

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:

Dr Tanisha Dutta, Joint Commissioner, CGST & CX 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	ANMOL INDUSTRIES LIMITED
Address	Maity Para, Delhi Road, Hooghly, West Bengal, Pin Code-712311
GSTIN	19AADCB9169P1ZS
Case Number	WBAAR 30 of 2022
ARN	AD190922011281C
Date of application	October 11, 2022
Jurisdictional Authority (State)	Large Tax Payers Unit
Jurisdictional Authority (Central)	Dankuni Division, Howrah Commissionerate
Order number and date	24/WBAAR/2023-24 dated 20.12.2023
Applicant’s representative heard	Mr. Ankit Kanodia, Authorized Advocate

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 submits that he has entered into a leasing agreement with the Shyama Prasad Mookerjee Port, Kolkata (hereinafter referred to as SMPK), a body incorporated under the Ministry of Ports, Shipping and Waterways, Government of India, wherein, the SMPK has agreed to lease a industrial plot of land at Taratala Road for a period of thirty years (30 years) for setting up commercial office complex. The allotment of the plot has been done vide letter bearing number Lnd. 6063/22/2869 dated 21.09.2022.

1.3 The applicant submits further that as per the allotment letter supra, it has been agreed that the applicant shall pay a sum of Rs. 39,00,11,000/- to the Lessor, SMPK as upfront lease premium. The applicant states that the allotment letter further seeks to charge GST @18% on the above amount also.

1.4 The applicant is of the view that as per entry No. 41 of Notification No. 12/2017 Central Tax (Rate) dated 28.06.2017, as amended from time to time, the above upfront lease premium is exempt from GST.

1.5 In the backdrop of aforesaid activities, 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 the upfront premium payable by the applicant towards the services of leasing of the land for industrial purposes by SMPK is exempted under entry 41 of Notification No. 12/2017 Central Tax (Rate) dated 28.06.2017?

1.6 During the course of hearing, the AAR observed that the instant application cannot be accepted since an application for advance ruling can be filed by the supplier in relation to supply of goods or services or both being undertaken or proposed to be undertaken by the applicant. But, in respect of supply involved in the aforesaid question, the applicant is the recipient of services. The applicant was allowed an opportunity of hearing in this regard and thereafter the AAR vide order dated 09.02.20123, rejected the application.

1.7 The applicant filed writ petition before the Hon'ble Calcutta High Court challenging the said rejection order of the WBAAR. The Hon'ble Calcutta High Court vide order dated 05.04.2023 allowed the applicant to file appeal before the appellate authority against the aforesaid order.

1.8 The applicant filed appeal before the Hon'ble Division Bench at Calcutta High Court. The Hon'ble Division Bench of Calcutta High Court vide order dated 21.04.2023 set aside the ruling of the WBAAR with direction to the authority to decide the application on merits and in accordance with law. In compliance with the order of the Hon'ble Division Bench of Calcutta High Court, the applicant is heard by the WBAAR.

Submission of the applicant

2.1 The applicant submits that the services provided by SMPK to him for leasing of an industrial plot of land at Taratala Road for a period of thirty years (30 years) for setting up commercial office complex against upfront lease premium is exempted from payment of tax vide serial number 41 of Notification No. 12/2017 Central Tax (Rate) dated 28.06.2017 as amended from time to time. The said entry reads as follows:

Sl No	Chapter, Section, Heading, Group or service Code (Tariff)	Description of Services	Rate (Per Cent)	Condition
41	Heading 9972	<p>Upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable in respect of service by way of granting of long term lease of thirty years, or more) of industrial plots or plots for development of infrastructure for financial business, provided by the State Government Industrial Development Corporations or Undertakings or by any other entity having 20 percent or more ownership of Central Government, State Government, Union territory to the industrial units or the developers in any industrial or financial business area.</p> <p>Explanation - For the purpose of this exemption, the Central Government, State Government or Union territory shall have 20 per cent or more ownership in the entity directly</p>	NIL	<p>Provided that the leased plots shall be used for the purpose for which they are allotted, that is, for industrial or financial activity in an industrial or financial business area:</p> <p>Provided further that the State Government concerned shall monitor and enforce the above condition as per the order issued by the State Government in this regard:</p> <p>Provided also that in case of any violation or subsequent change of land use, due to any reason whatsoever, the original lessor, original lessee as well as any subsequent lessee or buyer or owner shall be jointly and severally liable to pay such amount of central tax, as would have been payable on the upfront amount charged for the long term lease of the plots but for the exemption contained herein,</p>

		<p>or through an entity which is wholly owned by the Central Government, State Government or Union territory.</p>	<p>along with the applicable interest and penalty:</p> <p>Provided also that the lease agreement entered into by the original lessor with the original lessee or subsequent lessee, or sub-lessee, as well as any subsequent lease or sale agreements for lease or sale of such plots to subsequent lessees or buyers or owners shall incorporate in the terms and conditions, the fact that the central tax was exempted on the long term lease of the plots by the original lessor to the original lessee subject to above condition and that the parties to the said agreements undertake to comply with the same.</p>
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2.2 The applicant submits that to qualify for exemption under the aforesaid entry, following conditions need to be satisfied-

- I. Firstly, lease period should be of thirty years or more.
- II. Secondly, the property leased should be an Industrial plot or plots for development of infrastructure for financial business.
- III. Thirdly, service provider must be a state Government Industrial Development Corporations or Undertakings or by any other entity having 20 per cent. or more ownership of Central Government, State Government, Union territory (either directly or through an entity wholly controlled by the Central Government, State Government, Union territory).
- IV. Lastly, Service Recipient must be an Industrial Unit.

2.3 The applicant states that the present lease of land is for thirty years which can be duly indicated in the Allotment Letter dated 21.09.2022 issued by SMPK. Thus, the first condition as mentioned above is satisfied in the instant case.

2.4 The applicant states that the property being leased is industrial plot owned by SMPK and have been leased out for the purpose of setting up commercial office complex. Thus, the second condition as stated above is duly satisfied in the instant case.

2.5 As regards the third condition stated above, the applicant states that the lessor, SMPK in the instant case, is a body incorporated under the Ministry of Ports, Shipping and Waterways, Government of India. The lessor is directly controlled by the Central Government department.

2.6 The applicant argues that SMPK in its official website “ smporkolkata.shipping.gov.in” has declared vide notice dated 14.12.2018 bearing reference number FIN/368/B that SMPK is covered under the category of notified persons under notification number 50/2018 Central Tax dated 13.09.2018 and is required to deduct tax under section 51 of CGST/WBGST Act 2017. SMPK is therefore registered as a tax deductor in the state of West Bengal bearing registration number 19AAAJK0361L1DC.

2.7 Section 51 of the GST Act provides deduction of tax at source by the following persons:

- (a) a department or establishment of the Central Government or State Government;
or
- (b) local authority; or
- (c) Governmental agencies; or
- (d) such persons or category of persons as may be notified by the Government on the recommendations of the Council,

Notification No. 50/2018- Central Tax dated 13.09.2018 further requires to deduct tax under section 51 by the following persons:

- (a) an authority or a board or any other body,-
 - (i) set up by an Act of Parliament or a State Legislature; or
 - (ii) established by any Government,
with fifty-one per cent or more participation by way of equity or control, to carry out any function;
- (b) Society established by the Central Government or the State Government or a Local Authority under the Societies Registration Act, 1860(21 of 1860)
- (c) public sector undertakings.

2.8 The applicant contends further that the audit of books of accounts of SMPK is done annually by Comptroller and Auditor General of India under section 19(2) of the Comptroller & Auditor General’s (Duties, Powers & Conditions of Service) Act, 1971 read with Section 102(2) of the Major Port Trusts Act, 1963. The applicant states that audit under section 19(2)

supra is conducted only for corporations (not being companies) established under law made by parliament and accounts of such corporations are presented before Parliament.

Extract of section 19(2) of Comptroller & Auditor General's (Duties, Powers & Conditions of service) Act, 1971 is reproduced hereunder-

"The duties and powers of the Comptroller and Auditor-General in relation to the audit of accounts of corporations (not being companies) established by or under law made by parliament shall be performed and exercised by him in accordance with the provisions of the respective legislations."

2.9 According to the applicant, from a conjoint reading of clause (a) to notification 50/2018-Central Tax dated 13.09.2018 and section 19(2) of Comptroller & Auditor General's (Duties, Power & Conditions of service) Act, 1971 it is evident that more than fifty-one percent of control of SMPK is with Central Government. Therefore, it can be averred that SMPK satisfies the third condition stated above.

2.10 In regard to the last condition, the applicant submits that it is a manufacturing company duly registered under CGST/WBGST Act, 2017 and has manufacturing units in the state of West Bengal. Therefore, the applicant fulfils the last condition mention above as well.

Submission of the Revenue

The officer concerned from the revenue has express his views as under:

3.1 It is a settled fact that the lease period is for thirty years and SMPK is Central Government Undertaking. The applicant is also an industrial unit.

There are conditions prescribed in the said Notification to avail exemption (inserted vide Notification 28/2019-Central Tax (Rate) dt 31.12.19 w.e.f. 01.01.2020) as:

*"Provided that the leased plots shall be used for the purpose for which they are allotted, that is, **for industrial or financial activity in an industrial or financial business area:***

Provided further that the State Government concerned shall monitor and enforce the above condition as per the order issued by the State Government in this regard:

Provided also that in case of any violation or subsequent change of land use, due to any reason whatsoever, the original lessor, original lessee as well as any subsequent lessee or buyer or owner shall be jointly and severally liable to pay such amount of central tax, as would have been payable on the upfront amount charged for the long term lease of the plots but for the exemption contained herein, along with the applicable interest and penalty:

Provided also that the lease agreement entered into by the original lessor with the original lessee or subsequent lessee, or sub-lessee, as well as any subsequent lease or sale agreements, for lease or sale of such plots to subsequent lessees or buyers or owners shall incorporate in the terms and conditions, the fact that the central tax was exempted on the long term lease of the plots by the original lessor to the original lessee subject to above condition and that the parties to the said agreements undertake to comply with the same.”
(emphasis inserted)

3.2 On the basis of the above condition, not only the plot should be used for industrial or financial activity but also the area where the plot is located should be an industrial or financial business area.

3.3 Industrial area means any area declared to be an industrial area by the State Government by notification in the Official Gazette, which is to be developed and where industries are to be accommodated. In the application, the applicant did not produce any evidence on the nature of the land and area to prove it as industrial business area.

3.4 Besides, in the petition itself, the applicant sought for advance ruling on exemption only on the ground of the services of leasing land **for industrial purpose**, so, the applicant did not go into “the financial activity” or “financial business area” clauses. Hence, the comments are restricted only on industrial perspective.

3.5 It is mentioned in the allotment letter that the land was leased for “setting up commercial office complex”. The commercial office complex may or may not include industrial activity.

3.6 As the term “industry” is not defined in CGST/WBGST Act, 2017, so, the reference is drawn from Sec – 2(7)(j) of the Industrial Disputes Act, 1947, –

“industry” means any systematic activity carried on by co-operation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature), whether or not,--

- (i) any capital has been invested for the purpose of carrying on such activity; or*
- (ii) such activity is carried on with a motive to make any gain or profit,*

and includes—

(a) any activity of the Dock Labour Board established under section 5A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1948);

(b) any activity relating to the promotion of sales or business or both carried on by an establishment.

but does not include—

(1) any agricultural operation except where such agricultural operation is carried on in an integrated manner with any other activity (being any such activity as is referred to in the foregoing provisions of this clause) and such other activity is the predominant one.

Explanation.--For the purposes of this sub-clause, "agricultural operation" does not include any activity carried on in a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951); or

(2) hospitals or dispensaries; or

(3) educational, scientific, research or training institutions; or

(4) institutions owned or managed by organisations wholly or substantially engaged in any charitable, social or philanthropic service; or

(5) khadi or village industries; or

(6) any activity of the Government relatable to the sovereign functions of the Government including all the activities carried on by the departments of the Central Government dealing with defence research, atomic energy and space; or

(7) any domestic service; or

(8) any activity, being a profession practised by an individual or body or individuals, if the number of persons employed by the individual or body of individuals in relation to such profession is less than ten; or

(9) any activity, being an activity carried on by a co-operative society or a club or any other like body of individuals, if the number of persons employed by the co-operative society, club or other like body of individuals in relation to such activity is less than ten;"

3.7 In the application, the allotment letter does not specify structure or activities of "commercial office complex". Also the applicant did not produce any document that can describe the activities to be done in that commercial office complex and whether such activity fulfills all conditions to be termed as "industrial activity".

3.8 Therefore, in paucity of supporting evidences, the undersigned prayed before the authority that the exemption should not be allowed as it does not cover all conditions laid down in the notification mentioned above.

Observations & Findings of the Authority

4.1 We have gone through the records of the issue as well as submissions made by the authorised advocate of the applicant during the course of personal hearing. We have also considered the submission made by the officer concerned from the revenue. The issue before us is to determine whether the services of leasing of an industrial plot of land at Taratala Road for a period of thirty years (30 years) for setting up commercial office complex against upfront lease premium provided by SMPK to the applicant is exempted from payment of tax or not in terms of entry number 41 of Notification No. 12/2017 Central Tax (Rate) dated 28.06.2017.

4.2 The crux of the contention of the applicant is that the applicant being an industrial unit has entered into an agreement for having leased out land for a period of thirty years for setting up commercial office complex against upfront lease premium. According to the applicant, the aforesaid factual position leaves no doubt that the applicant has fulfilled all the conditions as specified in entry number 41 of Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 from the end of the recipient. And that from supplier's end, SMPK also fulfils the condition specified in the said entry.

4.3 We first take the issue to decide whether SMPK falls within the ambit of suppliers as specified in the relevant entry of the exempt notification supra. The applicant argues that since SMPK deducts tax under section 51 of the GST Act and the books of accounts of SMPK is audited by Comptroller and Auditor General of India, it is evident that more than fifty-one percent of control of SMPK is with the Government.

4.4 In regard to the argument of the applicant that the books of accounts of SMPK are audited by CAG, we find it relevant to reproduce the scope of audit and its jurisdiction of Comptroller and Auditor General of India as follows:

The accounts of Government Companies are audited by the Comptroller and Auditor General of India (CAG) under the provisions of Section 143(5) to 143(7) of the Companies Act, 2013. The Statutory Auditors (Chartered Accountants) appointed by the CAG certify the accounts of such companies which are subject to supplementary audit by the CAG. The CAG gives comments on or supplements the report of the Statutory Auditors. The Companies Act, 2013 empowers the CAG to issue directions to the Statutory Auditors on the manner in which the Company's accounts shall be audited.

The audit jurisdiction of the CAG extends to bodies or authorities such as statutory corporations, government companies, autonomous bodies constituted as societies,

trust or not for profit companies, urban and rural local bodies and also to any other body or authority whose audit may be entrusted to CAG under law. The Sixth schedule of the Constitution of India also envisages audit of accounts of Autonomous District Councils.

4.5 From the official website of SMPK, the organization is found to be “An Autonomous Body under the Ministry of Port, Shipping & Waterways, Government of India”. However, to decide this issue, SMPK was requested vide Memo No. 97/WBAAR/2023 dated 05.06.2023 and 173/WBAAR/2023 dated 30.11.2023 respectively to clarify the following aspects:

- ‘Whether 20(twenty) percent of more ownership of the Syama Prasad Mookerjee Port is with the Central Government and/or State Government, put together’.
- Status of SMPK as a notified person in terms of Notification No. 50/2018 – Central Tax dated 13.09.2018.
- Status of SMPK in respect of audit of books of accounts being done annually by Comptroller and Auditor General of India under section 19(2) of the Comptroller & Auditor General’s (Duties, Powers & Conditions of Service) Act, 1971 read with Section 102(2) of the Major Port Trusts Act, 1963.

4.6 SMPK, in its reply dated 09.06.2023 and 08.12.2023 respectively, has submitted as under:

“In this regard we would like to inform you that Kolkata Port Trust (Presently Syama Prasad Mookerjee Port, Kolkata) herein after referred as SMPK has been functioning since the year 1853 or so. Initially, SMPK was being administered under the Calcutta Port Act, 1890 after the repeal of the Calcutta Port Act, 1870 and various other related laws. Later on the Calcutta Port Act, 1890 was subsumed with the Major Port Trust Act, 1863. Presently, the SMPK is governed under the Major Port Authorities Act, 2021 through which the Central Government has formed the Board of SMPK which shall be responsible for administration, control and management of SMPK. As per Section 3 of the Major Port Authorities Act, 2021 the constitution and composition of Board of Major Port Authority shall be as follows:

- a. *Chairperson*
- b. *Deputy Chairperson, and*
- c. *One Member each from the –*
 - (i) *Concerned State Government in which the Major Port is situated;*
 - (ii) *Ministry of Railways;*

- (iii) Ministry of Defence; and
- (iv) Customs, Department of Revenue;
- d. Not less than two and not exceeding four Independent Members ;
- e. One Member not below the rank of Director nominated by the Central Government,
- f. Two Members representing the interests of the employees of the Major Port Authority.

Therefore, the ownership of Syama Prasad Mookerjee Port, Kolkata is vested upon the Board appointed under the Major Port Authorities Act, 2021 and Central Government is not holding any ownership in the SMPK. Further, as per the second proviso of the Major Port Authorities Act, 2021 the Board constituted under the Act shall be a body corporate having perpetual succession and a common seal with power to acquire, hold or dispose of property and may by the name by which it is constituted , sue or be sued. [emphasis supplied]

Further, as stated in your letter, the clarification regarding ownership of SMPK is required in reference to clause 41 of the notification No. 12/2017- Central Tax (Rate) dated 28.06.2017. In this regard we would like to state that SMPK as per their Land Policy, is collecting Lease Rent payable by the Lessee over the Lease Term calculated on Pro-rata basis multiplying by a G-Sec Rate which is not in the nature of Salami, Premium, development charge etc for providing long term lease for more than 30 years. Further, as stated above, as Central Government has no ownership in SMPK since it is an autonomous body, therefore, the upfront amount paid by the lessee at the time of entering into the lease agreement shall not be exempted by virtue of clause 41 of the Notification No. 12/2017- Central Tax (Rate).” [emphasis supplied]

‘SMPK is governed by Major Port Authorities Act, 2021 which is an Act passed by the Parliament. Therefore, under both Section 51 of the CGST Act read with Notification No 50/2018-CT as referred above, SMPK is liable to get themselves registered for deduction and deposit the same with the Central Government.’”

“As per Major Port Authorities Act, audit of SMPK is to be carried out each year by the Comptroller and Auditor General of India (CAG).”

4.7 In this context, sub-section (3) of section 44 the Major Port Authorities Act, 2021 which deals with ‘Accounts and audit’ may be reproduced:

(3) The Comptroller and Auditor-General of India and any person appointed by him in connection with the audit of the accounts of the Board under this Act shall have

the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India generally has in connection with the audit of Government accounts and, in particular shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers, and to inspect any of the offices of the Authority.

4.8 On due consideration of the reply given by SMPK and in light of the discussions detailed herein above including scope of audit of CAG, we are unable to conclude that SMPK may be regarded as an entity having 20 percent or more ownership of Central Government merely on the ground that its books of accounts are audited by CAG. We are also unable to hold that being registered as a deductor of tax at source under section 51 of the GST Act can be equated with the supplier of services specified in entry number 41 of Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 i.e., an entity having 20 percent or more ownership of Central Government.

In view of the above, we rule as under:

RULING

- Question: Whether the upfront premium payable by the applicant towards the services of leasing of the land for industrial purposes by SMPK is exempted under entry 41 of Notification No. 12/2017 Central Tax (Rate) dated 28.06.2017?
- Answer: The services of leasing of the land for industrial purposes by SMPK to the applicant is found not to be covered under entry 41 of Notification No. 12/2017 Central Tax (Rate) dated 28.06.2017 and therefore cannot be treated as an exempt supply.

(Dr TANISHA DUTTA)

Member

West Bengal Authority for Advance Ruling

(JOYJIT BANIK)

Member

West Bengal Authority for Advance Ruling

Place: Kolkata

Date: 20th December, 2023

To,

Anmol Industries Limited

Maity Para, Delhi Road, Hooghly, West Bengal, Pin Code-712311

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 Special Commissioner, Large Tax Payers Unit, 14, Beliaghata Road, Kolkata-700015
- (4) The Commissioner of CGST, Howrah Commissionerate, Customs House, M.S. Building, 2nd floor, 15/1, Strand Road, Kolkata-700001
- (5) Office Folder