

AUTHORITY FOR ADVANCE RULING – MADHYA PRADESH**Goods and Service Tax****O/o THE COMMISSIONER, COMMERCIAL TAX,****MOTI BUNGALOW,****MAHATMA GANDHI MARG, INDORE (M.P.) - 452007****e-mail :aar@mptax.mp.gov.in Phone : 0731- 2437315 fax. no. : 0731-2536229****PROCEEDINGS OF THE AUTHORITY FOR ADVANCE RULING**
U/S,98 OF THE GOODS AND SERVICES TAX ACT ,2017**Members Present**1. Shri Manoj Kumar Choubey
Joint Commissioner

Office of the Commissioner of Commercial Tax, Indore Division-1

2. Shri Virendra Kumar Jain
Joint Commissioner

Office of the Commissioner CGST and Central Excise, Indore

GSTIN Number. If any/User-id	23AAACE6607L1ZQ
Name and address of the applicant	Essel Mining & Industries Ltd. 60, West Sultania Road, Opposite Old Secretariat, Koh-E-Fiza, Bhopal, Madhya Pradesh, 462001
Point on which advance ruling sought	Whether the Upfront payment made to state Government is in the nature of deposit or advance for the purpose of determining the time of supply under the GST Law(Section 972(c))
Present on behalf of applicant	Aaditya Kumar Jain, CA
Case Number	...04./2020
Order dated	15.09.2020
Order Number	15/2020

PROCEEDINGS

(Under sub-section (4) of Section 98 of Central Goods and Service Tax Act, 2017 and the Madhya Pradesh Goods & Service Tax Act, 2017)

1. M/s Essel Mining and Industries Limited (hereinafter referred to as 'Applicant') having its registered office at 60, West Sultania Road, Opposite



Old Secretariat, Koh-E-Fiza, Bhopal, Madhya Pradesh, 462001, is engaged in the business of mining and minerals.

2. The applicant is registered under the Central Goods and Services Tax Act, 2017 (CGST Act) and State Goods and Services Tax Act, 2017 (SGST Act), and holds GST registration number 23AAACE6607L1ZQ (in the State of Madhya Pradesh).
3. The provisions of the CGST Act and MPGST Act are identical, except for certain provisions. Therefore, unless a specific mention of the dissimilar provision is made, a reference to the CGST Act would also mean a reference to the same provision under the MPGST Act. Further, henceforth, for the purposes of this Advance Ruling, a reference to such a similar provision under the CGST or MP GST Act would be mentioned as being under the GST Act.
4. **Brief facts of the case :-**
 - 4.1 The applicant is allotted with various mining sites across the country on lease for excavating minerals.
 - 4.2 As per Section 13 of the MMDR Act, the Central Government has enacted Mineral (Auction) Rules, 2015 (hereinafter referred to as Mineral Rules) to regularize the grant of prospecting licences and mining leases in respect of minerals.
 - 4.3 The Directorate of Geology and Mining, Government of Madhya Pradesh had issued a Notice Inviting Tenders for grant of Mining Lease (ML) for Bunder Diamond Block in Chhatarpur District of Madhya Pradesh. The copy of the Tender Document submitted by the applicant with Applicanton as **Annexure -1.**
 - 4.4 Once the entire process is completed, the applicant would be granted mining lease in respect of the Bunder Diamond Block under the provisions of Mines and Minerals (Development & Regulation) Amendment Act, 2015 (hereinafter referred to as MMDR Act) by the Madhya Pradesh State Government.



4.5 For granting the right to excavate diamond, the applicant is required to make various payments to the State Government. The different types of payments are briefly summarized herein below:

Revenue share

4.6 After receipt of mining lease and commencement of production of mineral from the ore, the applicant is required to make monthly payments to the State government in the form of revenue share, which is calculated on the basis of a specified percentage of the published sale price of the minerals dispatched or the minimum production requirement, as specified in the MDPA.

Upfront payment

4.7 The applicant is required to make upfront payment of an amount equal to 0.50% of the value of estimated resources, as specified in the tender document(Annex-I)

"2.26. **"Upfront Payment"** means an amount equal to INR 275,24,84,400 (Rupees Two Hundred Seventy Five Crore Twenty Four Lakh Eighty Four Thousand Four Hundred) payable pursuant to the Auction Rules."

4.8 Rule 11 of the Auction rules dealt with the "upfront payment" for mining lease.

The relevant extract is reproduced hereunder:

"11. Upfront payment for mining lease.- (1) An amount equal to 0.50% of the value of estimated resources shall be the upfront payment.

(2) The upfront payment shall be payable to the State Government in three instalments of ten per cent.; ten percent.; and eighty per cent. as specified in the tender document and shall be adjusted in full at the earliest against the amount payable under sub-rule (3) of rule 8 on commencement of production of mineral as specified in the tender document."

4.9 The said amount has to be paid upfront in three instalments in the manner tabulated below:

Instalment Payment	Corresponding Action/result
First instalment being	The State Government shall issue a letter of intent



10% of the upfront payment;	(LOI) to the preferred bidder.
Second instalment being 10% of the upfront payment;	On fulfilling other condition along with payment of second instalment the "preferred bidder" shall be considered to be the "successful bidder"
Third instalment being 80% of the upfront payment;	Subsequent to execution of the Mine Development and Production Agreement, and upon such payment the State Government shall grant a mining lease to the successful bidder.

4.10 The clause 12.1 of the tender document categorically states that the aforesaid instalment payments are adjusted in full at the earliest against the amount payable as revenue share after commencement of production of mineral. The relevant extract of the same is reproduced hereunder:

"12. Payments by the Successful Bidder

12.1. Upfront Payment

The Upfront Payment paid by the Successful Bidder shall be adjusted in full at the earliest against the amount payable in accordance with the percentage of Value of Mineral Despatched quoted as the Final Price Offer on commencement of production of mineral(s) as specified in MDPA."

4.11 After the upfront payment is made, the state government shall enter into an agreement with applicant for grant of mining lease. The relevant extract of tender document for issuing grant of lease is as under:

3. CONDITION FOR GRANT OF MINING LEASE

3.1. Grant of Mining Lease over the Lease Area shall be conditional upon prior payment of the third instalment of the Upfront Payment which is INR 220,19,87,520 (Rupees Two Hundred Twenty Crore Nineteen Lakh Eighty Seven Thousand Five Hundred Twenty) within a period of 30 days from the Agreement Date.



3.2. Upon such payment, the State Government shall grant a Mining Lease to the Successful Bidder within a period of 30 days from the date of receipt of the payment.

3.3. The date of the commencement of the period for which a Mining Lease is granted shall be the date on which a duly executed Mining Lease is registered.

Performance Security

4.12 The applicant is also required to provide performance security to the State Government in form of irrevocable and unconditional Bank Guarantee of the value of 0.5% of the reassessed Value of Estimated Resources.

4. PERFORMANCE SECURITY AND APPROPRIATION

4.1. Performance Security

4.1.1. The Successful Bidder has provided to the State Government [an irrevocable and unconditional bank guarantee, dated [date] from [name of bank] issued at [place] and payable at Bhopal/ security deposit] for an amount equal to INR 275,24,84,400 (Rupees Two Hundred Seventy Five Crore Twenty Four Lakh Eighty Four Thousand Four Hundred) (the “**Performance Security**”) in the format provided in Schedule III of the Auction Rules.

4.1.2. The amount of Performance Security shall be reassessed every five years commencing from the date of issuance of the Performance Security i.e. [date], so that the amount of Performance Security corresponds to 0.5% of the reassessed Value of Estimated Resources including the value of any newly discovered mineral that may be included in the Mining Lease deed on its discovery.”

Royalty

4.13 In addition to the above, the applicant is required to pay royalty on a monthly basis on a certain percentage of the value of mineral excavated by the applicant from the mines allotted under the MMDR Act, 2015.



- 4.14 The applicant participated in the auction process of Bunder diamond Block. During the Competitive Forward auction process, the Government of Madhya Pradesh declared the applicant as "preferred bidder" for Bunder Diamond Block.
- 4.15 The Government of Madhya Pradesh vide letter dated 11.12.2019 (**Annexure-2 of Application**) declared the applicant as "preferred bidder" and requested the applicant to deposit the First instalment of Upfront payment of Rs. 27,52,48,440/- . The applicant vide letter dated 13.12.2019 (**Annexure-3 of application**) intimated the Government of Madhya Pradesh that the First instalment of Upfront payment of Rs. 27,52,48,440/- has been paid through RTGS on 13.12.2019. The applicant also requested the Government of Madhya Pradesh for issuance of "Letter of Intent" as prescribed in Mining (Auction) Rules, 2015.
- 4.16 On payment of "upfront payment" the Government of Madhya Pradesh vide letter dated 19.12.2019 (**Annexure-4 of application**) has issued the "Letter of Intent" in favour of the applicant.
- 4.17 Even though, the applicant is of the view that the aforesaid monetary payments are in the nature of compulsory extract of money and not for any "supply". The applicant as an abundant caution has decided to discharge GST liability on the upfront payments, at the time when the same are adjusted against the revenue share, under reverse charge mechanism as applicable in terms of SI No. 5 of Notification No. 13/2017-CT(rate) dated 28.06.2017.
- 4.18 According to the applicant, the amount paid as upfront payment is only in the nature of "deposit" and will not be treated as "consideration" towards grant of mining lease license unless the same is adjusted against amount payable as revenue share. Therefore, the time of supply shall be the adjustment of deposit as a consideration and not the payment of deposit in terms of Section 2(31) of the MP GST Act, 2017.

5. QUESTION RAISED BEFORE THE AUTHORITY -

"Whether the upfront payment made by the applicant to the State Government is in the nature of Deposit in terms of Section 2(31) of the MP GST Act, 2017 or is in the nature of advance paid, to determine the time of supply in terms of Section 13(3) of the MP GST Act, 2017 ?"



6. DEPARTMENT VIEW POINT -

The Joint Commissioner(Tech), CGST & Central Excise Hqrs. Bhopal vide letter F.No.IV(16)GST/Misc/Tech/BPL/2020-21 dated 06.08.2020 submitted that any classification of upfront payment in the nature of deposit or advances depends on the nature of contract agreed between the service recipient and service providers. He further submitted that the difference has also been clarified by the appellant Authority for Advance Ruling, West Bengal in case of IN RE: M/s Siemens Limited 2019(12)TMI 1244-APPELLATE AUTHORITY FOR ADVANCE RULING, WEST BENGAL vide its order dated 16.12.2019.

7. RECORD OF PERSONAL HEARING -

Due to Pandemic of COVID-19 virtual hearing was conducted on request of Applicant on 23.07.2020 through Video conferencing. At the time of hearing he reiterated the arguments attached with the application dated 06.03.2020. The summary of the submissions made by the applicant are as under :-

"A.1 In case of services taxable under reverse charge basis, as per Section 13(3) of the MP GST, the time of supply arises on the earlier of - (a) date of payment, or, (b) date immediately following 60 days from raising of invoice or any other document by whatever name called by the supplier.

A.2 Furthermore, proviso to the definition of "consideration" in Section 2(31) of the MP GST Act, 2017 provides that "deposit" received in respect of a supply would not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply.

A.3 In the present case, the "upfront payment" paid by the applicant is in the nature of 'deposit', tax liability would not arise immediately on the date of payment but only when the deposit amount is adjusted against revenue share in terms of section 2(31) of the MP GST Act, 2017.

A.4 The applicant is supposed to receive licensing service from the State Government for extracting minerals for the block intended to be allotted to the applicant. The contracts are high value contracts. The contracts are spread over a



longer period of time. Thus, in order to ensure that the applicant does not back out from the commitment, as per the Auction Rules, an amount is collected from the applicant on the name of "Upfront Payment" and thereafter on fulfilment of specified conditions the agreement for grant of lease would be entered.

A.5 Further, the amount of so called "upfront payment" paid by applicant is shown as "current assets" in books of accounts of the applicant. The same is not booked as expenditure. The amount would have been proportionately transferred to expenditure for service as and when applicant would have been liable to pay Revenue Share to the State Government.

A.6 The amount paid by applicant before entering into agreement is not an "advance" but only a "deposit". In support of this conclusion, the reliance is placed upon decision of the Supreme Court in the case of **Shri Hanuman Cotton Mills and Ors. V. Tata Air Craft Limited AIR 1970 SC 1986** (case law at page 7-21 of the compilation). The aforesaid judgement down the following principles regarding earnest money:

- (1) It must be given at the moment at which the contract is concluded.
- (2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.
- (3) It is part of the purchase price when the transaction is carried out.
- (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.
- (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest

A.7 On careful consideration of the aforesaid principles in the present case, it is clear that in the present case as well;

- a.) The contract shall be entered only once the "upfront payment" is paid to the state government.
- b.) The "upfront payment" as well as "performance security" are in the nature of guarantee for performance of the contract and the applicant shall be binding.



c.) The "upfront payment" shall be adjusted against the revenue share, thus it is a part of purchase price.

d.) In the present case, though the tender document does not specify about the forfeiture of the payment. But the "upfront payment" is for performance of contract and it will not change the color of "deposit". The Forfeiture may be subject to condition that the applicant defaults.

A.8 Hence, the applicant has fulfilled all the conditions specified above. Therefore, the liability to pay GST would arise only when the upfront payment is appropriated to the revenue share. The said sum of money would be treated as "value of taxable supply" only when the same is appropriated towards the revenue share. Hence, no GST is payable on the amount paid by the applicant.

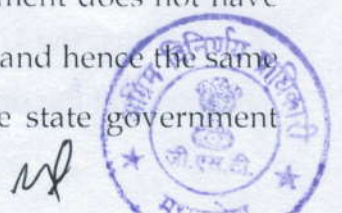
It is well settled that nomenclature cannot decide the nature of the transaction.

B. In the instant case, the amount paid by applicant as "upfront payment" over performance of contract is in the nature of deposit. This would not detract solely based on the aspect that the tender document use a different nomenclature. It is well settled that in taxation laws, it is the substance and not the form of the transaction that is to be looked into. It is not necessary that the contract should be construed purely from the legal aspect only. In support of the aforesaid submission relied is placed on the judgement of **Commissioner of Income Tax V/s Bhojraj Harichand (1946) 14 ITR 277 (Bom).**

THE "UPFRONT PAYMENT" IS IN THE NATURE OF DEPOSIT. THE STATE GOVERNMENT DOES NOT HAVE COMPLETE DOMINION OVER THE AMOUNT RECEIVED FROM THE APPLICANT. HENCE, THE SAME CANNOT BE TREATED AS "ADVANCE."

C.1 The state government does not have the complete dominion over the "upfront payment" received from the applicant.

C.2 In case by any reason, the state government repudiate the contract for the reasons not on account of applicant's default, the state government is liable to refund the "upfront payment" to the applicant. Hence, the state government does not have complete dominion over the amount received from the applicant and hence the same cannot be treated as consideration for provision of service. The state government



will have dominion to the extent the "upfront payment" is adjusted to "Revenue share" as a consideration for rendition of supply.

C.3 Reliance is placed on the judgement of Supreme Court of the United State in case of **Commissioner of Internal Revenue v. Indianapolis Power & Light Company** reported at 493 U.S. 203 (1990). The ratio of the above decision was also followed by the Indian Supreme Court in case of **Siddheshwari Sahakari Sakhar Kharkhana Ltd. v. CIT, 2004-TIOL-76-SC.**

C.4 In support of the aforesaid submissions the reliance is also placed on the ratios laid down in the following judgements :

a.) **Thermax Instrumentation Ltd. v. CCE, Pune-I 2016 (42) STR 19 (Tri-Mum)**

b.) **Thermax Engineering Const. Ltd. 2019 (22) GSTL 80 (Tri. Mum)**

ALTERNATIVELY, THE AMOUNT PAID AS SURETY TOWARDS A CONTRACT WHICH IS CONTINGENT IN NATURE, CANNOT TRIGGER TIME OF SUPPLY OF SERVICE AND THEREFORE LIABILITY OF GST DOES NOT ARISE.

D.1 The applicant has been declared as a "Preferred Bidder" by the State Government. The applicant also deposited the first installment of "upfront payment" to the state government. However, the applicant is yet to deposit the balance of the instalment. Furthermore, the applicant shall be eligible for excavating minerals from the Bunder Diamond block, only after the execution of the mining lease agreement.

D.2 The mining lease agreement will be executed, once certain stipulations have been fulfilled by the applicant. One of the conditions is the payment of the Upfront amount as specified in the tender document.

D.3 Thus, the contract for grant of mining lease is contingent in nature. If the applicant fails to pay the upfront payment, the agreement for grant of lease will not be executed. Thus, the payments made as Upfront payment, is not a consideration for any supply made by the State Government but is the condition for entering into an agreement with the state government for supply of service.

E. Thus, the Upfront Payment is in the nature of deposit and the GST liability shall arise at the time of adjustment of upfront payment to revenue share."

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8. **DISCUSSIONS AND FINDINGS -**

8.1 We have carefully considered the submissions made by the applicant.

8.2 The Applicant is engaged in business of mining and mineral for which they have obtained the various mining sites across the country on lease for excavating minerals. For obtaining the mines, the applicant has made upfront payment to government and the said upfront payment is adjusted in full at the earliest against the amount payable to government against revenue share after commencement of production of minerals. The applicant raised the question whether the upfront payment made by the applicant to the State Government is in the nature of Deposit in terms of Section 2(31) of the MP GST Act, 2017 or is in the nature of advance paid, to determine the time of supply in terms of Section 13(3) of the MP GST Act, 2017 ?”

8.3 The Section 2(31) of the MP GST Act, 2017 and Section 13(3) of MP GST Act, 2017 mentioned in the question raised by the applicant is reproduced below:-

Section 2(31) ‘consideration’ in relation to the supply of goods or services or both includes--

(a) 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;

(b) the monetary value of any act or forbearance, 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;

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

“Section 13(3) of MP GST Act, Time of supply of services -

13(3) In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely:--

(a) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or



(b) the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof by the supplier:

Provided that where it is not possible to determine the time of supply under clause (a) or clause (b), the time of supply shall be the date of entry in the books of account of the recipient of supply:

Provided further that in case of supply by associated enterprises, where the supplier of service is located outside India, the time of supply shall be the date of entry in the books of account of the recipient of supply or the date of payment, whichever is earlier"

8.4 On going through the above mentioned section, We find that the Section 2(31) of MP GST Act is in respect of definition of "consideration" and Section 13(3) of MP GST Act is in respect of time of supply of service. The definition of consideration is speaks about the value of service and proviso to section 2(31) of CGST Act, is about the deposit not about advance. The liability to pay GST on services shall arise on the basis of time of supply of service not from the definition of consideration given in Section 2(31) of MP GST Act. In this case, the applicant is liable to pay GST on the amount of revenue share under reverse charge mechanism as applicable in terms Sr.No.5 of of Notification No.13/20017-CT(rate) DATED 28.06.2017 and there is specific section 13(3) of MP GST Act in respect of time of supply of service for the person who are paying GST under the reverse charge mechanism. Hence, as per Section 13(3) of MP GST, the time of supply is date of payment as entered in the books of account of the recipient i.e. Government or the date on which the payment is debited in his(Applicant) bank account whichever is earlier.

8.5 In respect of whether upfront payment is advance or deposit amount. We find that there is a **difference between advance** money and **deposit** amount.

The **advance** is received toward goods or services to be supplied in future. On the other hand **deposit** money is received only as a security. It is generally not used by the supplier **in the** course of supply of goods or services. The upfront payment made by the applicant is adjusted toward the services to be supplied in future after commencement of excavating minerals which clearly shows that the said payment is



and advances against the future payment, hence the section 2(31) of MP GST Act which speaks about the deposit is not applicable in the case of applicant.

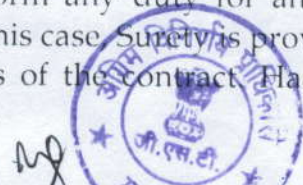
8.6 We find that in this case the upfront payment is payable in three installments and after payment of third installment, the State Government shall grant the mining lease to the successful bidder. We have gone through the tender and other documents submitted by the applicant and found that there is no clause of refund of that amount after allotment of mines on lease, hence the payment made to the state government is no more deposit after allotment of mines but is advance which will be adjusted against the future payment of revenue share amount. In this case, the mining lease is granted after the payment of third installment. The upfront payment made to the state government is treated as advance against the revenue share from the date of allotment of mines and the GST is payable on this advance from the date of allotment of mines to the applicant.

8.7 On going through the said cases laws cited by the Applicant, We find that the case law cited by the applicant are not squarely applicable in the instant case as the facts and circumstances of the case are distinguishable.

8.8 As per the proviso to 2(31), a deposit would be consideration if the supplier applies the deposit as consideration. This is not same as application of the deposit towards consideration. Thus, an amount would attain the character of "Deposit not attracting tax" where the amount is not to be adjusted against the consideration unless an event occurs or does not occur. In this case, the upfront payment is to be adjusted against consideration at the first available opportunity. Thus the supplier, i.e. GoMP is applying the deposit as consideration.

The applicant has reasoned that the supplier, i.e. GoMP does not have complete dominion on the amount of Upfront Payment and therefore, it cannot be treated as advance. In our considered opinion, dominion over an amount of payment or liability to refund back a sum received in case of cancellation of a contract does not alter the nature of the money given. As per the terms of a contract, both the security deposit and advance may have to be paid back. Therefore, dominion over moneys advanced does not change the character of the amount paid upfront.

Again, a **surety** is a person giving a guarantee in a **contract** of guarantee. A person who takes responsibility to pay a sum of money, perform any duty for another person in case that person fails to perform such work. In this case, Surety is provided by way of Performance Guarantee under the provisions of the contract. Had the



upfront payment been been surety for the contract, it would not have been adjusted at the earliest but at the end of the contract.

8.9 From the facts and circumstances as discussed above, we find that there is clear provision in law for liability of GST in case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis in case of applicant under the provision of Section 13(3) of MP GST Act, 2017, therefore we hold that the applicant is liable to pay service tax from the date of allotment of mines on lease by the government as the payment made by the Applicant to state Government is an advance.

9. RULING

9.1 Considering the Arguments and submissions made by the Applicant in respect of the Question raised before this authority, it is ruled that the upfront payment made to the state Government is in the nature of advance from the date of allotment of mines on lease to the applicant for the purpose of determining the time of supply under GST Law as per the Section 13(3) of MP GST Act, 2017 and hence applicant is liable to pay service tax from the date of allotment of mines on lease by the government as the upfront payment made by the Applicant to state Government is an advance

9.2 The ruling is valid subject to the provisions under Section 103(2) until and unless declared void under Section 104(1) of the GST Act.

(Manoj Kumar Choubey)
(Member)

(Virendra Kumar Jain)
(Member)

Copy to:- No. 04/2020/AA-R/R-28/36

1. Applicant
2. The Principal Chief Commissioner, CGST & Central Excise, Bhopal Zone, Bhopal
3. The Commissioner(SGST) Indore
4. The Commissioner, CGST & Central Excise, Indore
5. The Concerned Officer
6. The Jurisdictional Officer - State/Central

INDORE dated 15/09/2020

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