

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)

Members present:

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	SHREE POWERTECH
Address	WARD NO 6, ARAMBAGH, HOOGHLY, West Bengal, Pin Code- 712601
GSTIN	19ACUFS4143C1ZV
Case Number	WBAAR 17 of 2022
ARN	AD190622005512F
Date of application	July 04, 2022
Jurisdictional Authority (State)	Howrah Charge
Jurisdictional Authority (Central)	Singur Division, Howrah Commissionerate
Order number and date	12/WBAAR/2022-23 dated 21.10.2022
Applicant's representative heard	Mr. Rishabh Mishra, C.A Mr. Arup Dasgupta, C.A

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 rendering various 'works contract' services related to modification/construction, renovation & maintenance of roads & highway projects and works connected with and incidental thereto. The applicant has been awarded a sub-contract from M/s KCC Buildcon Private Limited for shifting of electrical utilities for construction of 'Proposed 4-Laning of Barasat – Krishnagar Section of NH-34 Project on EPC mode.

1.3 Prior to the amendment made vide Notification No. 03/2022-Central Tax (Rate) dated 13.07.2022, serial number 3(iv)(a) of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017, as amended from time to time, would read as follows:

Sl No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of services	Rate (per cent)	Condition
3	Heading 9954 (Construction services)	(iv) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,— (a) a road, bridge, tunnel, or terminal for road transportation for use by general public;	6	-

1.4 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 question vide serial number 14 of the application in FORM GST ARA-01:

Whether in the facts and circumstances of the case, does the activity carried out by the applicant falls under Heading 9954: Entry No. 3(iv)(a) of Notification No. 11/2017-CT(R) and liable to tax @ 12%?

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

1.6 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.

1.7 The officer concerned from the revenue has raised no objection to the admission of the application.

1.8 The application is, therefore, admitted.

2. Submission of the Applicant

2.1 The applicant submits that the Government of India entrusted the development, maintenance and management of National Highway No. 34 including the section from km 48.533 to km 115.272 (approx. 66.72 km) to the National Highway Authorities of India (NHAI).

2.2 The NHAI resolved to take up the Balance work for construction of 4 laning of Barasat - Krishnagar section of NH-34 from km 48.533 to km 115.272 (length 66.72 km) pertaining to Nadia District in the state of West Bengal on EPC Mode (hereinafter called the "NH 34 on Engineering, Procurement, Construction ("EPC").

2.3 The NHAI accordingly invited the proposals (the "Request for Proposals" or "RFP") from the eligible bidders as per the technical and commercial terms and conditions prescribed in the RFP for undertaking the Project.

2.4 After evaluation of the bids received, the NHAI accepted the bid of the selected bidder and issued its Letter of Acceptance (hereinafter called the "LOA") to the selected bidder for construction of the above section of NH 34.

2.5 The applicant submits that in pursuance of the LOA issued by the NHAI to M/s KCC Buildcon Private Limited, having registered office at BU-5, SFS Flats, Outer Ring Road, Pitampura, Delhi –110034 (herein after referred to as, the contractor) for execution of the balance work for construction of 4-laning of Barasat-Krishnanagar section of NH-34 in the state of West Bengal, the contractor has issued 'Work order for sub-contracting of shifting of electrical utilities in respect of Proposed 4-laning of NH-34 Project' to the applicant.

2.6 The brief scope of work, arising out the aforesaid sub-contract from M/s KCC Buildcon Private Limited is as follows:

- (a) Shifting of Electrical Utility within the ROW or as directed by NHAI/KCC Buildcon Representative, as per approved estimates of NHAI in Barasat to Krishnagar Km. 48.533 to Km. 115.272 in the state of West Bengal.*
- (b) The Scope of Works shall inter alia include conducting complete joint survey with the Relevant Utility Board of Project site for identification of utilities which are required to be shifted. The Sub-Contractor shall be responsible for preparing and seeking*

approval of drawings made on the basis of the survey of the Project site and shall also be responsible for procurement of material, etc. at its own cost as per Standards & Specifications. Further, it shall be the obligation of the Sub-Contractor to erect material/lines, including but not limited to shifting of utilities and employ the necessary manpower/machines/equipment at its own cost. Testing of lines including seeking approvals for Relevant Utility Board as applicable shall also be done by the Sub-Contractor. The Sub-Contractor shall handover the lines/utilities to Relevant Utility Board, as may be applicable and remove old materials from the Project site and stack/hand over to the Relevant Utility Board or as directed by KCC Buildcon Pvt. Ltd., as the case may be.

- (c) *All the temporary works which means all temporary works of every kind and nature required to be executed for the successful execution and completion of the Works, to the satisfaction of the Contractor and the Authority. Such Temporary Works shall also include any other temporary works which in the opinion of the KCC/Authority/Relevant Utility Board, the Sub-Contractor is required to execute.*

2.7 In the light of the foregoing activities being undertaken by him, the applicant contends as under:

- a) National Highways Authority of India (in short 'NHAI') is set up by an Act of Parliament as an Authority for the development, maintenance and management of National Highways and for matter connected therewith or incidental thereto.
- b) The National Highway Authority of India ('NHAI') is an Agency of the Central Government which carries out the function of construction of roads and matters incidental thereto. The task of development of highways by the NHAI is a multi-faceted process which involves various phases that must be carried out. In such cases, organizations like the NHAI may get this work executed through contractors.
- c) The Applicant is currently undertaking electrical utility shifting which is directly connected with construction of 4-Laning of Barasat-Krishnagar section of NH-34 in the state of West Bengal. The existing power transmission lines are crossing the National Highways and for the purpose of widening of these roads to four lanes, these power lines are required to be shifted, to obtain safe clearances and safety purpose.
- d) The said work of utility shifting is being done by NHAI by appointing contractors, who in turn, may execute the work themselves or appoint sub-contractors.

e) That in terms of Notification No. – 11/2017 – Central Tax (Rate) dated 28.06.2017, as amended from time to time (here-in-after referred to as the 'Rate Notification'), the supply of works contract services has been classified under Heading 9954 (Construction Services). That under the said rate notification, the rate of GST applicable in relation to construction services with respect to 'construction of roads' has been given in Heading 9954 - Entry No. 3(iv)(a) as 6%. Similar rates have been prescribed under West Bengal Goods and Services Tax Act, 2017 ("WBGST Act"). On a combined reading of notifications issued under CGST Act and WBGST Act, the effective rate of tax comes to 12% on construction of roads.

f) The relevant text of the rate notification is reproduced as below:

Sl. No	Chapter, Section or Heading	Description of Service	Rate (percent)	Condition
(1)	(2)	(3)	(4)	(5)
1	Chapter 99	All Services		
2	Section 5	Construction Services		
3	Heading 9954 (Construction services)	<p>(iv) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, [other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above], supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of, —</p> <p>(a) a road, bridge, tunnel, or terminal for road transportation for use by general public;</p> <p>(b)</p> <p>(c)</p>	6	-

g) "Works Contract" as defined in section 2(119) of the CGST/WBGST Act 2017 is as follows: -

(119) "works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;

- h) As per the above definition, the essential requirements for a contract to qualify as a 'works contract' are:
- a contract for
 - building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning
 - of immovable property and
 - ownership of goods used for execution of contract is transferred.

Therefore, the above-mentioned criterion needs to be fulfilled for a contract to be regarded as a Works Contract.

- i) That since there exists a written agreement between the applicant and the contractor for a part of the work of the highway expansion project, it is clear that there exists a contract between the parties for such work. Further, a contract will be termed as 'works contract' only when it is for construction of immovable property. Therefore, it is imperative to analyse definition of 'immovable property'. The meaning of term 'immovable property' is not provided under the GST law. Therefore, the same has to be borrowed from allied laws, which is reproduced below for reference:

Section 3(26) of the General Clauses Act 1897 states that - "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;

- j) That in the present case, the construction at the site of the highway project including utilities like cables and wires are fastened to the earth by using cement and concrete or by using nuts and bolts and if in case they are required to be shifted from one location to another then they are first dismantled and then re-erected at another site. The scope of work of the applicant also involves activities like drilling through the ground to lay down such new electrical lines. That within the scope of work, the applicant will also have to erect structures commonly used for transmission of power through electrical conductors on which conductors and electric wires can be affixed at a suitable height above the ground. Structurally these towers are required to be

able to resist loads such as wind load, snow load and self-weight. In order to erect these structures, it is clear that the previously existing structures will be dismantled and thereafter new structures shall be erected.

- k) In light of the above cited law and interpretation, it is submitted that the activity proposed to be undertaken by the applicant will be in the nature of a 'works contract' in terms of section 2(119) of the CGST/WBGST Act 2017 since the supply involves transfer of goods along with construction services and such supply is resulting in the formation of immovable property.
- l) The scope of the work of NH-34 highway project, in its Article – 9, inter-alia, also includes:

Shifting of obstructing utilities

9.2 The Contractor shall, in accordance with Applicable Laws and with assistance of the Authority, undertake the work of shifting of any utility (including electric lines, water pipes, gas pipelines and telephone cables) to an appropriate location or alignment, if such utility or obstruction adversely affects the execution of Works or Maintenance of the Project Highway in accordance with this Agreement. The cost of such shifting, as per estimates prepared by the entity owning the utility and approved by the Authority, shall be reimbursed by the Authority to the Contractor. The scope of work of such shifting of Utilities shall be as indicated in Schedule-B-1. In the event of any delay of such shifting on the part of the contractor, no extension of time for completion of the project and no claims, in any manner, shall be admissible on this account against the Authority.

- m) That on a reading of Article – 9 of the Agreement dated 20.05.2020, it is clear that each component of the scope of work as listed in the Agreement has to be carried out by the contractor in order for the Agreement to be fulfilled. Since the Agreement includes the obligations as given in Article 9 of the Agreement as well, it is evident that carrying out the work as prescribed therein is a part of the process and a vital component of the work of construction of a four-lane highway to be carried out by the main Contractor in order to carry out the highway development project. Thus, it is submitted that the work proposed to be carried out by the Applicant in the present case is nothing more than the obligations of the main Contractor, which consists of construction as well as completion of a road.
- n) In the present case, the main contract awarded by NHAI to the Contractor itself includes in its scope of work the construction of project facilities. It can be said that

these facilities will be a part of the four-lane highway and it is essential for the development of the highway as per the Agreement.

- o) That as per the facts of the current case, NHAI has executed an agreement with the Contractor for the development/expansion of part of NH-34 into a four-lane highway. The Applicant proposes to enter into a contract with the said Contractor for carrying out a specified part of this work. Thus, it can be said that the Applicant is a sub-contractor for NHAI, providing services of a works contract. However, it is to be noted that to be eligible under Entry 3(iv)(a) the nature of service recipient is irrelevant. It only has to be a works contract service in relation to construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a road.

- p) Intention of GST Council:

That it is also the intent of the GST Council that in cases where the main contractor is falling within any entry, the same entry should also be made applicable on a sub-contractor providing those services. This intent has clearly been reflected in one of the recommendations that was made by the GST Council in their 25th Meeting held on 18-1-2018, the text of which is as follows:

"To reduce GST rate (from 18% to 12%) on Works Contract Services (in short 'WCS') provided by sub-contractor to the main contractor providing works contract services to Central Government, State Government, Union territory, a local authority, a Governmental Authority or a Government Entity from which attracts the GST rate of 12%. Likewise, WCS attracting 5% GST, their sub-contractor would also liable @ 5%."

- q) On a reading of the above, it is clear that the purpose or object of the GST Council is to extend benefit to the last chain of said supply and reason for the same is to provide equal opportunities and equal level playing fields to business entities and avoid discrimination. Based on this reason, as well as the interpretation of the notification as explained above, it is submitted that the rate that should be applicable on the Applicant should be the same as that of the main contractor for providing the service of a works contract in relation to construction of roads.
- r) That this intent of the GST Council has also been recognised by the Maharashtra AAR in the case of Shree Constructions, [2018] 97 taxmann.com 317/69 GST 866 (A.A.R. - GST), which has been upheld by the Appellate Authority as well Shree Construction, [2019] 103 taxmann.com 448/73 GST 456 (App. A.A.R. - GST).

The relevant text of the Maharashtra AAAR is reproduced below for reference:

“It is very much clear that any supply of works contract pertaining to the railways including monorail and metro is subject to concessional rate of 12% GST. In the instant case, though the respondent i.e., M/s Shree Construction is providing works contract services to its main contractor who has entered into works contract agreement with railways, the composite supply of works contract being carried out by M/s Shree Construction is ultimately going to the use of railways without being subjected to any change or modification, thus the said works contracts, though undertaken by the sub-contractor, is undoubtedly pertaining to the railways and no one else. Thus, the condition specified under item (v) of the Sr. 3 of the said notification is completely fulfilled and therefore the services provided by the sub-contractor would attract concessional rate of 12% GST. As regards the appellant's contention that there is no specific mention of sub-contractor providing services in Sr. (v) as provided in item (ix) and (x) which were incorporated into the Notification No. 11/2017-C.T. by the amending Notification No. 1/2018, dated 25-1-2018, we are of the opinion that there was no need to include such sub-contractors in the item (v) of the Notification as there was no confusion whether the sub-contractor will be eligible to such concessional rate of GST, since the activities described under item (v) of Sr. No. 3 of the notification are services specific. The service provider and the service recipient are immaterial for the determination of beneficiary of this concessional rate of GST. That is if the works contract services provided by the main contractor or sub-contractor are pertaining to the railways, the concessional rate of 12% GST is allowed to the person who carries out the such works contract pertaining to railways.”

- s) That based on a reading of the above cited case laws and interpretation of the applicant, it is submitted that the current contract is one of construction of road and thus should be covered in Entry - 3(iv)(a) of Heading 9954 and the effective rate for the contract proposed to be undertaken by the Applicant will thus be 12% (6% CGST + 6% WBGST).

3. Submission of the Revenue

3.1 The officer concerned from the revenue, in a written submission dated 22.09.2022, has expressed his view as under:

The applicant, who happens to be a sub-contractor, has been awarded the work of shifting of electrical utilities while Notification No. 11/2017-Cental Tax (Rate) allows concessional rate in case of works contract of road, bridge, tunnel or terminal for road transportation for use by

general public. Hence, the activities do not fall under serial number 3(iv) (a) of the said Notification.

3.2 The officer concerned, in support of his argument, has drawn attention to the Advance Ruling No. RAJ/AAR/2019-20/34 dated 05.03.2020 pronounced by the Rajasthan Authority for Advance Ruling [2020(37) GSTL 121 (AAR-GST-Raj)].

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 In the instant case, contract for construction of National Highway pertaining to Nadia District in the state of West Bengal has been awarded to M/s KCC Buildcon Private Limited on Engineering, Procurement, Construction (EPC, for short) mode. The main contractor i.e., M/s KCC Buildcon Private Limited thereafter, has entered into a sub-contract with the applicant for shifting of electrical utilities in respect of the said project.

4.3 The applicant, therefore, has been awarded a sub-contract from the main contractor for shifting of electrical utilities which requires removing of old materials from the project site along with erection of materials/lines. The applicant thus has been awarded to carry out a specific part of the work as specified in the agreement made between NHAI and M/s KCC Buildcon Private Limited. From the documents produced by the applicant, it is noticed that all the provisions of Articles 9.0 of EPC Agreement, Letter of Award dated 15th October, 2019 and relevant clauses of scope of work mentioned in the EPC Agreement shall apply on back to back basis to the applicant. In the said article, as we find, that the contractor shall undertake the work of shifting of any utility (including electric lines, water pipes, gas pipelines and telephone cables) to an appropriate location or alignment and the cost of such shifting, as per estimates prepared by the entity owning the utility and approved by the Authority, shall be reimbursed by the Authority to the contractor.

4.4 The applicant has contended that in the current case, NHAI has executed an agreement with the Contractor for the development/expansion of part of NH-34 into a four-lane highway. The applicant proposes to enter into a contract with the said Contractor for carrying out a specified part of this work. Thus, it can be said that the applicant is a sub-contractor for NHAI, providing services of a works contract. We are unable to accept this proposition. Clause (93) of section 2 of the GST Act speaks that “recipient” of supply of goods or services or both, means—

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) *****

(c) *****

and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;

In the instant case, the applicant has entered into the agreement with M/s KCC Buildcon Pvt Ltd i.e., the main contractor for shifting of electrical utilities and for this work, the main contractor is liable to pay the consideration to the applicant. So, in terms of sub-clause (a) of clause 93 of section 2, there can be no dispute that the applicant is supplying the services to M/s KCC Buildcon Pvt Ltd and not to NHAI.

4.5 It transpires from the documents produced that the work being undertaken by the applicant is limited to shifting/erection of electrical utilities. Therefore, the moot question involved in the case is to decide whether the work of such shifting of electrical utilities can be regarded as services provided by way of construction of road or not. Admittedly the 'Scope of Project' in respect of the main contractor means and includes construction of Project Highway which demands shifting of obstructing utilities as and where required and for that purpose, such shifting work can be considered as an ancillary to the main work. However, when the sub-contractor, on being awarded, provides services of shifting of electrical utilities only, can it be said that the sub-contractor is supplying services by way of construction of road. The issue may be examined with an example. A contractor, say Mr X is engaged in construction of a building pursuant to a work order awarded to him by Mr Y. The scope of work of the said contract includes laying of pipe under the ground for water connectivity and Mr X awards that specific work i.e., laying of underground pipeline to Mr Z on sub-contract basis. Admittedly the services provided by Mr Z to Mr X is an ancillary services to construction of building but such services itself, in any way, cannot be considered as services of construction of a building. Similarly, in the instant case, the services provided by the applicant, for its very limited scope towards shifting of electrical utilities, cannot be regarded as supply by way of construction of road. The terms and condition of the agreement made between NHAI and the contractor stipulates that the cost of such shifting shall be reimbursed by the Authority to the Contractor which also indicates the independent nature of the work.

4.6 In the case of Gaurish Sharma, the Rajasthan AAR has observed that the proposed activity carried out by the applicant is of shifting/erection of 11 KV & LT lines only and the same cannot be categorised as construction of road as classified under Entry number 3(iv)(a) of the Notification No. 11/2017-CT (Rate) dated 28-6-2017, as amended. The AAR also observed that since such cost of the aforesaid activity will be borne by the Authority or by the entity owning such utility, therefore such payment of above mentioned activity is not the part of the main contract i.e. construction of road as awarded to main contractor by NHAI. Thus, there establish no nexus between the main contract awarded for construction of road by the NHAI and the work proposed to be undertaken by the applicant.

4.7 We find that the activities carried out by the applicant in the instant case is identical with the case of Gaurish Sharma before the Rajasthan AAR. Further, we also have expressed our view that providing services of shifting of electrical utilities only cannot be regarded as services by way of construction of road. We are, therefore, of the opinion that the work being undertaken by the applicant fails to get covered under serial number 3(iv)(a) of the Notification No. 11/2017-Central Tax (Rate) dated 28-6-2017, as amended.

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

RULING

The activities being carried out by the applicant as a sub-contractor for shifting of electrical utilities for construction of 'Proposed 4-Laning of Barasat – Krishnagar Section of NH-34 Project cannot be regarded as composite supply of works contract by way of construction of road as specified under serial number 3(iv)(a) of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017, as amended.

(BRAJESH KUMAR SINGH)
Member
West Bengal Authority for Advance Ruling

(JOYJIT BANIK)
Member
West Bengal Authority for Advance Ruling

Place: Kolkata

Date: 21.10.2022

To,

SHREE POWERTECH

WARD NO 6, ARAMBAGH, HOOGHLY, West Bengal, Pin Code- 712601

Copy to:

- (1) The Principal Chief Commissioner, CGST & CX, 180, Shantipally, R.B.Connector, Kolkata-7000107
- (2) The Commissioner of State Tax, West Bengal, 14, Beliaghata Road, Kolkata-700015
- (3) The Commissioner, Howrah Commissionerate, Singur Division, , 7th floor, Customs House, MS Building, 15/1, Strand Road, Kolkata-700001
- (4) The Sr. JCCT, Howrah Charge, 7/1,Mackenzie Lane,Howrah-711101
- (5) Office Folder