

**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-14-F/2019-20

DATE:17-02-2020

Sl. No	Name and address of the appellant	M/s Manipal Energy & Infratech Ltd, Udayavani Building, Udayvani Road, Manipal 576104
1	GSTIN or User ID	29AAHCM0173A1ZT
2	Advance Ruling Order against which appeal is filed	KAR/ADRG 111/2019 Dated: 30th Sept 2019
3	Date of filing appeal	19-11-2019
4	Represented by	Shri. Ravi Raghavan& Ms Sandhya Sarvode Advocates
5	Jurisdictional Authority- Centre	Commissioner of Central Tax, Mangalore Commissionerate.
6	Jurisdictional Authority- State	LGSTO 280, Mangalore
7	Whether payment of fees for filing appeal is discharged. If yes, the amount and challan details	Yes. CIN No HDFC19112900121455 dated 14.11.2019 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 Manipal Energy & Infratech Ltd, Udayavani Building, Udayvani Road, Manipal 576104 (herein after referred to as Appellant) against the advance Ruling No. KAR/ADRG 111/2019 dated 30th Sept 2019.

Brief Facts of the case:

3. The Appellant (MEIL) is engaged in civil construction, mechanical structural work, erection of equipment, electrical infrastructure including substations etc. The Appellant regularly bids for the tenders floated by various electricity companies. In the instant case, the Appellant participated in the tenders floated by some of the electricity distribution companies based in Karnataka i.e., Hubli Electricity Supply Company Limited (hereinafter referred to as “HESCOM”), Mangalore Electricity Supply company Limited (hereinafter referred to as “MESCOM”) and Bangalore Electricity supply company Limited (hereinafter referred to as “BESCOM”).

4. The Appellant, upon participating in the tender, has been awarded the following contracts by MESCOM:

- a. Contracts for “Strengthening of Distribution Networks in Udupi Circle of MESCOM, Karnataka under Integrated Power Development Scheme (IPDS) on turnkey basis”.
- b. Contract for the work of providing infrastructure to regularized unauthorized IP sets by extending 11KV HT Lines, LT 3 phase 4 wire lines, erection of BEE 3 Star Rated 25/63KVA distribution transformers on total turnkey basis under rate contract for a period of one year in urban section of Shikaripura O&M Sub-division.
- c. Contract for “Rural Electrification and System Strengthening works in Udupi District of MESCOM, Karnataka under DeenDayal Upadhyaya Gram Jyothi Yojana (DDUGY) on turkey basis.

4.1. Similarly, the Appellant has been awarded the contract by BESCOM for the work of providing infrastructure to regularized unauthorized IP sets by extending 11KV HT Lines,

erection of 25KVA 3 star rated distribution transformers and extension of LT line 3 phase 4 wire on Total Turnkey basis under rate contract for a period two year in Kolar division.

4.2. Also, the Appellant has been awarded the contract by HESCOM for strengthening works in 8 Nos. of towns in Belagavi circle of Belagavi District in HESCOM of Karnataka State under integrated power development scheme (IPDS).

5. The rate of tax applicable on supply of services under Chapter Heading 9954 to the Central Government, State Government, Union Territory, a local authority or a governmental authority or government entity, by way of construction, erection, commissioning, installation services in the nature of original works is covered under entry Sl.No 3(vi)(a) of GST Rate Notification No 08/2017 IT (R) dated 28-06-2017. Alternatively, entry Sl.No3(xii) to the said Notification, provides applicable rate of GST @ 18% on works contract service.

6. The Appellant sought an advance ruling in respect of the following question:

Whether entry 3(vi)(a) to Notification No.8/2017 –Integrated Tax (Rate) is applicable for services provided to Electricity Supply Companies (wholly owned Government of Karnataka undertakings) by way of construction, erection, commissioning, installation, completion, etc., which attracts levy of 12%.

7. The Karnataka Authority for Advance Ruling vide Order No KAR ADRG 111/2019 dated 30-09-2019 held as follows:

“The services provided by the applicant to the Electricity Supply Companies (wholly owned Government of Karnataka Undertakings) by way of construction erection, commissioning, installation, completion, etc. are not covered under entry 3(vi)(a) of the Notification No.12/2017-Central Tax (Rate) dated 28.06.2017 or under entry 3(vi)(a) of the Notification No.8/2017-Integrated Tax (Rate) dated 28.06.2017 as amended from time to time and consequentially are not eligible to be taxed at a lower rate of 12% GST and hence are liable to be taxed at 18% GST.”

8. Aggrieved by the above ruling, the Appellant filed this appeal on the following grounds:

8.1. The Appellant submitted that the services provided by them are covered under heading 9954 and this classification of the services has not been questioned by the lower Authority and hence the tax for supply of services by the Appellant to the electricity distribution companies must be determined based on the tax applicable for supplies under such heading; that the services provided by them to the electricity distribution companies are composite supply of works contract as defined under clause (119) of Section 2 of the CGST Act; that the electricity distribution companies HESCOM, MESCOM and BESCOM are established by the Government of Karnataka with shareholding of more than 90 percent and have been formed for carrying out the business of distribution of electricity under the Electricity Act 2013 and that hence these companies would fall under the meaning of "Government Entity"; that the lower Authority has also accepted that the said companies are Government Entities. They further submitted that the contracts undertaken by the Appellant are in the nature of original works as it is new additions and installation works; that this point has also been accepted by the lower Authority in the impugned order. They also submitted that the works contract services procured by the electricity distribution companies are in relation to work entrusted by the Central Government and Govt of Karnataka.; that the electricity distribution companies viz. BESCOM, MESCOM and HESCOM are performing the statutory function entrusted to them under the Electricity Act, 2013 and that this aspect has also not been disputed by the lower Authority in the impugned order.

8.2 The Appellant disputed the finding of the lower Authority that the original works executed by the Appellant are meant to be used predominantly by the electricity distribution companies for commerce, industry or any other business or profession. They argued that the electricity distribution companies are formed for the purpose of complying with the requirements under the Electricity Act and are not formed with the intention of making profit; that the electricity distribution companies are considered as State in terms of Article 12 of the Constitution of India; that the scope of State under Article 12 is very wide and it includes other authorities and also covers State Government. They submitted that some functions of the government are discharged through the traditional government departments and officials while some functions are

discharged through autonomous bodies existing outside the departmental structure, such as companies, corporations, etc; that all such bodies have been regarded as “instrumentality” of the State by virtue of a concept developed by the Supreme Court in the case of Rajasthan State Electricity Board, Jaipur vs Mohan Lal and Ors [MANU/SC/0360/1967]. They submitted that the electricity distribution companies are merely complying with the requirements under the Electricity Act and therefore, the electricity companies can be regarded as an instrumentality of the State Government and accordingly covered under the definition of ‘State’.

8.3. They placed reliance on the decision of the Constitution Bench of the Supreme Court in the case of Ajay Hasia and Ors vs Khalid Mujib Sehravardi and Ors [MANU/SC/0498/1980] wherein the Court summarised the following tests to adjudge whether a body is an instrumentality of the government or not:

i. If the entire share capital of the body is held by the government, it goes a long way towards indicating that the body is an instrumentality of the government;

ii. Where the financial assistance given by the government is so large as to meet almost entire expenditure of the body, it may indicate that the body is impregnated with governmental character;

iii. It is relevant factor if the body enjoys monopoly status which is conferred or protected by the State;

iv. Existence of deep and pervasive state control may afford an indication that the body is a state instrumentality.

v. If the functions performed by the body are of public importance and closely related to governmental functions, it is relevant factor to treat the body as an instrumentality of the government;

vi. Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government.

8.5. In view of the above, they submitted that since the State Government holds nearly

entire shares by way of equity in all the three entities viz. BESCO, HESCO and MESCOM, the first test laid down by the Supreme Court is satisfied; that the companies under consideration have received the entire financial assistance from the State Government and therefore, the second test laid down by the Supreme Court is also satisfied. Further, since the electricity distribution companies have monopoly in distribution of electricity in respective areas assigned to them, the third test laid down by the Supreme Court is also satisfied. The Articles of Association of BESCO, MESCOM and HESCO have provided powers to the State Government to appoint all Directors of the Board, Directors to the Office of the Chairman of the Board of Directors or Managing Director or Whole Time Directors of the Company and also the right to remove the Directors from office. Thus, the fourth test laid down by the Supreme Court of deep and persuasive state control in the electricity distribution companies is also satisfied. They also submitted that licences were granted under the Karnataka Electricity Reforms Act, 1999 to BESCO, MESCOM and HESCO for distribution and retail supply of electricity; that the companies were formed by the State Government to undertake the activities originally vested in the name of the State Government and are formed for the purpose of complying with the requirements under the Electricity Act; that this satisfies the fifth test laid down by the Supreme Court i.e the functions performed by the body are of public importance and closely related to governmental functions. Further, they submitted that prior to the enactment of the Electricity Act, 2003, the Karnataka Electricity Board (KEB) was involved in the transmission and distribution of electricity in the State of Karnataka; that later KEB was corporatized in 1999 into Karnataka Power Transmission Corporation Ltd (KPTCL). Subsequently, the distribution wing was carved out of KPTCL and five electricity distribution companies were formed to cater to the distribution of electricity to different regions of Karnataka State. This satisfies the sixth test laid down by the Supreme Court i.e department of Government getting transferred to a corporation. In view of the above, they submitted that the electricity distribution companies are State under Article 12 of the Constitution.

8.6. They further submitted that as per Section 2(h) of the Right to Information Act, 2005, a 'public authority' means any authority or body or institution of self-government established or constituted; that the electricity distribution companies are body owned, controlled and financed by Government of Karnataka and therefore, they fall squarely under the meaning of public authority as provided under the RTI Act. Further, they

submitted that the electricity distribution companies are State under Article 12 of the Constitution notwithstanding the fact that they are also covered under the definition of Government Entity; that a corporation which is covered under the definition of Government Entity can also be covered under the definition of State Government. In view of the above submissions, the Appellant contended that the Explanation to entry 3(vi)(a) of the Rate Notification is squarely applicable to them as the activities are undertaken by State Government in which they are engaged as Public Authority and consequently the supply of works contract services by the Appellant to the electricity distribution companies are covered under entry 3(vi)(a) of the Rate Notification and are liable to be taxed under 12% GST.

PERSONAL HEARING:

9. The Appellants were called for a personal hearing on 10th January 2020 and were represented by Advocates Shri. Shri. Ravi Raghavan & Ms Sandhya Sarvode who reiterated the submissions made in their grounds of appeal and emphasized the submission that the electricity distribution companies are State under Article 12 of the Constitution notwithstanding the fact that they are also covered under the definition of 'Government Entity'.

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 as well as at the time of personal hearing. The issue to be determined is the rate of tax applicable on the composite supply of works contract supplied by the Appellant to the electricity distribution companies like BESCO, MESCOM and HESCO. The question raised by the Appellant in their application for advance ruling was whether they are eligible for the GST rate of 12% as per entry Sl.No 3(vi)(a) of Notification No 08/2017 IT (R) dated 28-06-2017 in respect of the supply of works contract to electricity distribution companies. The relevant entry in the Rate Notification No 08/2017 IT (R) dated 28-06-2017 as amended vide Notification No 24/2017 IT (R) dated 21-09-2017 and Notification No 17/2018 CT (R) dated 26-07-2018 is reproduced below:

SL. No	Heading	Description of Services	Rate	Condition
(1)	(2)	(3)	(4)	(5)
	Heading 9954	<p>(vi) Composite supply of works contract as defined in clause (119) if section 2 of the Central Goods and Services Tax Act, 2017, provided to the Central Government, State Government, Union Territory, a local authority, a Governmental Authority or a Government Entity by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of-</p> <ul style="list-style-type: none"> (a) A civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession; (b) A structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment; or (c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in paragraph 3 of the Schedule III of the Central Goods and Services Tax Act, 2017. <p>Explanation. – For the purposes of this item, the term ‘business’ shall not include any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities.</p>	12%	Provided that where the services are supplied to a Government Entity, they should have been procured by the said entity in relation to a work entrusted to it by the Central Government, State Government, Union territory or local authority, as the case may be.

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11. The lower Authority on examining the case held that the contracts executed by the Appellant for the electricity distribution companies are a composite supply of works contract as in Section 2(119) of the CGST Act, 2017; that the service of works contract is supplied to electricity distribution companies (BESCOM, MESCOM & HESCOM) who are Government Entities in terms of the definition of Government Entity as given in clause (ix) to Para 4 of Notification No 08/2017 IT (R) dated 28-06-2017; that the electricity distribution companies are procuring these services from the Appellant in relation to a work entrusted to them by the State Government which is supply of electricity to consumers and that the contract is for construction, erection, commissioning, installation and completion of original works. The lower Authority however held that the original works executed by the Appellant for the electricity distribution companies are meant to be used predominantly for the supply of electricity to consumers for a consideration which is in the nature of commerce or business and hence, the Appellant will not be eligible for the tax rate of 12% under entry SL.No 3(vi)(a) of the said Notification. It also held that the Explanation to entry Sl.No 3(vi) will not apply to the Appellant as the electricity distribution companies are not Central Government, State Government or local authority. It is against this finding of the lower Authority that the Appellant is in appeal before us.

12. The argument of the Appellant is that the electricity distribution companies are State in terms of Article 12 of the Constitution of India which includes State Government notwithstanding the fact that they are also covered under the definition of 'Government Entity'. Therefore, the short point for us to determine is whether the electricity distribution companies can be considered as State in terms of Article 12 of the Indian Constitution. The said Article states that,

“Definition in this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”

13. The expression "State" is defined in Article 12 for the purpose of Part III of the Constitution. Part III of our constitution consists of a long list of fundamental rights, it starts right from Article 12 to Article 35. For the purposes of Part III of the constitution, the state comprises of the following:

1. Government and Parliament of India i.e the Executive and Legislature of the Union
2. Government and Legislature of each State i.e the Executive and Legislature of the various States of India
3. All local or other authorities within the territory of India
4. All local and other authorities who are under the control of the Government of India

Today's government performs a large number of functions and acts through natural persons as well as juridical persons. Some functions are discharged through the traditional governmental departments and officials while some functions are discharged through autonomous bodies existing outside the departmental structure, such as, companies, corporations etc. The term 'other authorities' in Article 12 has nowhere been defined. Neither in the Constitution nor in the General Clauses Act, 1897 nor in any other statute of India. Therefore, the term 'other authorities' has been interpreted by various judicial pronouncements in accordance with the facts and circumstances of different cases.

14. In the case before us, the question is whether the electricity distribution companies qualify as 'other authorities' as mentioned in Article 12. For this, let us understand the background to the formation of the electricity distribution companies. The transmission and distribution system in the state was under the control of the Government of Karnataka (then Mysore) till year 1957. In the year 1957, MSEB was formed and the private distribution companies were amalgamated with Karnataka Electricity Board. Till the year 1986, KEB was a profit-making organisation. To improve the performance of the power sector and in tune with the Reforms initiated by Government of India, the Government of Karnataka came out with a general policy proposing fundamental and radical Reforms in the power sector. Accordingly, an Act, namely the Karnataka Electricity Reforms Act was passed by the Karnataka Legislature. The Reform has mandated major restructuring of the Karnataka

Electricity Board and its Corporatisation. As part of corporatisation, Karnataka Electricity Board ceased to exist and Karnataka Power Transmission Corporation Limited was constituted. As a part of the Reforms, the distribution sector was further divided into 4 companies viz. Bangalore Electricity Supply Company Limited – BESCO; Hubli Electricity Supply Company Limited – HESCO; Mangalore Electricity Supply Company Limited – MESCOM; Gulbarga Electricity Supply Company Limited – GESCOM.

15. The main object of incorporating the above companies was to carry out the business of distribution of electricity. The distribution of electricity by the incorporated companies is a commercial activity. Electricity is a concurrent list subject at Entry 38 in List III of the seventh Schedule of the Constitution of India. In India's federal governance structure, this means that both the central government and India's state governments are involved in establishing policy and laws for the electricity sector. This requires the central government and individual state governments to enter into memoranda of understanding to help expedite projects in the individual states. While these incorporated companies are set up with major funding from the State Government and are considered as Government Entities, they are not the Government per se since they do not have the sovereign power which resides with the State Government. While considering whether such government entities are an authority within the meaning of Article 12, we are of the opinion that authorities constitutional or statutory invested with power by law but not sharing the sovereign power do not fall within the expression "State" as defined in Article 12. Those authorities which are invested with sovereign power i.e., power to make rules or regulations and to administer or enforce them on citizens and others fall within the definition of "State" in Article 12, and constitutional or statutory bodies which do not share that sovereign power of the State are not, "State" within the meaning of Article 12 of the Constitution. Further, there must be deep and pervasive governmental control over the financial, administrative and functional activities of the entity. Mere regulatory control by the Government will not suffice to fulfil the requirements of Article 12. Therefore, we reject the Appellant's argument on this count and hold that the electricity distribution companies like BESCO, MESCOM and HESCO though being Government Entities, do not qualify as 'State' within the meaning given in Article 12 of the Constitution.

16. For availing the benefit of Sl.No 3(vi)(a) of Notification No. 08/2017-IT(Rate), dated 28-6-2017 as amended, the pre-condition is that the services being provided by the Applicant


to BESCOM, MESCOM and HESCOM by way of construction erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of a civil structure or any other original works must *predominantly be for use other than for commerce, industry, or any other business or profession*. This effectively means that for availing the aforesaid benefit of tax rate of 12%, it is of paramount importance that the services under taken/work done by the Appellant for the above electricity distribution companies must necessarily be for use which is non-commercial in nature. As already mentioned earlier, BESCOM, MESCOM and HESCOM are companies incorporated under the Companies Act, 1956, and are companies limited by share. From the information available on public domain, it is clear that the principal/primary and foremost aim of these companies are predominantly commercial in nature and more over these electricity distribution companies generally work for the efficient and economic management of Electric power and optimum utilization of available resources. Since the nature of activities of BESCOM, MESCOM and HESCOM are principally and predominantly, commercial in nature, we come to the considered conclusion that the Appellants are not eligible for the benefit of 12% GST in terms of entry Sl.No 3(vi)(a) of Notification No 08/2017 IT (R) dated 28-06-2017 as amended.

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

ORDER

We uphold the Advance Ruling No KAR/ADRG 111/2019 dated 30-09-2019 and dismiss the appeal filed by M/s Manipal Energy & Infratech Ltd, on all counts.


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


(M.S. SRIKAR)
Member
Karnataka 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, Mangalore Commissionerate
4. The Assistant Commissioner, LGSTO-280, Mangalore
5. Office folder