

THE WEST BENGAL AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX
14, Beliaghata Road, Kolkata – 700015
(Constituted under section 96 of the West Bengal Goods and Services Tax Act, 2017)

Members present:

Shafeeq S, Joint Commissioner, CGST & CX

Jaydip Kumar Chakrabarti, Senior Joint
Commissioner, SGST

Preamble

A person within the ambit of Section 100 (1) of the Central Goods and Services Tax Act, 2017 or West Bengal Goods and Services Tax Act, 2017 (hereinafter collectively called 'the GST Act'), if aggrieved by this Ruling, may appeal against it before the West Bengal Appellate Authority for Advance Ruling, constituted under Section 99 of the West Bengal Goods and Services Tax Act, 2017, within a period of thirty days from the date of communication of this Ruling, or within such further time as mentioned in the proviso to Section 100 (2) of the GST Act.

Every such appeal shall be filed in accordance with Section 100 (3) of the GST Act and the Rules prescribed there under, and the Regulations prescribed by the West Bengal Authority for Advance Ruling Regulations, 2018.

Name of the applicant	Karam Chand Thapar & Bros (Coal Sales) Limited
Address	7TH, 163, THAPAR HOUSE, Shyama Prasad Mukherjee Road, Kolkata, West Bengal, Pincode-700026
GSTIN	19AABCK1281H1ZL
Case Number	WBAAR 06 of 2025-26
ARN	AD190425025233B
Date of application	May 21, 2025
Jurisdictional authority (State)	Alipur Charge
Jurisdictional authority (Centre)	BBD Bag I Division, Kolkata North Commissionerate
Order number and date	31/WBAAR/2025-26 dated 13.02.2026
Applicant's representative heard	Mr. Vivek Jalan, CA Mr. Hirak Das, ACMA

1.1 At the outset, we would like to make it clear that the provisions of the Central Goods and Services Tax Act, 2017 (the CGST Act, for short) and the West Bengal Goods and Services Tax Act, 2017 (the WBGST Act, for short) have the same provisions in like matter except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the WBGST Act. Further to the earlier, henceforth for the purposes of these proceedings, the expression “GST Act” would mean the CGST Act and the WBGST Act both.

1.2 The applicant entered into three agreements with THDC India Ltd (formerly known as Tehri Hydro Development Corporation Limited) in the year 1996 for execution of work for the construction of Hydro Power Plants which was completed in the year 2007/08 and the final payment was received by the applicant in the year 2011. During the execution of the work, dispute arose over the extra expenses incurred by the applicant for the project which led to several litigations. Accordingly the Arbitral Tribunal was constituted by Supreme Court and Delhi High Court for deciding all the disputes between the parties pertaining to all the three packages. Finally, in the year 2023, Awards were passed in favour of the applicant which allowed private quarry costs, costs incurred on excavation method change, cost involved in use of higher grade of cement, cost involved in relocation of infrastructure, etc incurred by the applicant. Conciliation Proceedings commenced between THDC India Ltd and the Applicant in June 2024. Accordingly, the payment is received by the applicant as per the Settlement Agreement in October 2024.

1.3 The applicant has made this application under sub section (1) of section 97 of the GST Act and the rules made there under seeking an advance ruling in respect of following questions:

- i) That whether claims allowed by the Arbitral Tribunal vide the Arbitration Awards be termed as supply or not?
- ii) That whether claims allowed by the Arbitration Tribunal vide the Arbitration Awards be termed as liquidated damages or not?
- iii) That whether GST would be applicable, on the claims allowed vide Arbitration Awards and payment received pursuant to Conciliation Proceedings resulting into the Settlement Agreement, both during the GST regime?
- iv) That whether GST would be applicable for the cost of arbitration allowed vide Arbitration Award and received vide the Settlement Agreement, both during the GST regime?
- v) If the answer to the above (iii), (iv) and /or (v) are in affirmative, then under what SAC and GST rate is the said liability to be discharged by the applicant and at what time?
- vi) That for (vi) above, whether debit note / supplementary invoices or tax invoice need to be issued by the applicant to the contractor in order to recover and discharge the tax liability?

- (vii) That the work got executed prior to GST Regime however the claim is received during the GST Regime. Under such circumstances what is the applicability of GST on the same

1.4 The aforesaid questions on which the advance ruling is sought for are found to be covered under clause (e) of sub-section (2) of section 97 of the GST Act.

1.5 The applicant states that the questions raised in the application have neither been decided by nor are pending before any authority under any provision of the GST Act.

1.6 The officer concerned from the Revenue has raised no objection to the admission of the application.

1.7 The application is, therefore, admitted.

2. Submission of the Applicant

2.1. The applicant Company was engaged in the business inter alia of Construction, tunnelling, Civil works, and other allied works pertaining to Hydro Electric Projects. THDC India Limited (in short THDC) is a joint venture company formed to develop and maintain the Tehri Hydro Power Complex and other Hydro Projects. THDC is having its office at Bhagirathi Bhawan (Top Terrace) Bhagirath Puram, Tehri Distt. Tehri, Tehri Garhwal- 249001.

2.2 THDC took over implementation of Tehri Dam Project from erstwhile Uttar Pradesh Irrigation Department (UPID) in the year 1988 at Tehri Garhwal in the State of Uttarakhand. The stage-I works of said project consisted of a 260.05m high Earth & Rock Fill Dam, spillways structures and Hydro power Plant (4x250MW). The work for the construction of Hydro Power Plant (HPP) was envisaged to be executed in three separate contracts viz. Package-I, Package-II & Package-III. The reason for splitting said work into three packages was to invite three tenders by way of augmentation of deployment of resources viz manpower and machinery separately for each of the packages and to encourage better participation from the prospective bidders

2.3 The tenders for the three packages were invited through domestic open competitive bidding.

PACKAGE I: Intake Works, balance works of Headrace tunnel, Control Gate Shaft, bifurcation of HRTs, Butterfly Valve Chamber, Penstock Assembly Chamber, Erection Chamber, Vertical and Horizontal Pressure Shafts, Approach adits, and other appurtenant Works.

PACKAGE II: Machine Hall, Transformer Hall, Upper and Lower Expansion Chamber, Cable Tunnel

Ventilation Tunnel, Control Room, Drainage Galleries, Approach adits, etc and other appurtenant works.

PACKAGE III: Construction of Tehri HPP civil works – comprising Civil works of Tailrace Tunnel 1 & 2, Approach adits, TRT Exit Structures and other appurtenant works

2.4 The Letter of Intent (LOI) for each of these Packages was issued separately to the applicant vide LOI No. THDC/RKSH/CD-150/Package-I dated 8th/9th Nov'1995; LOI No. THDC/RKSH/CD-150/Package-II dated 8th/9th Nov'1995; and LOI No. THDC/RKSH/CD-150/Package-III dated 8th/9th Nov'1995. THDC entered into contract agreements on 03.01.1996 with the applicant separately for each of the said Packages by signing Agreement No. THDC/ RKSH/CD-150/Package-I/AG for Package-I, Agreement No: THDC/RKSH/CD-150 / Package-II/AG for Package-II and Agreement No: THDC/RKSH/CD-150/Package-III / AG for Package-III at a value of Rs. 69,08,01,017.55, Rs. 96,81,23,502.50 and Rs. 44,95,32,487.60 respectively with complete period of 54 months, 60 months & 45 months respectively.

2.5 For the Package-I, the applicant by letter dated 28.06.2011 raised Final Bill which was inclusive of work done bill amount, price adjustment, bill amount and other payments. For the Package-II, the applicant vide letter dated 17.2.2011 raised Final Bill which was inclusive of work done bill amount, price adjustment bill amount and other amounts. For the Package-III, the applicant vide letter dated 27.04.2010 raised its Final Bill, which was inclusive of work done bill amount, price adjustment bill amount and other payments.

2.6 THDC made the payment against the Final Bill towards work done on 13.10.2011 and the payment against the Final Bill towards Price Adjustment on 20.11.2011 in case of PKG III. However, several disputes arose between the two parties during the execution of the work pertaining to PKG I, PKG II and PKG III and as per the Clause 60 (Settlement of Disputes) of all the three Agreements, a four-tier system for settlement of disputes between the parties is prescribed. Disputes are to be referred to the Engineer-In-Charge, as defined under the Contract. If the Contractor is dissatisfied with the decision of the Engineer, appeal against the same shall be referred to the Chairman and Managing Director (CMD) of the THDC. The decision of CMD shall be given in writing and within 30 days after the decision of the CMD, the Contractor shall indicate to the CMD its intention to refer the matter to Dispute Resolution Board (DRB), and further if even after recommendation / decision by the DRB, the parties still failed to resolve the dispute, either party may resort to arbitration. THDC defaulted in performing its obligation for constitution of the DRB and despite the applicant nominating its nominee (Mr. N.N. Singhal) on 12.09.1996, THDC appointed its nominee (Mr. V.V. Badreenarayana) only on 23.11.2001, i.e., more than five years later. The DRB was finally constituted only on 10.05.2002

2.7 Out of twenty disputes referred to the DRB, the DRB was able to decide only four disputes between November 2002 and 02.08.2005. Even after 02.08.2005, the DRB did not function with due expedition and for various developments leading to non-functionality of the DRB. Further on 18.03.2015, the Hon'ble Supreme Court in Civil Appeal Nos. 7407/2009, 7408/2009, 7409/2009, and SLP No. 1688 of 2013 recorded the consent of the parties that the disputes must be referred to the arbitral Tribunal consisting of three arbitrators, one to be nominated by each of the parties, and the third one to be appointed by the Supreme Court. Pursuant to the said order, the applicant nominated Justice J.D. Kapoor (Retd.), THDC nominated Justice R.V. Raveendran (Retd.), and the Supreme Court nominated Justice A.K. Patnaik (Retd.) as the third arbitrator by order passed on 31.03.2015. By the said order dated 31.03.2015, the Hon'ble Supreme Court also directed that this arbitral Tribunal shall decide all the claims and the counterclaims, which arise between the parties with respect to all the Packages.

2.9 For the package-I, the applicant sought adjudication of 18 Claims besides seeking interest and the cost of arbitration proceedings. Detail of each claim and amount claimed there against is shown in the table extracted herein below:

Sl. No.	PARTICULAR	AMOUNT (Rs.) in Lakhs			
		Principal Claim Amount	Interest up to 30.04.2015	Total Amount	Interest @18% Compounded Annually
1	Claim for Extra expenditure incurred in purchasing boulder, Aggregates, and sand from private agencies.	29.41	469.1	498.51	From 29.03.1998 to 30.04.2015
2	Claim for Reimbursement of monthly expenditure being incurred for operating private quarry	6.21	75.77	81.98	From 01.10.1999 to 30.04.2015
3	Claim for extra expenditure incurred due to change in methodology for excavation of Control Gate Shafts	67.66	863.33	930.99	From 01.07.1999 to 30.04.2015
4	Claim for Extra item of arranging and procuring Admixture for shotcreting work.	7.31	124.42	930.99	From 01.07.1999 to 30.04.2015

5	Claim for Reimbursement of losses suffered due to suspension of work/ public agitation/ dharna (under Clause 45.0 & 45.1 of GCC)	34.99	558.11	593.1	From 28.03.1998 to 30.04.2015
6	Claim for refund of excess recovery towards interest on mobilisation advance.	31.18	375.04	406.22	From 01.11.1999 to 30.04.2015
7	Claim for idle machineries kept for removal of muck from dam area	82.51	1434.23	1516.74	From 01.10.1999 to 30.04.2015
8	Claim for excess recovery made towards 2% & 1.5% rebates from RA Bill and less paid Price Adjustment.	844.63	5299.47	6144.1	From 31.12.1996 to 30.04.2015
9	Claim for reimbursing the wrongful deduction towards 0.5% rebate from price adjustment payment.	53.86	261.46	315.32	From 21.01.2004 to 30.04.2015
10	Claim for payment of additional expenditure incurred pursuant to enactment of "Payment of Bonus" (Amendment) Act, 2007 (No 45 of 2007) by Govt of India entitling Bonus w.e.f.01.04.2006 to employees employed by the Contractor on building operations and getting salary or wages up to Rs 10000/- per month.	16.22	41.53	57.75	From 01.04.2007 to 30.04.2015
11	Claim for reimbursement of expenditure incurred consequent to increase in Employees provident fund contribution during execution of contract agreement.	104.44	677.62	782.06	From 21.09.1997 to 30.04.2015
12	Claim for payment for the differential of cost for actually using 43 grade cement in place of 33 grade of cement as per the contract specifications.	143.13	991.81	1134.94	From 31.12.1996 to 30.04.2015

13	Claims for reimbursement of accommodation and extra expenditure incurred in shifting of residential infrastructure facilities from Simlasu and Ranibagh to the land allotted by RESPONDENT near Koti/ Gajna.	123.98	297.29	421.27	From 10.12.2007 to 30.04.2015
14	Claim for Price Adjustment of extra item under HPP Civil Contract – P-I	4488.94	6021.41	10510.4	From 11.03.2010 to 30.04.2015
15	Claim for Price Adjustment of extra items under HPP Civil Contract P-1	52.48	939.76	992.24	From 01.08.1997 to 30.04.2015
16	Claim for correction in the determination of rates of extra items.	6828.37	5727.38	12555.8	From 27.08.2011 to 30.04.2015
17	Claim for payment of Compensation/ Damages on account of suspension of the open excavation work at Intake Structure	58.51	877.44	935.95	From 3.08.1998 to 30.04.2015
18	Claim for certain deduction/ deletion of items, from Final Bill of P-I.	48.85	23.34	72.19	From 19.12.2012 to 30.04.2015
	TOTAL	13022.7	25059	38880	

2.10 For package II- The applicant sought adjudication of 18 Claims besides seeking interest and the cost of arbitration proceedings. Detail of each claim and amount claimed there against is shown in the table extracted herein below:

Sl. No.	PARTICULAR	AMOUNT Rs. In Lakh			
		Principal Claim Amount	Interest up to 30.04.2015	Total Amount	Interest @ 18% compounded annually
1	Claim for Extra Expenditure incurred in purchasing Boulder, Aggregates, and sand from private agencies	14.38	229.37	243.75	From 19.03.1998 to 30.04.2015

2	Claim for Reimbursement of monthly expenditure being incurred for operating private quarry	3.04	37.09	40.13	From 01.10.1999 to 30.04.2015
3	Claim for idle machineries due to no supply of admixture by M/s THDC	34.46	549.65	584.11	From 28.03.1998 to 30.04.2015
4	Claim for Extra item of arranging and procuring Admixture for shotcreting/ concreting work.	45.19	769.18	814.37	From 15.11.1997 to 30.04.2015
5	Claim for Reimbursement of losses suffered due to suspension of work/ public agitation / dharna (under Clause 45.0 & 45.1 of GCC)	7.65	122.02	129.67	From 28.03.1998 to 30.04.2015
6	Claim for refund of excess recovery towards interest on mobilization advance.	143.49	1,108.95	1,252.44	From 01.11.1999 to 30.04.2015
7	Claim for extra expenditure incurred by the Claimant for excavation of Compressors and Receiver Room at the end wall of Machine Hall	16.79	204.87	221.66	From 01.10.1999 to 30.04.2015
8	Claim for excess recovery made towards 2% & 1.5% rebates from RA Bill and less paid Price Adjustment.	336.06	2,002.88	2,338.94	From 31.12.1996 to 30.04.2015
9	Claim for reimbursing the wrongful deduction towards 0.5% rebate from price adjustment payment.	33.89	163.2	197.09	From 21.01.2004 to 30.04.2015
10	Claim for payment of additional expenditure incurred pursuant to enactment of "Payment of Bonus" (Amendment) Act, 2007 (No 45 of 2007) by Govt of India entitling Bonus w.e.f 01.04.2006 to	22.74	58.2	80.94	From 01.04.2007 to 30.04.2015

	employees employed by contractor on building operations and getting salary or wages up to Rs 10000/- per month				
11	Claim for reimbursement of expenditure incurred consequent to increase in Employees provident fund contribution during execution of contract agreement.	82.84	551.09	633.93	From 21.09.1997 to 30.04.2015
12	Claim for payment for the differential of cost for actually using 43 grade cement in place of 33 grade of cement.	62.76	439.03	501.79	From 31.12.1996 to 30.04.2015
13	Claims for reimbursement of extra expenditure incurred in shifting of residential accommodation and infrastructure facilities from Simlasu and Ranibagh to the land allotted by THDC near Koti/ Gajna.	173.75	416.63	590.38	From 10.12.2007 to 30.04.2015
14	Claim for Price Adjustment of extra item under HPP Civil Contract – P-II.	2294.31	3077.56	5371.87	From 11.03.2010 to 30.04.2015
15	Claim for cost of delay due to prolongation of time.	5282.92	5898.57	11181.49	From 21.10.2010 to 30.04.2015
16	Claim for correction in the determination of rates of extra items.	2682.9	2250.32	4933.22	From 05.12.2011 to 30.04.2015
17	Claim for payment of cost of material for the work of prestressed anchor blind holes and through holes.	30.01	283.72	313.72	From 01.03.2001 to 30.04.2015
18	Claim for certain deduction/ deletion of items, from Final Bill of P-II.	466.29	297.31	763.6	From 07.05.2012 to 30.04.2015

TOTAL	11733.47	18459.6	30193.1	
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2.11 For package III- The Applicant sought adjudication of 16 Claims besides seeking interest and the cost of arbitration proceedings. The details of each claim and amount claimed there against is shown in the table extracted herein below:

SL. No.	PARTICULAR	AMOUNT (Rs.) In Lakhs			
		Principal Claim	Interest upto 30.04.2015	Total Amount	Interest @ 18% Compounded Annually
1	Claim for Extra Expenditure incurred in purchasing Boulder, Aggregates, and sand from private agencies.	21.56	343.88	365.44	From 29.03.1998 to 30.04.2015.
2	Claim for Reimbursement of monthly expenditure being incurred for operating private quarry	4.55	55.52	60.07	From 01.10.1999 to 30.04.2015
3	Claim for idle machineries due to no supply of admixture by M/s THDC	9.41	150.09	159.5	From 28.03.1998 to 30.04.2015
4	Claim for Extra item of arranging and procuring Admixture for shotcreting/ concreting work.	1.39	23.66	25.05	From 15.11.1997 to 30.04.2015
5	Claim for Reimbursement of losses suffered due to	7.65	122.02	129.67	From 28.03.1998 to 30.04.2015

	suspension of work/public agitation/dharna (under Clause 45.0 & 45.1 of the GCC)				
6	Claim for refund of excess recovery towards interest on mobilisation advance.	16.39	206.17	222.56	From 01.11.1999 to 30.04.2015
7	Claim for extra expenditure incurred in back Filling behind Walls of TRT Exit Structure at TRT Outlet	285.45	3814.99	4100.44	From 28.03.1999 to 30.04.2015
8	Claim for excess recovery made towards 2% & 1.5% rebates from RA Bill and less paid Price Adjustment.	279.33	1734.52	2013.85	From 31.12.1996 to 30.04.2015
9	Claim for reimbursing the wrongful deduction towards 0.5% rebate from price adjustment payment.	25.74	114.66	140.4	From 21.01.2004 to 30.04.2015
10	Claim for payment of additional expenditure incurred pursuant to enactment of "Payment of Bonus" (Amendment) Act, 2007 (No 45 of 2007) by Govt of India entitling Bonus w.e.f. 01.04.2006 to employees employed by contractor on building operations and getting salary or wages	10.56	27.02	37.58	From 01.04.2007 to 30.04.2015

	up to Rs. 10,000/- per month				
11	Claim for reimbursement of expenditure incurred consequent to increase in Employees provident fund contribution during execution of contract agreement.	36.17	294.2	330.37	From 21.09.1997 to 30.04.2015
12	Claim for payment for the differential of cost for actually using 43 grade cement in place of 33 grade of cement as per the contract specifications.	50.38	391.38	441.68	From 31.12.1996 to 30.04.2015
13	Claims for reimbursement of extra expenditure incurred in shifting of residential accommodation and infrastructure facilities from Simlasu and Ranibagh to the land allotted by THDC near Koti/ Gajna.	80.67	193.44	274.11	From 10.12.2007 to 30.04.2015
14	Claim for Price Adjustment of extra item under HPP Civil Contract – P-III.	155	207.92	362.92	From 11.03.2010 to 30.04.2015

15	Claim for cost of delay due to prolongation of time.	3098	4012.98	7110.97	From 23.04.2010 to 30.04.2015
16	Claim for correction in the determination of rates of extra items of Package III	192.9	146.3	339.2	From 05.12.2011 to 30.04.2015
TOTAL		4275.15	11838.7	16113.9	

2.12 However, the Arbitration Tribunal has allowed some of the claims for all the three packages in full, for some of the claims partially and some of the claims were totally disallowed for all the three packages. The Arbitration Tribunal passed the awards on 01.11.2023 i.e., during the post-GST era, for all the three packages separately. Since most of the claims in all the three packages are identical, hence, the claims and the amounts sanctioned under the arbitration award are combined for all the three packages herein below-

Sl. No.	Category	Claim No.	Claim	Amount allowed by the Arbitral Tribunal
I	Unpaid Amounts on Extra expenditure incurred	1	Claim for extra expenditure incurred in purchasing Boulder, Aggregates and sand from private agencies.	33.2
		2	Claim for reimbursement of monthly expenditure being incurred for operating private quarry.	13.8
		3	Claim for extra expenditure incurred due to change in methodology for excavation of Control Gate Shafts.	67.66
		4	Claim for payment for the differential of cost for actually using 43 grade cement in place of 33 grade of cement as per the contract specifications.	256.27

		5	Claims for Reimbursement of extra expenditure incurred in shifting of residential accommodation and infrastructure facilities from Simlasu and Ranibagh to the land allotted by THDC near Koti/ Gajna.	326.84
		6	Claim for Price Adjustment of extra item.	6937.94
		7	Claim for extra expenditure incurred due to change in the methodology for excavation of Compressor and Reciever room at the end wall of Machine Hall.	12.15
		8	Claim for payment of coast of material for work of pre-stressed anchor blind holes and through holes	30.01
		9	Claim for Extra Expenditure in back filling behind walls of TRT Exit structure at TRT Outlet.	208.67
II	Refund of excess deductions	10	Claim for excess recovery towards 2 % & 1.5 % rebates from RA Bill and less paid Price Adjustment.	1460.02
		11	Claim for reimbursing the wrongful deduction towards 0.5 % rebate from price adjustment payment.	113.49
		12	Claim for certain deduction/deletion of items, from Final Bill for P-I and P-II	367.34
			Total	9827.39
III	Arbitration Costs		Cost of Arbitration	190

			Sub- Total	10017.39
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2.13 Subsequently, on 01.03.2024, THDC filed separate applications for each of the three packages under Section 34 of the Arbitration and Conciliation Act, 1996, before the Hon'ble Delhi High Court. These applications sought to set aside all the three final awards issued by the Arbitration Tribunal for the respective packages, dated 01.11.2023. Further on 17.04.2024 THDC invited the applicant to avail conciliation process to resolve the contractual disputes arising from Package I, II and III through Disputes Resolution Committee (DRC).

2.14 However, the applicant filed execution application for each of the three packages under Section 36 of the Arbitration and Conciliation Act, 1996 on 18.04.2024, seeking enforcement of all the three final awards issued by the Arbitration Tribunal for the respective packages dated 01.11.2023 before Delhi High Court. Further, on 29.04.2024, THDC again informed the Applicant to resolve the contractual disputes arising from Package I, II and III through Disputes Resolution Committee (DRC). On 08.05.2024, the applicant gave its consent to resolve the contractual disputes arising from Package I, II and III through Disputes Resolution Committee (DRC) formerly known as the Conciliation Committee of Independent Experts (CCIE). On 12.05.2024, THDC gave its consent to resolve the contractual disputes arising from Package I, II and III through Disputes Resolution Committee (DRC) and suggested three panel of DRC.

Further, on 20.05.2024, the applicant again conveyed its consent and opted for DRC-3 from the three panel of DRC suggested by THDC. Thereafter, on 13.06.2024, Disputes Resolution Committee (DRC) was constituted comprising of following members- (a) Sh. L.C. Goyal, IAS (Retd.) (b) Sh. Anil Kumar Jha, Ex-Director (Technical), NTPC Ltd. (c) Sh. Chinmoy Gangopadhyay, Ex-Director (Projects), PFC Ltd. On 25.09.2024, DRC passed its award thereby directing THDC to pay Rs 94,55,80,409.00 (i.e., 94.56 crores) within 45 days from the order. Then, finally on 24.10.2024, Settlement Agreement was signed and the payment of Rs 94,55,80,409/- (i.e., Rs 94.56 crores) was being received by the applicant.

2.15 In this backdrop, the final amount agreed as per the Settlement Agreement is received by the applicant. As per understanding of the applicant, the payment received by the applicant is against the claim under arbitral award and such claim under arbitral award is merely a flow of money from the party who causes breach of the contract to the party who suffered such loss or breach. Hence, such flow of money should be considered as liquidated damages. However, it is understood that department may consider the payments received under arbitral awards otherwise. Hence the applicant prefers to move this application before Advance Ruling Authority.

2.16 Payment against Arbitration Agreement u/s 7 of the Arbitration and Reconciliation Act, 1996:

It is the understanding of the applicant that the payment received by the applicant is as per the Arbitration agreement entered into by the applicant and the THDC, and this Arbitration Agreement is distinct in law and in existence from the underlying substantive contract in which it is embedded.

Clause 60 (common for all the three packages) of the general conditions of the contract agreement entered into between the applicant and the THDC dated 03.01.1996 states that in case the parties decide to go for Arbitration, then the disputes arising, shall be in accordance with the provisions of Indian Arbitration Act, 1940, or any statutory amendments thereof.

The clause 60 of the Contract agreement for package-I is reproduced below-

.....(ii) *The disputes arising between the contractor and the THDC shall be resolved by arbitration in accordance with the provisions of Indian Arbitration Act 1940, or any statutory amendments thereof. The Board of arbitrators shall comprise of three arbitrators one to be nominated by the Contractor, the second by the THDC and the third by the Secretary (Power), Ministry of Energy, Govt. of India.*

With the amendment made, the Arbitration and Conciliation Act, 1996 was brought up. Section 7 of the 1996 Act speaks about Arbitration agreement. Section 7 of the Arbitration and Conciliation Act, 1996 is reproduced below-

7. Arbitration agreement. — (1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

From the above section, it can be inferred that Section 7(2) of the Arbitration and Conciliation Act 1996 provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Doctrine of separability/severability-

As per the doctrine of Separability, the arbitration agreement is distinct in law and in existence from the underlying substantive contract in which it is embedded. It is considered to be autonomous and juridically independent from the substantive contract. The effect of this doctrine is that the arbitration agreement will ordinarily remain valid and binding, notwithstanding the invalidity, illegality, termination or repudiation of the underlying contract. The substantive contract contains the commercial terms of the contract between the parties, which stipulate the rights and obligations of the parties whereas the arbitration clause is the agreement between the parties regarding the mode of dispute resolution.

Moreover, Section 16(1) provides that the arbitral tribunal is empowered to rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement. Section 16(1) is an inclusive provision which would comprehend all jurisdictional issues, including limitation, res judicata, etc.

Section 16 (1) of the Arbitration and Conciliation Act, 1996 is reproduced below-

16. Competence of arbitral tribunal to rule on its jurisdiction. —

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, —

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Further, the doctrine of severability, allows a court to remove or "sever" the unenforceable or illegal parts of a contract while keeping the rest of the contract intact and enforceable. Section 16 gives statutory recognition to the doctrine of severability. An arbitration clause though an integral part of the contract has an independent existence from that of the contract in which it is embedded. It is a collateral term of the contract, independent and distinct from the substantive terms. Clause (a) of Section 16(1) provides that the tribunal may consider an arbitration clause to be an agreement independent of the other terms of the contract.

In conclusion, it can be stated that the arbitral award granted to the applicant is independent of the underlying contract agreement. This award, rendered by the arbitral tribunal, serves as compensation for the breach of the contract and is, in essence, a form of liquidated damages determined and awarded in accordance with the terms and provisions governing the dispute.

2.17 CBIC Circular No 178/10/2022 dated 03.08.2022 has clarified on the taxability, under CGST Act 2017, of liquidated damages, and other payments in the nature of compensation, penalty and cancellation charges arising out of a breach of contract.

Before issuance of the captioned clarification by CBIC, the principal issue was whether an amount for settling a dispute arising out of breach of contract constitute a supply within the scope of Entry 5(e) of Schedule-II to the CGST Act, 2017 which reads as follows:

“Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act”.

In this connection it is pertinent to observed that the scope of entry 5(e) of Schedule-II to the CGST Act, 2017 has been elaborately discussed in the GST Council and based on the discussion the said circular has been issued to clarify the types of transactions which fall under this entry.

In the agenda for discussion in the 47th GST Council Meeting the Fitment Committee made recommendation for issuing clarification in relation to services of liquidated damages, breach of contract, etc., The same is extracted here under:

Proposal	Details of Request	Discussion in Fitment Committee & its recommendation
To clarify applicability of GST on payments in the nature of liquidated damages, compensation, penalty, cancellation charges, late payment surcharge etc. arising out of breach of contract or otherwise.	A number of cases have been brought to the notice of the Board where question has been raised regarding taxability of an activity or transaction as the supply of service of agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act.	Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act” has been declared to be a supply in para 5 (e) of Schedule I of CGST Act. Various transactions have been sought to be classified by the tax authorities under the said description and in many cases this has led to disputes and litigation. The issues arising out of taxation of activities by way of “agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act” were deliberated in detail. It was felt that the entry is being very widely and at times erroneously interpreted which is leading to a lot of disputes and litigations. It was generally felt that a circular clearly explaining the situations in which an activity shall amount to a supply of service by way of agreeing to refrain from an act or to tolerate an act or a situation etc. may be issued. After detailed deliberations over course of two meetings, the Fitment Committee recommended that the issues involved may be clarified by way of the enclosed draft circular placed at Annexure B. The draft circular incorporates the basic principles of GST law, Indian and international jurisprudence and international VAT/GST guidelines and practices and elucidates guiding principles with the help of suitable examples/ illustrations. Issuance of the guidance note/ circular is

	expected to resolve/ reduce litigation.
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The draft circular prepared by the fitment committee was also put on agenda and the same was discussed and recorded in the minutes. The said circular was notified vide Circular No. 178/10/2022-GST, dated: 03-08-2022. The said circular was later ratified in the 48th GST Council Meeting held on 17-12-2022.

The said circular discusses the taxability of an activity on a transaction as supply of service of agreeing to the obligations to refrain from an act or to tolerate an act or a situation, or to do an act under the GST. This includes applicability of GST on payments in the nature of liquidated damage, compensation, penalty, cancellation charges, late payment surcharge, etc., arising out of breach of contract or otherwise and scope of entry at para-5(e) of schedule-II of CGST Act, 2017.

The applicant would like to refer this very Circular which examines the applicability of CGST on aforementioned payments in light of the scope of entry at Para 5(e) of Schedule II of the CGST Act 2017 which is being reproduced below:

“Agreeing to the obligation to refrain from an act or to tolerate an act or a situation, or to do an act”.

The description as stated above was intended to cover services which are expressible in either of the following three limbs:

- a) Agreeing to the obligation to refrain from an Act.
- b) Agreeing to the obligation to tolerate an act or a situation.
- c) Agreeing to the obligation to do an act.

The primary theme of the Circular revolves around the necessity of a “contractual relationship” for an activity to constitute a ‘supply’ under GST, to be exigible to tax. Under such a contractual relationship, an individual is required to undertake an activity at the desire of another person for whom the activity is undertaken, in exchange for a consideration. This Circular has discussed at length the illustrations which will be covered by the entry-5(e) of schedule-II as follows:

i. non-compete agreements, where one party agrees not to compete with the other party in a product, service or geographical area against a consideration paid by the other party.

ii. A builder refraining from constructing more than a certain number of floors, even though permitted to do so by the municipal authorities, against a compensation paid by the neighbouring housing project, which wants to protect its sun light.

iii. An industrial unit refraining from manufacturing activity during certain hours against an agreed compensation paid by a neighbouring school which wants to avoid noise during those hours.

vi. A shop keeper allowing a hawker to operate from the common pavement in front of his shop against a monthly payment by the hawker.

v. An RWA tolerating the use of loud speakers for early morning prayer by a school located in the colony subject to the school paying an agreed sum to the RWA as compensation.

vi. An industrial unit agrees to install equipment for zero emission / discharge at the behest of the

RWA of a neighbouring residential complex against a consideration paid by such RWA, even though the emission/discharge from the industrial unit was within permissible limit and there was no legal obligation upon the individual unit to do so.

In the said circular, while discussing the aspect of “Liquidated Damages” it is observed that:

Para-7.1: Breach or non-performance of contract by one party results in loss and damages to the other party. Therefore, the law provides in Section 73 of the Contract Act, 1972 that when a contract has been broken, the party which suffers by such breach is entitled to receive from the other party compensation for any loss or damage caused to him by such breach. The compensation is not by way of consideration for any other independent activity; it is just an event in the course of performance of that contract.

Para-7.1.1: It is common for the parties entering into a contract, to specify in the contract itself, the compensation that would be payable in the event of the breach of the contract. Such compensation specified in a written contract for breach of non-performance of the contract or parties of the Circular No. 178/10/2022-GST contract is referred to as liquidated damages. Black’s Law Dictionary defines ‘Liquidated Damages’ as cash compensation agreed to by a signed, written contract for breach of contract, payable to the aggrieved party.

Para-7.1.2: Section 74 of the Contract Act, 1972 provides that when a contract is broken, if a sum has been named or a penalty stipulated in the contract as the amount or penalty to be paid in case of breach, the aggrieved party shall be entitled to receive reasonable compensation not exceeding the amount so named or the penalty so stipulated.

Para-7.1.3: It is argued that performance is the essence of a contract. Liquidated damages cannot be said to be a consideration received for tolerating the breach or non-performance of contract. They are rather payments for not tolerating the breach of contract. Payment of liquidated damages is stipulated in a contract to ensure performance and to deter non-performance, unsatisfactory performance or delayed performance. Liquidated damages are a measure of loss and damage that the parties agree would arise due to breach of contract. They do not act as a remedy for the breach of contract. They do not reconstitute the aggrieved person. It is further argued that a contract is entered into for execution and not for its breach. The liquidated damages or penalty are not the desired outcome of the contract. By accepting the liquidated damages, the party aggrieved by breach of contract cannot be said to have permitted or tolerated the deviation or non-fulfilment of the promise by the other party.

Para-7.1.4: In this background a reasonable view that can be taken with regard to taxability of liquidated damages is that where the amount paid as ‘liquidated damages’ is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract

and there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages, in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and are not taxable.

Para-7.1.5: Examples of such cases are damages resulting from damage to property, negligence, piracy, unauthorized use of trade name, copyright, etc. Other examples that may be covered here are the penalty stipulated in a contract for delayed construction of houses. It is a penalty paid by the builder to the buyers to compensate them for the loss that they suffer due to such delayed construction and not for getting anything in return from the buyers. Similarly, forfeiture of earnest money by a seller in case of breach of 'an agreement to sell' an immovable property by the buyer or by Government or local authority in the event of a successful bidder failing to act after winning the bid, for allotment of natural resources, is a mere flow of money, as the buyer or the successful bidder does not get anything in return for such forfeiture of earnest money. Forfeiture of Earnest money is stipulated in such cases not as a consideration for tolerating the breach of contract but as a compensation for the losses suffered and as a penalty for discouraging the non-serious buyers or bidders. Such payments being merely flow of money are not a consideration for any supply and are not taxable. The key in such cases is to consider whether the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. If the answer is yes, then it constitutes a 'supply' within the meaning of the Act, otherwise it is not a "supply".

Para-7.1.6: If a payment constitutes a consideration for a supply, then it is taxable irrespective of by what name it is called; it must be remembered that a "consideration" cannot be considered de hors an agreement/contract between two persons wherein one person does something for another and that other pays the first in return. If the payment is merely an event in the course of the performance of the agreement and it does not represent the 'object', as such, of the contract then it cannot be considered 'consideration'. For example, a contract may provide that payment by the recipient of goods or services shall be made before a certain date and failure to make payment by the due date shall attract late fee or penalty. A contract for transport of passengers may stipulate that the ticket amount shall be partly or wholly forfeited if the passenger does not show up. A contract for package tour may stipulate forfeiture of security deposit in the event of cancellation of tour by the customer. Similarly, a contract for lease of movable or immovable property may stipulate that the lessee shall not terminate the lease before a certain period and if he does so he will have to pay certain amount as early termination fee or penalty. Some banks similarly charge pre- payment penalty if the borrower wishes to repay the loan before the maturity of the loan period. Such amounts paid for acceptance of late payment, early termination of lease or for pre-payment of loan or the amounts

forfeited on cancellation of service by the customer as contemplated by the contract as part of commercial terms agreed to by the parties, constitute consideration for the supply of a facility, namely, of acceptance of late payment, early termination of a lease agreement, of prepayment of loan and of making arrangements for the intended supply by the tour operator respectively. Therefore, such payments, even though they may be referred to as fine or penalty, are actually payments that amount to consideration for supply, and are subject to GST, in cases where such supply is taxable. Since these supplies are ancillary to the principal supply for which the contract is signed, they shall be eligible to be assessed as the principal supply, as discussed in detail in the later paragraphs. Naturally, such payments will not be taxable if the principal supply is exempt.

2.18 Thus, applying the above circular in the present case, the following can be determined-

- Breach of Contract- In the present case there has been a breach and/or non-performance of contract by THDC which resulted in loss or damage to the applicant.

The law provides in Section 73 of the Contract Act, 1972 that when a contract has been broken, the party which suffer by such breach is entitled to receive from the other party compensation for any loss or damage caused to him by such breach. This compensation is not by way of consideration for any other independent activity; it is just an event in the course of performance of the contract. Such compensation specified in a written contract for breach of non-performance of the contract or the parties of the contract is referred to as the liquidated damages.

- Mere flow of money- The compensation awarded to the applicant is an amount paid only to compensate for injury, loss or damage suffered by the applicant due to the breach of the contract and there is no agreement, express or implied, by the applicant receiving such compensation, to perform an activity. In such cases the compensation is a mere flow of money from the party who causes breach of the contract (here THDC) to the party who suffers loss or damage due to such breach (here the applicant). Such compensation does not constitute consideration for supply and are not taxable.
- No Agreement to tolerate- Applying the aforementioned principles to Para 5(e) of Schedule II, a contractual relationship cannot be presumed to exist simply because there is a flow of money from one party to another. There ought to be an express or implied promise by the recipient of money to agree to do or abstain from doing something or to tolerate something in return for the money paid to him.

The Circular states that these amounts received are for not tolerating an act or situation and to deter such acts; such amounts are for preventing a breach of contract or non-performance and thus, are mere 'events' in a contract.

- Payment for non-fulfilling the terms of the contract- The compensation received by the applicant does not fall within the scope of Entry 5(e) of Schedule II to CGST Act, as no consideration passed on for any of the act mentioned therein. Further the

compensation awarded to the applicant are not towards agreeing to the obligations to refrain THDC from an act, or to tolerate an act or situation of THDC, or to do an act by THDC, but solely in due compliance with the arbitral award. In other words, the applicant has not sought any obligation or refrained THDC from doing any act. The amount payable as the Arbitral Award is purely in the form of compensation payable for additional expenditure incurred in the completion of the contracts by the applicant in the pre-GST era and does not involve any additional supply or labour.

- Payment is de-hors the contract- The compensation received by the applicant is merely an event in the course of performance of the agreement entered into between the applicant and the THDC and it does not represent the 'object', as such, of the contract and hence, it cannot be considered 'consideration'. Thus, such compensation are received *de hors* agreement and hence do not constitute a consideration and hence not taxable under the GST.

Therefore, it is relevant to point out that the said Circular has considered similar facts and held that liquidated damages awarded in arbitration are not liable to be taxed under GST. The said Circular is squarely applicable to the facts herein and in view of the said circular the settlement amount represents liquidated damages.

2.19 Supplies were executed in pre-GST regime; hence GST provisions are not applicable with respect to money receipt on account of arbitration claim awarded in post GST scenario

In the instant case the applicant had issued Purchase Orders in the pre-GST period and all the work allocated was completed in the Pre-GST Period and the payments were also settled in the Pre-GST period itself. The Applicant and the Sub-Contractor have duly remitted VAT and Service Tax on the entire contract value. Thus, it is pertinent here that the supply/work was completed during Pre-GST period. However, though the execution of the contract was over in Pre-GST period, the Arbitration Award was announced only in the GST period. Accordingly the award/amount received under the said arbitration can be examined in terms of transitional provisions provided under CGST Act, 2017.

The relevant provisions are as follows:-

Section 142(11)

(a) notwithstanding anything contained in section 12, no tax shall be payable on goods under this Act to the extent the tax was leviable on the said goods under the Value Added Tax Act of the State;
(b) notwithstanding anything contained in section 13, no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994 (32 of 1994);

Section 142(2)(a): where, in pursuance of a contract entered into prior to the appointed day, the

price of any goods or services or both is revised upwards on or after the appointed day, the registered person who had removed or provided such goods or services or both shall issue to the recipient a supplementary invoice or debit note, containing such particulars as may be prescribed, within thirty days of such price revision and for the purposes of this Act such supplementary invoice or debit note shall be deemed to have been issued in respect of an outward supply made under this Act;

2.20 In view of the above facts and provisions of the Act, the applicant would like to summarize the instant matter as follows:

Section 142(11)(b) states that, notwithstanding anything contained in Section 13, no tax is required to be paid under the CGST Act 2017, to the extent that the tax was leviable on the said services under the provisions of service tax law. Section 142(11)(c) states that, where any tax was paid on a supply both under VAT and service tax law, tax shall be leviable under the provisions of CGST Act 2017 to the extent of supplies made after the appointed day and the taxable person is entitled to take credit of taxes that were paid under the earlier regime.

On a combined reading of Section 142(11)(a) and Section 142(11)(b), the following scenarios are evident:

- If the service tax is already “leviable” under the provisions of service tax law, then there cannot be any tax under the provisions of CGST Act 2017 to such an extent, notwithstanding anything contained in Section 13, i.e. time of supply for services.
- Regarding the receipt of the award amount during GST regime, the applicant would like to state that this should not create any issues, especially, when the provisions of Section 142(11)(b) use the expression ‘notwithstanding anything contained in Section 13’. In other words, the receipt of payment may have created any issue in other situations, since the receipt also triggers the time of supply (that is time when tax is to be paid). However, since the provisions of Section 142(11)(b) in clear terms state that there cannot be any tax under the provisions of CGST Act 2017, notwithstanding anything contained in Section 13, the receipt alone cannot trigger any tax under CGST Act 2017.

The time of supply of the services in the present case is as per the VAT and Service Tax Act. Hence, as per the provisions of Section 142 (11) (a) and (b) the tax if at all leviable under the VAT/ Service Tax Act shall have been levied as service/ sale occurred at that time and not in the GST era.

- As per Section 142(2)(a) of CGST Act’ 2017 “where, in pursuance of a contract entered into prior to the appointed day, the price of any goods or services or both is revised upwards on or after the appointed day, the registered person who had removed or provided such goods or services or both shall issue to the recipient a supplementary invoice or debit note,

containing such particulars as may be prescribed, within thirty days of such price revision and for the purposes of this Act such supplementary invoice or debit note shall be deemed to have been issued in respect of an outward supply made under this Act;”

However, in this case there is no upward revision of price pursuant to the contract. It is the payment received for breach of the contract. Hence, it is a mere compensation against the Award.

- Therefore, GST is applicable on the additional consideration given after 01.07.2017 if the same happens due to upward revision of price as per the contract agreement between the contracting parties. But there was no upward revision of price in the present issue where the supplier/claimant had to obtain the additional payment by way of compensation through award by Hon'ble Tribunal for Arbitration.

Thus, in view of above discussion on transitional provisions it is clear that in the instant case, as no supply has happened during the GST regime, no GST shall be payable. Further the additional payment received by way of compensation through award by Hon'ble Tribunal for Arbitration is not falling under Section 142(2)(a) and hence not chargeable to GST.

2.21 Mere flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach should not constitute “consideration” for a supply and hence are not taxable

In Service Tax law, 'service' was defined as any activity carried out by a person for another for consideration. In service tax education guide, the concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration. An activity done without such a relationship i.e., without the express or implied contractual reciprocity of a consideration would not be an 'activity for consideration'. The element of contractual relationship, where one supplies goods or services at the desire of another, is an essential element of supply.

The Contract Act 1872 defines 'Contract' as a set of promises, forming consideration for each other. 'Promise' has been defined as willingness of the 'promisor' to do or to abstain from doing anything. 'Consideration' has been defined as what the 'promisee' does or abstains from doing for the promises made to him. There must be a necessary and sufficient nexus between the supply (i.e. agreement to do or to abstain from doing something) and the consideration.

Payments such as liquidated damages cannot be linked with 'activity' which are rendered for a consideration. They are rather amounts recovered for an activity not happening as per the contract. Unless payment has been made for an 'activity' or 'service' under an arrangement entered into for such service, the payments will not constitute 'consideration' and hence such activity will not constitute "supply" within the meaning of the CGST Act 2017.

Breach or non-performance of contract by one party results in loss and damages to the other party. Therefore, the law provides in Section 73 of The Indian Contract Act, 1872 that when a contract has been broken, the party which suffers by such breach is entitled to receive from the other party compensation for any loss or damage caused to him by such breach. The compensation is not by way of consideration for any other independent activity; it is just an event in the course of performance of that contract.

Where the amount paid as 'liquidated damages' is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to perform an activity, in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and hence such activity will not constitute "supply" within the meaning of the CGST Act 2017.

In this context, the applicant would like to rely upon the judgement of the Hon'ble Bombay High Court pronounced on 13 September 2019 in the case of *Bai Mamubai Trust & others Vs. Suchitra [2019]* where on a similar scenario, the Court in para 60 has pointed out the very characteristics of damages and their exigibility under GST as follows:

60. Damages may arise in an action in tort, or one in breach of contract as they both entail civil wrongs. Damages represent the compensation or restitution for the loss caused to the plaintiff for the violation of a legal right. It may even be the closest monetary alternative to a remedy in specific performance. The term 'Damages' may be used to include payments towards contractual obligations which are performed yet unpaid for, but the law of damages is not restricted to ordering that what ought to have been done or ought to have been paid under contract. The law recognizes and awards damages between persons who do not have privity, if there is a violation of a legal right resulting in a civil wrong which must be remedied.

The Hon'ble Court, further relying on the ruling in *Senairam Doongarmall Vs. Commissioner of Income Tax [1962]*, has held that the quality of the payment and not the method used to determine its measure determines its character namely whether it is 'consideration' or damages. The method of computation is not material. While holding so the Hon'ble Court in para 72 states that:

72. I am of the view that although the measure for quantifying a payment of royalty to the Court Receiver may be determined by looking at consideration payable under a contract or arising out of a business relationship, the royalty may still be in the nature of payments towards a potential award of damages or Mesne Profits, and therefore not liable to attract GST for reasons separately stated.

2.22 Short analysis of the various items and the amounts sanctioned under the Arbitration Claim awarded to the applicant –

(I) Unpaid amount on extra expenditures incurred: The claim (i) to (ix) of the table appended hereinabove are for the unpaid amount on the extra expenditures incurred by the applicant for the execution of the works contract service. The brief facts and the Hon'ble Arbitration Tribunal's verdict in respect of each of such claim is been summarized below-

- i) Claim for Extra Expenditure incurred in purchasing Boulder, Aggregates, and sand from private agencies:

Facts of the case - The applicant was tasked with crushing boulders into aggregates for shotcreting and concrete works. After receiving approval for quarry allotment from THDC, the applicant began mining and constructing approach roads. However, within 15 days, the quarry was re-allotted based on a No Objection Certificate from THDC. This prevented the applicant from producing aggregates, forcing them to procure materials from private agencies at significantly higher market rates.

Arbitral Tribunal's verdict- The Tribunal found that the quarry given to KCT had local issues, which forced them to buy materials from third parties and request reimbursement for extra costs. Since THDC owned all the land for quarrying, KCT had no other options. Based on the situation and partial access to the quarry, the Tribunal approved the claim in part.

Nature- The payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot be considered as consideration instead such payments are in the form of liquidated damages.

- ii) Claim for Reimbursement of monthly expenditure being incurred for operating private quarry:

Facts of the case- This claim is linked to Claim No. 1. The applicant was unable to mine boulders from the quarry allotted by THDC due to local agitations over rehabilitation and compensation. As a result, the applicant had to lease a quarry from a third party for 23 months to continue work without disruption. Thus, the applicant seeks reimbursement of the monthly rent paid for the leased quarry, applicable to all three Packages.

Arbitral Tribunal's verdict- The applicant informed THDC about the lack of a suitable quarry and submitted evidence, including receipts. The Tribunal found the apportionment of the claim across three packages reasonable and awarded the amount accordingly.

Nature- The payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-

fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot be considered as consideration instead such payments are in the form of liquidated damages.

iii) Claim for extra expenditure incurred due to change in methodology for excavation of Control Gate Shafts:

Facts of the case- The contract between the applicant and the THDC required THDC to provide an Alimak Raise Climber for excavating pilot shafts from bottom to top, as specified in the tender document. However, THDC was unable to provide the equipment at the start of the work, leading to a change in construction methodology. The applicant was instructed to excavate shafts 1 and 2 from top to bottom, while shafts 3 and 4 required strengthening measures due to geological conditions. As the methodology differed from the original plan, the work became additional, and the applicant calculated the claim based on revised rates and executed quantities.

Arbitral Tribunal's Verdict- Clause 35 of the contract stated that extra work, as directed by the EIC, would be carried out by the contractor. Due to changes in the construction methodology, the work was different from the original plan, making it extra work. The applicant calculated the claim using revised rates and applied them to the quantities executed on-site, providing full details of the claim. THDC did not offer an alternative calculation or identify any errors in the claim. The Tribunal found the claim to be justified and awarded the amount accordingly.

Nature- The payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot be considered as consideration instead such payments are in the form of liquidated damages.

iv) Claim for payment for the differential of cost for actually using 43 grade cement in place of 33 grade of cement as per the contract specifications:

Facts of the Case- The applicant initially used 33-grade cement for the HPP Civil works as instructed, but during testing, it failed to meet the required strength. THDC then directed the use of 43-grade cement, which was more expensive. The claim is for reimbursement of the additional cost of using 43-grade cement for the updated quantities, including price adjustments for all packages.

Arbitral Tribunal's Verdict- The Tribunal concluded that THDC instructed the applicant to use 43-grade cement, as evidenced by multiple communications. The Tribunal found the applicant's claim for the rate difference justified and supported by the evidence presented, with no valid objection raised by THDC.

Nature- The payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot be considered as consideration instead such payments are in the form of liquidated damages.

- v) Claims for Reimbursement of extra expenditure incurred in shifting of residential accommodation and infrastructure facilities from Simlasu and Ranibagh to the land allotted by THDC near Koti/Gajna:

Facts of the case- The applicant-built infrastructure for its employees on land initially allotted by THDC for executing the contract. However, this land later became submerged while the work was ongoing. As a result, the applicant had to relocate to new land provided by THDC. Thus, the applicant was forced to construct official and residential accommodation twice during the currency of contract. and construct residential and office facilities again, incurring additional costs during the contract period.

Arbitral Tribunal's Verdict- The applicant did not notify THDC at the time of setting up labour facilities in submerged areas or when directed by the EIC to shift these facilities to new locations due to impounding activities. However, the Tribunal found the applicant's claim for the cost of constructing new facilities at the relocated sites to be valid, as no errors in the claim were demonstrated by THDC. The applicant was not entitled to reimbursement for dismantling the old facilities or for supervision charges, as the claim was for reimbursement rather than extra work. The total amount awarded was apportioned across the contract packages proportionately.

Nature- The payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot be considered as consideration instead such payments are in the form of liquidated damages.

- vi) Claim for price adjustment of extra item:

Facts of the case- The claim relates to extra work items executed over an extended period during the project. Clause 35 of the GCC states that extra work items do not invalidate the contract, and the contractor is obligated to carry them out as directed. However, this provision cannot be used to significantly expand the scope of work beyond the original contract. Clause 36 allows price adjustments for BOQ items, variations, and extra work items whose rates are determined under Clause 35. The claimant argues that the same principle applies to numerous extra items ordered

over the years, with their rates fixed early on, even though the work continued until the project's completion.

Arbitral Tribunal's verdict- The arbitral Tribunal noted that the CMD of the Respondent, in a letter, acknowledged the Claimant's claim as admissible but accepted only one of the proposed methods for determining the rate of extra items. This method, under Clause 35(ii) of the GCC, involved periodic analysis of rates with supporting documents for the relevant period. The Tribunal found no evidence from the Respondent to prove that the calculations and quantifications were inconsistent with Clause 36 of the GCC. It rejected the Respondent's contention that the claim was prohibited under the clause. Based on the sufficient evidence provided by the Claimant, the Tribunal upheld the claim and awarded amounts corresponding to the respective packages.

Nature- The payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot be considered as consideration instead such payments are in the form of liquidated damages.

vii) Claim for extra expenditure incurred due to change in the methodology for excavation of Compressor and Receiver room at the end wall of Machine Hall:

Facts of the case- By the time the Respondent issued its letter, the Machine Hall excavation had already been completed below 600m across its full length. However, the decision to construct the compressors and receivers' room was made later, making the excavation work for these rooms significantly different from that of the Machine Hall. This delay adversely impacted productivity and increased excavation costs. The work was completed in September 1999, and the Claimant submitted a rate analysis, arguing that the BOQ rate was inapplicable due to the challenging working conditions. While the Respondent made payments, it did so at the Machine Hall rate, which the Claimant found unacceptable.

Arbitral tribunal's verdict- The excavation of the compressors and receivers' room required additional effort and qualifies as an extra item, warranting rate determination under Clause 35 of the GCC. The Tribunal, therefore, allows this claim and holds that the Claimant is entitled to a revised rate, with the total amount payable determined accordingly.

Nature- The payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot

be considered as consideration instead such payments are in the form of liquidated damages.

viii) Claim for payment of cost of material for work of pre-stressed anchor blind holes and through holes:

Facts of the case- Initially, the contract provided that THDC would supply all materials for cable anchors free of cost. However, this provision was later removed through an amendment. The Claimant subsequently submitted a claim for the cost of materials used in the pre-stressed cable anchor work up to January 2000. The claim included rates for both blind-type and through-type cable anchors. However, the Respondent rejected the claim, stating that, under the amended contract, the Claimant was responsible for arranging the materials.

Arbitral tribunal's verdict- The entire contract, including BOQ items 13 and 14 and Clause 5.11 of the Technical Specifications, was drafted by THDC. Even after removing the phrase "from materials supplied by THDC," ambiguity remained about whether the rates for BOQ items 13 and 14 included the cost of materials to be provided by the Claimant. The Delhi High Court in Flowmore Ltd. v. Skipper Ltd. (2023) held that any ambiguity in a contract must be interpreted against the party that drafted it. Applying this principle, the Tribunal finds that the Claimant reasonably believed that the rates for BOQ items 13 and 14 did not include the cost of materials. Therefore, the Tribunal awards the Claimant an amount under this claim.

Nature- The payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot be considered as consideration instead such payments are in the form of liquidated damages.

ix) Claim for Extra Expenditure in back filling behind walls of TRT Exit structure at TRT Outlet:

Facts of the case- The Respondent orally instructed the Claimant to use muck excavated from Packages II and III to fill the area between the hill slope and the walls of the Tail Race Tunnel exit/portal in a restricted space and in layers. This work was challenging, requiring careful manoeuvring of dumpers and spreading of muck with a dozer in a confined area, resulting in additional expenditure for the Claimant.

Arbitral tribunal's verdict- THDC claimed that the area in question was designated as a disposal area but provided no evidence to support this contention. The Tribunal determined that the work performed by KCT was not simple muck disposal but backfilling, which contributed to strengthening the TRT structure. The Claimant initially sought payment for the muck based on prior

correspondence and appeals but later revised the claim in the SoC using CWC Guidelines of 1997. The Tribunal held that KCT is entitled to the amount initially claimed.

Nature- The payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot be considered as consideration instead such payments are in the form of liquidated damages.

(II)Refund of excess deductions: The claim (x) to (xii) below are the refund on the excess deductions being claimed by the applicant which is wrongfully deducted by THDC. The brief facts and the tribunal's verdict in respect of each claim is been summarized below-

- x) Claim for excess recovery made towards 2 % & 1.5 % rebates from RA Bill and less paid Price Adjustment:

Facts of the case- The applicant offered lump sum rebates linked to specific conditions, which were included in the BOQ. These rebates applied to the total value of work done in each RA bill until the full rebate amounts were recovered by THDC. Once the recovery was complete, the rebate no longer applied to subsequent RA bills. The rebates did not affect the rates of individual BOQ items but were tied to the overall value of work done.

Arbitral tribunal's verdict- The Tribunal held that price adjustments should be based on the value of work done at the BOQ rates specified in the contract, not on the rebated value. The applicant's application of the rebate to price adjustments was not considered binding, as the terms of the contract govern the parties' rights and obligations. The Tribunal found that THDC had deducted excess amounts from the applicant's bills for rebates and ruled in favour of the applicant.

Nature- This is clearly towards deductions which were made earlier from the applicant's invoice as rebates and the said amounts are now claimed by the applicant in lieu thereof. It is understood that since the earlier amounts were deducted by THDC, Service Tax/VAT/ CST/ Other erstwhile taxes were also not devolved on these amounts. Now this payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot be considered as consideration instead such payments are in the form of liquidated damages.

- xi) Claim for reimbursing the wrongful deduction towards 0.5% rebate from price adjustment payment:

Facts of the case- The Claimant offered an additional 0.5% rebate for payments under interim/RA bills made within 15 days as per Clause 38.2. However, the Respondent wrongly and arbitrarily applied this rebate to price adjustment bills under Clause 36.0 of the GCC, which was not intended.

Arbitral tribunal's verdict- The additional 0.50% rebate was applicable only to interim bills submitted under Clause 38.2 of the GCC, provided payment was made within 15 days of submission. The Tribunal found that the Respondent's reliance on the letter of intent alone was incorrect, as the agreement must be read together with the price bid. Accordingly, the Tribunal held that the 0.50% rebate applied only to payments for interim bills and not to price adjustments.

Nature- This is clearly towards deductions which were made earlier from the applicant's invoice as rebates and the said amounts are now claimed by the applicant in lieu thereof. It is understood that since the earlier amounts were deducted by THDC, Service Tax/VAT/ CST/ Other erstwhile taxes were also not devolved on these amounts. Now this payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot be considered as consideration instead such payments are in the form of liquidated damages.

xii) Claim for certain deduction/deletion of items, from Final Bill:

Facts of the case- When settling the final bill, several items payable to the Claimant were either omitted or ignored by the Respondent without any valid explanation. The bill included claims for work done, reimbursement for admixtures, withheld amounts, royalty reimbursements, deductions for the 0.5% rebate, and other unpaid amounts.

Arbitral Tribunal's verdict- Since the Final Bill was accepted and the No Claim Certificate was not voluntarily obtained from KCT, the Tribunal will consider the claim for non-payment of amounts due under the Final Bill on its merits. However, the Tribunal will take into account THDC's argument that KCT had signed the measurements of quantities in the Measurement Books at the relevant time. The Tribunal has awarded a reduced amount compared to the amount originally claimed.

Nature- This is clearly towards deductions which were made earlier from the applicant's invoice as rebates and the said amounts are now claimed by the applicant in lieu thereof. It is understood that since the earlier amounts were deducted by THDC, Service Tax/VAT/ CST/ Other erstwhile taxes were also not devolved on these amounts. Now this payment has been made to compensate for injury, loss or damage suffered by the applicant due to breach of the contract by THDC as suitable conditions for the execution of the contract was not provided. There is no agreement to tolerate the act. The payment is for non-fulfilling the contract. Moreover, the payment is 'de hors' contract and hence such payment cannot be considered as consideration instead such payments are in the form of liquidated damages.

2.23 Thus, relying on the various provisions of the GST and other laws, the CBIC circular dated 3.8.2022 and the High Court judgements cited hereinabove, it can be said that the receipt of money in case of arbitration claim awarded to the applicant should not be taxable under GST law.

2.24 Additional Submission made on 24.07.2025

Point 1 : Payment received is distinct from the substantive contract (Page 20)

Arbitration Agreement is distinct in law and in existence from the underlying substantive contract in which it is embedded.

Point 2: Doctrine of Separability/ severability (Page 21) :

The effect of this doctrine is that the arbitration agreement will ordinarily remain valid and binding, notwithstanding the invalidity, illegality, termination or repudiation of the underlying contract.

Further as per section 16(1)(a) of the Arbitration and Conciliation Act, 1996 : *an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract*

Further, the doctrine of severability, allows a court to remove or "sever" the unenforceable or illegal parts of a contract while keeping the rest of the contract intact and enforceable.

Point 3: Compensation vs Consideration (Page 23) :

This award, rendered by the arbitral tribunal, serves as compensation for the breach of the contract and is, in essence, a form of liquidated damages determined and awarded in accordance with the terms and provisions governing the dispute.

Point 4 Necessity of a contractual Relationship (Page-27)

The primary theme of the Circular revolves around the necessity of a "contractual relationship" for an activity to constitute a 'supply' under GST, to be exigible to tax. Under such a contractual relationship, an individual is required to undertake an activity at the desire of another person for whom the activity is undertaken, in exchange for a consideration.

Here no such contract was entered into between KCT and THDC, for receiving of compensation for non performance of contract in the absence of such contractual relationship, any amount received hence would not be characterized as consideration.

Point 5: Consideration is received for fulfillment of contract where as compensation is received for breach of contract (Page- 28)

Consideration is received in connection with the performance of a contract, reflecting the agreed exchange of value between the parties. In contrast, compensation is received in connection with the breach or non-performance of a contract, as recognized under Section 73 of the Indian Contract Act, 1872. Such compensation is not linked to any independent activity or service rendered but is a legal remedy for the loss or damage suffered due to breach, and hence does not constitute consideration under GST.

Point 6: Performance vs Non- Performance (Page-29) :

Liquidated damages are compensation for non-performance of a contract, not for any service rendered. They arise when one party fails to fulfil contractual obligations, triggering a pre-agreed penalty. As clarified in GST Circular No. 178/10/2022-GST, such payments are not consideration for supply. Any amount received due to such breach of contract it would not tantamount to supply since it would be a compensation for non performance of a contract and would not attract GST.

Point 7 : Desired Outcome (Page- 29) :

The liquidated damages or penalty are not the desired outcome of the contract. The compensation is for not tolerating the breach of Contract.

Point 8 : Mere flow of money due to loss suffered (Page -30) :

Liquidated damages are mere flow of money paid only to compensate for injury loss/or damage suffered by the aggrieved party.

Point 9: Article 300A : Bank A/c is a property (Page- 30):

Under Article 300A of the Constitution, no person shall be deprived of their property except by authority of law, and this includes bank accounts and monetary assets as recognized forms of property. Therefore, in terms of Para 7.1.5 of Circular 178/10/2022 dated 03.08.2022 there is a compensation by THDC for damage to such property of the applicant.

Point 10 : Payment is de hors the contract (Page- 31):

If a payment constitutes a consideration for a supply, then it is taxable irrespective of by what name it is called; it must be remembered that a “consideration” cannot be considered de hors an agreement/contract between two persons wherein one person does something for another and that other pays the first in return.

Point 11 : Undisputed facility and agreed upon terms (Page-32)

Where there is a breach there is no dispute in the consideration and the terms are not agreed. However liquidated damages are taxed in only those circumstances when there is an undisputed facility which is agreed upon.

Point 12 : Breach of contract (Page -33) :

The law provides in Section 73 of the Contract Act, 1972 that when a contract has been broken, the party which suffer by such breach is entitled to receive from the other party compensation for any loss or damage caused to him by such breach.

Point 13 : Mere flow of money (Page- 33) :

The compensation awarded to the applicant is an amount paid only to compensate for injury, loss or damage suffered by the applicant due to the breach of the contract in terms of section 73 of Indian Contract Act, 1972, and there is no agreement, express or implied, by the applicant receiving such compensation, to perform an activity.

Point 14 : No Agreement to tolerate (Page-33) :

There is no agreement for tolerating an act, but payment is made solely in due compliance with

arbitral award for not tolerating the breach.

Point 15 : Time of supply pre GST period (Page – 35)

The Applicant and the Sub-Contractor have duly remitted VAT and Service Tax on the entire contract value in terms of time/point of sales/ services in Pre- GST period, on the billing made. Further the applicant would like to rely on the provisions of section 142(11)(a) and (b) of the CGST Act, 2017. On a combined reading of Section 142(11)(a) and Section 142(11)(b), which read as follows:

Section 142 (11)

- (a) *notwithstanding anything contained in section 12, no tax shall be payable on goods under this Act to the extent the tax was leviable on the said goods under the Value Added Tax Act of the State;*
- (b) *notwithstanding anything contained in section 13, no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994; (32 of 1994.)*

Further the applicant would like to rely on the case of National Tobacco Co Ltd [1978 (2) ELT 416(SC) – 1972-VIL-04-SC-SE] ; Vazir Sultan Tobacco Ltd [1996 (83) ELT 3 (SC) – 1996 – VIL-28-SC-CE].

With respect to the contention that since bill/invoice was raised on the Pre – GST regime, in terms of section 13(2) of the CGST Act, 2017, no GST is applicable irrespective of whether the payment is received under GST.

Point 16 : Upward Revision (Page – 38) :

However, in this case there is no upward revision of price pursuant to the contract. It is the payment received for breach of the contract. Hence, it is a mere compensation against the Award.

Point 17 Case law : Bai Mamubai Trust & others Vs. Suchitra [2019] Bombay High Court (Page- 40)

It may even be the closest monetary alternative to a remedy in specific performance. Compensation even if “closest monetary alternative” cannot be consideration.

Point 18: Quality and not measure determines character of payment (Page- 41)

Quality of the payment and not the method used to determine its measure determines its character namely whether it is ‘consideration’ or damages.

Point 19 : Claim for Extra Expenditure incurred in purchasing Boulder, Aggregates, and sand from private agencies (Pg -42):

Compensation for loss not consideration; due to breach of conditions for work

Point 20: Claim for Reimbursement of monthly expenditure being incurred for operating private quarry (Pg-43) :

Breach for work conditions

Point 21 : Claim for extra expenditure incurred due to change in methodology for excavation of Control Gate Shafts (page- 44)

Change of conditions of work

Point 22: Claim for payment for the differential of cost for actually using 43 grade cement in place of 33 grade of cement as per the contract specifications (page- 45):

Misrepresentation on making contract

Point 23: Claims for Reimbursement of extra expenditure incurred in shifting of residential accommodation and infrastructure facilities from Simlasu and Ranibagh to the land allotted by THDC near Koti/Gajna (Page- 46):

Non existence of guaranteed conditions for work

Point 24: Claim for price adjustment of extra item (Page -47) :

Expansion of scope not agreed. Misrepresentation at the time of contract

Point 25: Claim for extra expenditure incurred due to change in the methodology for excavation of Compressor and Receiver room at the end wall of Machine Hall (Page- 49)

Expansion of scope – misrepresentation at the time of contract

Point 26: Claim for payment of cost of material for work of pre-stressed anchor blind holes and through holes (Page- 50) :

Breach of promise

Point 27: Claim for Extra Expenditure in back filling behind walls of TRT Exit structure at TRT Outlet (Page-51):

Misrepresentation of scope of work

Point 28 : Refund of excess deductions (Page-52) :

Wrongful deduction of refund on which tax paid earlier.

Point 29: Claim for reimbursing the wrongful deduction towards 0.5% rebate from price adjustment payment (Page-54) :

Refund of wrong deduction

Point 30: Claim for certain deduction/deletion of items, from Final Bill (Page-55) :

Wrongful deduction refund.

3.Submission of the Revenue

3.1 The concerned officer from the revenue has not expressed any view on the merit of the issue raised by the applicant.

4. Observations & Findings of the Authority

4.1 We have gone through the records of the issue as well as submissions made by the authorized representatives of the applicant during personal hearing. The Revenue has not given any view in this regard.

4.2 According to the facts narrated by the applicant, he has been engaged in the business *inter alia* of construction, tunneling, civil works and other allied works pertaining to Hydro Electric projects. In the year 1988 THDC (Tehri Hydro Development Corporation) India Limited was entrusted with the work of implementation of Tehri Dam Project at Tehri Garhwal in the state of Uttarakhand. The stage - I work of the project consisted of 260.05 meter high Earth and Rock filled Dam, Spillways structures and Hydro Power Plant.

The construction of Hydro Power Plant was envisaged to be executed in three separate contracts viz. Package – I, Package – II and Package – III. The letters of intent for all the projects were issued to the applicant separately. On 03.01.1996 THDC India Limited entered into contract agreements with the applicant vide Agreement no. THDC/RKSH/CD-150/Package-I/AG for Package – I, THDC/RKSH/CD-150/Package-II/AG for Package – II and THDC/RKSH/CD-150/Package-III/AG for Package – III.

For the aforementioned three projects the applicant raised final bills for the projects vide letters dated 28.06.2011, 17.02.2011 and 27.04.2010 respectively. THDC India Limited However, several disputes arose between the two parties during the execution of the works pertaining to all the three packages.

Clause 60 of all the agreements has prescribed a four-tier system for settlement of disputes. The disputes are to be referred first to the Engineer-in-charge as defined under the contracts. The first appeal against the order of the Engineer-in-charge will lie with the Chairman and Managing Director (CMD in short) of THDC India Limited and the second appeal will lie with Dispute Resolution Board (DRB). If the parties still fail to resolve the dispute, then either of the parties may resort to Arbitration.

Total twenty disputes were referred to the DRB and the board was able to decide only four such disputes during its active functioning period from November 2002 to August 2005. The civil appeals were filed before the Hon'ble Supreme Court of India. The Apex Court recorded the consent of both the parties towards resolution of disputes in the Arbitral Tribunal. The Arbitral Tribunal was formed consisting of Justice J.D. Kapoor (Retd.) as nominated by the present applicant, Justice R.V. Raveendran (Retd.) as nominated by THDC India Limited and Justice A.K. Patnaik (Retd.) as nominated by the Apex Court. The Apex Court directed that all the claims and counter-claims should be decided by the tribunal.

The tribunal passed the awards on 01.11.2023 for all the three packages under different heads. The following table will show the arbitration awards in combined form for all the three packages:

Sl. No.	Category	Claim No.	Claim	Amount allowed by the Arbitral Tribunal (in lakh rupees)
I	Unpaid Amounts on Extra expenditure incurred	1	Claim for extra expenditure incurred in purchasing Boulder, Aggregates and sand from private agencies.	33.2
		2	Claim for reimbursement of monthly expenditure being incurred for operating private quarry.	13.8
		3	Claim for extra expenditure incurred due to change in methodology for excavation of Control Gate Shafts.	67.66
		4	Claim for payment for the differential of cost for actually using 43 grade cement in place of 33 grade of cement as per the contract specifications.	256.27
		5	Claims for Reimbursement of extra expenditure incurred in shifting of residential accommodation and infrastructure facilities from Simlasu and Ranibagh to the land allotted by THDC near Koti/ Gajna.	326.84
		6	Claim for Price Adjustment of extra item.	6937.94
		7	Claim for extra expenditure incurred due to change in the methodology for excavation of Compressor and Receiver room at the end wall of Machine Hall.	12.15

		8	Claim for payment of cost of material for work of pre-stressed anchor blind holes and through holes	30.01
		9	Claim for Extra Expenditure in back filling behind walls of TRT Exit structure at TRT Outlet.	208.67
II	Refund of excess deductions	10	Claim for excess recovery towards 2 % & 1.5 % rebates from RA Bill and less paid Price Adjustment.	1460.02
		11	Claim for reimbursing the wrongful deduction towards 0.5 % rebate from price adjustment payment.	113.49
		12	Claim for certain deduction/deletion of items, from Final Bill for P-I and P-II	367.34
			Total	9827.39
III	Arbitration Costs		Cost of Arbitration	190
			Sub- Total	10017.39

Subsequently, on 01.03.2024, THDC India Limited filed separate applications for each of the three packages under Section 34 of the Arbitration and Conciliation Act, 1996, before the Hon'ble Delhi High Court. These applications sought to set aside all the three final awards issued by the Arbitration Tribunal for the respective packages, dated 01.11.2023. On 17.04.2024 THDC India Limited invited the applicant to avail conciliation process to resolve the contractual disputes arising from Package I, II and III through Disputes Resolution Committee (DRC). However, the applicant filed execution application for each of the three packages under Section 36 of the Arbitration and Conciliation Act, 1996 on 18.04.2024, seeking enforcement of all the three final awards issued by the Arbitration Tribunal for the respective packages dated 01.11.2023 before the Hon'ble Delhi High Court.

On 29.04.2024, THDC India Limited again informed the Applicant to resolve the contractual disputes arising from Package I, II and III through Disputes Resolution Committee (DRC). The applicant gave its consent to resolve the contractual disputes arising from Package I, II and III through Disputes Resolution Committee (DRC) on 08.05.2024. THDC India Limited gave its consent on 12.05.2024.

On 13.06.2024, Disputes Resolution Committee (DRC) was constituted comprising of the following members-

1. Shri L.C. Goyal, IAS (Retd.)
2. Shri Anil Kumar Jha, Ex-Director (Technical), NTPC Ltd.
3. Shri Chinmoy Gangopadhyay, Ex-Director (Projects), PFC Ltd.

On 25.09.2024, the DRC passed its award thereby directing THDC to pay Rs 94,55,80,409.00 (i.e., 94.56 crores) within 45 days from the order. Then, finally on 24.10.2024, Settlement Agreement was signed and the payment of Rs 94,55,80,409/- (i.e., Rs 94.56 crores) was being received by the applicant.

4.3 In the above context, the following questions have been raised by the applicant:

- i) Whether claims allowed by the Arbitral Tribunal vide the Arbitration Awards be termed as supply or not?
- ii) Whether claims allowed by the Arbitration Tribunal vide the Arbitration Awards be termed as liquidated damages or not?
- iii) Whether GST would be applicable, on the claims allowed vide Arbitration Awards and payment received pursuant to Conciliation Proceedings resulting into the Settlement Agreement, both during the GST regime?
- iv) Whether GST would be applicable for the cost of arbitration allowed vide Arbitration Award and received vide the Settlement Agreement, both during the GST regime?
- v) If the answer to the above (iii), (iv) and /or (v) are in affirmative, then under what SAC and GST rate is the said liability to be discharged by the applicant and at what time?
- vi) That for (vi) above, whether debit note / supplementary invoices or tax invoice need to be issued by the applicant to the contractor in order to recover and discharge the tax liability?
- vii) That the work got executed prior to GST Regime however the claim is received during the GST Regime. Under such circumstances what is the applicability of GST on the same.

4.4 The applicant believes that the payment received by the applicant is against the claim under arbitral award and such claim under arbitral award is merely a flow of money from the party who causes breach of the contract to the party who suffered such loss or breach. Hence, such flow of money should be considered as liquidated damages.

The Arbitration Agreement, as per the understanding of the applicant, is distinct in law and in existence from the underlying substantive contract in which it is embedded. Clause 60 (common for all the three packages) of the general conditions of the contract agreement entered into between the applicant and the THDC dated 03.01.1996 states that in case the parties decide to go for Arbitration, then the disputes arising, shall be in accordance with the provisions of Indian

Arbitration Act, 1940, or any statutory amendments thereof.

The applicant has referred to Circular no. 178/10/2022-GST Dated 03.08.2022 and tried to apply the different aspects of the Circular on the relevant issue to his case. According to the applicant,

- There has been a breach and/or non-performance of contract by THDC India Limited which resulted in loss or damage to the applicant.
- The law provides in Section 73 of the Contract Act, 1972 that when a contract has been broken, the party which suffer by such breach is entitled to receive from the other party compensation for any loss or damage caused to him by such breach.
- This compensation is not by way of consideration for any other independent activity; it is just an event in the course of performance of the contract.
- Such compensation specified in a written contract for breach of non-performance of the contract or the parties of the contract is referred to as the liquidated damages.

The compensation awarded to the applicant, according to him, is an amount paid only to compensate for injury, loss or damage suffered by the applicant due to the breach of the contract and there is no agreement, express or implied, by the applicant receiving such compensation, to perform an activity. As the recipient of money the applicant has not agreed to do or to abstain from doing something or to tolerate something in return for the money paid to him.

The amount received as the Arbitral Award is purely in the form of compensation payable for additional expenditure incurred in the completion of the contracts by the applicant in the pre-GST era and does not involve any additional supply.

The applicant opines that a combined reading of Section 142(11)(a) and 142(11)(b) is required to understand the issues raised in Question no. (vi) and (vii). From a conjoint reading of the provisions, according to the applicant, it is clear that in the instant case, as no supply has happened during the GST regime, no GST shall be payable. Further the additional payment received by way of compensation through award by Hon'ble Tribunal for Arbitration is not falling under Section 142(2)(a) and hence not chargeable to GST.

4.5 Before going into the details of the discussion, we should enlighten ourselves with the concept of Liquidated Damages.

In a contract, when the parties to the agreement decide to pay a stipulated amount, if there is non-performance of the contract on the part of any of the parties, such damages are called Liquidated Damages. These damages are agreed upon by the parties concerned when they enter into the contract, i.e. before the execution of the contract itself. Further, this amount is fixed, and no changes can be made after it is signed.

Liquidated Damages in a contract is a provision that determines the sum to be paid as damages for the party's breach. With these damages, one benefit is that there is no need to prove the actual

loss. This is because the clause specifies the estimation of damages in advance.

The essential characteristics of Liquidated Damages are as under:

1. It is a just and fair pre-estimation of the damages.
2. It is an estimation of the amount which the parties agree to compensate for the breach.
3. These damages are awarded in full irrespective of the amount of loss. Further, the courts do not have the power to increase or decrease the amount decided by the parties concerned.
4. The damages are mentioned in the agreement itself.

A liquidated damage clause should not be "*de hors*" (outside of) the contract. It is a rather contractual provision, meaning it is a part of the agreed-upon terms and conditions of the contract. Liquidated damages are meant to be a genuine pre-estimated amount of compensation for a breach of contract, and it is typically included within the contract itself. Liquidated damages clauses are essentially clauses within a contract that specify a fixed sum of money or a formula for calculating damages in the event of a breach of contract.

4.6 For understanding the term 'Liquidated Damages' from a legal viewpoint we must refer to Section 73 of the Indian Contract Act, 1872. We are reproducing the relevant portion of the said section:

'Compensation for loss or damage caused by breach of contract.—*When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.'

It is clear from the legal provision that Liquidated Damage is a compensation for a breach of contract by a party for which another party suffers any loss or damage. This compensation is included within the contract itself.

4.7 Liquidated Damage or for that matter the taxability of liquidated damage has been a matter of discussion in the GST era since long.

The Circular No. 178/10/2022- GST Dated 03.08.2022 has dealt with the issue elaborately and comprehensively. Any issue related to the taxability of Liquidated Damage must be examined with reference to the analyses provided in the circular. The relevant portions of the said circular are reproduced here:

Liquidated Damages

7.1 *Breach or non-performance of contract by one party results in loss and damages to the other party. Therefore, the law provides in Section 73 of the Contract Act, 1972 that when a contract has been broken, the party which suffers by such breach is entitled to receive from the other party compensation for any loss or damage caused to him by such breach. The compensation is not by way of consideration for any other independent activity; it is just an event in the course of performance of that contract.*

7.1.1 *It is common for the parties entering into a contract, to specify in the contract itself, the compensation that would be payable in the event of the breach of the contract. Such compensation specified in a written contract for breach of non-performance of the contract or parties of the contract is referred to as liquidated damages. Black's Law Dictionary defines 'Liquidated Damages' as cash compensation agreed to by a signed, written contract for breach of contract, payable to the aggrieved party.*

7.1.2 *Section 74 of the Contract Act, 1972 provides that when a contract is broken, if a sum has been named or a penalty stipulated in the contract as the amount or penalty to be paid in case of breach, the aggrieved party shall be entitled to receive reasonable compensation not exceeding the amount so named or the penalty so stipulated.*

7.1.3 *It is argued that performance is the essence of a contract. Liquidated damages cannot be said to be a consideration received for tolerating the breach or non-performance of contract. They are rather payments for not tolerating the breach of contract. Payment of liquidated damages is stipulated in a contract to ensure performance and to deter non-performance, unsatisfactory performance or delayed performance. Liquidated damages are a measure of loss and damage that the parties agree would arise due to breach of contract. They do not act as a remedy for the breach of contract. They do not restate the aggrieved person. It is further argued that a contract is entered into for execution and not for its breach. The liquidated damages or penalty are not the desired outcome of the contract. By accepting the liquidated damages, the party aggrieved by breach of contract cannot be said to have permitted or tolerated the deviation or non-fulfillment of the promise by the other party.*

7.1.4 *In this background a reasonable view that can be taken with regard to taxability of liquidated damages is that where the amount paid as 'liquidated damages' is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied, by the aggrieved party*

receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages, in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and are not taxable.

7.1.5 Examples of such cases are damages resulting from damage to property, negligence, piracy, unauthorized use of trade name, copyright, etc. Other examples that may be covered here are the penalty stipulated in a contract for delayed construction of houses. It is a penalty paid by the builder to the buyers to compensate them for the loss that they suffer due to such delayed construction and not for getting anything in return from the buyers. Similarly, forfeiture of earnest money by a seller in case of breach of 'an agreement to sell' an immovable property by the buyer or by Government or local authority in the event of a successful bidder failing to act after winning the bid, for allotment of natural resources, is a mere flow of money, as the buyer or the successful bidder does not get anything in return for such forfeiture of earnest money. Forfeiture of Earnest money is stipulated in such cases not as a consideration for tolerating the breach of contract but as a compensation for the losses suffered and as a penalty for discouraging the non-serious buyers or bidders. Such payments being merely flow of money are not a consideration for any supply and are not taxable. The key in such cases is to consider whether the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. If the answer is yes, then it constitutes a 'supply' within the meaning of the Act, otherwise it is not a "supply".

7.1.6 If a payment constitutes a consideration for a supply, then it is taxable irrespective of by what name it is called; it must be remembered that a "consideration" cannot be considered de hors an agreement/contract between two persons wherein one person does something for another and that other pays the first in return. If the payment is merely an event in the course of the performance of the agreement and it does not represent the 'object', as such, of the contract then it cannot be considered 'consideration'. For example, a contract may provide that payment by the recipient of goods or services shall be made before a certain date and failure to make payment by the due date shall attract late fee or penalty. A contract for transport of passengers may stipulate that the ticket amount shall be partly or wholly forfeited if the passenger does not show up. A contract for package tour may stipulate forfeiture of security deposit in the event of cancellation of tour by the customer. Similarly, a contract for lease of movable or immovable property may stipulate that the lessee shall not terminate the lease before a certain period and if he does so he will have to pay certain amount as early termination fee or penalty. Some banks similarly charge pre- payment

penalty if the borrower wishes to repay the loan before the maturity of the loan period. Such amounts paid for acceptance of late payment, early termination of lease or for pre-payment of loan or the amounts forfeited on cancellation of service by the customer as contemplated by the contract as part of commercial terms agreed to by the parties, constitute consideration for the supply of a facility, namely, of acceptance of late payment, early termination of a lease agreement, of pre-payment of loan and of making arrangements for the intended supply by the tour operator respectively. Therefore, such payments, even though they may be referred to as fine or penalty, are actually payments that amount to consideration for supply, and are subject to GST, in cases where such supply is taxable. Since these supplies are ancillary to the principal supply for which the contract is signed, they shall be eligible to be assessed as the principal supply, as discussed in detail in the later paragraphs. Naturally, such payments will not be taxable if the principal supply is exempt.

Clause 7.1.3 and 7.1.4 are the essence of the above circular for treatment of Liquidated Damage in the GST era. If we analyse the clauses the following points emerge:

1. Performance is the essence of any contract.
2. Liquidated Damages are not consideration received for tolerating the breach or non-performance of contract. Rather, they are payments for not tolerating the breach or non performance of contract.
3. Liquidated Damages are measure of loss and damages that the parties agree would arise due to breach of contract.

It is evident from the Circular that payment of Liquidated Damage cannot be considered as a consideration for supply if

1. The payment is made for compensating any injury, loss or damage suffered by the aggrieved party.
2. The injury, loss or damage has been caused due to the breach of contract by the other party.
3. There is no agreement, either express or implied, that the aggrieved party receiving the liquidated damages will refrain from or tolerate an act or do anything for the party paying the liquidated damages.

If the above conditions are fulfilled, liquidated damages are to be considered as mere a flow of money from the party who causes breach of the contract to the party who suffers injury, loss or damage due to such breach.

4.8 Now that we have clarified what are liquidated damages and the tax treatment of the same in the GST era, we now proceed to examine whether the amounts received by the applicant as a result of the Arbitration Award qualify to be termed Liquidated Damages, or whether they should

be treated simply as additional consideration for the supply already made by them. It is necessary, at this point, to examine the transitional provisions of the GST Laws, which deal with the situation where a supply is made partly in the legacy tax regime and partly in the GST regime.

Section 142(2) of the CGST Act, 2017 states

*“(a) where, **in pursuance of a contract entered into prior to the appointed day**, the price of any goods or services or both **is revised upwards on or after the appointed day**, the registered person who had removed or provided such goods or services or both shall issue to the recipient a supplementary invoice or debit note, containing such particulars as may be prescribed, within thirty days of such price revision and for the purposes of this Act **such supplementary invoice or debit note shall be deemed to have been issued in respect of an outward supply made under this Act**;*

(b) where, in pursuance of a contract entered into prior to the appointed day, the price of any goods or services or both is revised downwards on or after the appointed day, the registered person who had removed or provided such goods or services or both may issue to the recipient a credit note, containing such particulars as may be prescribed, within thirty days of such price revision and for the purposes of this Act such credit note shall be deemed to have been issued in respect of an outward supply made under this Act:

Provided that the registered person shall be allowed to reduce his tax liability on account of issue of the credit note only if the recipient of the credit note has reduced his input tax credit corresponding to such reduction of tax liability.”

[emphasis supplied]

4.9 Section 142(2)(a) provides that when the price of any goods or services is revised upwards after the implementation of GST in pursuance of a contract entered into during the legacy tax regime, the person who provided such goods or services shall issue a supplementary invoice/debit note and such supplementary invoice/debit note shall be deemed to have been issued in respect of an outward supply made under the CGST Act. In brief, the following elements should come together for such price revision to be deemed as a supply under GST – there should be an upward price revision; and such price revision should be in pursuance of a contract entered into prior to the appointed day, i.e. 01.07.2017.

4.10 In the matter under consideration, there is no doubt that the contract was entered prior to 01.07.2017, since a mere perusal of the facts indicate that the Letters of Intent were issued in November 1995 and the contracts were signed in January 1996. Now, it becomes apposite to examine whether the contracts contains any provision for upward price revisions and whether the

amounts received by the applicant in compliance with the Arbitration Award are in pursuance of such provisions of the contract, if extant.

4.11 On perusal of the Contract Agreements, it is seen that three clauses 34, 35, and 36 deal with “Alterations, Additions, and Omissions”, “Extra Items”, and “Price Adjustment” respectively. These clauses are relevant to our discussion to determine whether the amounts in the Arbitration Award stem from upward price revisions pursuant to the provisions in the contract. The relevant portions are reproduced below:

“ *Clause 34.0: ALTERATIONS, ADDITIONS, AND OMISSIONS*

i) *Variations*

The Engineer-in-Charge shall have powers to make any variation of the form, quality, or quantity of the works of any part thereof that may in his opinion be necessary and for that purpose, or if for any other reason it shall in his opinion be desirable, he shall have power to order the Contractor do and the Contractor shall do any of the following:

- a) Increase or decrease the quantity of any work included in the Contract*
- b) Omit or substitute any such work*
- c) Change the character or quality or kind of any such work*
- d) Change the levels, lines, position, and dimensions of any part of the works*
- e) Execute additional work of any kind necessary for the completion of the works and no such variations shall in any way vitiate or invalidate the Contract, but the value, if any of all such variations shall be taken into account in ascertaining the amount of the contract price, and*
- f) Change any specified sequence, method or timing of construction of any part of the work”*

Sub-clause ii) of the same clause 34.0 stipulates that orders for such variation are to be in writing and Sub-clause iii) of the same clause 34.0 proceeds to lay down how the variations will be valued and how payment will be made in respect of such variations

“*Clause 35.0: EXTRA ITEMS*

Extra items of work shall not in any way vitiate the contract. The contractor shall be bound to execute extra items of work as directed by the Engineer-in-Charge. The rate(s) of any additional, altered, or substituted items shall be determined by the Corporation ...[...]”

Further sub-clauses of Clause 35.0 lays down the guidelines in determining the rates of such extra

items.

“Clause 36.0: PRICE ADJUSTMENT

Contract price as awarded shall be adjusted for increase or decrease in rates and price for labour, materials, fuel and lubricants in accordance with the following principles and procedures:-“

The clause then proceeds to lay down in detail how such adjustment is to be calculated, separately for labour, for construction material, and for petrol diesel, oil and lubricants.

4.12 From the above, it is clear that the Contract Agreement contains clear and unequivocal terms governing any additional work to be done, and any adjustment in the contract price which may result from such additional work. In the light of these terms, as well as the law on Liquidated Damages and their tax treatment in GST as detailed above, we now proceed to examine each item of the arbitration award to arrive at its taxability under the GST regime.

4.13 It is already noted that the amounts awarded by the Arbitration Tribunal under different heads for the three packages can be categorised broadly under twelve heads. Those heads and the amount for each head have been mentioned in the table in Paragraph no. 4.2. Now we will discuss the nature of amount awarded to the applicant head-wise and find out in the light of Circular no. 178/10/2022- GST Dated 03.08.2022 whether the said amounts are received as compensation or consideration.

HEAD WISE DISCUSSION

1. Claim for extra expenditure incurred in purchasing boulder, aggregates and sand from private agencies:

The applicant has stated that the THDC was under contractual obligation to provide quarry areas to the applicant for procurement of boulder, aggregates and sand. On this issue, the Arbitration Tribunal has recorded their finding as follows:

“On reading of the aforementioned provisions of the Contract, it becomes clear that providing the quarry area on “as is where is basis” was the obligation of the Respondent. The Respondent was the owner of the land needed for the quarrying boulders, sand etc. for Tehri Dam Project. For obtaining the land for quarrying, the Claimant was dependent on the Respondent. There was no quarrying area, which was available outside the land owned by the Respondent, which could be exploited for the purpose of extracting boulders and other quarrying material.

Therefore, the arbitral Tribunal is of the view that making the quarry area available to the Claimant for quarrying, was the obligation of the Respondent”

The Respondent, in this case, is THDC, and the Claimant is the applicant before us.

For procurement of boulder, aggregates, sand and mixed materials of sand and boulder for the construction works at Tehri Dam Project, the contractee was under the contractual obligation of providing quarry areas to the applicant. The quarry area earmarked by the contractee was not only inadequate for procuring materials but also it was subsequently leased out to another individual. The applicant found no other quarry area for extracting boulders and other materials. So he was compelled to procure the materials from the open market at higher rate. The Arbitration Tribunal allowed claim due to this extra burden of the applicant, due to breach of contractual obligations by THDC. The award is in the nature of compensation of loss suffered by the applicant due to breach of contract by the contractee by not providing proper quarry areas.

2. Claim for extra expenditure incurred for operating private quarry:

This is similar to the first point, inasmuch as it stems from the breach of contractual obligation by THDC to provide to the applicant a quarry free from encumbrances. The findings of the Arbitral Tribunal on the matter as have been quoted in the discussion of point no.1 is equally applicable here.

Since the start of the project the applicant was not allotted any quarry free of all hindrances by the contractee. So the contractor was forced to start quarrying boulders from the quarry owned by an individual on a monthly rental basis. The other materials were to be procured from open market. Both created additional burden on the applicant. The Arbitration Tribunal allowed claim due to this extra burden of the applicant which he would not have incurred had the contractee followed his contractual obligation. The award is in the nature of compensation.

3. Claim for extra expenditure incurred due to change in the methodology for excavation of control gate shafts:

The applicant had to construct Control Gate Shafts over four Head Race Tunnels (HRT in short) in the entire Tehri Dam Project. For this purpose the agreed upon methodology was excavation of pilot shaft from bottom to top. The contractee was under the obligation to provide the machinery named Alimak Raise Climber for this particular construction methodology. But the contractee failed to discharge his obligation for providing the machinery. In addition to this, the geological structure at HRT 4 was not suitable for executing the above noted process of construction. The applicant had to excavate in reverse sequence. This excavation necessitated

extra work on the part of the applicant. The relevant portion of the finding of the arbitral Tribunal in this matter is reproduced below:

“55.

(vii) The Respondent's next contention is that change in methodology would not amount to extra work in terms of Clause 35 of the Contract. In this regard, we find that vide its letter dated 10.04.1997 THDC informed the Claimant that change in methodology in the CGS was submitted by the Claimant and was approved by THDC. Therefore, it is beyond any doubt that there was a change in construction methodology. The said change was on account of inability of the Respondent to make Alimak Raise Climber available in terms of the Contract and instructing the Claimant to execute the work of Pilot Shaft 1 & 2 from top to bottom. For CGS 3 & 4, the work of executing Pilot Shaft from bottom to top was not possible due to geological conditions without taking strengthening measures.

(ix) Clause 35 of the Contract required extra items of work as directed by the EIC, would be carried out by the Contractor. With the change in methodology, the work did not remain the same for which the rate was quoted in the relevant BOQ item **hence it became the extra work**. The Claimant has quantified its claim by working out the new rates on the basis of analysis of rate and applied the rate so derived to the quantities executed at the site.”

[emphasis supplied]

Here, the Tribunal has recorded a clear finding that this Award is due to the extra work being carried out by the applicant, due to peculiar geological conditions and non-provision of equipment. We find that the amount awarded against this aspect of the claim stems from the extra work carried out, for which the provision for calculating rates are provided for in the Contract itself, which has been reproduced *supra* in this Ruling. It is also clear that this amount, which is consideration for works contract services provided by the applicant, has not suffered taxation in the legacy tax regime since the amount was not paid by THDC till 2024. From the above, we are of the considered view that this amount is a result of upward revision of prices for work carried out in the previous tax regime in pursuance of a Contract entered into prior to 01.07.2017. Thus, all the ingredients of Section 142(2)(a) of the CGST Act, 2017 are satisfied, and it has to be necessarily held that this amount is taxable under the GST statute.

4. Refund of rebate wrongfully recovered / deducted by the contractee:

The applicant had offered the contractee, THDC (Tehri Hydro Development Corporation) India Limited 2% rebate on the contract value in lieu of interest free equipment advance equal to 5% of the contract price and 1.5% rebate on the contract value for award of all the three packages to the applicant. An additional rebate of 0.5% was offered if the payment of interim bills was made within 15 days of the submission of bills. The first two rebates were on the contract price

and the last one was on the amount of interim bills. But the contractee went on deducting the rebate on all R.A. bills and price adjustment bills. The tribunal awarded the entire claim of the alleged wrongful recovery of rebate.

It is clear from a reading of the contract that the rebate is nothing but a kind of discount offered on the contract price. The applicant's claim was that THDC deducted more rebate than was eligible to be deducted by them. It is also clear that the underlying consideration on which the rebate is being applied is nothing but the consideration for carrying out works contract service. Now, the arbitral Tribunal has held that THDC has indeed deducted more rebate than it should have. The net effect of the same is to increase the consideration to the extent of such excess rebate. In other words, the price has been revised upwards by the reversal of such rebate.

In our considered view, in order to avoid double taxation on the same amount, this amount should be not taxed in the GST regime if the same amount has suffered any kind of tax in the earlier tax regime. The applicant was specifically instructed to furnish documentary proof i.e. the statutory returns in order to show whether the turnover in respect of Project I, II and III as declared in the returns of the earlier tax regime was inclusive or exclusive of rebates wrongfully deducted and subsequently allowed by the Arbitration tribunal.

The applicant, in response to a query from this Authority, has in his written communication dated 19.01.2026 has informed that he has made all possible efforts to trace and retrieve the Sales Tax/ Service Tax returns and supporting records relating to the said projects. The applicant regretted his inability to produce the same. The applicant has also recorded that the non-production of the records is neither intentional nor deliberate. According to him, the records are no longer available, the same having been maintained only for the period mandated under the relevant laws.

In absence of the proper records this authority is not in a position to arrive at any particular decision. In our considered view, if the amount under question has not suffered tax in the earlier regime, it should be considered as taxable in the GST regime.

5. Refund of rebate wrongfully deducted from price adjustment by the contractee:

An additional rebate of 0.5% was offered by the applicant if the payment of interim bills was made within 15 days of the submission of bills. This offer was categorical and applicable for interim R.A. bills only. The contractee, however, deducted the rebate from price adjustment bills as well in violation of agreement. The tribunal awarded the entire claim of the alleged wrongful recovery of rebate. The award is similar to one referred to in the preceding paragraph except that this pertains to such rebate deducted from price adjustment. It has already been stated above that Price Adjustment is part and parcel of the contract, as provided for in Clause 36.0. Since the reasoning is identical to point 4, we hold the same view taken in the subject matter discussed in Point 4 *ibid*.

6. Claim for cost difference for actual use of higher grade of cement:

The applicant by the terms of contract was supposed to use 33 Grade cement for construction works. But it was found by the experts of the contractee that desired target strength was not being achieved by using this grade of cement. So it was instructed that the contractor (here the applicant) should procure 43 Grade cement for construction works. This cement was costlier by Rs. 2.00 per bag of 50 kilogram cement. The bid was given by the applicant considering the price of 33 Grade cement, not 43 Grade cement.

In this matter, THDC had claimed before the Arbitral Tribunal that there is no extra payment due to the applicant since Clause 15.0 of the Contract specified that the materials will be purchased by the Contractor at their own expense. However, the Tribunal held that since the grade of the cement was changed based on written instruction by THDC, the differential cost of such cement was to be paid to the applicant. The Tribunal also recorded its finding that *“the Claimant’s obligation under the Contract was to use 33 grade of cement. The contention of the Respondent to the extent that usage of the cement was directly related to the compressive strength irrespective of the grade, is not in accordance with the contract. Had the obligation of the Claimant been to arrange cement of specific compressive strength, the Contract would have been worded accordingly instead of specifying 33 grade cement.”*

From the above finding recorded by the Arbitral Tribunal, it is clear that this is in the form of reimbursement/compensation awarded to the applicant for breach of contract terms by THDC. Since the Tribunal has recorded explicitly that this change was not in accordance with the contract, we also find that this is covered under neither Clause 35 or Clause 36 of the contracts. Therefore, this cannot be said to be an upward revision of price in pursuance of the contract.

The applicant had to bear additional cost due to change of the quality of cement actually used in construction work. The amount allowed under this head represents the differential amount due to change in the grade of cement used. No extra or new work not envisaged in the contract itself was carried out. So there is no upward revision of contract value as such. So the amount awarded by the Arbitral Tribunal is basically compensatory in nature. Therefore, we find that the liability of GST does not accrue on this amount.

7. Claim as reimbursement of expenditure for shifting of infrastructure facility:

When the project works were under full swing the applicant was directed by THDC India Limited to shift the entire infrastructural facility from Simlasu to Koti village on the argument that the facility at Simlasu would be submerged after the closure of the Diversion Tunnels 1 and 2. The

applicant failed to shift infrastructure facility at Koti since the land of the village was not vacant. The applicant was further instructed to shift infrastructure facility to village Gajna. The shifting of all mechanical workshops, fabrication shops, stores, offices and accommodation for labours created huge extra burden on the contractor.

The Arbitral Tribunal found that *“No provision of the Contract has been shown to demonstrate that in any eventuality, the infrastructure facilities once established were required to be shifted to another place during the period of the Contract.”*. The Tribunal has also recorded that THDC is liable to reimburse the cost of shifting of infrastructure facilities incurred by the applicant. This amount is in the nature of reimbursement of expenses incurred by the applicant due to the breach of contractual terms by THDC. Since this is awarded as a reimbursement of expenses and not for any goods/services provided and since this is of the nature of a compensatory award for breach of contract, no taxability accrues to this amount.

8. Claim due to payment of price adjustment on extra items:

The Arbitral tribunal has observed that a large number of extra items in all the three packages were supplied by the contractor at the instruction of the Engineer-in-charge of the contractee. There were nearly seventy such items as found out by the tribunal and the total value of those items stood at Rs. 177 crore. Many of the extra items were given requisition right at the time of commencement of work at site. The applicant had to bear the extra costs that were not mentioned in the contract.

As is clear from the description, this is nothing but extra consideration arising out of extra work and governed by the terms of Price Adjustment specified in Clause 36.0 of the Contract. In fact, the Tribunal, while recording its finding awarding the amount to the applicant, has extensively relied on Clause 35.0 and 36.0 of the Contract. These clauses have been discussed in detail *supra* and they lay down the terms for revision of prices. From the description, as well as a detailed reading of the Tribunal's award, it emerges that this amount is in lieu of extra work carried out by the applicant.

How this is to be treated has been laid down in detail in the contract, and therefore, we have no hesitation in holding that this is an upward revision of prices in pursuance of a contract entered into prior to 01.07.2017. Since all the conditions in Section 142(2)(a) of the CGST Act, 2017 are satisfied, this amount is leviable to GST.

9. Claim for deduction/ deletion from Final bill:

This claim represents dues towards wrong deduction of quantities of BoQ items (e.g. cement, plugging concrete etc.) and other due amounts not paid by the contractee on different allegations (e.g. charge of lack of cleaning, wastage of admixture, non-reimbursement of

admixture etc.). The arbitral tribunal has partially allowed the claim.

This stems from the fact that THDC had short-paid the amounts due to the applicant in their Final Bill. It is evident that the Final Bill was raised for provision of works contract services. Therefore, any additional consideration will attract the same tax treatment. Therefore, this is nothing but an upward revision of prices in pursuance of a contract entered into prior to 01.07.2017 and is therefore, taxable under GST.

10. Claim for extra expenditure incurred for excavation of compressors and receiver's room at the end wall of machine hall:

In the findings on this issue, the arbitral Tribunal has recorded that *"The excavation of CR and RR definitely required extra efforts and qualifies to be an extra item whose rate should have been determined in accordance with the parameter prescribed under Clause 35 of GCC"*.

From the description as well as the unequivocal finding of the Tribunal, it is clear that this is nothing but extra work, which was covered under the contractual terms for which payment was not made by THDC. This is nothing but price revision made in terms of an existing contract entered into prior to 01.07.2017, and is therefore, taxable under GST.

11. Claim for payment of cost of materials for work of pre-stressed anchor in the blind holes and through holes:

The contractor was supposed to install pre-stressed anchors in through holes exceeding 18 mtrs. but not exceeding 30 mtrs. and also to install pre-stressed anchors in through holes exceeding 10 mtrs. but not exceeding 18 mtrs. As per the agreement, the anchors were to be made from materials supplied by the contractee. Then an amendment was made by virtue of which the materials were to be provided by the applicant.

This claim arises from the cost of such materials which were used by the applicant to execute this work. The Tribunal has awarded the claim based on the cost of material. This is again a case where the cost of materials required for doing extra work was claimed by the applicant. The Arbitral award has resulted in a price revision, which has ultimately resulted from the terms of the contract and was not based on any breach of contractual obligations. Since this is a price revision covered under the contractual terms, this amount is also leviable to tax under GST by virtue of Section 142(2)(a) of the CGST Act, 2017.

12. Reimbursement of extra expenditure for backfilling the behind walls of TRT outlet:

This issue is related with the dispute between the contractor and the contractee in respect of disposal of muck excavated from Package II and III. By the terms of the agreements the excavated materials of Package II and III should have been disposed in 'Disposal Area-III' and

'Disposal Area-I' respectively on the left bank of river Bhagirathi. But subsequently the applicant was directed to use the muck excavated from works of Package II and III to fill the area between the hill slope and the walls of the Tail Race Tunnel (TRT) Exit Structure. The point of dispute was whether this activity had been a simple disposal of muck or it had been a work of backfilling thereby creating permanent structure adding strength to the TRT walls. The applicant argued that the process of backfilling as had been done in this case required extra efforts both in terms of man and machinery. Placing the muck in tight spaces and restricted area involved the dumper to have been manoeuvred with great difficulty. Backfilling also required filling all contact areas and compacting the layers of muck properly and safely. This required use of Dozer and extra supervisory staff. This is nothing but a new work not envisaged in the original contract. Any amount awarded due to this should be considered as consideration for the respective new work and hence is taxable under the GST Act.

Based on the discussions above, the amounts received for SI Nos. 3, 8, 9,10,11 and 12 are held to be taxable under the GST statutes in terms of Section 142(2)(a) of the CGST Act, 2017, being in effect price revision in pursuance of a contract entered into prior to 01.07.2017. The other amounts for serial no. 1, 2, 6, 7, being in the nature of liquidated damages/reimbursements are not taxable. For serial no. 4 and 5 the treatment should be as per the discussions made in respect of the said serial numbers, depending on whether these amounts have suffered tax in the legacy tax regime.

4.14 In addition to all the above noted awards of claims, the Arbitration Tribunal has also awarded cost of arbitration for all the three projects as under:

Project	Cost of arbitration awarded (in Rupees)
Project I	1,00,00,000.00
Project II	50,00,000.00
Project III	40,00,000.00
Total	1,90,00,000.00

The arbitration as service has been provided by the Arbitration Tribunal to the applicant. The tribunal has been constituted in the pre-GST era (by an order dated 31.03.2015 by the Supreme Court of India) and it has delivered its order of arbitration in the GST era vide order dated 01.11.2023. Therefore, the service is taxable.

Arbitration service will fall under Legal and Accounting services under heading no. 9982 and group no. 99821. The specific service is covered by service code no. 998215. The place of supply of such service is guided by Clause (a) of Section 12(2) of the IGST Act, 2017. So here in our case the place of supply of arbitration service will be the location of the applicant i.e. West Bengal.

As per Notification No. 13/2017 – Central Tax (rate) Dated 28.06.2017 it is taxable under Reverse Charge under the provisions of Section 9(3) of the CGST Act and the corresponding provisions of

the SGST Act. The relevant portion of the notification is reproduced here:

Sl. No.	Category of Supply of Services	Supplier of service	Recipient of Service
(1)	(2)	(3)	(4)
3	Services supplied by an arbitral tribunal to a business entity.	An arbitral tribunal.	Any business entity located in the taxable territory.

The place of supply of such service will be West Bengal following provisions of Section 12(2) of the IGST Act, 2017. The relevant portion of the section is reproduced here:

(2) The place of supply of services, except the services specified in sub-sections (3) to (14),—

(a) made to a registered person shall be the location of such person;

(b) made to any person other than a registered person shall be,—

(i) the location of the recipient where the address on record exists; and

(ii) the location of the supplier of services in other cases.

Clearly the applicant's case will be covered by clause (a) as above and as such it is held taxable under reverse charge @ 9% CGST + 9% SGST under serial no. 20 vide Notification No. 11/2017-Central Tax (Rate) Dated 28.06.2017, as amended.

Regarding the time of supply we have to refer to the relevant provisions of Section 13 of the CGST Act. The relevant sub-section is reproduced here:

(3) In case of supplies in respect of which tax is paid or liable to be paid on reverse charge basis, the time of supply shall be the earlier of the following dates, namely:—

(a) the date of payment as entered in the books of account of the recipient or the date on which the payment is debited in his bank account, whichever is earlier; or

(b) the date immediately following sixty days from the date of issue of invoice or any other document, by whatever name called, in lieu thereof [by the supplier, in cases where invoice is required to be issued by the supplier; or]

(c) the date of issue of invoice by the recipient, in cases where invoice is to be issued by the recipient:

Provided that where it is not possible to determine the time of supply under clause (a) or clause (b) or clause (c), the time of supply shall be the date of entry in the books of account of the recipient of supply:

Here in our case the applicant is the recipient of supply of arbitration service supplier being the Arbitration Tribunal formed for this purpose. So clause (a) will be applicable here and the time of supply will be the date on which payment for arbitration fees is debited from the bank account of the applicant.

The value of supply in this case will be the amount of fees paid to the arbitrators. The applicant being recipient of service is liable to pay tax as above under reverse charge.

However, the amount awarded as the cost of arbitration will not come under the purview of GST. This is an amount to be paid to the applicant by THDC India Limited as part of compensation in respect of the expense of arbitration that the applicant had to bear. There is no supply of service between the two. This amount is not paid as consideration of any supply. It is a mere flow of money between the two parties as compensation of a part of the expenses incurred for arbitration and the origin of the said transaction is the order of the arbitration tribunal, not any kind of supply. Tax on reverse charge is payable only when the payment of fees is made to the arbitration tribunal.

In view of the foregoing discussion, we rule as under:

RULING

i) Whether claims allowed by the Arbitral Tribunal vide the Arbitration Awards be termed as supply or not?

Answer: The answer to this question should follow our discussion under point number 1 to 12 in Paragraph number 4.13 *supra*.

The claims allowed for extra expenditure due to change in the methodology for excavation of control gate shafts, claims allowed due to payment of price adjustment on extra items, claims allowed for deduction or deletion from final bill, for extra expenditure incurred for excavation of compressors and receiver's room at the end wall of machine hall, for payment of cost of materials for work of pre-stressed anchor in the blind holes, for extra expenditure for backfilling the behind walls of TRT outlet and claims allowed as refund of rebate wrongfully recovered or deducted and rebate wrongfully deducted from price adjustment are to be considered as supply.

On the other hand, the claims allowed for extra expenditure incurred in purchasing boulder, aggregates and sand from private agencies, for operating private quarries, for cost difference for actual use of higher grade of cement, claims allowed as reimbursement of expenditure for shifting of infrastructure facility are not considered as supply.

ii) Whether claims allowed by the Arbitration Tribunal vide the Arbitration Awards be termed as liquidated damages or not?

Answer: The claims allowed for extra expenditure incurred in purchasing boulder, aggregates and

sand from private agencies, claims allowed for operating private quarries, claims allowed for cost difference for actual use of higher grade of cement and claims allowed as reimbursement of expenditure for shifting of infrastructure facility do not fall in any of the provisions of the contract. Except these claims the rest of the claims allowed by the Arbitration Tribunal vide the Arbitration Awards can be termed as liquidated damages.

iii) Whether GST would be applicable, on the claims allowed vide Arbitration Awards and payment received pursuant to Conciliation Proceedings resulting into the Settlement Agreement, both during the GST regime?

Answer: The answer will follow the answer given to question no. (i) as above.

iv) Whether GST would be applicable for the cost of arbitration allowed vide Arbitration Award and received vide the Settlement Agreement, both during the GST regime?

Answer: The answer is in the negative. However, the applicant is liable to discharge tax liability on the fees paid to the arbitrators under serial no. 20 vide Notification No. 11/2017- Central Tax (Rate) Dated 28.06.2017, as amended @ 9% CGST + 9% SGST as discussed in Paragraph 4.10 *supra*.

v) If the answer to the above (iii), (iv) and /or (v) are in affirmative, then under what SAC and GST rate is the said liability to be discharged by the applicant and at what time?

Answer: The SAC for the services under this application is 995422, the description being 'general construction services of harbours, waterways, dams, water mains and lines, irrigation and other water works'.

It is covered by Entry No. 3(xii) of Notification No. 11/2017 – Central tax (Rate) Dated 28.06.2017, as amended. It is the residual entry which reads 'construction services other than (i), (ia), (ib), (ic), (id), (ie), (if), (vii), (viii), (x), (xi) above' and as such it is to be taxed @ 9% CGST + 9% SGST.

vi) That for (vi) above, whether debit note / supplementary invoices or tax invoice need to be issued by the applicant to the contractor in order to recover and discharge the tax liability?

Answer: The answer is in the affirmative in cases where the allowance of claim is considered as supply.

vii) That the work got executed prior to GST Regime however the claim is received during the GST Regime. Under such circumstances what is the applicability of GST on the same?

Answer: Section 142(2)(a) of the CGST Act, 2017 provides that when the price of any goods or services is revised upwards after the implementation of GST in pursuance of a contract entered into during the legacy tax regime, the person who provided such goods or services shall issue a supplementary invoice/debit note and such supplementary invoice/debit note shall be deemed to have been issued in respect of an outward supply made under the CGST Act. In brief, the following elements should come together for such price revision to be deemed as a supply under GST – there should be an upward price revision; and such price revision should be in pursuance of a contract entered into prior to the appointed day, i.e. 01.07.2017.

So clearly Section 142(2)(a) *ibid* creates the scope of applicability of GST on some of the receipts as discussed in ruling in respect of question no. (i) as above.

Sd/-

(SHAFEEQ S)

Member

The West Bengal Authority for Advance
Ruling

Sd/-

(JAYDIP KUMAR CHAKRABARTI)

Member

The West Bengal Authority for Advance Ruling

Place: Kolkata

Date: 13th February 2026

To,

Karam Chand Thapar & Bros (Coal Sales) limited

7TH, 163, THAPAR HOUSE, Shyama Prasad Mukherjee Road,

Kolkata, West Bengal, Pincod-700026

Copy to,

(1) The Principal Chief Commissioner, CGST & CX, 180, Shantipally, R.B.Connector, Kolkata-700107

(2) The Commissioner of State Tax, West Bengal, 14, Beliaghata Road, Kolkata-700015

- (3) The Commissioner, Kolkata North Commissionerate, 180, Shantipally, R.B.Connector, Kolkata-700107
- (4) The Charge Officer, Alipur Charge, 620,Diamond Harbour Road,Behala Industrial Complex, Kolkata-700 034
- (5) Office Copy

