchi Soya will not bare losses for Suzlon's failure to provide quality services and in the event that Suzlon does fail to provide a quality service, it should make good the losses borne by Ruchi Soya.

- *It was observed by the CESTAT that the payment of compensation should not be construed as the taxable service of "tolerating an act" by the service recipient. Incorporation of penalty clauses is a condition in the contract and the payment pursuant to such a clause is 'condition to the contract'. Thus, reading the agreement as a whole and considering the intent and purpose of the contract is necessary in ascertaining taxability.*
 - *It is opined that when the agreement is read in its entirety it is evident that the machine availability clause is incorporated to ensure that the terms of agreement are not violated and Suzlon does not compromise on the quality of service. Should the quality of service be inadequate, the commercial interests of Ruchi Soya are safeguarded in the form of compensation payable by Suzlon.*
 - *Reference was made to the decision of South Eastern Coalfields Ltd. v. Commissioner of Central Excise And Service Tax, Raipur that recovery of liquidated damage cannot be construed to be payment for any service per se as the objective of imposing compensation and providing for it in an agreement is to ensure that the defaulting act is neither undertaken nor repeated, which would indicate that the machine availability clause does not show Ruchi Soya tolerating the default committed by Suzlon.*
 - *It is held that "the amount cannot be called as consideration for the tolerance of service provided.*
 - *The tax department's contention that receiving compensation from the service provider is a Declared Service liable to service tax was held to be incorrect after considering the dictionary meaning of the word "tolerate". It was observed that to qualify as a declared service, first an underlying service has to be established in fact.*
 - *Relying on the Supreme Court's decision in Association of Leasing and Financial Service Companies v. Union of India to conclude that absent a service, there cannot arise liability for service tax.*
- (f) Further, the Delhi bench of the Customs, Excise and Service Tax Appellate Tribunal in the case of Honda Cars India Limited [Final Order No. 51650/2020][Copy submitted] held that cancellation fee paid in pursuance of an agreement being terminated to compensate for certain losses cannot be attributed to the provision of a service.

(g) In the case of Ford India Private Limited vs. Commissioner, LTU, Chennai[2018 (1) TMI 1219 - CESTAT Chennai], a Division Bench of the Tribunal, held that no identifiable service can be attributed for payments made if the agreement is terminated, since the consideration is to make good the loss. The observation is as follows:

"7. Regarding the tax liability on the consideration received due to termination of the arrangement, we note that no identifiable service can be attributed for such consideration. It is rather a termination of arrangement which itself the original authority held as a service. We note that by terminating the arrangement, the appellants are adversely put to certain business loss. The consideration has been paid for such loss. No identifiable service could be attributed for such payment during the material time."

14. The Applicant submits that the subject matter is not chargeable to GST.

Question on which Advance Ruling sought:

15. *'Whether payment of settlement fees pursuant to deed of settlement and Release signed for Timor-Leste Oil Block Production Sharing Contract qualifies as a 'supply' under Goods and Service Tax(GST) regulations and thereby attract levy of GST?'*

16. Vide submission dated 29-6-2021, the applicant rephrased the question as follows:

'Whether payment of settlement fees against demand made by Autoridade Nacional do Petroleo E Minerais (ANP) vide letter dated 15.07.2015 attract levy of GST under GST regulations.'

Personal hearing:

17. Shri Anil Chauhan, C.A. appeared for the hearing on 30-6-21 and reiterated the contents of the application and the contents of submission dated 29-6-21. Further as per the request of the applicant, another personal hearing (through video conferencing) was accorded on 12-8-2021 for which Shri Anil Chauhan, C.A. appeared. During the course of personal hearing, Shri Chauhan was enquired if the performance guarantee was encashed before the settlement to which he replied that till the completion of settlement, performance guarantee was not encashed.

FINDINGS

18. At the outset we would like to make it clear that the provisions of CGST Act, 2017 and GGST Act, 2017 are in *parimateria* and have the same provisions in like matter and differ from each other only on a few specific provisions. Therefore, unless a mention is particularly made to such dissimilar provisions, a reference to the

CGST Act would also mean reference to the corresponding similar provisions in the GGST Act.

19. We have carefully considered all the submissions made by the applicant. From the facts presented before us, we find that the prime reason GSPC(J) and other contractors of ANP sought Termination of the PS Contract was due to the uncertainty arising out of the arbitration proceedings initiated by the Timor-Leste Government against the Government of Australia to have Certain Maritime Agreements in Timor Sea(CMATS) Treaty declared as void ab initio and the termination of CMATS would result in automatic termination of Timor Sea Treaty governing petroleum operations in the JPDA, and in effect the PSC entered into for JPDA 06-103. We cannot brush aside this fact on record. In response, ANP vide letter dated 13.5.2015 issued a Notice of intention to terminate PSC to Operator Oilex (JPDA 06-103) Ltd. Consequently, ANP vide letter dated 15-7-2015 demanded the payment of an amount of USD 1,70,18,789.72 from the concessionaries. Further we find that ANP initiated Arbitration at International Chamber of Commerce on 8-10-2018 against the respondents and vide ICC Arbitral Tribunal Order dated 16-9-2020. Further we find the Deed of Settlement and Release was entered between ANP and GSPC(J) [along with other contractors] on 15-7-2020.

20. We find that the subject issue hinges whether the settlement payment made/to be made, vide the Deed of Settlement dated 15-7-2020, by the applicant to ANP would be liable to GST or not.

21. We record our findings as follows:

21.1 Is the subject amount paid by M/s GSPC(J) to ANP, a Cost Petroleum charge paid to ANP/ Exploration Costs paid to ANP/ Damages as a condition of Contract of PSC paid to ANP?

We find the following facts forthcoming in subject matter, as follows:

- i. The subject 20% of Settlement Payment(hereinafter referred to as the subject payment for the sake of brevity) to be paid by GSPC(J) is not ‘ Cost Petroleum’ as referred to in CBEC Circular dated 12-2-18. Infact, Cost Petroleum is that Portion of the value of petroleum which the GSPC(J) is entitled to take/ receive as per PS Contract. In subject matter, we find a situation where GSPC(J) is paying subject payment to ANP and not receiving any amount from ANP. CBIC vide Circular No.32/06/2018-GST dated 12-2-18 clarified that as per the Production Sharing Contract(PSC) between the Government and the oil exploration and production contractors, in case of a commercial discovery of petroleum, the contractors are entitled to recover from the sale proceeds all expenses incurred in exploration,

development, production and payment of royalty. Portion of the value of petroleum which the contractor is entitled to take in a year for recovery of these contract costs is called 'Cost Petroleum'. It was clarified that the cost petroleum is not a consideration for service to Government and thus not taxable under GST regulations. The subject payment under consideration is not Cost Petroleum.

- ii. The subject payment is not Exploration Cost/ Reimbursements cost as contended by GSPC (J) in subject application. ANP vide its letter dated 15-7-2015 terminated PS Contract and raised demand for cost of exploration. We do not find a situation of payment of amount of exploration cost or reimbursement cost by GSPC (J) to ANP in pursuance to this letter. Thus exploration/ reimbursement cost payment is not the matter under consideration.
- iii. **Further, We note that the amount of demand made by ANP for breach of PSC is USD 1,70,18,789.72 whereas the settlement amount as per Deed of Settlement and Release dated 15-7-2020 is USD 80,00,000.**
- iv. **The subject payment to be paid by GSPC(J) to ANP is to be borne by GSPC(J) as the liability is several and each Respondent is obliged to pay only its respective proportionate share of the Settlement Sum per the ICC Order dated 16-9-20 and not jointly and severally, as submitted by the applicant.**
- v. **The subject payment is not for the breach of PS Contract. The PS Contract had been terminated on 15-7-15. The subject payment was in pursuance to the Deed of Settlement and Release, vide which there was an agreement between GSPA (J) and ANP and Release of Performance Guarantee of GSPA (J) by ANP. The subject settlement was the explicit agreement made by ANP for the following-**
 - a. **Agreeing to do an act by ANP towards GSPC (J):**
 - To release the Performance Guarantee of GSPC (J)**
 - b. **ANP to Tolerate the following actions/situations:**
 - **To tolerate non-payment of Exploration Costs by GSPC(J)**
 - **To tolerate non-payment of damages in pursuance to breach of PS Contract.**
 - c. **ANP Agreeing to refrain from the following acts:**

ANP not to pursue the Arbitration Proceedings against GSPC(J) on payment of subject payment by GSPC(J), as the subject payment, as per ICC Order 16-9-20 is to be paid by GSPC as the liability is several and each Respondent is obliged to pay only its respective proportionate share of the Settlement Sum.

21.2 Is any Supply involved in the subject matter?

- i. We note from the aforementioned paragraph 21.1, that
 - a. ANP is service provider by providing the service of agreeing to do certain acts for GSPC(J);
ANP is service provider by agreeing to tolerate certain acts of GSPC(J);
ANP is service provider by agreeing to refrain from certain acts to benefit GSPC(J).
 - b. GSPC(J) is service recipient.
 - c. Consideration is the subject payment which is 20% of USD 80,00,000 to be paid by GSPC(J).
- ii. Further we refer to the definition of Supply as defined at Section 7 of CGST Act, reproduced as follows:

7. (1) For the purposes of this Act, the expression "supply" includes—

 - (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*
 - (b) import of services for a consideration whether or not in the course or furtherance of business;*
 - (c) the activities specified in Schedule I, made or agreed to be made without a consideration; and*
 - (d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.*
- iii. We also note that there is a specific entry at clause 5(e) to Schedule II, CGST Act, as follows:

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;

As per said Schedule II (5) (e), the said activity shall be treated as Supply of Service.
- iv. We hold that subject activities performed by ANP to GSPC (J) for consideration of subject payment is Supply of Service in the GST era.

21.3 Is subject Supply in GST era or not?

- i. We note that the subject payment is made in pursuance to the Deed of Settlement and Release, wherein ANP has agreed to provide creation Service to GSPC (J).

- ii. We note the date of Deed of Settlement and Release is 15-7-20.
- iii. We note the ICC Order is dated 16-9-20, ordering GSPC(J) to pay 20% of USD 80,00,000, liability of which is to be borne by GSPC(J) individually and not jointly and severally by all the concessionaires.
- iv. We note that the subject agreement and subject ICC order both are dated in the year 2020.
- v. GST era has been ushered with effect from 1-7-2017. Thus we hold that subject activity falls within the scope of Supply, as per Section 7 CGST Act. And that the subject Supply is within the umbrella of GST era.

21.4 GST liability, whether, on ANP or GSPC(J)?

- i. We note that ANP is in non-taxable territory.
- ii. We note that GSPC(J) is in taxable territory.
- iii. We note that ANP and GSPC(J) are not mere establishments of each other.
- iv. We note that GSPC(J) has to make the subject payment to ANP.
- v. We refer to Section 13(1) & (2) of IGST Act which reads as follows:
- vi. *“13. (1) The provisions of this section shall apply to determine the place of supply of services where the location of the supplier of services or the location of the recipient of services is outside India.*
(2) The place of supply of services except the services specified in sub-sections (3) to (13) shall be the location of the recipient of services:
Provided that where the location of the recipient of services is not available in the ordinary course of business, the place of supply shall be the location of the supplier of services.

22. On reading the Section 2(14) IGST Act, we find that the location of the recipient (GSPC(J)) in subject matter is Gujarat, which is a taxable territory. Further, as per entry 1 to Notification 10/2017-Integrated Tax(R), we find that the applicant, being the recipient of service, is liable to pay IGST on the supply of service by ANP, which is located in non-taxable territory) on reverse charge basis. Entry No.1 to Notification No.10/2017-Integrated Tax(Rate) dated 28.06.2017, reads as follows:

In exercise of the powers conferred by sub-section (3) of section 5 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), the Central Government on the recommendations of the Council hereby notifies that on categories of supply of services mentioned in column (2) of the Table below, supplied by a person as specified in column (3) of the said Table, the whole of integrated tax

leviable under section 5 of the said Integrated Goods and Services Tax Act, shall be paid on reverse charge basis by the recipient of the such services as specified in column (4) of the said Table:-

Sl. No.	Category of Supply of Services	Supplier of service	Recipient of Service
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>
1.	Any service supplied by any person who is located in a non-taxable territory to any person other than non-taxable online recipient.	Any person located in a non-taxable territory	Any person located in the taxable territory other than non-taxable online recipient.

22.1 Thus we find that this situation, calls into action, the provisions of Entry No. 1 of Notification No. 10/2017- IGST (Rate). What we find here is the supply of service by ANP which is in non taxable territory to GSPC(J) which is in taxable territory. This is import of service by GSPC(J) and the GST liability mechanism is Reverse Charge.

23. Time of Supply of Service

- i. As per Section 12 (3) (b) of CGST Act, 2017, we find the time of supply is the date of payment of subject 20% of USD 80,00,000 by GSPC(J) to ANP. For we understand that ICC order dated 16-9-20 holds good that payment be made by GSPC(J) and there is no provision or need to raise an invoice in this regard by ANP on GSPC(J).
- ii. We dismiss the contention of the applicant that subject payment to ANP pertains to period prior to GST regime, for we made our thought process clear by holding that subject payment to ANP is in pursuance of the Deed of Settlement and Release. We do not hold that subject payment is in nature of Cost Petroleum charges arising out of obligation of PS Contract, but is in nature of Agreement charges to be paid to ANP arising out of the Deed of Settlement and Release dated 5-8-20.

24. We note that GSPC(J) has cited case laws.

24.1 We hold the time of supply in subject matter is the date of payment of the 20% of USD 80,00,000 by GSPC(J) to ANP. We further hold that the subject activity pertains to GST era. Thereby reliance on Wood kraft India case law by GSPC (J) is misplaced. We are careful not to confuse the damages in pursuance to the breach of PSC contract with the payment in pursuance to deed of settlement. We note the Time of supply in subject matter is date of payment by GSPC(J), as per Section 12 (3)(b) of CGST Act, 2017.

24.2. We note that PS Contract had already been terminated and subject payment made by GSPC(J) is not payment of USD 1,70,18,789.72 in pursuance to breach of a Prior contract[PSC] which had expired on 15-7-15. But payment of 20% of USD 80,00,000 in pursuance to an Agreement made between ANP and the GSPC(J) for subject payment as the liability is several and each Respondent is obliged to pay only its respective proportionate share of the Settlement Sum, wherein, inter alia ANP has agreed to perform certain obligations towards GSPC(J) such as Release of its Performance Guarantee.

25. We note that the applicant has referred a Australian Tax office comments that with no earlier or current supply, the payment will not be treated as consideration for a supply at all. We note that as per the GST law in India, in particular with reference to the definition of Supply under Section 7 CGST Act and Schedule II(5)(e) CGST Act where the subject activity by ANP to GSPC(J) is supply of service, there is supply of service in subject matter and the cited Australian office comments is not applicable in subject matter. Also, GST liability is as per GST Scheme of law enacted by the competent legislature in India and we confine ourselves to the Central Goods and Services Act, 2017 enacted by the Parliament for arriving at our conclusion for pronouncement of the Ruling. Further, we find that GSPC(J) has placed reliance on certain case laws pertaining to the Service Tax era, such as, in KN Food Industries case CESTAT held that the appellants are entitled ex-gratia job charges to cover up the loss or deficiencies in normal job charges and that this was due to breach of terms of contract and is not considered to be towards payment for any services; in the case of M.P. Poorva Kshetra Vidyut Vitran Co. Ltd. CESTAT held that demand of Service Tax on the amount collected towards liquidated damages and theft of electricity collected by the appellant is not liable; CESTAT's decision in the case of Ruchi Soya Industries Limited wherein the demand of service tax by the Department on the amount of Rs.1.33 crores issued in the form of credit note by Suzlon to Ruchi Soya (who is the service recipient) as the wind turbine generators provided by them broke down and were so unavailable for use by Ruchi Soya; CESTAT decision in the case of Honda Cars India Limited [Final Order No. 51650/2020] involves service tax demand on amount paid by Honda Cars India ltd. towards reimbursement of costs to Honda Japan which is an issue different from the present case; CESTAT decision in the case of Ford India Private Limited Chennai involves demand of Service Tax on amount received by M/s. Ford India pvt.ltd. under the head 'Business Auxiliary Service' In both these cases of Honda cars and Ford India, the issue held was there was no identifiable service. These decisions of service tax era are at variance with subject matter where Supply of service as per GST scheme of law has been identified and established. **Before**

passing the subject Ruling, we make known that this Authority is a creature of GST statute and for pronouncing Rulings, we are confined within the four walls of this statute. By traversing far and wide within the confines of GST law, we find it loud and clear like a crescendo that activity mentioned at Schedule II(5)(e)CGST Act is Supply of Service. No amount of submission by the applicant countering this position of law enacted by the competent legislature can water down/ obscure/ nullify/ declare unconstitutional the said Schedule II(5)(e). For as long as the inclusive definition of Supply is laid down at Section 7, CGST Act, the subject activity merits to be treated a Supply and precisely, Supply of Service. We do not find any Court of Law watering down or declaring illegal the provision of the said Schedule II(5)(e) CGST Act. As such, the GST scheme of law treats the subject activity Supply. We find that the subject payment is not arising as a condition to the Production Sharing Contract, i.e, the subject consideration paid to ANP has not arisen as a condition to the contract. Due to the services provided by ANP to GSPC(J), the subject payment has been made to ANP.

26. Further we note that GSPC(J) referred case laws, which have facts and substantial Questions of law at variance with the subject matter, in the case of Bai Mamubai Trust, Vithaldas Laxmid as Bhatia, Smt. Indu Vithaldas Bhatia vs. Suchitra (109 taxmann.com 200) the issue pertained to (i) liability of GST on services or assistance rendered by the Court Receiver appointed by the Court and (ii) GST liability on royalty or payments under a different head paid by a defendant to the Court Receiver in respect of properties over which a Court Receiver has been appointed. Hon'ble Bombay High Court, in the case of Bai Mamubai Trust, Vithaldas Laxmid as Bhatia, Smt. Indu Vithaldas Bhatia vs. Suchitra (109 taxmann.com 200), has held that GST is not payable on damages/compensation paid for a legal injury. The principle laid down by the Court is that such payment does not have the necessary quality of reciprocity to make it a 'supply' and, therefore, GST is not payable on such amount. The subject matter of GSPC(J), has reciprocity and supply of service from ANP to GSPC(J). We note that the subject supply of service is not envisaged or arising from the Production sharing agreement, but arising as an agreement between ANP and GSPC(J) and is dependent on the Deed of Settlement and Release and therefore we hold that subject settlement amount is not due to a breach of contract of PSC but due to the ANP's obligation to supply said services to GSPC(J). We hold that subject payment is consideration as payment to ANP for the supply of service as expounded in aforementioned paragraphs.

27. In Conspectus of aforementioned findings, we pass the Ruling:

RULING

GSPC (J) is liable to pay IGST, vide Reverse Charge Mechanism, on Import of Subject supply of Service from ANP.

(SANJAY SAXENA)
Member(S)

(ARUN RICHARD)
Member(C)