

ADVANCE RULING NO. HAR/HAAR/R/2018-19/02, Dated 29th June, 2018

HARYANA AUTHORITY FOR ADVANCE RULING

GOODS AND SERVICE TAX

HARYANA VANIJYA BHAWAN, PLOT NO I-3, SECTOR -5,

PANCHKULA -134151 (HARYANA)

(IN APPLICATION NO. 01/2018-19, dated 06.04.2018)

Name and address of the applicant	:	M/s B. M. Industries, 33, Industrial Estate, Phase-II, Yamunanagar (Haryana)
GSTIN of the applicant	:	06ACEPK7246A2ZY
Date of application	:	06.04.2018
Clause(s) of section 97(2) of CGST/ HGST act, 2017, under which the question(s) raised	:	(iv) Admissibility Of Input Tax Credit of tax paid on any goods or services or both (v) Determination of the liability to pay tax on any goods or services or both
Date of Personal Hearing	:	20.06.2018
Present for the applicant	:	Pankaj Malik, CA & Sh Harish Arora, Finance Manager, B.M. Industries, Yamunanagar.

1. As per facts stated by Sh. Rajesh Kumar, Prop. M/s B. M. Industries, 33, Industrial Estate, Phase-II, Yamunanagar (Haryana) [hereinafter referred to as the "applicant"], the firm is a going concern engaged in manufacture and sale of aluminium profiles, owning fixed assets, current assets and also has long term as well as current liabilities. The applicant proposes to merge as GOING CONCERN with M/s Bimal Aluminium Pvt. Ltd., Yamunanagar, having GSTIN 06AAACB6210G1Z9. That consequent to merger the proprietorship firm M/s B. M Industries, owned by the applicant, shall cease to exist and its all present and future assets, liabilities, rights, claims, businesses, etc., shall be taken over by M/s Bimal Aluminium Pvt. Ltd. All future liabilities of GST, as and when arise, shall be met by M/s Bimal Aluminium Pvt. Ltd., in normal course of business. After merger, M/s B. M. Industries shall apply for cancellation of registration in form GST-REG-16, within 30 days as prescribed.

2. The applicant submits that as per Rule 41 of CGST/HGST Rules and Section 29 of the CGST/HGST Act, tax is not payable in case of merger of proprietorship firm with company, in the manner, as mentioned above and consequent upon merger unutilized input tax credit of the Applicant firm will be available to M/s Bimal Aluminium Pvt. Ltd., Yamunanagar.

3. Questions on which ruling has been sought by the applicant, are as under:-^

a) Whether the applicant is liable to pay tax under CGST/SGST Act, on merger of his proprietorship firm as a going concern with a private limited company on the fixed assets and current assets including stocks of raw material, semi-finished and finished goods.

b) Whether the input tax credit available in the credit ledger account or cash ledger account of proprietorship firm shall be transferred to the respective credit ledger and cash ledger account of the private limited company, consequent upon merger.~

Comment of the Officer under section 98 (1) of the CGST, HGST Act 2017

The DETC (ST), Jagadhari had submitted his comments on 18.06.2018, wherein the legal provisions as contain in section 41 and section 85 of the CGST/HGST Act, 2017 have been reproduced without any observation viz a viz the

facts of the case.

RECORDS OF PERSONAL HEARING - 2nd PROVISO TO SECTION 98(2) OF CGST/HGST ACT, 2017

4. Opportunity for personal hearing was granted to the applicant on 20.06.2018, which was attended by Sh. Pankaj Malik, Chartered Accountant, on behalf of the applicant. He made following submissions:-^

(a). That the merger of M/s B.M. Industries with M/s Bimal Aluminium Pvt. Ltd. would be for consideration based on the valuation of assets & liabilities on the date of merger. Consequent upon merger of M/s B.M. Industries all assets and liabilities shall be taken over by M/s Bimal Aluminium Pvt Ltd and business of M/s B.M. Industries would continue to run under the ownership of M/s Bimal Aluminium Pvt. Ltd with regularity and permanency. The merger or takeover is for the complete business of M/s B.M. Industries as a whole involving transferring of all assets & liabilities to M/s Bimal Aluminium Pvt. Ltd and not for part of the assets.

(b). Section 7 of the CGST Act 2017 defines the scope of supply. As per sub section 1, the supply includes sale, transfer, barter, exchange made for a consideration in the course of or for furtherance of business. The transfer of the applicant's business as a going concern to a private limited company is not in the ordinary course of business or for the furtherance of business. The selling of business is not the business of the applicant. It, in fact, cannot be called a transaction in the normal course of business or for furtherance of business. It is an extraordinary activity which shall bring the business to an end in the hands of the applicant although it will continue to operate with regularity and permanently in the hands of the buyer i.e. M/s Bimal Aluminium Pvt Ltd. As the action of the applicant is not in the regular course of business nor it has the impact of furtherance of business, therefore, the activity cannot be termed as supply as per Section 7 & hence exempt from the payment of tax.~

5. Reference was made to the provisions of Schedule II of the CGST Act 2017 specifies the activities to be treated as "Supply of Goods or Supply of Services" and it was submitted that as per Para 4(c) of subject schedule, transfer of business as a going concern is not treated as supply. The applicant also referred to Notification no. 12/2017-Central Tax (rate) Dated 28-06-2017. The notification exempts the intra state supply of services of description as specified in column 3 of the table from Central Tax leviable thereon under Subsection (1) of Section 9 of CGST Act 2017 as is in excess of the tax calculated at the rate as specified In the corresponding entry in column (4) of the table. As per Sr. No.2 of the said notification, services by way of transfer of going concern, as a whole or an independent part thereof, have been exempted. Similar notification No 47/ ST 2 dated 30-06-2017 has been issued by the Haryana Government under HGST Act 2017.

6. The applicant also placed reliance on the advance ruling given by the Authority for Advance Rulings, Karnataka having Advance Ruling No KAR ADRG 06 of 2018 Dated 23/04/2018, in the case of Rajashri Foods (P) Ltd. The applicant has submitted that the facts and circumstances of the applicant's case are identical to the facts & circumstances of the Rajashri foods (P) Ltd case, hence the ruling is fully applicable to the applicant's case. The Ld. Advance Ruling Authority, Karnataka has given the ruling that:-^

"1. The transaction of transfer of business as a whole of one of the units of the Applicant in the nature of a going concern amounts to supply of service.

2. The transactions of transfer of one of the units of the Applicant as a going concern is covered under Sr. No 2 of the notification Nol2/2017-Central Tax (Rate) dated 28-06-2017 subject to the condition that the unit is a going concern."~

7. The applicant quoted the provisions of Section 18 of the CGST Act 2017 and Rule 41 of CGST Rules and submitted that Section 18(3) read with Rule 41 allows the transfer of the input tax credit shown in the account of the Applicant as balance of the Electronic Cash Ledger and The Electronic Credit Ledger to the respective ledgers of M/s Bimal Aluminium Pvt. Limited subject to observance of conditions prescribed in Rule 41 of CGST Rules.

After hearing the applicant in detail and discussions, the applicant was admitted as being covered by section 97 (2) (d) & (e) of the CGST/HGST Act, 2017. As regard merits, the decision was reserved which is being released today.

DISCUSSIONS AND FINDINGS OF THE AUTHORITY

8. We have carefully gone through the facts and records of the case. On facts presented by the applicant, this is a case of merger of two entities, and the questions raised relate to transfer of ITC lying as balance in electronic credit ledger of the going concern. In this regard, it is observed that Section 18 (3) of the CGST/HGST Act, 2017, provides as under:-^

"(3) Where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilised in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed."~

Further, Rule 41 of the CGST/HGST Rules, 2017, provides as under:-^

"RULE 41. Transfer of credit on sale, merger, amalgamation, lease or transfer of a business:

(1) A registered person shall, in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason, furnish the details of sale; merger, de-merger, amalgamation, lease or transfer of business, in FORM GST ITC-02, electronically on the common portal along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee:

Provided that in the case of demerger, the input tax credit shall be apportioned in the ratio of the value of assets of the new units as specified in the demerger scheme.

(2) The transferor shall also submit a copy of a certificate issued by a practicing-chartered accountant or cost accountant certifying that the sale, merger, demerger, amalgamation, lease or transfer of business has been done with a specific provision for the transfer of liabilities.

(3) The transferee shall, on the common portal, accept the details so furnished by the transferor and, upon such acceptance, the un-utilized credit specified in FORM GST ITC02 shall be credited to his electronic credit ledger.

(4) The inputs and capital goods so transferred shall be duly accounted for by the transferee in his books of account.

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Thus, it is evidently clear that there are provisions in the law, where in case of merger, a registered person, by filing Form GST ITC-02, electronically on common portal, can transfer un-utilized input tax credit lying in his electronic credit ledger to the transferee. Here it is to be noted that these provisions pertain to transfer of unutilized input tax credit. These provisions are not applicable to un-utilized balance lying in electronic cash ledger.

9. It is further observed that Section 7 of the CGST/HGST Act, 2017, defines the scope of supply, which includes sale, transfer, barter, exchange made for a consideration in the course of or for furtherance of business and also provides vide clause (d) to sub-section (1) that the activities to be treated as supply of goods or services as referred to in Schedule II.

As per Schedule II of the CGST/HGST Act 2017, para 4 pertain to transfer of business assets and clause (c) of para 4, provides as under:-^

(a) Where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be taxable person, unless,-^

(i) The business is transferred as a going concern to another person; or

(ii) The business is carried on by a personal representative who is deemed to be a taxable person."~~

Thus, we find force in the contentions raised by the applicant that as per Para 4(c) of Schedule II to the CGST/HGST Act, 2017, transfer of business as a going concern is not treated as supply and thus, the same stands excluded from the scope of supply of goods.

10. Reference made by the applicant Notification no. 12/2017-Central Tax (rate) Dated 28-06-2017, which exempts the intra state supply of services of transfer of a going concern as a whole or an independent part thereof from the central tax payable under section 9(1) of the CGST Act, is also found to be in favour of the contentions raised by the applicant. [Similar notification No.47/ ST-2 dated 30-06-2017 has been issued under the HGST Act 2017].

11. Thus, it emerges that the applicant can transfer un-utilized input tax credit, under the provisions of Section 18(3) of the CGST/HGST Act, 2017 and Rule 41 of the CGST/HGST Rules, 2017, in case of merger. Accordingly, in the light of above, the advance ruling is pronounced as under:-

ADVANCE RULING UNDER SECTION 98 OF THE CGST/HGST ACT, 2017

12.1. The applicant, on merger of his proprietorship firm as a going concern with a private limited company, is not liable to pay tax under CGST/SGST Act on the fixed assets and current assets including stocks of raw material, semi-finished and finished goods.

12.2. The input tax credit available in the credit ledger account proprietorship firm shall be transferred to the respective credit ledger account of the private limited company, consequent upon merger, subject to the provisions of Section 18(3) of the CGST/HGST Act, 2017 and Rule 41 of the CGST/HGST Rules, 2017.

12.3. The provisions of Section 18(3) of the CGST/HGST Act, 2017 and Rule 41 of the CGST/HGST Act, 2017, are not applicable to the balance in lying in electronic cash ledger.

29.06.2018

Panchkula.
(Sangeeta Karmakar)
Member CGST

(Vijay Kumar Singh)
Member SGST