AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICE TAX
UTTAR PRADESH
4, Vibhuti Khand, Gomti Nagar, Lucknow-

ADVANCE RULING NO. UP ADRG- २२/2023 Dated. २१.04.2023

PRESENT:

1. **Shri Rajendra Kumar**
   Additional Commissioner, Central Goods and Service Tax
   Audit Commissionerate, Lucknow ....Member (Central Tax)
2. **Shri Harilal Prajapati**
   Joint Commissioner, State Goods and Service Tax .....Member (State Tax)

1.	Name of the Applicant	M/S Uttar Pradesh Metro Rail Corporation Limited, Administrative Building, Near Dr. Bhim Rao Ambedkar Samajik Parivartan Sthal,Vipin Khand,Gomti Nagar, Lucknow Uttar Pradesh -226010
2.	GSTIN or User ID	09AACCL5936H2Z9
3.	Date of filing of Form GST ARA-01	20.01.2023
4.	Represented by	Shri Hari Bindal, CA and Mr. Akash Deep
5.	Jurisdictional Authority-Centre	Range-Range IV, Division- Lucknow II, Commissionerate- Lucknow
6.	Jurisdictional Authority-State	Sector- Lucknow Sector-20, Range-Lucknow (C), Zone- Lucknow II
7.	Whether the payment of fees discharged and if yes, the CIN	HDFC23010900384221

ORDER UNDER SECTION 98(4) OF THE CGST ACT, 2017 & UNDER SECTION 98 (4) OF THE UPGST ACT, 2017

1. M/S Uttar Pradesh Metro Rail Corporation Limited, Administrative Building, Near Dr. Bhim Rao Ambedkar Samajik Parivartan Sthal,Vipin Khand,Gomti Nagar, Lucknow Uttar Pradesh-226010 (here in after referred to as the applicant) is a registered assessee under GST having GSTN: 09AACCL5936H2Z9.

2. The applicant has submitted an application for Advance Ruling dated 04.01.2023 enclosing dully filled Form ARA-01 (the application form for Advance Ruling) along with annexure and attachments. The applicant in his application has sought advance ruling on following question-

(a) Whether the services supplied by the KESCO by way of utility shifting are integral part of services supplied by KESCO by way of distribution of electricity?

(b) Whether the services supplied by the KESCO by way of utility shifting are ancillary to the principal supply of services by way of distribution of electricity?

(c) Whether the exemption given under Entry 25 of the Exemption Notification No.12/22017-Central Tax (Rate) dated 28.06.2017 with respect to the services by way of transmission and distribution of electricity is available to the KESCO?

(d) If the answer to issue at (c) is Yes, whether the Applicant is liable to pay GST on the activity of utility shifting performed by KESCO or by itself as such utility shifting is an integral part of services supplied by KESCO by way of distribution of electricity which is exempted from levy GST?

(e) If the answer to issue at (c) is No, whether the situation faced by the Applicant wherein KESCO has provided only supervision services and not borne cost towards labour and material, shall be governed by provisions of Section 15(1) or by Section 15(2)(b) of the Central goods and Services Tax Act, 2017 read with Section 15 of the Uttar Pradesh Goods and Services Tax Act, 2017 for the purposes of determining transaction value of supply?

(f) Whether the applicant is liable to pay GST on services supplied by KESCO by way of supervision, only on the Supervision charges (i.e., 5% of estimated cost of deposit work) or on the estimated cost of deposit work as depicted in letter dated 03.09.2022? (Letter dated 03.09.2022 is Annexed here with as Annexure-A).

3. As per declaration given by the applicant in Form ARA-01, the issue raised by the applicant is neither pending nor decided in any proceedings under any of the provisions of the Act, against the applicant.

The applicant has submitted that-

a. That Uttar Pradesh Metro Rail Corporation (hereinafter referred to as **"UPMRC/Applicant"**) is engaged in erection, commissioning, and construction of metro rail facility in Kanpur Uttar Pradesh. During construction, sometimes it is necessary to divert the transmission lines and other electrical equipment like electrical poles and transformers, (hereinafter referred to as **"utility shifting"**) for various safety reasons. For this, UPMRC has to place a request to the Kanpur Electricity Supply Company Limited, a Government of UP undertaking, local electricity distribution licensee in Kanpur (Urban) (hereinafter referred to as **"KESCO"**). KESCO is engaged in distribution of electricity in the area of Kanpur (Urban). In the context of electricity regulatory scheme governed by Electricity Act, 2003 "utility shifting" is referred as "deposit work". Any asset created during execution of deposit work is under ownership of transmission or distribution company by virtue of operation of provisions and for regulatory requirement of Electricity Act, 2003. For the purposes of this application terms "utility shifting" and "deposit work" has been used interchangeably.

b. The above referred deposit work can be executed by two methods. First, where whole work is executed by the licensee i.e., KESCO and Second, where whole work is done by UPMRC or through any of its third-party agent but under the supervision of KESCO. The specifications and supplier of the material used under second method in is approved by the KESCO only. Under first method, all cost towards labour and material used in utility shifting is incurred by KESCO and then recovered from UPMRC along with applicable GST on total cost. This cost invariably includes supervision charges. Under second method all cost towards labour and material is borne by UPMRC and supervision charges is paid to KESCO separately. UPMRC has adopted second method and was paying supervision charges along with GST to KESCO on supply of supervisions services. Such supervision charges are generally 5% of the total cost incurred towards utility shifting. It may be noted that it is the KESCO who carried out estimation exercise to determine the estimated cost towards "utility shifting". UPMRC has accepted this practice and never raised any issue towards any

estimate given by the KESCO and always paid supervision charges on such estimate.

c. However, recently, vide letter dated 03.09.2022, titled as "revised Estimate" addressed to Deputy Chief Engineer (Electrical), Overhead Section, Kanpur Metro Rail Corporation Ltd. KESCO has raised a demand of Rs. 11,21,843/- comprising of supervisions charges @5% amounting to Rs. 2,18,257/- and Rs. 9,03,586/- towards GST charged @18%. On perusal of the said letter dated 03.09.2022 it appears that KESCO has charged GST on the total estimated cost, whereas GST should have been charged only on supervisions charges. Letter dated 03.09.2022 is annexed herewith as Annexure-A.

d. Reference may be further taken with respect to the Letter No. 781 dated 15.07.2022 whereby KESCO has demanded GST on the total estimated cost for deposit work, which is subject to enhancement as and when work is done, based on Instructions dated 3.11.2020, issued by UPPCL. The ratio for charging GST on the total estimated cost of the deposit work is that in a situation where whole of the deposit work (including material and labour) is done by the UPPCL/distribution company, the cost which was supposed to be paid by UPPCL/distribution company to the agency performing such work, same shall be paid by the UPMRC to the agency performing deposit work, in case UPMRC has decided to get the deposit work done by such agency, hence as per Section 15(2)(b) GST shall be chargeable on total estimated cost of the deposit work, even though, deposit work is not performed by the UPPCL/distribution company, except supervision of such work. Letter dated 15.07.2022 and instructions dated 3.11.2020 is annexed herewith as Annexure-B & C

e. In this factual Matrix, as the UPMRC is of the view that GST shall be payable only at the supervision charges. Being aggrieved, applicant herein has decided to file an application on this issue before Hon'ble Authority for Advance Ruling, Uttar Pradesh seeking advance ruling on following issues.

4. The applicant has submitted their interpretation of law as under-

A. That the services supplied by KESCO by way of utility shifting is integral part of main services supplied by KESCO by way of distribution of electricity which is exempted under Notification No. 12/2017- Central Tax (Rate) dated 28.06.2017. Being so, the supplies made by way of executing deposit work including supervisions services is also covered under entry 25 of the Exemption Notification. In this context GST charged by the KESCO on supply of supervision services is not correct.

A.1 It is submitted that KESCO, is a corporate body engaged in distribution of electricity in Kanpur (Urban). It has also obtained a license under Section 14 of the Electricity Act, 2003 to distribute electricity as a distribution licensee. Term "distribution licensee" has been defined under Section 2(17) of the Electricity Act, 2003 as *"distribution licensee" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply"*. It is Submitted that KESCO is under a statutory obligation to develop and maintain an efficient, co-ordinated, and economical distribution system in its area of supply and to supply electricity. Not only that it is also under obligation to setup a grievance redressal system for consumer complaints. In this respect relevant part of Section 42 of the Electricity Act, 2003 is reproduced asunder:

Section 42. (Duties of distribution licensee and open access): --- (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical

distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

Further Section 24 of the Electricity Act, 2003 provides that distribution license can be suspended for the reason for not maintaining efficient distribution system and for complying with the provisions of Electricity Act, 2003 and for other reasons if appropriate commission finds so.

"Section 24. (Suspension of distribution licence and sale of utility): ---
(1) If at any time the Appropriate Commission is of the opinion that a distribution licensee –
(a) has persistently failed to maintain uninterrupted supply of electricity conforming to standards regarding quality of electricity to the consumers; or
(b)……; or
(c)……; or
(d) ……,

the Appropriate Commission may, for reasons to be recorded in writing, suspend, for a period not exceeding one year, the licence of the distribution licensee and appoint an Administrator to discharge the functions of the distribution licensee in accordance with the terms and conditions of the licence:

Provided that before suspending a licence under this section, the Appropriate Commission shall give a reasonable opportunity to the distribution licensee to make representations against the proposed suspension of license and shall consider the representations, if any, of the distribution licensee.

From the above provisions it is clear that KESCO, under the Electricity Act, 2003 has a statutory obligation to maintain an efficient and economical distribution system and if any complaint is received about such system, it is also under obligation to redress such complaint, failing which it may lose its license. Term "distribution system" has been defined under Section 2(19) Electricity Act, 2003 a *"distribution system" means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers.*

Further term *"utility" "electric lines and "electrical plant* has been defined under Section 2 of the electricity Act as under:

"Utility means the electric lines or electrical plant, and includes all lands, buildings, works and materials attached thereto belonging to any person acting as a generating company or licensee under the provisions of this Act;

(20) "electric line" means any line which is used for carrying electricity for any purpose and includes

(a) any support for any such line, that is to say, any structure, tower, pole or other thing in, on, by or from which any such line is, or may be, supported, carried or suspended; and

(b) any apparatus connected to any such line for the purpose of carrying electricity"

(22) "electrical plant" means any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity but does not include-

(a) an electric line; or

(b) a meter used for ascertaining the quantity of electricity supplied to any premises; or

(c) an electrical equipment, apparatus or appliance under the control of a consumer;

A.2 Basis analysis of above provisions, it is submitted that KESCO being a distribution licensee, has a duty to develop and maintain an efficient, co-ordinated, and economical distribution system in its area of supply. It also has the duty to provide uninterrupted supply to the consumers in its supply area. To maintain an efficient and economical distribution system, it is inherent that it also needs to carry out several other functions like diversions, shifting, modification and maintenance of damaged and worn-out electrical lines and other utilities. Reasons for doing utility shifting could be various, but the objective behind such shifting is to operate and maintain a system which is capable of supplying interrupted supply of electricity. Such utility shifting is also done where it poses safety issues to the general public. In this regard Section 53 (1)(b) of the electricity Act may be referred. Under section 53 of the Electricity Act, 2003 Authority may, in consultation with State Government, prescribe suitable measures, for eliminating or reducing the risks of personal injury to any person, or damage to property of any person or interference with use of such property.

Basis above discussion, it is clear that maintenance of distribution system is an integral part of the duty to distribute electricity. It would be against the scheme of Electricity Act, to argue that duty to distribute electricity does not include maintenance of such distribution system. Further, utility shifting being a measure to ensure public safety of persons and properties in general, as coded in Section 53 of the Electricity Act, is an integral part of function of distribution of electricity. Moreover, as the ownership of all the lines, utilities and other systems are vested in the distribution company (i.e., KESCO, in this case) they have the responsibility to maintain such system. In the instant case utility shifting is required to ensure the safety to persons and property, and to avoid damages to the utilities which will result in non-supply of electricity to consumers, while constructions activities are carried out by UPMRC. Utility shifting either done by the KESCO or done by some other vendor under the supervision of KESCO is an integral part of the duty conferred to maintain an efficient and economical distribution system. Further, the very purpose of insisting on execution of deposit work in supervisions of KESCO and charging supervision charges for same, is to ensure that quality, efficiency, and co-ordination of the distribution system must not be compromised. It is quite clear that both the activities (i.e., utility shifting and distribution of electricity though an efficient, well maintained and coordinated distribution system) are so well connected that without one, other cannot be in existence and both has to be performed to discharge its statutory function under Electricity Act, 2003. No, doubt, such function is exempted under GST laws.

A.3 As the supply of services by way of transmission or distribution of electricity is taxed at nil rate under Entry 25 of Notification No. 12/2017-Central Tax dated 28.06.2017 activities like utility shifting forming integral part of such services shall also be taxed at NIL rate.

B **That the transaction between KESCO and UPMRC is limited to the extent of supply of supervisions services for which consideration is being paid in form of supervisions charges. As the cost towards labour and material involved in utility shifting, is not borne by the KESCO, such cost cannot be included in the transaction value for the purposes of calculating tax payable by relying on Section 15(2)(b) of the CGST Act.**

B.1 It is submitted that reliance placed on Section 15(2)(b) of the CGST Act, by UPPCL and KESCO while collecting GST on the total estimated cost of deposit work is incorrect. Before one proceed to analyse the Section 15, few crucial facts which must be keep in mind are as under:

(i) That the manner in which any deposit work related to utility shifting is to be conducted has to be decided by the KESCO only. In this regards the option to get the deposit work done by UPMRC on its own or through any of its agent but under supervision of KESCO, is agreed by the KESCO.

(ii) That the selection of the agency to perform the deposit work is finalised by the UPMRC only.

(iii) That the payment to the agency performing deposit work, though under supervisions of KESCO, is being done by the UPMRC only and KESCO has no role in deciding the actual amount payable to such agency.

(iv) That there is no privity of contract between KESCO and agency performing deposit work for UPMRC. Mere supervision during execution of work does not create any contractual obligation between KESCO and such agency. If any contractual obligation is being created that is between KESCO and UPMRC.

(v) That the ownership of assets created because of deposit work vests in KESCO. However, such vested ownership does not create any privity of contract between KESCO and agency performing deposit work on behalf of UPMRC.

B.2 It is further submitted that in a situation where the deposit work (i.e., utility shifting) has been done by the UPMRC through its vendors under the supervisions of KESCO, the activity performed by the KESCO falls under supply of services. As the utilities to be shifted are under ownership of KESCO and it also has the right to approve the material and suppliers of such material to be used in shifting of utilities. However, mere approval of the material cannot not create any privity of contract between KESCO and the person performing deposit work on behalf of UPMRC.

B.3 It is submitted that any contract of supply of goods or services or both does meet out the essentials of a contract as defined under Indian Contract Act, 1972 and are just a subset of vide variety of contracts existing in the commercial world.

B.4 In the instant case the contract or supply contract for execution of deposit work (i.e., utility shifting) is entered between KESCO and UPMRC. In conformity with regulatory requirements of scheme of Electricity Act, 2003, such supply contract can be executed either by the KESCO itself or executed by UPMRC through its vendors but under supervisions of KESCO. It is submitted that when UPMRC places a request for utility shifting in any particular area and such request is accepted by the KESCO against

payment of a consideration (either against total estimated cost of deposit work including supervisions charges or only against supervisions charges) a legal contract comes into existence. The consensus ad idem i.e., meeting of minds is reached when UPMRC accepted the estimated cost of deposit work prepared post survey done by KESCO and agreed to pay the supervision charges against facility of supervision to be provided by KESCO. This is also supported by the fact that in any of its demand letters KESCO has not demanded cost of labor and material paid by the UPMRC to the agency performing deposit work. All such demand letters are demanding only supervision charges. So, the intention of the parties is quite clear that under supply contract, only services by way of supervision during execution of deposit work by KESCO is the subject to matter of the contract and hence only supervision charges shall be collected from UPMRC which is not disputed by KESCO in any of its demand letters.

B.5 It is submitted that Supply contract between KESCO and UPMRC is separate and independent of contract between UPMRC and its vendor who is actually performing deposit work. There is no privity of contract between KESCO and Vendor working for UPMRC. Being so, even if any asset is created resultant to execution of deposit work and ownership of same is vested in KESCO, there is no right and obligation inter se between KESCO and such vendor. Ownership in assets created during deposit work, if any, vests in KESCO only for the purposes of Electricity Act, 2003 and Rule made thereunder (i.e., development and maintenance of efficient, economic, and coordinated distribution system) and certainly not for taxation of goods and services involved in transaction of deposit work or other contractual obligations. Further, there cannot be assignment of any obligation including payment of consideration to such vendor by the UPMRC in favour of KESCO without the permission of KESCO. No such obligation has been assigned by UPMRC to KESCO, as KESCO has never sought such an assignment or given any permission in this regard. Being so, KESCO has no legal basis to assume that the cost towards labour and material in execution of deposit work payable to vendor acting on behalf of UPMRC is related to supply contract entered between KESCO and UPMRC.

B.6 It is further submitted that term consideration as defined under Section 2(d) of the Indian Contract Act, 1872 and as defined under Section 2(31) of the CGST Act, is *pari materia* though coded in different words. Under CGST Act, though the term consideration is not defined but only an inclusive definition is given, however, it contains all essentials for term "consideration". As per Section 2(31) of the CGST Act, Consideration includes, any payment made or to be made in respect of or in response to or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person. Subsidies by the State Government or Central Government has been kept out of scope of term consideration. Term "consideration" also includes monetary value of any act or forbearance, in respect of, or in response to, or for the inducement of the supply of goods or services or both, whether by the recipient or by any other person. Proviso to Section 2(31) provides that any deposit given in respect of any supply of goods or services or both shall not be considered as payment towards such supply unless supplier applies such deposit as consideration for the said supply. In other words, proviso makes it clear that there has to be a direct nexus or reciprocity between price paid and supply to be made. Deposit made with the supplier for any purpose other than supply of goods or services under consideration, cannot be treated as consideration for said supply, unless reciprocity between deposit made and object of supply is manifested by the supplier by act of applying such deposit as consideration for such supply. The words used *"such supply"* and *"for the said supply"* leaves no doubt that there must be a direct nexus between price paid and subject of supply, resulting to consensus ad idem between supplier and receiver.

B.7 It is submitted that Section 15 of the CGST Act, read with relevant rules, provides for determination of value of taxable supply. Section 15 is reproduced as under:

"15. Value of taxable supply–

(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

(2) The value of supply shall include-

(a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;

(b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;

(c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;

(d) interest or late fee or penalty for delayed payment of any consideration for any supply; and

(e) subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments.

Explanation- For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.

(3) The value of the supply shall not include any discount which is given-

(a) before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply; and

(b) after the supply has been effected, if-

(i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and

(ii) input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.

(4) Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed

(5) Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government on the recommendations of the Council shall be determined in such manner as may be prescribed.

Explanation- For the purposes of this Act,-

(a) persons shall be deemed to be "related persons" if-

(i) such persons are officers or directors of one another's businesses;

(ii) such persons are legally recognised partners in business;

(iii) such persons are employer and employee;

(iv) any person directly or indirectly owns, controls or holds twenty-five per cent. or more of the outstanding voting stock or shares of both of them;

(v) one of them directly or indirectly controls the other;

(vi) both of them are directly or indirectly controlled by a third person;

(vii) together they directly or indirectly control a third person; or

(viii) they are members of the same family;

(b) the term "person" also includes legal persons;

(c) persons who are associated in the business of one another in that one is the sole agent or sole distributor or sole concessionaire, howsoever described, of the other, shall be deemed to be related."

A perusal of Section 15(1) reveals that the value of a taxable supply has been defined in terms of 'transaction value', which presupposes that to determine the value of supply whole transaction need to keep in mind. The price actually paid or payable for a supply can be treated as taxable value of such supply if the parties are not related and price is the sole consideration. The expression *"price actually paid or payable"* suggests that, transaction value as declared by the supplier has to be accepted by the Revenue if parties are un-related and price is sole consideration. To Question the price declared as transaction value, revenue has to first reject the price declared by the supplier and then has to show that related nature of parties has actually affected the transaction value and price was not the sole consideration. Sub-section (4) provides that where the value of supply cannot be determined under Section 15(1), same shall be determined in such manner as may be prescribed. For the purposes of Section 15(4) various rules have been enacted under CGST Rule, 2017 including Rule 28 which provides for determination of value of supply of goods or services or both between distinct or related persons, other than through an agent. A combined reading of Sub-section (1) and Sub-section (4) reveals that in a situation where supplier and receiver of supply are related persons or where price is not the sole consideration, taxable value of supply cannot be determined under Sub-section (1) and by virtue of Sub-section (4) same shall be determined as per applicable rules. Further, Sub-section (2) created a deeming fiction by implication and provides for inclusions which will form part of taxable value. Further, a combined reading of Section 15(1) and 15(2) reveals that amount to be included by virtue of Clause (b) of section 15(2), by way of deeming fiction, become part of taxable value as determined under section 15(1). Clause (b) of Sub-section (2) of Section 15 provides that taxable value of a supply shall, also include any amount which, as per supply contract, must be incurred by the supplier however, in actual been incurred by the receiver, and such amount is not already included in price. In other words, such an amount must have been incurred on

behalf of supplier. Use of words *"in relation to such supply"* suggests that the amount sought to be included under Section 15(2)(b) must have been incurred by the receiver in connection with the supply under consideration. If the amount to be included is not incurred in connection with supply, the same cannot be included in taxable value of supply.

B.8 In the instant case, UPMRC has entered into two separate and independent supply contracts. First with KESCO where KESCO is under obligation only to provide supervision services against supervision charges, second with its vendor which is actually performing shifting of utilities under supervision of KESCO. These two supply contracts are not connected and cannot be treated as dependent on each other. It may be noted that in both the contracts UPMRC is the receiver of supply.

The reasoning adopted by the KESCO/UPPCL to justify the inclusion of amount payable to the vendor in taxable value of supply by way of supervision services is that had the UPMRC has decided to get the whole deposit work done by KESCO, then KESCO would have paid such amount to the vendor, which UPMRC is paying now, thus as per Section 15(2)(b) such amount should also be come within the net of tax.

The reasoning adopted by the KESCO is faulty at various fronts which are listed as under:

(a) That the reasoning adopted by the KESO/UPPCL is hypothetical and based on assumptions. It assumes that if UPMRC had decided to get the whole deposit work done by the KESCO, then KESCO would have to pay an amount to the vendor. Being so, the proposal for inclusion of such amount is not based on facts, but a mere assumption. It is well settled that tax cannot be collected on a supply based on assumptions and on hypothetical transactions. In fact, the scope of supply contract entered with KESCO is only provision of supervision services and nothing more. KESCO has never disputed such scope in any of its demand letters where they have charged only supervisions charges and sought to included amount towards material and labour, only at the time of determining GST payable on supervisions charges. Such scope is also in accordance with the option provided by KESCO, where it has allowed the UPMRC to get the deposit work done though some other vendor under KESCO's supervision. It is obvious that the taxable value of a supply cannot include something which is not connected to the such supply.

(b) Section 15(2)(b) provides in most clear terms that only that amount is includible which, as per the contract, is the liability of the supplier but incurred by the receiver and such amount is not included in price. In the instant case, KESCO was never under obligation to incur such an amount as the scope of supply has been limited to the Supervisions services only. The actual execution of the deposit work is not done by the KESCO but by the vendor, that too under a separate contract entered with UPMRC. KESCO is totally alien to such contract. Use of words *"supplier is liable to pay in relation to such supply"* and *"but has been incurred by the receiver"* leaves no doubt that, before inclusion, such amount should have actually been incurred by the receiver on behalf of supplier. It is clear that, amount sought to be included must have been expensed in relation to the supply for which supplier is under obligation to provide. Any amount expensed either by supplier or by receiver on his behalf, in relation to anything which is out of the scope of supply, can never be included. In the instant case, an amount has been paid by the UPMRC but not on behalf of KESCO and in relation to a

separate contract and not in relation to a contract entered with KESCO. Use of words *"such supply"* makes it clear that amount sought to be included must have been incurred in connection to the supply made by the Supplier, in this case, KESCO. KESCO has not made any supply other than supervisions services. Had the UPMRC incurred any expenses which KESCO is supposed to incurred in connection with supervisions services, such amount would have been liable to be included in taxable value of supervisions charges. As the amount sought to be included was never the liability of KESCO and the same was incurred by UPMRC under a separate contract, such amount be considered for inclusion in taxable value of supply by way of supervisions services by KESCO.

(c) That as KESCO has no privity of contract with the vendor who is actually executing the deposit work for UPMRC, the amount paid to such vendor by UPMRC cannot be considered for any purposes whatsoever connected with supply made by KESCO. In simple terms, the doctrine of privity of contract is that a contract cannot confer rights or impose those obligations arising under it, on any person except the parties to it. The term "parties" may seem simple enough but there are situations where it may become doubtful as to exactly who the parties are and resultantly, who, in the eyes of the law should be liable or should be compensated in event of inevitable breaches that may occur from time to time. It is submitted that KESCO's position does not fall under any of the exceptions to the doctrine of privity of contract. Another important aspect related to the doctrine of Privity of Contract is Assignment of rights and obligations under a Contract. An assignment in law is an act by which one person transfers to another or causes to vest in another his right or title to something before the object of the transfer has become a property in possession of the assignor. In **Khardah Company Ltd, V Raymon & Co Ltd***AIR 1962 SC 1810* it was observed by the Hon'ble Supreme Court that an assignment of a contract might result by transfer either of the rights or of the obligations thereunder. But there is a well-recognized distinction between these two classes of assignment. As a rule, obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties. In the facts of the instant case, hypothesis adopted by KESCO for inclusion of amount paid by the UPMRC to the Vendor in taxable value of the supply made by way of supervisions services, can be a reality in that situation only where UPMRC has actually assigned its obligation of making payment its vendor to the KESCO, and KESCO has accepted such assignment of obligation and already made the payment. In the instant case, no such assignment has been made by UPMRC. Further, KESCO has not discharged the obligation, if any assigned by the UPMRC, as KESCO has not made any payment to the vendor.

(d) Further, as per Section 15(2)(b) only that amount can be included in the taxable value which supplier is liable to pay but which has been incurred by the recipient. It may be noted that Section 15(2)(b) talks about inclusion of amount in the context of a single standalone supply contract. It does not refer to the situation where two separate contracts have been entered with two different parties.

(e) In the instant case, it is not disputed that KESCO and UPMRC are un-related, and price is the sole consideration and nothing is paid to the KESCO over and above the supervision charges. Moreover, KESCO, through its demand letter is

collecting only supervision charges which is 5% of the estimated cost. However, while charging tax on the supervision charges, KESCO is insisting on inclusion of the cost of labor and material supposedly payable to the vendor had the KESCO has done the deposit work on its own. So, the KESCO is trying to charge and collect GST on an amount which is neither payable to KESCO nor actually been charged and recovered by KESCO. It is obvious that such an amount cannot not be included in taxable value of supply for the reason that such amount does not fall under the definition of consideration.

C. That the acceptance of the reasoning adopted by the KESCO would lead to double taxable of the amount paid to the vendor, first in the hands of the vendor and second in the hands of UPMRC, even though supply has been made once only.

C.1 Even if, for the sake of argument, though denied, we assume that the amount paid to the third-party vendor by UPMRC is includible in the taxable value for determining the tax chargeable from UPMRC, such an approach would lead to the double taxation of the same amount once in the hands of the third-party vendor and secondly in the hands of the UPMRC, even though supply has been made once only. In other words, supply of services provided by the vendor to the UPMRC shall be taxed twice, which can never be the intention of the legislature.

C.2 In the instant case, KESCO has agreed to the arrangement that Deposit work/utility shifting can be get done by UPMRC from a third-party vendor however, such vendor must execute such work under the supervision of KESCO. It is the UPMRC who is supposed to make payment against the supply made by such third-party vendor along with applicable GST on such supply. The supply contract between third party vendor and UPMRC is an independent and stand-alone contract. Now, inclusion of the amount paid to third party vendor, is sought to be included by KESCO in the taxable value while collecting GST against the supervision services. It is submitted that if, such inclusion is allowed, amount paid to third-party vendor would again be taxed, even though so supply has been made by KESCO against such amount. Moreover, such amount itself is not being collected by the KESCO in its invoices, as KESCO is only charging supervisions charges. However, only for the purposes of determining tax chargeable from UPMRC against Supervision services, amount paid to third-party vendor is also sought to be included. Such an inclusion is totally illegal, considering the scheme of Section 15(2)(b) where immediate connection between supply and consideration is *sine qua none* for inclusion in the taxable value, and leading to the double taxation of the same amount, even though only single event of supply has been taken place. In fact, there is no happening taxable event with respect to the amount paid to the third-party vendor, between UPMRC and KESCO, hence inclusion of such amount is totally illegal would lead to double taxation of the single amount.

D. That inference in favour of non-inclusion of amount paid to third-party vendor in the value for the purposes of determining the tax collectible from the UPMRC by the KESCO can also be drawn from the scheme of Input tax credit. Under scheme of CGST Act, in principle, Input Tax Credit is available to the person who has borne the burden of the input tax and to the extent of tax paid by it. It would be highly illogical and against the scheme of CGST Act to make the UPMRC to bear the burden of tax twice and allowing to avail input credit of such tax for once.

D.1 It is submitted that in a situation where UPMRC is making payment to the third party vendor for the execution of deposit work, it shall be eligible for availing ITC of the tax paid to such third party vendor. However, if the KESCO is allowed to include the same amount again in the taxable value for supervisions services only for the purposes of

collecting GST, not only it will amount to double taxation but also UPMRC will not be eligible to avail credit of such tax paid to KESCO, as no supply has been made by KESCO against such collection of tax. In nutshell, UPMRC shall be eligible for availing credit of input tax once however, it will be bearing the burden of tax twice, once in the hands of third-party vendor and secondly in the hands of KESCO.

E. That the supply made by way of utility shifting and by way of distribution of electricity, are intrinsically related and supplied in conjunction and in furtherance of achieving the main objective of developing and maintaining of an efficient, economical and co-ordinated distribution system and thus activity of utility shifting or supervising the execution of work of utility shifting by third party vendor has to be treated as a supply ancillary and in furtherance of the main supply of distribution of electricity.

E.1 It is submitted that even if we assume that the services like utility shifting provided in relation and in furtherance of supply of transmission and distribution of electricity are per se not covered by the exemption notifications, then such services would form part of ancillary supplies in relation to and in furtherance of main supply namely, transmission and distribution of electricity and taxed accordingly.

E.2 It is well settled that where the main activity is exempted from payment of tax, the activities which is incidental and ancillary to the main activity is also exempted from tax. It can never be intention of the legislature to exempted the main supply and levy the tax on the supplies incidental and ancillary and in furtherance of main supply. It cannot be doubted that main supply of the KESCO is distribution of electricity and to provide such supply, maintenance of an efficient, economical and co-ordinated distribution system is a sine qua none. Being so, any supply made which is in furtherance of maintaining an efficient distribution system shall be treated as ancillary to main supply and same tax treatment has to be given to which main supply is subject to.

E.3 As the main supply is tax at Nil rate under exemption Notification No. 12/2017- Central Tax (Rate) dated 28.6.2017, related ancillary supplies namely utility services shall also be taxed at NIL rate only. Consequently, it is submitted that KESCO should not have charged GST on the utility shifting either wholly provided by it or where its role is restricted till supervision only.

F. The advance ruling in Rajasthan Vidyut Prasaran Nigam Ltd., Ruling No. RAJ/AAR/2019-20/16 cannot be relied upon by the Authority for Advance Ruling in this case.

F.1 As per Section 103 of the CGST Act, Advance rulings are binding only on the applicant who has sought such ruling and on the jurisdiction officer. However, such rulings shall not be binding if facts and law supporting the original advance rulings got changed. For the identical reasons, advance ruling in case of NHAI shall also not be applicable and cannot be relied upon.

F.2 It may further be noted that in our humble view this ruling is bad in law and vitiated by non-consideration of the submissions of GST department represented by the Jurisdictional Officer, State Tax. In its submission jurisdictional officer, recorded in the judgment under para 4, submitted that value of supply, in both the cases, where deposit work is done by RVPN itself and where work is executed by the consumer under supervision of RVPN, shall be determined as per section 15(1) of the CGST Act. Further, no reason for not considering or rejecting such submission made on this behalf, is given in the order.

F.3 Further, while giving its finding under para 5(c) Ld. AAR stated that though the expenditure towards material and labour in execution of deposit work, in actual, is incurred by the consumer/intending agency and then relied upon some accounting practice followed by RVPN to conclude that such deposit work will be treated as if done by the RVPN. Relevant part of the judgment is reproduced asunder:

"in this transaction, though the expenditure in actual is incurred by the consumer /intending agency but the applicant being the owner of the asset/infrastructure under Regulations, account it in its books by creating asset on the one hand and income on the other hand as a consumer contribution.

In other words, we observe that even though the expenditure and the work in actual is done by the consumer/intending agency but the same will be treated as the work has been done by the applicant."

F.4 It is well settled that accounting treatment of an amount received in the books of account will not decide or taxability or otherwise. Existence or absence of entries in the books of accounts will not be decisive or conclusive. In the case of Kedarnath Jute Mfg. Co. Ltd vs Commissioner of Income Tax, 1972 SCR (1) 277, where the income tax officer has denied the claim of deduction of the assessee equivalent to the sale tax liability incurred by it before finalisation of income tax assessment, for the reasons that assessee had denied its liability to pay that amount and had made no provision in its books with regard to the payment of that amount, Hon'ble Supreme Court while allowing the deduction, observed as under.

We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the- books of account and although under the law, a deduction must be allowed by the Income Tax Officer, the assesses will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter.

F.5 It is further submitted that sole reasoning for inclusion of cost of deposit work in the taxable value based on Section 15(2)(b), given by the Ld. AAR is that since the ownership of assets created at the completion of deposit work lies in RVPN, cost of such assets incurred by the consumer/intending agency is to be included in the value of supply, is wholly misconceived and cryptic. Section 15(2)(b) never talks about ownership of assets or whatsoever and it is immaterial for GST purposes. Only criteria prescribed by Section 15(2)(b) for inclusion of any amount is that such amount was supposed to be incurred by the supplier under the terms of supply contract, however, it has been incurred by the receiver of supply on his behalf and such expenses has been done in connection of supply only. It is submitted that ruling is against the specific mandate of Section 15(2)(b) of the CGST Act.

F.6 Finally, while making statements under operative para of the Judgment it has not where specified that taxable value should include cost of assets as per Section 15(2)(b). It simply stated that *"in both the cases as mentioned by the applicant, value shall be the*

transaction value, that is price actually paid or payable in terms of Section 15 of the GST Act, 2017".

As the operative part of the judgment is ambiguous and does not declare the verdict in clear terms, ruling is devoid of having any precedential value.

5. As per declaration given by the applicant in Form ARA-01, the issue raised by the applicant is neither pending nor decided in any proceedings under any of the provisions of the Act, against the applicant.

6. The application for advance ruling was forwarded to Deputy Commissioner, Central Tax & Central Excise, Division-Lucknow-II vide letter dated 07.02.2023 to offer their comments/views/verification report on the matter. No views/comments has been offered from the on the ground that no proceedings on the question raised in the application is pending or decided in his office under any provision of the Act as communicated vide letter dated 20.02.2023.

7. The applicant was granted a personal hearing on 24.02.2023 which was attended by Shri Hari Bindal, CA and Mr. Akash Deep, the authorized representatives of the applicant during which he reiterated the submissions made in the application of advance ruling.

DISCUSSION AND FINDING

8. At the outset, we would like to make it clear that the provisions of both the CGST Act and the UPGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the UPGST Act. Further for the purposes of this Advance Ruling, a reference to such a similar provision under the CGST Act / UPGST Act would be mentioned as being under the 'CGST Act'.

9 We have gone through the Form GST ARA-01 filed by the applicant and observed that the applicant has ticked following issues on which advance ruling required-

(1) Applicability of a notification issued under the provisions of this Act.
(2) Determination of value of supply of goods or services or both.

We would like to examine whether the issue raised in the application is squarely covered under Section 97(2) of the CGST Act 2017 or not. For this we would like to examine this matter in light of definitions of Advance Ruling under section 95 of the CGST Act 2017 and the same is reproduced as under:

Section 95. Definitions of Advance Ruling.— In this Chapter, unless the context otherwise requires,—
(a) —advance ruling means a decision provided by the Authority or the Appellate Authority to an applicant on matters or on questions specified in sub-section (2) of section 97 or sub-section (1) of section 100,in ***relation to the supply of goods or services or both being undertaken or proposed to be undertaken by the applicant;***
(b) —Appellate Authority means the Appellate Authority for Advance Ruling referred to in section 99;
(c) —applicant means any person registered or desirous of obtaining registration under this Act;

The meaning of the applicant defined at Point No. (c) should be derived only in consonance with Point No. (a) of Section 95 of the CGST Act 2017.

We find that Applicant M/S Uttar Pradesh Metro Rail Corporation Limited is receiver of the Goods/Services provided by the KESCO. In light of point (a) provided under Section 95 of CGST Act 2017, only supplier of the services can file Application for Advance Ruling. In this case the supplier of service is KESCO. Also in the similar matter M/s Purvanchal Vidyut Vitran Nigam Limited had applied for advance ruling as supplier of service and advance ruling authority has ruled on merit. Accordingly, we do not admit the application for consideration/ruling on merits as applicant does not fall under the definition of Advance Ruling.

10. Accordingly, we pass the ruling as under:

RULING

No ruling can be given in the matter as discussed above.

11. This ruling is valid only within the jurisdiction of Authority for Advance Ruling Uttar Pradesh and subject to the provisions under Section 103(2) of the CGST Act, 2017 until and unless declared void under Section 104(1) of the Act.

(Harilal Prajapati)
Member of Authority for Advance Ruling

(Rajendra Kumar)
Member of Authority for Advance Ruling

To,

M/S Uttar Pradesh Metro Rail Corporation Limited,
Administrative Building, Near Dr. Bhim Rao
Ambedkar Samajik Parivartan Sthal,Vipin Khand,
Gomti Nagar, Lucknow Uttar Pradesh -226010

AUTHORITY FOR ADVANCE RULING –UTTAR PRADESH

Copy to –

1. The Chief Commissioner, CGST & Central Excise, Lucknow, Member, Appellate Authority of Advance Ruling.
2. The Commissioner, Commercial Tax, Uttar Pradesh, Member, Appellate Authority of Advance Ruling.
3. The Principal Commissioner, CGST & C. Ex, Gst Bhavan, 7-A,Ashok Marg, Lucknow-226001.
4. The Deputy Commissioner, Lucknow Division-II, CGST & Central Excise, Kendriya Bhawan, Aliganj, Lucknow -226024
5. Through the Additional Commissioner Gst-I, Lucknow Zone-II, Uttar Pradesh to jurisdictional tax assessing officers.

Note: An Appeal against this advance ruling order lies before the Uttar Pradesh Appellate Authority for Advance Ruling for Goods and Service Tax, 4, Vibhuti Khand, Gomti Nagar, Lucknow – 226010, within 30 days from the date of service of this order.