

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)

BENCH

Mr Brajesh Kumar Singh, Joint Commissioner, CGST & CX
Mr Joyjit Banik, 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 thereunder, and the Regulations prescribed by the West Bengal Authority for Advance Ruling Regulations, 2018.

Name of the applicant	COSMIC FERRO ALLOYS LIMITED
Address	35, TRISHUL APARTMENT, GROUND FLOOR, ROWLAND ROAD, KOLKATA, 700020
GSTIN	19AACCC1730C2Z7
Case Number	05 of 2022
ARN	AD190222011805E
Date of application	March 10, 2022
Order number and date	02/WBAAR/2022-23 dated 22.04.2022
Applicant's representative heard	Mr. N.D. Saha, Authorised Advocate Mr. Sonwal Tibrewal, Authorised Advocate

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 is stated to be engaged in manufacturing of Ferro alloys and Cold Rolled Formed Sections having its factories at Barjora (hereinafter referred to as the "FERRO Unit") and Singur (hereinafter referred to as the "CRF Unit/ CRF business") respectively. It is submitted that the entire operations of the applicant are segmented in the said two units i.e. FERRO Unit and CRF Unit and both the units are functional and running independently.

1.3 The applicant intends to sell its CRF unit as a whole which involves transferring of all the assets to the purchaser which includes taking over all the liabilities due and payable as on the date of transfer for a lump sum consideration.

1.4 The applicant has made this application under sub section (1) of section 97 of GST Act and the rules made there under raising following questions vide serial number 14 of the application in FORM GST ARA-01:

- (i) Whether the transaction would amount as supply of goods or supply of services or supply of goods and services?
- (ii) Whether the transaction would be covered under Entry No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017?

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

1.6 The applicant states that the question raised in the application has neither been decided by nor is pending before any authority under any provision of the GST Act.

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

1.8 The application is, therefore, admitted.

2. Submission of the Applicant

2.1 The applicant submits that he intends to sell his CRF unit as a whole with all assets and liabilities to Cosmic CRF Limited (herein after referred to as, the purchaser) for which he has entered into a Business Transfer Agreement (hereinafter referred to as, the BTA) with the purchaser.

2.2 The applicant submits that the CRF unit has fixed assets in the form of land, building, plant and machinery, inventories and other current assets and he has also availed credit facilities from financial institutions and also has other outstanding short-term liabilities.

2.3 It is submitted that the proposed transaction is for the sale of CRF unit owned by the applicant as a going concern, as a whole envisages transfer of the entire business of the CRF unit to the purchaser who is taking over the assets as well as the liabilities of the said CRF unit which includes the employees and their benefits. The business of the CRF unit will continue as it is after the transfer.

2.4 The proposed transaction is transfer of business as a going concern wherein all assets and liabilities have been agreed to be transferred to the purchaser and the said purchased unit will continue its business without any hindrances and or stoppages.

2.5 The applicant submits that the BTA dated 19.01.2022 establishes the intent of the purchaser and seller to conclude the transaction for sale/purchase of one independent self-sustained unit of the seller along with its liabilities and employees. The purchaser intends to

continue with the same business as the unit is presently involved in i.e. manufacturing of Cold Rolled Forms.

2.6 The applicant's interpretation of Law is that the transaction contemplated being sale of an independent unit is a supply of service as a going concern and in view of the Entry No 2 of the Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017, the said transaction is to be charged at 'NIL' rate of tax.

2.7 The contentions of the applicant are summarized as under:

- The first aspect to be established is whether the sale contemplated is as a going concern.

The concept of going concern has been defined in Accounting Standards – 1 issued by ICAI which states that a fundamental accounting assumption is that of 'Going Concern' according to which "the enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations".

Thus, the main ingredients of going concern are operation in foreseeable future & steps taken for business continuity.

The BTA contains the following provisions: -

- (a) Transfer of employees of the said CRF unit to the employment of the purchaser (Ref: Clause 3 at page 5 of the BTA)
- (b) Takeover of Current Net Assets (Ref: Clause 2.1.3 at page 4 of the BTA)
- (c) Conduct of business to ensure continuity (Ref: Cause 7 at page 8 of the BTA)
- (d) Non-Compete Clause by seller (Ref: Clause 9.4 at page 9 of the BTA)
- (e) Transfer of permission and licenses (Ref: Clause 10(a) at page 10 of the BTA)

The aforementioned provisions have been provided to ensure that the CRF unit continues to do the same business as it was involved in before the proposed takeover/transaction. It is further stated that the very basis of the BTA has been to continue the business of the unit as being done by the seller.

- Transfer of Assets and Liabilities

Clause 2 on page 4 & clause 4 from page 5 envisages sale of entire CRF unit including liabilities both Term Loan and current liabilities. The purchase consideration being paid after due consideration of the Assets and Liabilities being taken over.

2.8 The applicant, in support of his argument that the transfer is made as a going concern, has relied on the following judgements:

- (a) The concept of transferring a company as a 'going concern' was examined by the Delhi High court in In re Indo Rama Textile Limited (2013) 4 Comp LJ 141 (Del). In this case the Delhi High Court held that a company is said to be transferred as a 'going concern' when the assets and liabilities being transferred constitute a business activity capable of being run independently for a foreseeable future.

- (b) The Supreme Court in Allahabad Bank Vs. ARC Holding AIR 2000 SC 3098 (Allahabad Bank case) held that if the company is sold off as a 'Going concern', then along with the assets of the company, if there are any liabilities relevant to the business or under taking, the liabilities too are transferred.

In view of the above the proposed transaction would be considered as sale by way of transfer of an independent business unit as a going concern.

2.9 For the purpose to determine whether sale as a going concern constitutes a supply of services under section 7 of the GST Act, the applicant has referred clause (d) of sub-section (1) of section 7 along with clause 4(c) of Schedule II as under:

7. (1) For the purposes of this Act, the expression “supply” includes—

- (d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.'

Clause 4(c) of Schedule II:

Transfer of business assets

where any person ceases to be a taxable person, any goods forming part of the assets of any business carried on by him shall be deemed to be supplied by him in the course or furtherance of his business immediately before he ceases to be a taxable person, unless—

- (i) the business is transferred as a going concern to another person, or
(ii) *****

Referring the aforesaid legal provisions of the GST Act, the applicant submits that from the construction of the wordings in 7(1)(d and Schedule II(4)(c), it can be said that an exception has been carved out in the statute with regards sale of business as a going concern, specifically stating that the same is not a supply of goods and thus as an alternative the sale of going concern can be considered as a supply of service.

2.10 Further, Entry No 2 of the Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017 speaks that the services of transfer of a going concern, as a whole or independent part thereof, is covered under 'NIL' rate of GST. The essential condition required is that the sale has to be made by way of going concern.

2.11 The applicant reiterates that as the proposed transaction is infact transfer of business as a going concern and hence Entry no 2 of the Notification No. 12/2017- Central Tax Rate dated 28.06.2017 will apply therefore will attract 'NIL' rate of GST.

2.12 The applicant further placed his reliance on the following rulings given by the Advance Ruling Authority on similar question:

- a. Advance Ruling No. KAR ADRG 06 / 2018 dated 23rd April 2018 by the Karnataka Authority for Advance Ruling
- b. Advance Ruling No. GUJ/GAAR/R/46/2021 dated: 27-08-2021 by the Gujrat Authority for Advance Ruling

3. Submission of the Revenue

3.1 The concerned officer from the revenue has expressed his view in writing stating that the documents including Business Transfer Agreement (BTA) as furnished by the instant applicant had been scrutinized in full. With respect to BTA the reliance is hereby placed on the following clauses:

- (a) Transfer of employees of the said CRF unit to the employment of the Purchaser (Ref Clause 3.00 page 5 of the BTA)
- (b) Takeover of Current Net Assets (Ref: Clause e 2.1.3 in page 4 of the BTA)
- (c) Conduct of business to ensure continuity (Ref: clause 7 in page 8 of the BTA)
- (d) Non-Compete Clause by Seller (Ref clause 9.4 in page 9 of the BTA)
- (e) Transfer of Permission and licenses (Ref clause 10(a) in page 10 of the BTA)

From the perusal of the above noted points, it becomes imperative that the applicant intends to transfer a going concern and same will be continued by the purchaser.

3.2 The concerned officer has observed that with respect to query as raised through question-1, the same is supply within the meaning and scope of Sec. 7 of the GST Act and with respect to query as raised through question-2, the same apparently appears to attract 'NIL' rate of Tax in terms Entry vide serial- 2 of Notification No". 12/2017 Central Tax Rate dated 28.06.2017 [Corresponding SGST Notification- 1136-F .T. Dated: 28.06.2017]

4. Observations & Findings of the Authority

4.1 We have gone through the records of the issue as well as submissions made by the authorised advocates of the applicant during the course of personal hearing. We have also considered the submission made by the officer concerned from the Revenue.

4.2 The fact of the case as we find is that the applicant has entered into a 'Business Transfer Agreement' (BTA) intending to sell of his CRF unit as a whole with assets and liabilities to Cosmic CRF Limited.

4.3 The relevant clauses of the BTA are reproduced herein under:

- "Business" shall mean CRF Unit located at Vill-Ajabnagar, P.O.-Molla Simla, Dist-Singur, PIN-712409 and shall include all of the Assets, Employees, Liens and Liabilities collectively. [Clause 5 of Part A of Schedule 'A']
- "Employees" shall mean the persons employed by the Seller hereto in CRF Unit. [Clause 8 of Part A of Schedule 'A']
- Fixed Assets:
 - a. All assets related to the CRF unit more fully described in Schedule "D" herein below.
 - b. All the accreditation, registrations and permission pertaining to the said CRF unit received from various Authorities including Railways, Rites etc.[Clause 2.1.1]
- Term Liabilities:

All amount due and payable to the Financial Institution i.e., Phoenix ARC Ltd (Hereinafter referred to as "Phoenix") as on the closing date in respect of the CRF unit subject to a maximum of Rs. 34.00 Crores will be taken over by the Purchaser and shall be borne and/or repaid by the Purchaser in lines with clause 4 herein below. [Clause 2.1.2]

- Current Liabilities and assets:

Net current assets will be assessed as on the closing date and the Purchaser will pay and equivalent amount to the Seller for the same as per terms written hereunder. It is clarified that the value of Net Current Assets will form a part of the total consideration CRF unit on slump Sale Basis. The net current assets inter alia include the following as on closing date:-

- Actual Stock in hand valued at prevailing market price on the closing date.
- Sundry Creditors, Debtors, Advance to Creditors, SD BG, and any security deposit related to CRF unit as mutually agreed
- It is however clarified that any dues with Oscorp Industries Pvt Ltd in the form of overdue outstanding in the debtor's book will be excluded.[Clause 2.1.3]

- Employees

The Purchaser shall continue to employ the current Employees of CRF unit even after the takeover of the CRF business. The seller will not object if the Employees of CRF unit working for the Seller opts to join the Purchaser company as employees of CRF Unit. The said employment will be with effect from the closing on terms and conditions of service, which are no less favourable than those, which, the Employees enjoyed immediately prior to the closing with the seller without any interruption or break in service. [Clause 3.1]

All wages, salaries and other entitlements of the Employees under their respective employment and all tax deductions and other contributions relating thereto (including gratuity) which are due and payable at the Closing shall be paid and discharged by the Seller in respect of the period up to Closing. [Clause 3.2]

- Conduct of business of Seller. During the period from the date of this Agreement and up to the Closing date (Standstill period), the Seller agrees that it shall
 - carry on the Business in the Ordinary Course of Business in substantially the same manner as heretofore conducted;
 - pay its debts and Taxes when due in respect of CRF unit;
 - pay or perform other obligations as and when due;
 - preserve intact the Business, keep available the services of its present Employees, if the employees do not leave at their own will;
 - preserve its relationship with, customers, having business dealing with it, to the end that its ongoing ability to provide services shall be unimpaired at the Closing; and

- Provide all documents and support as may be required for the purpose of due diligence by the Purchaser and its Bankers. [Clause 7]
- Non- competitions
 - (a) The Seller agrees that on and after Closing it shall not, and shall cause its promoters not to, engage, directly or indirectly in any of the following activities:
 - (i) The Seller shall not be entitled to engage in any business competing with the activities of Purchaser in respect of exiting CRF Business.
 - (ii) The use or disclosure of any client database, intellectual property, or other confidential or proprietary information of the CRF Business or other know-how or other information pertaining to the CRF Business or its customers or suppliers; and
 - (iii) The solicitation of any customers or suppliers of the CRF Business to terminate or otherwise adversely modify their relationship with the CRF Business;[Clause 9.4]

4.4 The applicant has submitted that the impugned sale of CRF Unit in pursuance of the BTA can be considered as a supply of services and qualifies for exemption under Sl. No.2 of the Notification No.12/2017-Central Tax (Rate) dated 28.06.2017.

4.5 We first take the issue to decide whether the transfer of the business of the CRF unit involved in the instant case shall qualify as a supply of services or not.

4.6 Clause (a) of sub-section (1) of section 7 of the GST Act reads as follows:

(1) For the purposes of this Act, the expression “supply” includes—

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

4.7 In the instant case, admittedly the applicant has entered into an agreement which inter alia involves transfer of goods forming part of the assets of the business. In a standalone manner, such transfer shall be treated as supply of goods in terms of clause (a) of Entry No. 4 of Schedule II.

4.8 However, here the applicant intends to sell his entire CRF unit where the purchaser agrees to take over the assets as well as the liabilities of the said CRF unit along with the employees and their benefits. In our view, such transfer of a unit of a business cannot be treated as supply of goods since business cannot be said to be a movable property so as to qualify as ‘goods’ as defined in clause (52) of section 2 of the GST Act. Further, anything other than goods, money and securities falls within the meaning of ‘services’ as defined in clause (102) of section 2 of the GST Act.

4.9 In the matter of *Innovative Textiles Ltd*, the Uttarakhand Authority for Advance Ruling (Ruling No. 20/2018-19 dated 26.03.2019) has observed that ‘a transfer of a business as a going concern is the sale of a business including assets. In terms of financial transaction ‘going concern’ has the meaning that at the point in time to which the description applies, the business is live or operating and has all parts and features necessary to keep it in operation.’

4.10 The term ‘going concern’ is not defined under the GST Act or rules framed there under. The applicant has submitted that the concept of going concern has been defined in Accounting Standards – 1 issued by ICAI which states that a fundamental accounting assumption is that of ‘Going Concern’ according to which “the enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations”.

4.11 We also find that in ‘Taxation of Service: An Education Guide’ published by the Central Board of Excise & Customs, Para 7.11.15 reads as follows:

- *What does the term ‘transfer of a going concern’ mean?*

Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business, but shall not cover mere or predominant transfer of an activity comprising a service. Such sale of business as a whole will comprise comprehensive sale of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc. Since the transfer in title is not merely a transfer in title of either the immovable property or goods or even both it may amount to service and has thus been exempted.

4.12 The applicant has referred following Advance Rulings in support of his contentions that the instant transfer of his business unit shall be treated as transfer of a going concern:

- a. Advance Ruling No. KAR ADRG 06 / 2018 dated 23rd April 2018 by the Karnataka Authority for Advance Ruling
- b. Advance Ruling No. GUJ/GAAR/R/46/2021 dated: 27-08-2021 by the Gujrat Authority for Advance Ruling

4.13 In the matter of *Rajashri Foods Pvt Ltd* (Advance Ruling No. KAR ADRG 06 / 2018 dated 23rd April 2018), the Karnataka Authority for Advance Ruling held that the transaction of transfer of business as a whole of one of the units of the applicant in the nature of a going concern amounts to supply of services and is covered under Sl. No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 subject to the condition that the unit is a going concern.

4.14 In the matter of *M/s. Airport Authority of India* (Advance Ruling No. GUJ/GAAR/R/46/2021 dated: 27-08-2021), the Gujrat Authority for Advance Ruling held that the subject supply of ‘Transfer of Going Concern service’ is Supply under Section 7 CGST Act and is covered at Entry No. 2 of Notification 12/2017-CT(R).

4.15 We find that the applicant has entered into BTA agreeing to sell the CRF Business located at Vill-Ajabnagar, P.O.-Molla Simla, Dist-Singur, PIN-712409. The purchaser has also agreed to purchase the CRF business having assets and all liabilities attached to the said CRF Unit as a going concern.

4.16 The BTA further refers that the purchaser shall continue to employ the current employees of CRF Unit even after the takeover of the CRF business. Furthermore, the seller i.e., the applicant has agreed that he shall not be entitled to engage in any business competing with the activities of the purchaser in respect of existing CRF business. Both the clauses indicate that the business will continue by the purchaser with regularity.

4.17 The applicant has also submitted that the concept of transferring a company as a 'going concern' was examined by the Delhi High court In re *Indo Rama Textile Limited* (2013) 4 Comp LJ 141 (Del). Para 27 of the said judgement reads as follows:

"Statement on Standard Auditing Practices (SAP) 16, "Going Concern", issued by the Council of the Institute of Chartered Accountants of India, provides that -- "When a question arises regarding the appropriateness of the Going Concern assumption, the auditor should gather sufficient appropriate audit evidence to attempt to resolve, to the auditor's satisfaction, the question regarding the entity's ability to continue in operation for the foreseeable future."

4.18 It therefore appears that to qualify as a 'going concern', the business must not have 'intention or necessity of liquidation or of curtailing materially the scale of the operations'. In this context, we like to mention that the applicant has not furnished any documentary evidences from the auditor with regard to the '*entity's ability to continue in operation for the foreseeable future*' in absence of which we are unable to conclude that the applicant has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations.

In view of the above discussions, we rule as under:

RULING

- (i) The transaction of transfer of business unit of the applicant involved in the instant shall be treated as a supply of services.
- (ii) The transaction would be covered under Entry No. 2 of the Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 subject to fulfillment of the conditions to qualify as a going concern.

(BRAJESH KUMAR SINGH)
Member
West Bengal Authority for Advance Ruling

(JOYJIT BANIK)
Member
West Bengal Authority for Advance Ruling