KARNATAKA APPELLATE AUTHORITY FOR ADVANCE RULING
6TH FLOOR, VANIJYA THERIGE KARYALAYA, KALIDASA ROAD,
GANDHINAGAR, BANGALORE – 560009

(Constituted under section 99 of the Karnataka Goods and Services Tax Act, 2017 vide Government of Karnataka Order No FD 47 CSL 2017, Bangalore, Dated:25-04-2018)

BEFORE THE BENCH OF

SHRI. D.P.NAGENDRA KUMAR, MEMBER

SHRI. M.S.SRIKAR, MEMBER

ORDER NO.KAR/AAAR/02/2021 **DATE:02-02-2021**

Sl. No	Name and address of the appellant	M/s Durga Projects & Infrastructure Pvt Ltd, No 125/1-18, GK Arcade, T.Mariyappa Road, 1st Block, Jayanagar, Bangalore 560011
1	GSTIN or User ID	29AACCD5554H1ZI
2	Advance Ruling Order against which appeal is filed	KAR/ROM03/2020 Dated: 11th Sept 2020
3	Date of filing appeal	07-11-2020
4	Represented by	Mr Srikanth Aacharay G.B Chartered Accountant
5	Jurisdictional Authority- Centre	The Commissioner of Central Tax, Bangalore South Commissionerate.
6	Jurisdictional Authority- State	LGSTO 90, Bangalore
7	Whether payment of fees for filing appeal is discharged. If yes, the amount and challan details	Yes. Challan CIN No SBIN20112900052715 dated 06-11-2020 for Rs 20,000/-

PROCEEDINGS

(Under Section 101 of the CGST Act, 2017 and the KGST Act, 2017)

1. At the outset we would like to make it clear that the provisions of CGST, Act 2017 and SGST, Act 2017 are in *parimateria*and have the same provisions in like matter and differ from each other only on a few specific provisions. Therefore, unless a mention is particularly made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the KGST Act.

2. The present appeal has been filed under section 100 of the Central Goods and Service Tax Act 2017 and Karnataka Goods and Service Tax Act 2017 (herein after referred to as CGST Act, 2017 and SGST Act, 2017) by M/s Durga Projects & Infrastructure Pvt Ltd, No 125/1-18, GK Arcade, T. Mariyappa Road, 1st Block, Jayanagar, Bangalore 560011 (herein after referred to as Appellant) against the ROM order No. KAR/ROM03/2020 dated 11th Sept 2020.

Brief Facts of the case:

3. Appellant is engaged in the business of property development i.e construction and sale of residential apartments. Appellant had executed projects under JDA with land owners for an agreed ratio of built-up area. Construction was commenced during pre-GST period and continued under GST regime.

4. On account of implementation of GST, Appellant approached the Authority for Advance Ruling (AAR) seeking a ruling on the following question:

> ***Whether Applicant is liable for GST towards work executed under JDA on land owner's portion where work commenced during pre-GST and continued under GST law? If tax is applicable the valuation for payment of tax.***

5. The AAR vide its order KAR ADRG No 17/2019 dated 25th July 2019 gave the following ruling:

> *The Applicant is liable to pay GST towards work executed under Joint Development Agreement on Land owner's portion, on the value to be arrived at in terms of para 2 of the Notification No 11/2017-Central Tax (Rate) dated 28-06-2017 at the time of transfer of possession of the land owner's portion of the flats.*

6. The Appellant filed an application dated 27-09-2019 for rectification of mistake (ROM) in the Advance Ruling order dated 25-07-2019 in terms of Section 102 of the CGST Act, 2017. In the ROM application, the Appellant stated that the ruling given by the Advance Ruling Authority in their case differed significantly with the ruling issued in the case of M/s Nforce Infrastructure India Pvt Ltd vide AAR Order KAR ADRG 30/2018 dated 28-11-2018, even though both the cases were on similar facts. Further, the ROM application sought to rectify the ruling given with regard to valuation on the grounds that the provisions of Para 2 of Notf No 11/2017 CT (R) cannot be made applicable to construction service provided to land owners under JDA since it does not involve transfer of undivided interest in land from

developer to land owner. Right in the undivided interest in the land to the extent of land owner's share was never transferred by land owner to the developer.

7. The Authority examined the ROM application and concluded that the Authority had considered all the submissions and that there is no error / apparent mistake on the face of the record and hence the ROM application was rejected in terms of Section 98(2) of the CGST Act vide order No KAR ROM 03/2020 dated 11-09-2020.

8. Aggrieved by the rejection of the ROM application, the appellant has filed this appeal on the following grounds.

8.1. The Appellant submitted that the advance ruling that they are liable to pay tax entirely under GST even on the portion of work executed under pre-GST regime, is contrary to Section 142 of the CGST Act. The said Section states that where tax is leviable under VAT/Service Tax law, then GST shall not be levied. Where the point of taxation is under pre-GST regime, then no GST can be levied under GST law.

8.2. As per Section 7 of the Karnataka VAT Act, the time of sale in the case of execution of works contract, happens at the time of incorporation of goods in the course of execution of works contract whether or not there is receipt of payment; that in the absence of monetary consideration between land owner and developer, work executed by the developer to the extent of land owner's built up area against receipt of undivided interest in land amounts to barter / exchange and does not attract tax under KVAT law. They submitted that as per the Service Tax law – Rule 3 of the Point of Taxation Rules, 2011, the point of taxation is the earliest of the following:

a) Date of issue of invoice for service provided

b) If invoice is not issued within 30 days of completion of provision of service, then it is the date of completion of provision of service;

c) If payment is received before the date of issue of invoice or completion of service, then it is the date of receipt of payment.

In this regard they submitted that in case of transactions between landlords and developer, usually there is no system of issue of invoices; that therefore, out of the above three events listed, the date of receipt of consideration or date of completion of service would be relevant in case of JDA; that as per Rule 3 of Taxation Rules, 2011, the point of taxation is the date on which the development rights are received by builder / developer, as the developer gets the

possession of land. Therefore, in the case of JDA construction service provided by developer to land owner, the point of taxation arises on the date of entering into the JDA. They relied on the CESTAT decision dated 11-05-2018 in the case of Vasanth Green Projects – Appeal No: ST/31095/2017 wherein it was held that whatever consideration was received by the appellant in the form of developmental right was considered as assessable value.

8.3. In view of the above they submitted that in case of JDA construction service provided or agreed to be provided by the developer to the land owner, the point of taxation arises on the date of entering JDA, for the reason that developer will receive the consideration i.e developmental rights / undivided interest in land on the date of JDA. They relied on the clarification issued under Education Guide dated 20-06-2012 in the Service tax regime wherein it was clarified that under JDA, the liability to pay service tax for construction service provided or agreed to be provided shall arise on the date of JDA. Therefore, where JDAs were entered into in pre-GST regime, the incidence of tax on construction activity for land owner's built up area having involvement of both transfer of property in goods and provision of labour / service falls under both VAT Act as well as under Service Tax law. Appellant cannot be made liable to pay GST on the same transaction.

8.4. They submitted that the Advance Ruling Authority in the case of M/s Nforce Infrastructure India Pvt Ltd, Mangaluru – AAR Order No KAR ADRG 30/2018 dated 28-11-2018 having identical issues, clarified that the applicant in that case is liable to pay service tax/GST proportionate to the services provided before / after 30-06-2017 in respect of construction activity on land owner's share of built up area, which contradicts the clarification issued in the case of the Appellant. They also submitted that the ROM application has been rejected without giving proper reasons and hence is bad in law. Therefore, they prayed that the impugned advance ruling which makes the Appellant liable to pay tax entirely under GST on the portion of work executed under pre-GST regime, be set aside.

8.5. The Appellant also applied for condonation of 20 days delay in filing the appeal on the grounds that the Appellant firm was short of manpower as most of the employees were working from home on account of the pandemic and the management could not take the decision to file an appeal in time.

PERSONAL HEARING

9. The appellant was called for a virtual hearing on 14th December 2020 and the same was conducted on the Webex platform following the guidelines issued by the CBIC vide Instruction F.No 390/Misc/3/2019-JC dated 21st August 2020. The Appellant was represented by their Chartered Accountant Shri. Srikanth Aacharay G.B who gave a brief about the facts of the case and reiterated the submissions made in the grounds of appeal. He submitted that the applicant filed an application for rectification of the advance ruling alleging that the authority has given a ruling in the case of M/s Nforce Infrastructure India Pvt Ltd wherein on similar set of facts it was held that GST is payable only on the proportionate service supplied after 30-06-2017. Further the ROM application sought to rectify the ruling given with regard to valuation on the grounds that the provisions of Para 2 of Notf 11/2017 CT (R) cannot be made applicable to construction service provided to land owners under JDA since it does not involve transfer of undivided interest in land from developer to the land owner. However, the ROM application was rejected vide order KAR ROM 3/2020 dated 11.09.2020 and being aggrieved by that decision, the present appeal has been filed.

9.1. On a specific query by the Members regarding the admissibility of the instant appeal which is based on an order passed by the lower Authority in terms of Section 98(2) of the CGST Act and not under Section 98(4) of the said Act, the authorised representatives agreed to file additional written submissions within 2 weeks in this regard.

9.2. The Appellant furnished additional submissions on 24th December 2020 in response to the query raised during the personal hearing. They submitted that the original application for advance ruling and the application for rectification made before the AAR were on the same subject matter and not an independent advance ruling application; that the filing of appeal during the pendency of the rectification application amount to violation of hierarchical system provided under Chapter XVII, which is not allowable under law; that the advance ruling is not complete unless the rectification application is disposed off. In other words, where the matter is pending for rectification, the remedy for filing appeal accrues or arises from the date of completion of such rectification proceedings. They submitted that where law provides for rectification of order as well as appeal, both the remedies are not available simultaneously especially when the subject matter or issue is pending before the authority for

rectification. They relied on the Allahabad High Court decision in the case of Utility Equipment &Management Private Ltd vs Commissioner of Trade Tax reported in 1999 115 STC 462 (All) wherein it was held that "where wrong name of dealer was mentioned in an assessment order and rectification was sought for correction of name, limitation runs from the date of service of amended order.

9.3. They further submitted that the rejection of rectification is not the order passed under Section 98(2) as it was not a fresh application; that the appeal is admissible based on the order passed by the Respondent in terms of Section 98(4) of the CGST/SGST Act after passing of rectification order. They relied on the Income Tax Appellate Tribunal decision in the case of Ashu Engineers & Plastics Pvt Ltd in A.No 3453/Mum/2010 as well as the Supreme Court decision in the case of Kundan Lal Srikishan vs Commissioner of Sales Tax U.P and Ors reported in [1987] 65 STC 62 (SC) wherein it was held that the period of limitation for the application for rectification has to be calculated from the date of the order passed under Section 21 of the UP Sales Tax Act. Applying the ratio of the above decisions, the Appellant submitted that the limitation for appeal shall be calculated from the date of rectification order and not from the date of the original order.

9.4. The Appellant further submitted that they had filed the rectification application on 27-09-2019 which was well within the time prescribed for filing appeal under Section 100 of the CGST Act; that the lower Authority took almost one year to complete the rectification proceedings and therefore the limitation for filing appeal commences from the date of receipt of rectification order. They also made a plea that since the lower Authority had made an observation in para 5.4 of the rectification order that the Appellant had not filed records to negate the findings that the possession of land owner's share of flats was not handed over to the land owner till 30-06-2017, the Appellant Authority may provide an opportunity to make fresh application/submissions before the lower Authority since there is a change in facts as against the facts based on which the advance ruling was rendered.

DISCUSSIONS AND FINDINGS

10. We have gone through the records of the case and considered the submissions made by the Appellant in their grounds of appeal and at the time of personal hearing as well as the detailed submissions made in the additional written submissions.

11. We will first address the issue of admissibility of this appeal under Section 100 of the CGST Act. In terms of the said Section an appeal to the Appellate Authority for Advance Ruling may be made by either the applicant, the concerned officer or the jurisdictional officer who is aggrieved by the advance ruling pronounced under Section 98(4) of the said Act. Section 98(4) relates to the advance ruling pronounced by the Authority on the questions specified in the application.

12. As per Section 95(a) of the CGST Act, "advance ruling" means a decision provided by the Authority or the Appellate Authority to an applicant on matters or questions specified in sub-section (2) of section 97 or sub-section (1) of section 100,in relation to the supply of goods or services or both being undertaken or proposed to be undertaken by the applicant. The procedure for obtaining an advance ruling is outlined in Section 98 of the said Act which is reproduced below for reference:

> ***98. Procedure on receipt of application.***—*(1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the concerned officer and, if necessary, call upon him to furnish the relevant records:*
>
> *Provided that where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the said concerned officer.*
>
> *(2) The Authority may, after examining the application and the records called for and after hearing the applicant or his authorised representative and the concerned officer or his authorised representative, by order, either admit or reject the application:*
>
> *Provided that the Authority shall not admit the application where the question raised in the application is already pending or decided in any*

proceedings in the case of an applicant under any of the provisions of this Act:

Provided further that no application shall be rejected under this sub-section unless an opportunity of hearing has been given to the applicant:

Provided also that where the application is rejected, the reasons for such rejection shall be specified in the order.

(3) A copy of every order made under sub-section (2) shall be sent to the applicant and to the concerned officer.

(4) Where an application is admitted under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority and after providing an opportunity of being heard to the applicant or his authorised representative as well as to the concerned officer or his authorised representative, pronounce its advance ruling on the question specified in the application.

(5) Where the members of the Authority differ on any question on which the advance ruling is sought, they shall state the point or points on which they differ and make a reference to the Appellate Authority for hearing and decision on such question.

(6) The Authority shall pronounce its advance ruling in writing within ninety days from the date of receipt of application.

(7) A copy of the advance ruling pronounced by the Authority duly signed by the members and certified in such manner as may be prescribed shall be sent to the applicant, the concerned officer and the jurisdictional officer after such pronouncement.

13. An advance ruling pronounced by the Authority under Section 98(4) may be appealed against to the Appellate Authority within a period of 30 days from the date on which the ruling sought to be appealed against is communicated to the aggrieved person. However, the

Appellate Authority may, if it is satisfied that the appellant was prevented by a sufficient cause from presenting the appeal within the said period of thirty days, allow it to be presented within a further period not exceeding thirty days. In terms of Section 101, the Appellate Authority may pass such order as it thinks fit, confirming or modifying the ruling appealed against. Further, Section 102 of the CGST Act, provides for rectification of advance ruling whereby the Authority or the Appellate Authority may amend any order passed by it under section 98 or section 101, so as to rectify any error apparent on the face of the record, if such error is noticed by the Authority or the Appellate Authority on its own accord, or is brought to its notice by the concerned officer, the jurisdictional officer, the applicant or the appellant within a period of six months from the date of the order.

14. Now let us set out the facts in this case leading to the instant appeal before us. The Appellant filed an application for advance ruling on 25-04-2018 before the Authority in terms of Section 97 of the CGST Act seeking a ruling on the question relating to applicability of tax on the work executed under a Joint Development Agreement with a land owner, where the work commenced before GST implementation and continued even after GST was implemented. The said application was admitted by the Authority under Section 98(2). The question raised in the application was examined and a ruling was pronouncedin terms of Section 98(4) on 25th July 2019 vide order No KAR ADRG 19/2019. On 27-09-2019, the Appellant made an application to the Authority for rectification of mistake (ROM) in the advance ruling dated 25-07-2019. The ROM application was filed on the grounds that the Authority had given a different ruling in their case when compared to the ruling given vide Order No 30/2018 dt 30-11-2018 in the case of advance ruling application filed by M/s Nforce Infrastructure when the facts and circumstances in both cases were the same. This ROM application was not admitted by the lower Authority and was rejected vide order dated 11-09-2020, in terms of Section 98(2) of the said Act for the reason that the lower Authority had considered all the submissions and facts and pronounced a ruling on all questions of the applicant and there was no error/mistake which was apparent on record. It is against this rejection of ROM vide order dated 11-09-2020 that this appeal has been filed before us.

15. A reading of the above provisions of law makes it clear that an appeal can be filed before the Appellate Authority only against an advance ruling pronounced in terms of Section 98(4). In this case, the ruling pronounced in terms of Section 98(4) is the advance ruling order No KAR ADRG 17/2019 dated 25-07-2019. An appeal is maintainable only against the

said order dated 25-07-2019 within the statutory period of 30 days from the date of communication of the said order. However, no appeal has been filed before us against the advance ruling dated 25-07-2019. The Appellant contends that they had filed for a rectification of mistake in the advance ruling dated 25-07-2019 and hence, when a matter is pending for rectification, the remedy for filing appeal accrues from the date of completion of such rectification proceedings. In this connection the Appellant has relied on the Allahabad High Court order in the case of Utility Equipment & Management Pvt Ltd. We have gone through the said decision. We find that the decision was rendered in the context of the U.P Trade Tax Act wherein assessment orders were passed in the case of the petitioner by mentioning a wrong name. The petitioner had made an application for rectification of mistake in the name and the same was allowed. The Hon'ble High Court held that in such circumstances, the time limitation for filing an appeal against the assessment orders could be reckoned only after the service of the amended order rectifying the name of the petitioner. We cannot apply the same ratio to the appeal before us. In the context of the GST law, the scope and ambit of a proceeding for appeal against an advance ruling order in terms of Section 100 of the CGST Act is distinct and different from a proceeding for rectification of an advance ruling order. The jurisdiction for rectification of advance ruling order for mistakes apparent on record is conferred on thelower Authority whereas the appellate jurisdiction lies with the Appellate Authority for Advance ruling and is clearly limited to appeals against the advance ruling order. Both jurisdictions are distinct and conferred on different authorities. It is therefore an incorrect interpretation that an appeal can be filed only after the order in respect of the rectification of mistake application is passed. The procedure for rectification of mistake is akin to an administrative function wherein mistakes which are apparent on record are corrected by the Authority which passed the order. On the other hand, the proceedings in appeal in terms of Section 100 of the CGST Act are judicial proceedings wherein the type of order which can be appealed against and the time period for filing the appeal are clearly laid down. Therefore, we hold that the order passed by the lower Authority rejecting the ROM application is not an order which can be appealed before us.

16. The Appellant has also relied on the Supreme Court decision in the case of Kundan Lal Srikishan vs Commissioner of Sales Tax U.P & Others and also the decision of the Income Tax Appellate Tribunal, Mumbai in the case of Ashu Engineers & Plastics Pvt Ltd to buttress their argument that even though the rectification application got rejected by the lower Authority, the advance ruling order passed under Section 98(4) is admissible for appeal and

the time limitation shall be calculated from the date of the rectification order and not from the date of the original order. We have gone through both the above referred decisions and find that the issues discussed therein relate to how the time limitation for filing the rectification of mistake application should be considered. This is not the issue in the instant appeal and hence the above referred decisions do not help the Appellant. The Appellant's argument seems to be that the order rejecting the ROM application merges with the original order and hence the appeal filed against the ROM rejection order dated 11-09-2020 is to be considered as an appeal against the original order dated 21-09-2020. This argument is not legally tenable.

17. The question whether there is any merger in a case where the authority has passed an original order and subsequently reconsidered the matter and passed another order, has been dealt extensively by the Hon'ble High Court of Karnataka in the case of Kothari Industrial Corporation vs Agricultural Income Tax Officer. The relevant para of the High Court order is reproduced below:

> *"11. The next question is where the authority who passed the order, has occasion to reconsider the matter and passed a subsequent order, whether there is any merger, and if so to what extent. There are two circumstances where an authority has occasion to reconsider his own order : (a) by way of review; and (b) by way of rectification. Normally, review is contemplated where new and important matter or evidence comes to light or where there is a mistake or error apparent on the face of the record. Rectification is resorted to, to correct clerical or arithmetical errors. When the authority grants an application for review of an order, the order in regard to which review is granted stands vacated or set aside and the order subsequently passed on review (either modifying, reversing or confirming the earlier order) will supersede the original order. In such a case, there is no question of merger, as the second order supersedes the first order and only the second order remains in existence. On the other hand, when an application for rectification is allowed, the original order is 'rectified' or corrected. The 'Rectification' presupposes the continuance of the original order with the change incorporated. Rectification is the process by which an order*

which contains an error is set right. If the entire order is to be replaced by a new order by the same authority, such an order is not an 'order of rectification', but an 'order on review'. When rectification is directed, there is no merger, as there is no order into which the original order can merge. When an order of rectification is made, the effect is that the original order has to be read subject to the corrections/modifications made by the rectification order. The correction is incorporated in the original order, as for example, where merely a figure is altered or typographical correction is made. However, having regard to the nature of original order and rectification order, if the correction cannot be incorporated in the original order, the rectification becomes an addendum to the original order, both being read together...."

18. From the above, it is clear that even in cases where a rectification of mistake application is admitted and a mistake apparent on record is corrected, the original order is not set aside. The original order remains on record and only the mistakes are corrected therein. The principle of doctrine of merger will not apply in such cases. Any appeal can be made only against the original order which will be read together with the correction made in the rectification order. In this case, the rectification application was not admitted as there was no error apparent on record and hence, the original order stands without any changes. The ROM rejection order does not merge with the original advance ruling order. The original advance ruling stands without any corrections. The appeal should have been filed by the Appellant against the advance ruling order dated 25-07-2019 within the period of 30 days from the date of communication of the said order or such extended period as permitted in terms of the proviso to Section 100(2) of the CGST Act.

19. We also observe that in the instant appeal, the Appellant is aggrieved by the fact that the lower Authority had given a different ruling in the application filed by M/s Nforce Infrastructure India Pvt Ltd when the subject matter and facts were the same as their case.Further, the issue which was part of the original application for advance ruling is now being contested in appeal before us. Assuming for the sake of argument that we consider this appeal as an appeal against the advance ruling dated 25-07-2019, even then we observe that the statutory time limit for filing an appeal against the advance ruling order has long expired. This Appellate Authority being a creature of the statue is empowered to condone a delay of

only a period of 30 days after the expiry of the initial time period for filing appeal. We are not empowered to condone any delay beyond what the statute permits us.

20. In view of the aforesaid, we hold that the appeal filed against the ROM order KAR ROM 03/2020 dated 11-09-2020 is not maintainable in as much as the impugned order is not an appealable order under Section 100 of the CGST Act, 2017. We also hold that the ROM rejection order dated 11-09-2020 does not merge with the original advance ruling dated 25-07-2019. Since the appeal is not maintainable, the question of addressing the issues raised in appeal as well as the condonation of delay application do not arise.

21. In view of the above discussion, we pass the following order

ORDER

We dismiss the appeal filed by M/s Durga Projects & Infrastructure Pvt Ltd, No 125/1-18, GK Arcade, T. Mariyappa Road, 1st Block, Jayanagar, Bangalore 560011 against the ROM order No. KAR/ROM 03/2020 dated 11th Sept 2020on the ground that it is not maintainable.

(D.P.NAGENDRAKUMAR)
Member
Karnataka Appellate Authority
for Advance Ruling

Member
Appellate Authority for Advance Ruling

(M.S. SRIKAR)
Member
Karnataka Appellate Authority
for Advance Ruling

Member
Appellate Authority for Advance Ruling

To,

The Appellant

Copy to

1. The Member (Central), Advance Ruling Authority, Karnataka.
2. The Member (State), Advance Ruling Authority, Karnataka
3. The Commissioner of Central Tax, Bangalore South Commissionerate
4. The Assistant Commissioner, LGSTO-90, Bangalore
5. Office folder

APPELLATE AUTHORITY FOR ADVANCE RULING BANGALORE