
Northern India Regional Council

HAM: GST implications

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Components of HAM projects

- For the purpose of analyzing the GST implications on the HAM projects, the same needs to be divided into following three components:

Milestone
payments
received
during
construction

Bi-Annual
annuity
payments

O&M
payments

Interest
receivable
in terms of
Clause 23.6
of MCA

Case Study

Case study

- NHAI has awarded a concession agreement for Design, Build, Operate and Transfer of a stretch of National Highway under HAM (hereinafter referred to as “Project”). In terms of the concession agreement the Concessionaire, being “Road Contractors Pvt. Ltd.” (hereinafter referred to as “RCPL”), is required to perform the following activities
 - Construction of Highway; and
 - After completion of Construction/ Operation and maintenance (hereinafter referred to as “O&M”) of Highway for 15 years. Operation and maintenance activities would include regular maintenance as also major maintenance.
- The estimated cost of construction is Rs. 500 Cr. The same would be incurred in the following manner:
 - 1st year: Rs. 300Cr.
 - 2nd year: Rs. 200 Cr.

Case study

- Estimated O&M cost to be incurred each year is Rs. 20 Cr.. In addition to this, during 8th year and the 15th year of operation, additional Rs 25 Cr. is estimated to be incurred in respect of major maintenance for both the years.
- Estimated cost and the agreed revenue (as quoted in the bid) is summarized in the table below:

Activities/ cost and revenue	Construction (in Cr.)	O&M (in Cr.)	Total (in Cr.)
Cost	500	[(15X20)+50] 350	850
Revenue quoted	800	[15 X 20] 300	1100

Case study

- The consideration agreed between NHAI and CPL is to be paid by NHAI in the following manner:
 - NHAI shall pay 40% of the cost of construction of the Bid Project Cost on achievement of milestones linked with the physical completion of the project in 10 equal instalments of 4% of bid project cost.
 - Upon Commercial Operation Date (“COD”), CPL shall be entitled to demand and collect remaining 60% of bid project cost as Annuity payments
 - The said 60% shall be paid to the Concessionaire in 30 biannual Annuities, after completion of 180 days from COD along with interest on the balance of annuity payments
 - NHAI shall also pay operation and maintenance costs (as per the bid of the CPL) during the 15 years of operations of the project.
- We shall be using this case study to elaborate different aspects of GST as applicable on various components of HAM projects.

Taxability of milestone payments

Construction of Road – Works contract

- Works contract is defined in Section 2(119) of the Central Goods and Service Tax Act, 2017 (“CGST Act”) as:

(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;

ALA Comments

- Works contract includes a *contract for construction, repair, maintenance, renovation of any immovable property* wherein transfer of property in goods is involved in execution of works contract.
- **Para 6 of Sch. II:** composite supply of works contract is treated as *service*.
- The activity of construction of road falls under **Works Contract**. Consequently the activity of construction of road would be treated as supply of service.

Rate of tax

ALA Comments

- **Rate of tax**: As per S. No. 3(iv) of the Notification No. 11/2017 **CGST rate** for composite supply of works contract, supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a road, bridge, tunnel or terminal for road transportation for use by general public is 6%.
- Thus the milestone payments received during construction of road would be taxable at the rate of 12% (CGST + SGST) or @ 12% IGST as the case may be.

Analysing the Case Study

- In terms of MCA, 40% of the bid project cost i.e 40% of Rs. 800 Cr. = Rs. 320 Cr. (with adjustment of inflation) is to be received during the construction period. Thus, the said 40% is chargeable to GST @ 12%

Time of supply and value

ALA Comments

- **Time of Supply:** needs to be determined in terms of Section 13 of the CGST Act.
- Time of supply, shall be earliest of the following:
 - a. Date of receipt of payment; or
 - b. Date of issuance of invoice by supplier, however where the invoice is not issued with the period prescribed in Section 31 then the date of provision of service is to be considered
- Section 31(5)(c) – where the payment is linked to the completion of an event, the invoice shall be issued on or before the date of completion of that event
- **Value of supply:**
 - i. **transaction value**, i.e. the price actually paid or payable for the supply of goods or services or both
 - ii. where the supplier and the recipient of the supply are **not related** and
 - iii. the **price is the sole consideration** for the supply.

Taxability of O&M payments

O&M payments - taxability

ALA Comments

Nature

- The operation and maintenance work of the road project is leviable to GST and the same would be treated as supply of works contract service.

Rate of tax

- In terms of entry 3(iv) of Notification No. 11/2017 – CT(R) dated 28.06.2017 effective from 01.07.2017, O&M payments is chargeable to tax (CGST + SGST) at

Analysing the case study

- RCPL has quoted Rs 20 Cr. Per annum (for the period of 15 years) payable bi-annually in respect of operation and maintenance.
- The whole of the amount received/ receivable in respect of O&M is chargeable to GST @ 12% in terms of entry 3(iv) of the Notification No. 11/2017- CT(R) dated 28.06.2017 effective from 01.07.2017.
- Further, the GST is payable for the month in which the said operation and maintenance payment is due from NHAI.

O&M payments

ALA Comments

Time of supply

- Time of supply would be the date when of issuance of invoice.
- Invoice to be issued on or before the payment becomes due

Taxability of Annuity receipts and interest

Annuity payments

- In terms of Clause 23.6 Concessionaire would receive the remaining amount of bid project cost (appx. 60 % of the BPC). The said amount would be due and payable in bi-annual installments over a period of 15 years commencing from Commercial Operation Date (COD) (Clause 23.6.2). These payments are called as annuity payments.

Exemption

- CG has issued Notification No. 12/2017 - CT(R) dated 28.06.2017 effective from 01.07.2017 to provide list of services that are exempt from GST.
- Vide **Entry No. 23A of Notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017** (effective from 13.10.2017) the Central Government has exempted
✓ *services by way of access to road or a bridge on payment of annuity*

ALA Comments

- Based on entry 23A a view may be taken that the annuity payments received from by the concessionaire from the NHAI is exempt and no tax is payable on the same.

Annuity payments

ALA Comments

- This view is based on the minutes of the 22nd meeting of the GST council wherein the said entry 23A was recommended by the council. The main part of the minutes is reproduced below:

61. Introducing this agenda item, the joint secretary (TRU-II), CBEC stated that while toll is a payment made by the user of road to concessionaries for usage of roads, annuity is an amount paid by the National Highways Authority of India (NHAI) to concessionaries for construction of roads in order that the concessionaire did not charge toll for access to a road or a bridge. In other words, annuity is a consideration for the service provided by the concessionaries to NHAI. ...

- GST council is a constitutional body and it plays a pivotal role in the drafting of the GST Act, rules and the notification issued thereunder. Thus, their recommendation is of great importance in order to understand the provisions of the GST law.
- In case of exempt supplies, in terms of Section 31(3)(c), bill of supply is to be issued containing the particulars as prescribed under Rule 49 of the CGST Rules

Annuity payments

ALA Comments

Analysing Case Study

- Annuity payments, as computed in terms of Clause 23.6.1 and 23.6.2, receivable by RCPL in the 30 bi-annual instalments shall be exempt from GST in terms of entry 23A of the Notification No. 12/2017_CT(R)
- RCPL is required to issue bill of supply as and when the annuity payments are due in terms of clause 23.6.3 of the MCA

Taxability of interest

ALA Comments

Taxability of interest received along with annuity payments

- In terms of Clause 23.6.3 each of the bi-annual instalments shall be paid along with interest as specified in clause 23.6.4.
- The said interest amount payable by NHAI to the Concessionaire along with the bi-annual instalment may also be regarded as annuity i.e. consideration for access of road and thus the interest may also get exempt in terms of entry 23A of Notification No. 12/2017 – CT(R) dated 28.06.2017 w.e.f. 01.07.2017.
- Further, interest may also get exempted in terms of **entry 27** of the Notification No. 12/2017. relevant portion of entry 27 is reproduced below:

Services by way of-

(a) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (other than interest involved in credit card services);....

Taxability of other payments that may be received by the Concessionaire from NHAI

GST on other payments

Mobilization advance (Clause 23.8)

- The Authority shall, on request of the Concessionaire, make an advance payment in a sum not exceeding 10% of the BPC (this is called as “**Mobilization Advance**”).
- The advance payment shall be made in 2 equal installments.
- The Concessionaire is required to pay interest on the said advance at the rate which is equal to the average of 1 year MCLR of top 5 Scheduled Commercial banks plus 1.25%, compounded annually.
- Mobilization advance shall be deducted by the Authority in 8 equal installments from each of the payments to be made by the authority. Interest shall be recovered from 9th and 10th installments

Issue for discussion

- Whether the GST treatment of the said receipt is made like an advance payment or in any other manner?

GST on other payments

Bonus on early completion (clause 23.5)

- In the event that the concessionaire shall achieve the COD on or more than 30 (thirty) days prior to the scheduled completion date, the authority shall pay to the concessionaire a bonus equal to .5% of 60% of the BPC for the first 30 days by which COD shall precede the Scheduled Completion Date and thereafter the said bonus shall be calculated on the pro-rata basis for each day preceding the said 30 days period.
- The bonus shall be due and payable to the concessionaire along with the first annuity payment.

Issue for discussion

- Whether the bonus would be treated as a consideration for supply of taxable service of road construction or it would be treated as an annuity payment?
- What would be the time of supply of the said receipt?

Reversal of ITC

Reversal of credit

- Section 17(2) of the CGST Act provides that where input goods or services are used by a registered person for partly effecting taxable supplies as well as partly for effecting exempt supplies, then ITC shall be restricted to *so much of the input tax that is attributable to the taxable supplies*.
- As discussed before the bi-annual payment received by the Concessionaire is exempt from payment of GST.
- Section 17(6) of CGST Act provides that the Government may *prescribe* the manner in which the input tax credit referred to in Section 17 (2) may be attributed.
- Rule 42 of the CGST Rules provides the manner for computation *input tax that is attributable to the taxable supplies*. The same is reproduced below:

$$D1 = C2 * E/F$$

where,

$$C2 = T - (T1 + T2 + T3 + T4)$$

T = the total input tax involved on inputs and input services in a tax period.

Reversal of credit

T1 = inputs and input services intended to be used exclusively for the purposes other than business

T2 = inputs and input services intended to be used exclusively for effecting exempt supplies

T3 = inputs and input services on which credit is not available under sub-section (5) of section 17

T4 = input tax credit attributable to inputs and input services intended to be used exclusively for effecting supplies other than exempted but including zero rated supplies

E = aggregate value of exempt supplies during the tax period

F = total turnover in the State of the registered person during the tax period

D1 = the amount of input tax credit attributable towards exempt supplies

Reversal of credit

- Tax period is defined under Section 2(106) of CGST Act to mean the *period for which the return is required to be furnished*. Accordingly, the reversal u/s 17(2) is to done on a monthly basis taking into account the inputs and input services availed during such particular month.
- **Issue:** The months in which the Concessionaire will receive milestone payments of 40% of the BPC i.e. taxable amount, the amount of monthly reversal come out as zero. However, the said reversal has to be computed again at the end of Financial Year considering the taxable and exempted turnover of complete financial year. But, if in entire financial year there is no exempt turnover, then even after applying formula prescribed under Rule 42(2) the reversal of credit may come out to be zero.

Refund – inverted duty structure

Refund – Section 54

Section 54(3)(ii)

- Section 54(3)(ii) of the CGST Act allows refund of any unutilised ITC which has *accumulated* on account of rate *of tax on inputs being higher than the rate of tax of output supplies*.
- Thus, in terms of Section 54(3)(ii) refund is allowed of the accumulated ITC where the accumulation has occurred as the rate of tax on **inputs** is higher than the rate of tax on **output**.

ALA Comments

- In the case of construction of road various inputs are used such as *cement, bitumen* and *stone aggregates*.
- Out of these inputs bitumen and aggregates are chargeable to tax at the rate of 18%, and cement is leviable to tax at the higher rate of 28%. Whereas as mentioned earlier the GST rate applicable on construction of road is only 12%. Likewise maintenance of road is also chargeable to GST @ 12%.
- Thus, in case of HAM projects there is inverted duty structure, that is to say, the rate of tax on inputs is higher than the rate of tax on output.

Notification No. 15/2017

ALA Comments

- Due to the presence of inverted duty structure there is huge accumulation of Input tax credit in the book of concessionaire which would ultimately become their cost.
- Thus, concessionaire may claim refund of accumulated GST in terms of Section 54(3)(ii) of the CGST Act.

Notification No. 15/2017 – CT(R)

- By virtue of the said Notification the refund of unutilised ITC as available in section 54(3)(ii) of the CGST Act is restricted where there is supply of services as specified in *item 5(b) of Schedule II* of the CGST Act. That means no refund would be allowed in terms of Section 54(3)(2) even if there is an inverted duty structure in the case of supplies that are covered in item 5(b) of Schedule II.

- Item 5(b) of Schedule II covers:

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Notification No. 15/2017

ALA Comments

- A dispute may arise that the refund available under Section 54(3)(ii) is restricted on the HAM projects in terms of Notification No. 15/2017 – CT(R).
- However, in our view it is a very good case to defend and to prove that the work of construction and maintenance of road, as in the case of HAM, would not be covered within the notification 15/2017- CT(R) and thus, there is no restriction on claiming the refund of unutilized ITC as allowed under Section 54(3)(ii) of the CGST Act

Formula for Refund

Rule 89(5)

- The formula for calculating "refund amount" in case of inverted duty structure has been prescribed in Rule 89(5) of the CGST Rules:

(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula:-

Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.

Explanation:- For the purposes of this sub-rule, the expressions -

(a) Net ITC shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules

(4A) or (4B) or both; and

(b) Adjusted Total turnover" and "relevant period" shall have the same meaning as assigned to them in sub-rule (4).

Formula for Refund

ALA Comments

- From the said formula it is evident that for computation of Net ITC, the ITC availed only in respect of inputs is considered and the ITC availed on input services and capital goods is not taken into account.
- Due to such a restrictive formula – no refund is allowed even in the cases of inverted duty structure and where the ITC is accumulated.

Ongoing dispute

- *Exclusion of input services and capital goods:* Dissenting judgments of different High Courts
 1. VKC Footsteps India Pvt. Ltd. V. UOI – Gujarat High court: In the said case the Hon’ble High Court of Gujarat read down the explanation (a) to the Rule 89(5) of the CGST Rules which defines “Net Input Tax credit”. The Hon’ble Gujarat High Court has held that the explanation is contrary to the provisions of Section 54(3) of the CGST Act. The court further held that the Net ITC should mean input tax credit availed on inputs and input services as defined under the Act

Formula for Refund

ALA Comments

2. Tvl. Transtonelstroy Afcons Joint Venture and others V. UOI and others

– Madras High court: upheld the constitutional validity of Section 54(3)(ii) of the CGST Act read with Rule 89(5) of the CGST Rules is valid and no need to be read down.

- In such background it is advised that the HAM contractors keep filing their refund claims for total accumulated ITC, and not only for inputs. In case the departmental authorities reject the claims the HAM contractors would have to file an appeal.
- Since the contractors have already filed the refund claim for whole of the unutilised ITC thus if at a later date the Supreme Court allows the refund of unutilised ITC that pertains to input service then the refund claim of HAM contractor would not be barred by limitation.

THANK YOU

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