

PUNJAB APPELLATE AUTHORITY FOR ADVANCE RULING

Order No. 02/AAAR/PSPCL/2023/333-35

Dated: 20.03.2023

Present:

1. Sh. Rajesh Puri, Chief Commissioner, IRS (C&IT), CGST Commissionerate, Chandigarh Zone, Chandigarh
2. Sh. Kamal Kishor Yadav, IAS, Commissioner of State Tax, Punjab

Name and Address of appellant	M/s Punjab State Corporation Power Limited, PSEB Head Office, The Mall, Patiala, Punjab-147001
GSTIN	03AAFCP5120Q1ZC
Date of Application	31-10-2022
Represented By	Mr. Atul Gupta, Chartered Accountant
Date of Personal Hearing	9 th of February, 2023
Order of Authority of Advance Ruling	AAR/GST/PB/07 dated 29.09.2022 issued by the Punjab Authority for Advance Ruling, Punjab

PROCEEDINGS

At the outset, we would like to make it clear that the provisions of both the Central Goods and Services Tax Act, 2017 and the Punjab Goods and Services Tax Act, 2017, (hereinafter referred to as, "CGST Act, 2017 and PGST Act, 2017") are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the corresponding similar provisions under the PGST Act.

FACTS OF THE CASE:

M/s Punjab State Power Corporation Limited (PSPCL) (hereinafter referred to as, "the appellant") holding GSTN 03AAFCP5120Q1ZC is a Punjab Government undertaking engaged in generation and distribution of Electricity.



2. The transmission or distribution of electricity is exempt under GST Act, vide Notification No.12/2017 dated 28th June, 2017 (Tariff heading 9969). For the generation of electricity, the appellant requires essential raw-material "Coal" which is being procured by them from Coal India Limited (CIL). In order to comply with the guidelines laid down by the Ministry of Environment and Forest, they are mandatorily required to get the raw coal washed before captive consumption for meeting the stipulated percentage ash. To undertake this activity, the appellant have engaged some washeries in private sector on job work basis for the job of coal beneficiation who in turn supplies the washed coal to the applicant. During the process of washing of coal at the washery/job worker, certain low quality coal is also generated which is commonly referred to as -Coal rejects" which is disposed off/sold directly by the washery/job worker in an environment friendly manner

3. The appellant filed an application before the Authority for Advance Ruling, Punjab (hereinafter referred to as, "AAR, Punjab"). The appellant sought Advance Ruling on the following questions before the AAR, Punjab:

1. Whether the coal rejects whose invoice is raised by the applicant upon washery/job worker is taxable under GST Act and Compensation cess Act in the hands of Applicant?
2. If the answer to above question is yes, whether Applicant is eligible to avail Input Tax Credit (ITC) of GST and Compensation Cess of raw coal brought from its supplier and transferred to washery/job worker for cleaning? and
3. If the answer to above question is yes and ITC is admissible, what is the admissible proportion of Input Tax Credit?

4. AAR Punjab disposed off the said application of the appellant vide Order **No.AAR/GST/PB/07 dated 29th of September, 2022**. The point-wise rulings of the AAR Punjab are enumerated as under:

1. Whether the coal rejects whose invoice is raised by the applicant upon washery/job worker is taxable under GST Act and Compensation cess Act in the hands of Applicant?

Advance Ruling: Yes, Coal rejects are to be classified under HSN 2701 and are taxable at 5% GST Rate + Rs 400 PMT compensation Cess.

2. If the answer to above question is yes, whether Applicant is eligible to avail Input Tax Credit (for brevity, "ITC") of GST and Compensation Cess of raw coal brought from its supplier and transferred to washery/job worker for cleaning?

Advance Ruling: Where the goods are being received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment. Thus, if the applicant fulfils the eligibility conditions as prescribed under Section 16 of CGST Act, 2017 and PGST Act, 2017 and if the type of ITC does not fall under the categories prescribed under Section 17 of CGST Act, 2017 and PGST Act, 2017, the applicant is eligible to avail Input Tax Credit of GST and Compensation Cess of raw coal brought from its supplier and transferred to washery/job worker for cleaning. Further, the "principal" shall be entitled to avail ITC in relation to goods sent directly to the premises of job-worker.

3. If the answer to above question is yes and ITC is admissible, what is the admissible proportion of Input Tax Credit?

Advance Ruling: The formula prescribed under Rule 42 of CGST and PGST Rules, 2017 for manner of determination of input tax credit in respect of inputs or input services and reversal thereof will be applicable in both cases i.e. GST and Compensation Cess. Therefore, the provisions prescribed under Rule 42 of CGST and PGST Rules, 2017 should be followed by the applicant and they have to make reversal in the proportion of exempt/taxable turnover.

5. **Appeal before the Appellate Authority for Advance Ruling, Punjab:** The appellant aggrieved by the said order passed by the AAR, Punjab, filed an appeal with the Appellate Authority for Advance Ruling, Punjab seeking further clarification to para 3 of their application. The appellant submitted that the impugned order lacks clarity insofar as Ruling on **Question no. 3** of their Advance

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Ruling application is concerned and AAR, Punjab, did not take cognizance of various factual and legal aspects. The appellant has also submitted that in order to answer the 3rd question of the Applicant concerning the '**admissible proportion of ITC available to the Applicant**', AAR vide Para 8.6 of Impugned Order has simply pronounced a ruling that the same will be governed as per Rule 42 of CGST Rules, 2017 ("the Rules") and later ruled that ITC is admissible to the Appellant in proportion of taxable & exempt turnover. The appellant sought further clarity on Rule 42 of the CGST Rules as how to calculate the admissible ITC applicable to them as they are engaged in taxable as well as exempted supplies.

6. RECORD OF PERSONAL HEARING:

The appellant was accorded the opportunity of Personal Hearing and Sh. Atul Gupta, Chartered Accountant appeared for the Personal Hearing on 09th of February, 2023 and submitted that the appellant is purchasing coal and after the washery operation, some part of coal is sold as such. They submitted that on the portion which is going into the exempted activity the ITC reversals should be based on the actual quantum of compensation cess paid on such coal instead of adopting value of such coal for the purpose of Rule 42 and Rule 43 of the CGST Rules, 2017 and equivalent SGST Rules. The reason for this request is that compensation cess is levied on specific basis and not on the basis of ad-valorem basis.

6.2 On being asked whether Rule 42 and 43 provides for adoption of quantity as the criteria for apportionment, the Authority observed this would mean that we intend to rewrite Rule 42 and Rule 43 of the CGST Rules, 2017. To this, the appellant replied that the compensation cess is out of purview of the said rules as it is not on ad-valorem but on specific basis.

6.3 Further, the Appellate Authority desired to know under which clause of sub-section (2) of section 97 of the CGST Act, 2017 they are seeking Advance Ruling to which they replied that they are seeking Advance Ruling under clause (d) of the said sub-section which provides admissibility of ITC on tax paid or deemed to have been paid.

7. DISCUSSIONS AND FINDINGS:

We have carefully examined the appeal filed by the appellant and the additional submissions made by appellant and observed that the AAR, Punjab have covered the



application of the appellant under the ambit of clause 3 of sub-section (2) of Section 97 of the CGST Act 2017, whereas the appellant during the Personal Hearing submitted that they have sought Advance Ruling under clause (d) of sub-section (2) of Section 97 of the CGST Act, 2017 which provides for admissibility of ITC on tax paid or deemed to have been paid.

7.2 In light of the aforementioned submissions of the appellant, the following questions require examination before going into the merits of the case;

(a) Whether the issue raised by the appellant before the Authority for Advance Ruling is maintainable as per the provisions of:

- i. Clause (c) of sub-section (2) of Section 97 of the CGST Act, 2017, as stated in the para 4 of the Order passed by the AAR, Punjab; or
- ii. Clause (d) of sub-section (2) of Section 97 of the CGST Act, 2017, as submitted by the representative of the appellant during the Personal Hearing.

(b) Whether the AAAR is empowered to remand back the case on the issue of maintainability (Case laws)

7.3 On the issue raised in point (a) above we are of the opinion that the question of maintainability was not examined at the AAR stage and it would be in the fitness of the things that the issue be re-examined by AAR itself.

7.4 Further, on the issue raised in point (b) above, it is to state that as per sub-section (1) of Section 101 of the CGST Act 2017, the appellate authority **may pass such order as it thinks fit, confirming or modifying the ruling appealed against or referred to.** The relevant portion of the Section is reproduced as under:

“The Appellate Authority may, after giving the parties to the appeal or reference an opportunity of being heard, pass such order as it thinks fit, confirming or modifying the ruling appealed against or referred to.”

(emphasis supplied)

As the power of remand back is not clearly detailed in the provision, it would be in fitness of things to refer to other Acts wherein similar provisions have been provided to appellate authorities.



For this we refer to the powers so provided to Commissioner (Appeals) under the erstwhile Central Excise Act, 1944. The relevant section is reproduced as under:

“35A *The Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against.*”

Further, reference is invited to sub-section (5) of Section 85 of Finance Act, 1994, which is reproduced as under:

“(5) *Subject to the provisions of this Chapter, in hearing the appeals and making order under this section, the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act, 1944 (1 of 1944).*”

A bare perusal of the above sections shows that the language used in the section 35A (as applied to cases of Service tax vide Section 85(5)) is similar to that used in Section 101 of CGST Act, 2017. Therefore, the jurisprudence so developed over the years may be referred as para-materia while ascertaining the ambit and scope of the powers of the AAAR.

7.5 Therefore, we refer to the following cases for better understanding the scope and ambit of powers to Appellate Authority and whether the same includes power to remand back:

- a) The Hon'ble Supreme Court in *UOI v. Umesh Dhaimode, 2002-TIOL-415-SC-CUS*, in the context of Section 128(2) of the Customs Act, the Court held that “*As the order under appeal itself notes, the aforesaid provision vested the appellate authority with powers to pass such order as it deemed fit confirming, modifying or annulling the decision appealed against. An order of remand necessarily annuls the decision which is under appeal before the appellate authority. The appellate authority is also invested with the power to pass such order as it deems fit. Both these portions of the aforesaid provision, read together, necessarily imply that the appellate authority has the power to set aside the decision which is under appeal before it and to remand the matter to the authority below for fresh decision.*”



b) In the case of **Commissioner of Central Excise vs Medico Labs and Anr.**(2004) 192 CTR Guj 112, wherein the Hon'ble High Court of Gujarat has held that:

i. *"We must also state that even after amendment, which has come into force w.e.f. 11th May, 2001, powers of remand by allowing the appeal of the Commr.(A) have not been taken away specifically. In that view of the matter, we are of the considered opinion that the appellate authority, viz., Commr.(A) was vested with the power while deciding the appeal as he deemed fit by confirming, modifying or annulling the decision or order appealed against him. In our considered opinion, order of remand necessarily annuls the decision, which is under appeal before the appellate authority. Therefore, we entirely agree with the view taken by the learned single Member of the Tribunal that even after amendment of Section 35A of the Central Excise Act, the appellate authority has the power to set aside the decision, which is under appeal before it and it has power to remand the matter to the authority below for its fresh consideration.*

c) In the case of **A.S. BABU SAH DESIGNS Versus COMMISSIONER OF C. EX. (APPEALS), CHENNAI-1** {2020 (38) G.S.T.L. 161 (Mad.) IN THE HIGH COURT OF JUDICATURE AT MADRAS} it was observed that Commissioner (Appeals) can pass orders as he thinks fit including an order of remand.

d) In the case of **M/s ALD Automotive Pvt. Ltd. Vs. Asst. Commissioner of Commercial Taxes (Audit)-1 Bengaluru** in the Writ Petition Nos. 13315-13316 of 2017 and WP Nos. 13752-13773 of 2017 (T-RES), decided on 26.06.2017 reported – 2017(7) GSTL 290 (Kar.) held as under in para 8 and 9:

"8 Needless to say, a reasoned order is an essential requirement of the principles of natural justice. In catena of cases, the Hon'ble Supreme Court has observed that even a quasi-judicial body is required to give reasons in its order. For, such orders are appealable in nature; for, such orders adversely affect the rights of the people, therefore, both the Appellate Authority and the adversely affected party have right to know the reasons for the quasi-judicial body while passing of its order.



"Thus, the Assessing Officer is duty bound to give cogent reasons for rejecting the specific plea raised by the petitioner. However, the Assessing officer has failed to do so.

9. *Thus, for the reasons stated above, this court has no other option but to set aside the assessment order dated 21.02.2017 and the assessment order dated 01.03.2017, and to remand the case back to the Assessing officer. This court directs the Assessing officer to give an opportunity of personal "hearing to the petitioner, and to deal with each and every plea raised by the petitioner".*

(d) In the case of **Commissioner of Service Tax Vs. Associated Hotels Ltd. [2015 (37) STR 723 (Guj.)]**, the Hon'ble High Court of Gujarat has given its verdict as to **whether the Commissioner (Appeals) exercising powers under Section 85 of the Finance Act, 1994 has the power to remand the proceedings back to the adjudicating authority**, the relevant portion of para-4 is reproduced as under:

"If proper inquiry is not conducted or the proceedings is decided ex parte, it would not be necessary in every case that the Commissioner (Appeals) converts himself to the adjudicating authority and conducts the entire inquiry necessary for proper adjudication of the issues. In such a case, the Commissioner (Appeals) may as well decide to remand the proceedings, and we see no limitation on his powers to do so. "

(e) Further, in this regard we would also like to rely upon the order of the Principal Bench of CESTAT, New Delhi in the case of **Commissioner of Central Excise, Meerut-II Vs. Honda Seil Power Products Ltd. [2013(287) ELT 353 (Tri.-Del.)]**.

The tribunal in the above referred case had held that "There may be circumstances where only just and proper order could be remand of the matter for fresh adjudication. For example, if the order-in-original is passed without giving opportunity of being heard to the assessee or without permitting him to adduce evidence in support of his case then only order-in-appeal by the Commissioner (Appeals) could be to set aside the impugned order on the ground of failure of justice. This would create an anomaly and cause prejudice to the Revenue as it would bring an end to the litigation without adjudicating on the demand raised by the show

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cause notice. Therefore, only just and proper order in such a case would be the order of remand to adjudicate the matter de novo after giving due hearing to the assessee. Thus, we are of the view that power to remand the matter back in appropriate cases is inbuilt in Section 35A(3) of the Central Excise Act, 1944."

7.6 We, also observe that the direction for remand has also been resorted to by other AAARs in the following cases:

a) M/s D.M Net Technologies-Gujarat AAAR Order dated 22.08.2022


b) M/s Myntra Designs Pvt. Ltd. –Karnataka AAAR Order dated 21.11.2022


Hence, from the above, it is apparent that the appellate authority can remand back the appeal of the appellant to the AAR, Punjab to re-examine the maintainability of the application filed by the appellant as per sub-section (2) of Section 98 of the CGST Act, 2017 and accordingly pass the order on merit.

ORDER

Without going into the merit of the case, we remand the appeal of the appellant to the AAR, Punjab to re-examine whether the application of the appellant is covered under sub-section (2) of Section 97 of the CGST Act, 2017 or otherwise and pass an order on its maintainability.

The appeal stands disposed off accordingly.


Rajesh Puri IRS (C&IT)
Chief Commissioner,
CGST and CX Zone, Chandigarh,
Chandigarh


Kamal Kishor Yadav, IAS,
Commissioner of State Tax,
Punjab.

Place: Chandigarh