

WEST BENGAL AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX
14 Beliaghata Road, Kolkata – 700015
(Constituted under section 96 of the West Bengal Goods and Services Tax Act, 2017)

BENCH

Mr Brajesh Kumar Singh, Joint Commissioner, CGST & CX
Mr Joyjit Banik, Senior Joint Commissioner, SGST

Preamble

A person within the ambit of Section 100 (1) of the Central Goods and Services Tax Act, 2017 or West Bengal Goods and Services Tax Act, 2017 (hereinafter collectively called 'the GST Act'), if aggrieved by this Ruling, may appeal against it before the West Bengal Appellate Authority for Advance Ruling, constituted under Section 99 of the West Bengal Goods and Services Tax Act, 2017, within a period of thirty days from the date of communication of this Ruling, or within such further time as mentioned in the proviso to Section 100 (2) of the GST Act.

Every such appeal shall be filed in accordance with Section 100 (3) of the GST Act and the Rules prescribed thereunder, and the Regulations prescribed by the West Bengal Authority for Advance Ruling Regulations, 2018.

Name of the applicant	Pioneer Associates
Address	Building No. 12/A/1/35, Shreyasi Apartment, 1 st Floor, Station Toad, Khardah North 24 Parganas, Pin Code 700117
GSTIN	19AAMFP7725R1Z5
Case Number	11 of 2021
ARN	AD190521001911H
Date of application	July 05, 2021
Order number and date	10/WBAAR/2021-22 dated 30/09/2021
Applicant's representative heard	Mr. Pradip Ghosh, Authorized Representative

1.1 At the outset, we would like to make it clear that the provisions of the Central Goods and Services Tax Act, 2017 (the CGST Act, for short) and the West Bengal Goods and Services Tax Act, 2017 (the WBGST Act, for short) have the same provisions in like matter except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the WBGST Act. Further to the earlier, henceforth for the purposes of these proceedings, the expression 'GST Act' would mean the CGST Act and the WBGST Act both.

1.2 The applicant is stated to be engaged in the business of construction of residential flats within the Khardah Municipal area in the district of North 24 Paraganas, West Bengal.

1.3 The applicant submits that he has some ongoing projects construction of which had started before 01.04.2019 and the applicant has opted to pay tax at old GST rates in respect of such ongoing projects.

1.4 The applicant submits further that the definition of 'affordable residential apartment' has been changed w.e.f. 01.04.2019 vide Notification No.03/2019-Central Tax (Rate) dated 29.03.2019.

1.5 The applicant has made this application under sub-section (1) of section 97 of the GST Act and the rules made there under raising following questions vide serial number 14 of the application in FORM GST ARA-01:

Whether this new definition is applicable in respect of flats (having carpet area of 60 sqm and value up to Rs. 45 lacs) of ongoing projects and collect tax @ 8% on all advances received after 01.04.2019 where:

- (i) *1st booking money received after 01.04.2019; and*
- (ii) *1st booking money received before 01.04.2019*

1.6 The aforesaid question on which the advance ruling is sought for is found to be covered under clause (b) of sub-section (2) of section 97 of the GST Act.

1.7 The applicant states that the question raised in the Application has neither been decided by nor is pending before any authority under any provision of the GST Act.

1.8 The officer concerned from the Revenue has raised no objection to the admission of the Application.

1.9 The Application is, therefore, admitted.

2. Submission of the applicant

2.1 In course of personal hearing, the authorised representative of the applicant has submitted (i) a detailed written submission, (ii) photocopy of receipted documents in support of submission of Annexure-IV before the JCCT, Commercial Tax, Barrackpore Jurisdiction Office in respect of 11 (eleven) projects, (iii) declaration by the applicant towards non-receipt of completion certificate in respect of 06(six) projects out of aforesaid 11(eleven) projects, (iv) certificate of commencement, project-wise carpet area certificate and project-wise first application for booking of flats along with copy of money receipt in respect of said 06(six) projects.

2.2 The applicant, vide the written submission, has contended that prior to 01.04.2019, the "Affordable Housing" is defined as a housing project using at least 50% of the Floor Area Ratio (FAR)/ Floor Space Index (FSI) for dwelling units with carpet area of not more than 60 square meters.

2.3 Accordingly, a housing project using at least 50% of the Floor Area Ratio (FAR)/ Floor Space Index (FSI) for dwelling units with area of not more than 60 square meters has been given the infrastructure status by the Government of India and therefore would be eligible for the benefit of reduced rate of 12% (effectively 8% after availing 1/3rd deduction towards value of land) with effect from 25.01.2018.

2.4 However, from 01.04.2019, the definition of 'affordable housing' has been changed. The new definition of Affordable Housing under Notification No. 3/2019-Central Tax (Rate) dated

29.03.2019 reads as ‘ a residential apartment in a project which commences on or after 1st April, 2019, or in an ongoing project in respect of which the promoter has not exercised option in the prescribed form to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) against serial number 3, as the case may be, having carpet area not exceeding 60 square meter in metropolitan cities or 90 square meter in cities or towns other than metropolitan cities and for which the gross amount charged is not more than forty five lakhs rupees.’

2.5 Further, the term ‘ongoing project’, according to the said Notification shall mean a project which meets all the following conditions, namely-

- (a) commencement certificate in respect of the project, where required to be issued by the competent authority, has been issued on or before 31st March, 2019, and it is certified by any of the following that construction of the project has started on or before 31st March, 2019: -
 - (i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or
 - (ii) a chartered engineer registered with the Institution of Engineers (India); or
 - (iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority.
- (b) where commencement certificate in respect of the project, is not required to be issued by the competent authority, it is certified by any of the authorities specified in sub-clause (a) above that construction of the project has started on or before the 31st March, 2019;
- (c) completion certificate has not been issued or first occupation of the project has not taken place on or before the 31st March, 2019;
- (d) apartments being constructed under the project have been, partly or wholly, booked on or before the 31st March, 2019.

2.6 The applicant argues that if any of the four conditions, as stated above, is not satisfied, the ongoing project will be treated as new project and the new definition of ‘affordable housing’ will be applicable.

2.7 Thus the applicant is of the view that in respect of his projects where booking money is received after 01.04.2019, the new definition of affordable housing will be applicable. The applicant further submits that as the 1st booking money is received after 01.04.2019, the project will be treated as new project and consequently the GST rate will be 1% or 5% (after availing 1/3rd deduction towards value of land) respectively.

2.8 Furthermore, the applicant has contended that as he has exercised option to pay GST at the rate specified for item (ie) and (if) in respect of ‘ongoing projects’ within the due date, the old definition of affordable housing is applicable in respect of flats of the ongoing projects. Therefore, the applicant can collect tax @ 8% on all flats having carpet area up to 60 sqm as specified in sub-item (da) of item (v) under entry serial number 3 of the Notification No.01/2018-Central Tax (Rate) dated 25.01.2018.

2.9 In support of his contention, the applicant has placed his reliance on an Advance Ruling pronounced by the Maharashtra Authority for Advance Ruling in the case of Prajapati Developers [Order No.GST-ARA-02/2018-2019/B-58 Mumbai dated 03.07.2018] where the AAR held that the construction services provided by the applicant qualifies for the reduced CGST rate of 6% vide the entry serial number as referred in the immediate preceding para.

3. Submission of the Revenue

3.1 The concerned officer from the revenue has furnished a written submission stating as under:

- Flats having carpet area of 60sqm and value up to 45 lacs are affordable residential apartment in metropolitan cities and flats having carpet area of 90sqm and value up to 45 lacs are affordable residential apartment in non-metropolitan cities. So, flats mentioned in the application are all affordable residential apartments.
- As per Notification No 03/2019-Central Tax (Rate) dated 29.03.2019, for all ongoing affordable residential projects (which are booked on or before 31-03-2019), if the promoter or builder exercises one-time option in the prescribed form (Annexure IV), within stipulated time, for paying tax at the old GST rate, he will pay the effective rate of GST @ 8% with ITC.
- So, for all flats for which first booking money is received by the applicant before 01-04-2019, should be treated as ongoing projects and therefore if the applicant exercised his onetime option as prescribed in the said notification fulfilling all formalities, he will pay the effective rate of GST @ 8% with ITC for all advances received on account of those residential apartments.
- However, it became immaterial in case of projects started on or after 01-04-2019, whether the applicant exercised this onetime option before his jurisdictional officer to pay GST at the old rate for all projects started on or after 01-04-2019.
- Flats for which the applicant received first booking money after 01-04-2019, should not be treated as on-going projects and in such cases, applicant will have to pay GST @ 1% (without ITC on total consideration) on all the advances received for all affordable residential apartments, as per Notification No 03/2019 dated 29.03.2019.

4. Observations & Findings of the Authority

4.1 We have gone through the records of the issue as well as submissions made by the authorised representatives of the applicant during the course of personal hearing. We have also considered the submission made by the officer concerned from the Revenue.

4.2 The issue involved in the instant case is to decide whether a promoter can pay tax at old GST of 12% (effective rate is 8%) on all advances received after 01.04.2019 in respect of apartments which qualifies the definition of affordable residential apartments as specified in Notification No 03/2019- Central Tax Rate) dated 29.03.2019.

4.3 Initially, construction services under Heading 9954 were taxable @ 18% [CGST @ 9% + WBGST @ 9%] vide entry serial number 3 of the Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 [corresponding West Bengal State Notification No. 1135 F.T. dated 28.06.2017]. The said entry read as follows:

<i>Sl No.</i>	<i>Chapter, Section or Heading</i>	<i>Description of Service</i>	<i>Rate (per cent)</i>	<i>Condition</i>
---------------	------------------------------------	-------------------------------	------------------------	------------------

3	Heading 9954 (Construction services)	(i)	Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	9	-
		(ii)	composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017.	9	
		(iii)	construction services other than (i) and (ii) above.	9	

Para 2 of the Notification stood as under:

In case of supply of service specified in column (3) of the entry at item (i) against serial no. 3 of the Table above, involving transfer of property in land or undivided share of land, as the case may be, the value of supply of service and goods portion in such supply shall be equivalent to the total amount charged for such supply less the value of land or undivided share of land, as the case may be, and the value of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply.

Explanation. – For the purposes of paragraph 2, “total amount” means the sum total of, -
(a) consideration charged for aforesaid service; and
(b) amount charged for transfer of land or undivided share of land, as the case may be.

4.4 The aforesaid notification has been amended from time to time. As per Sl.No.3, item (j), in Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017 as amended by Notification No. 03/2019-Central Tax (Rate), dated 29-3-2019, the Central Tax Rate of 0.75% (effective tax rate being 0.5% without ITC) is applicable for the following:

*‘Construction of affordable residential apartments by a promoter in a Residential Real Estate Project (herein after referred to as RREP) which commences on or after 1st April, 2019 or in an ongoing RREP in respect of which the promoter has not exercised option to pay central tax on construction of apartments at the rates as specified for item (ie) or (if) below, as the case may be, in the manner prescribed therein, intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.
(Provisions of paragraph 2 of this notification shall apply for valuation of this service)’*

4.5 The aforesaid entry thus prescribes that a promoter shall pay tax @1.5% w.e.f. 01.04.2019 (effective rate of 1% after allowing 1/3rd abatement for land) on intra-state supply of:

- (i) Construction of affordable residential apartments in a Residential Real Estate Project which commences on or after 1st April, 2019; or
- (ii) an ongoing RREP in respect of which he has not exercised option to pay central tax and state tax on construction of apartments at the rates as specified for item (ie) or (if).

4.6 It is therefore relevant to have a look at the description of services and the rate of tax as specified for item (ie) and (if) which is reproduced below:

SI No.	Chapter, Section or Heading	Description of Service	Rate (per cent)	Condition
(1)	(2)	(3)	(4)	(5)
	Heading 9954 (Construction services)	(ie) Construction of an apartment in an ongoing project under any of the schemes specified in sub-item (b), sub-item (c), sub-item (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and subitem (da) of item (v); and sub-item (c) of item (vi), against serial number 3 of the Table, in respect of which the promoter has exercised option to pay State tax on construction of apartments at the rates as specified for this item. (Provisions of paragraph 2 of this notification shall apply for valuation of this service)	6	Provided that in case of ongoing project, the registered person shall exercise one time option in the Form at Annexure IV to pay central tax on construction of apartments in a project at the rates as specified for item (ie) or (if), as the case may be, by the 10th of May, 2019#; Provided also that where the option is not exercised in Form at annexure IV by the 10th of May, 2019#, option to pay tax at the rates as applicable to item (i) or (ia) or (ib) or (ic) or (id) above, as the case may be, shall be deemed to have been exercised;
		(if) Construction of a complex, building, civil structure or a part thereof, including, – (i) commercial apartments (shops, offices, godowns etc.) by a promoter in a REP other than RREP, (ii) residential apartments in an ongoing project, other than affordable residential apartments, in respect of which the promoter has exercised option to pay State tax on construction of apartments at the rates as specified for this item in the manner prescribed herein,	9	Provided also that invoices for supply of the service can be issued during the period from 1st April 2019 to 10th May 2019# before exercising the option, but such invoices shall be in accordance with the option to be exercised.;

		<p>but excluding supply by way of services specified at items (i), (ia), (ib), (ic), (id) and (ie) above intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.</p> <p>Explanation. -For the removal of doubt, it is hereby clarified that, supply by way of services specified at items (i), (ia), (ib), (ic), (id) and (ie) in column (3) shall attract central tax prescribed against them in column (4) subject to conditions specified against them in column (5) and shall not be levied at the rate as specified under this entry.</p> <p>(Provisions of paragraph 2 of this notification shall apply for valuation of this service</p>	
			# The date has been extended to 20 th of May, 2019 vide Notification No. 10/2019-Central Tax (Rate) dated 10.05.2019 [West Bengal State Notification No. 771 F.T. dated 10.05.2019]

4.7 We find from the documents submitted that the applicant had filed option on 10-5-2019 before the JCCT, Commercial Tax, Barrackpore Jurisdiction Office in respect of 11 (eleven) projects. In course of personal hearing, the authorised representative has furnished a written statement showing particulars of such ongoing projects as on 31.03.2019 in a TABLE against which the applicant has exercised option in Annexure-IV. He has submitted that the question raised in the instant application for advance ruling is related to 06(six) projects only. The said TABLE is reproduced herein under:

Sl No.	Name of the project	Date of commencement	Total Floor Space excluding Balcony (sqm)	Total area having dwelling unit not exceeding 60 sqm	Status	Remarks
1	SASHI PLAZA	31-12-18	693.88	432.83	AFFORDABLE	1 st booking on 19-06-2018
2	BANOLATA APARTMENT	12-01-18	592.66	474.88	AFFORDABLE	1 st booking on 04-10-

						2017
3	KALYANI RESIDENCY	X	X	X	NON-AFFORDABLE	NOT RELEVANT TO OUR QUESTION
4	TARUCHAYA APARTMENT	X	X	X	NON-AFFORDABLE	NOT RELEVANT TO OUR QUESTION
5	USHA PLAZA	29-01-19	732.28	485.18	AFFORDABLE	1 st booking on 14-03-2019
6	INDRADHANUSH RESIDENCY	28-04-18	663.10	409.90	AFFORDABLE	1 st booking on 19-06-2018
7	KEDAR BHABAN	X	X	X	NON-AFFORDABLE	NOT RELEVANT TO OUR QUESTION
8	MAA SARADA BHABAN	01-02-19	753.29	753.029	AFFORDABLE	1 st booking on 16-01-2019
9	SARJURAM NIBAS	13-08-18	800.55	457.26	AFFORDABLE	1 st booking on 01-01-2019
10	ASHA PLAZA	X	X	X	CC OBTAINED BEFORE 01-04-2019	NOT RELEVANT TO OUR QUESTION
11	MANASHI APARTMENT	X	X	X	NON-AFFORDABLE	NOT RELEVANT TO OUR QUESTION

4.8 It has been stated earlier that the authorised representative has submitted certificate of commencement in respect of 06(six) projects involved in the instant case. The said certificates appear to have been issued under rule 28 of the West Bengal Municipal (Building) Rules, 2007 under West Bengal Municipal Act, 1993 by the L.B.S.. The date of commencement, as per the certificates, is found to be as under:

Name of the Project	Date of commencement
SASHI PLAZA	31.12.2018
BANOLATA APARTMENT	12.01.2018
USHA PLAZA	29.01.2019
INDRADHANUSH APARTMENT	28.04.2018
MAA SARADA BHAWAN	01.02.2019
SARJURAM NIBAS	13.08.2018

4.9 Here all the 06(six) projects are found to have been commenced before 01.04.2019. Further, the promoter has received 1st booking money before 01.04.2019 and completion certificates in respect of all the six projects have also not been issued on or before the 31st March, 2019. Thus, the said projects satisfy all the conditions of 'ongoing projects' as defined in Notification No.03/2019-Central Tax (Rate) dated 29.03.2019.

4.10 It is reiterated that in respect of an ongoing project, a promoter shall pay tax @ 1.5% w.e.f. 01.04.2019 (effective rate of 1% after allowing 1/3rd abatement for land) if he has not exercised option to pay central tax and state tax on construction of apartments at the rates 12% or 18% respectively (effective rate of 8% and 12% respectively), as the case may be.

4.11 But, in the instant case, the applicant has exercised option to pay tax at old rates. Hence, the effective tax rate of 1% or 5%, as the case may be, as introduced vide Notification No.03/2019-Central Tax (Rate) dated 29.03.2019 is found not to be applicable in respect of the said 06(six) projects, as discussed. The rate notification is amply clear to specify that liability to pay tax at old GST rate which was leviable prior to 01.04.2019 upon filing of option in Annexure-IV and levy of tax at new rate introduced w.e.f. 01.04.2019 is mutually exclusive. There is no scope to pay tax at both the rates on or after 01.04.2019.

4.12 In the instant application, the applicant has sought advance ruling in respect of applicability of the definition of 'Affordable Housing Project' which we presume, would be 'affordable residential apartment' since the applicant himself has cited the said definition in his written submission. In this context, we like to refer that Department of Revenue (Tax Research Unit), Ministry of Finance, Government of India has issued FAQs under F. No. 354/32/2019-TRU dated 7-5-2019 for guidance and easy understanding of all stakeholders in the real estate sector pursuant to changes made vide Notification No. 3/2019-Central Tax (Rate) dated 29.03.2019. Question Nos. 2 and 4 of the said FAQ's and the answer given is reproduced below:

<p>Question No. 2: What is an affordable residential apartment?</p>	<p>Answer: Affordable residential apartment is a residential apartment in a project which commences on or after 01-04-2019, or in an ongoing project in respect of which the promoter has opted for new rate of 1% (effective from 01-04-2019) having carpet area up to 60 square meter in metropolitan cities and 90 square meter in cities or towns other than metropolitan cities and the gross amount charged for which, by the builder is not more than forty-five lakhs rupees. [Cities or towns in the notification shall include all areas other than metropolitan city as defined, such as villages.]</p> <p>In an ongoing project in respect of which the promoter has opted for new rates, the term also includes apartments being constructed under the specified housing schemes of Central or State Governments.</p> <p>[Metropolitan cities are Bengaluru, Chennai, Delhi NCR (limited to Delhi, Noida, Greater Noida, Ghaziabad, Gurgaon, Faridabad), Hyderabad, Kolkata and Mumbai (whole of MMR) with their geographical limits prescribed by Government.]</p>
<p>Question No. 4: Does a promoter or a builder has option to pay tax at old rates of 8% & 12% with ITC?</p>	<p>Answer: Yes, but such an option is available in the case of an ongoing project. In case of such a project, the promoter or builder has option to pay GST at old effective rate of 8% and 12% with ITC.</p> <p>To continue with the old rates, the promoter/ builder has to exercise one time option in the prescribed form and submit the same manually to the jurisdictional Commissioner by the 10th of May, 2019.</p> <p>However, in case where a promoter or builder does not exercise option in the prescribed form, it shall be deemed that he has opted for new rates in respect of ongoing projects and accordingly new rate of GST i.e. 5% / 1% shall be applicable and all the provisions of new scheme</p>

	<p>including transitional provisions shall be applied.</p> <p>There is no such option available in case of projects which commence on or after 01.04.2019. Construction of residential apartments in projects commencing on or after 01.04.2019 shall compulsorily attract new rate of GST @ 1% or 5% without ITC.</p>
--	--

4.13 For reasons as discussed above, we are of the opinion that the definition of ‘affordable residential apartment’ is not applicable in respect of the 06(six) projects involved in the instant case for the following reasons:

- (i) Affordable residential apartment shall mean a residential apartment in a project which commences on or after 1st April, 2019. But here all the projects are found to have been commenced before 1st April, 2019;
- (ii) Affordable residential apartment shall mean a residential apartment in an ongoing project in respect of which the promoter has not exercised option to pay tax at the rates as specified for item (ie) or (if) i.e., old GST rates. But in the instant case, the promoter has exercised option to pay central tax and state tax at the rate which was leviable prior to 01.04.2019.

4.14 We also find that the advance ruling pronounced by the Maharashtra Authority for Advance Ruling in the case of Prajapati Developers as relied upon by the applicant has no applicability in respect of the instant case since the ruling was pronounced prior to issuance of Notification No. 3/2019 – Central Tax (Rate) dated 29.03.2019 and therefore the definition of ‘affordable housing apartment’ and levy of tax at a new rate was not a matter of issue in the said case.

In view of the above discussions, we rule as under:

RULING

The definition of ‘affordable residential apartment’ is not applicable in respect of flats having carpet area not exceeding 60 square meter in metropolitan cities or 90 square meter in cities or towns other than metropolitan cities and for which the gross amount charged is not more than forty five lakhs rupees, in an ongoing project in respect of which the promoter has exercised option to pay tax at old GST rates.

Where a promoter exercises option in Annexure-IV to pay tax at the rate as specified for item (ie) or (if) against serial number 3 of the Notification No. 3/2019 – Central Tax (Rate) dated 29.03.2019, there is no scope to pay tax at a reduced rate of 1% or 5% (effective rate), as the case may.

(BRAJESH KUMAR SINGH)

Member

West Bengal Authority for Advance Ruling

(JOYJIT BANIK)

Member

West Bengal Authority for Advance Ruling