



Dimensions – 16th Edition

Advance rulings:

1. GGL Hotel and Resort Company Limited – West Bengal ¹	
Issue for Consideration	Whether input tax credit ('ITC') is admissible on lease rent paid during the pre-operative period for the leasehold land, on which a resort is being constructed in order to be used for the furtherance of business, when the same is capitalized?
Discussion & Ruling	<p>Discussion:</p> <ul style="list-style-type: none"> • The Appellant has undertaken a project involving the construction of a resort. Accordingly, the land is acquired by payment of lease premium and lease rent. The AAR denied the ITC corresponding to lease rentals paid during the pre-operative period. • The Appellant filed an appeal focusing primarily on the following grounds: <ul style="list-style-type: none"> - The lease rent is paid to acquire the rights to the land during the pre-operative period and not used for the construction of immovable property. The AAR has erroneously held that the prohibition under Section 17(5)(d) of the CGST Act, 2017 ('the Act') is not limited to the civil structure being constructed, i.e., the same would apply to the immovable property in its entirety as the supplies in question are crucial for the construction of the civil structure on the said piece of land; - The ITC on lease rentals should be eligible with regard to the area on which no immovable property is constructed and where such an area would be used for auxiliary services; - As per Section 17(5)(d) of the Act, ITC with respect to the supplies for construction on own account only has been blocked. The Appellant is providing construction services to the owner of the land and therefore, the ITC on the supply of construction services should not be blocked.

¹ Appeal Case No..01/WBAAAR/APPEAL/2019 dated February 6, 2019- West Bengal Appellate Authority



- The Revenue refuted the contentions of the Appellant on the following grounds:
 - ITC on goods and services used for the construction of immovable property except plant and machinery comes under blocked credit as per Section 17(5)(d) of the Act;
 - The Appellant's prayer for allowing proportionate credit on the lease rental of the unconstructed area of the project proves that ITC on lease rentals is not available with regard to the construction of an immovable property.
- The contentions of the Appellant were dismissed by the Appellate Authority based on the following:
 - The owner of the land holds the ownership title of the land only. They have no proprietary interest in the immovable property constructed or being constructed on the land as the land is to be returned in its original condition on expiry of the lease period;
 - The Appellant is not providing any construction services to the owner of the land and neither will it be operating the resort on behalf of the owner;
 - The construction of the resort is not limited to the hotel building only as a significant amount of construction is involved with regard to creating swimming pools and landscaping;
 - Payment of the lease rent during the pre-operative period is essential to undertake subsequent construction;
 - The asset will be capitalized in the Appellant's books of accounts and therefore, it can be said to be on its own account for furtherance of business.

Ruling:

- The scope of the blocked credit as per Section 17(5) (d) of the Act is broad as it includes the goods and/or services used in the course of the furtherance of business. Accordingly, in this case, ITC on lease rentals is restricted.

**Dhruva
Comments /
Observations**

- This ruling clarifies that when a supply of services used towards the construction of an immovable property is capitalized, the ITC would be disallowed. Illusory grounds, such as when the supplies are received partly for the construction of building and partly for the provision of auxiliary services, do not confer a ground for bifurcation of available ITC.
- It is relevant to note the recent decision of the Orissa High Court in the case of **Safari Retreats Private Limited and Anr vs. Chief Commissioner of CGST [WP(C) No. 20463 of 2018]**, wherein the ITC of inputs and input services used for the construction of immovable property, with the intention of letting it out, has been allowed. The restriction in terms of Section 17(5)(d) of the Act was held to be against the object and intent of the GST regime, which was to avoid cascading effect of taxes and allow ITC on inward supplies consequential for provision of taxable output supplies. However, the High Court refrained from holding the said provision as *ultra vires*.
- Also, under the erstwhile regime, CENVAT credit was permissible until March 31, 2011 on the setting up of premises which included several pre-operative expenses within their scope. Accordingly, there were rulings under the erstwhile regime which permitted the ITC corresponding to pre-operative expenses.



- Considering the above, it would be interesting to observe how the judicial interpretation evolves on this subject.

2. Kerala State Construction Corporation Limited - Kerala²

Issue for Consideration

Whether the consultancy charges received by the Applicant and the charges paid towards outsourced services in respect of construction works are exempt from GST under Sr. no. 3 of Notification no. 12/2017-Central tax dated June 28, 2017 ('Exemption notification'), as "pure services provided to Government Entity by way of any activity in relation to any function entrusted to a Panchayat / Municipality under Article 243G / 243W of the Constitution"?

Discussion & Ruling

Discussion:

- The Applicant has been selected as the Construction Agency / Project Management Consultant / Special Purpose Vehicle for tendering of work, executing agreement with the contractor, etc. in relation to the construction of a model residential school, building for pre-examination training centre, pre-metric hostel and sub-registrar office.
- The other activities in relation to soil investigation and structural design works are entrusted to outside consultants.
- The AAR observed that the Applicant renders pure services falling under HSN code 998339, i.e., project management services for construction projects.
- It was held that the consultancy services relating to the construction of the model residential school, building for pre-examination training centre and pre-metric hostel would qualify for the exemption under the said entry. It was observed that both the conditions under the entry were satisfied, details of which are as follows:
 - The activities fall under the purview of the promotion of cultural, educational and aesthetic aspects mentioned in the Twelfth Schedule to Article 243W and the welfare of the weaker sections falling under the Eleventh Schedule of Article 243G of the Constitution; and
 - The services are provided by the Applicant to the State Government.
- The services pertaining to the construction of the sub-registrar office, however, were held to be outside the scope of the above exemption as such activities were not in relation to the functions entrusted to the Panchayat / Municipality.
- Further, services of soil investigation and structural design work for the DPR preparation, received by the Applicant were also said to be covered under the said exemption, as the Applicant themselves qualify as a "Government Entity".

Ruling:

- Pure services received and provided by the Applicant with regard to the construction of the model residential school, building for pre-examination training centre and pre-metric hostel would qualify for the exemption.

² Ruling No. KER/46/2019 dated April 12, 2019



	<ul style="list-style-type: none">Services in relation to the construction of the sub-registrar office for the Registration Department would be taxable at 18%.
Dhruva Comments / Observations	<ul style="list-style-type: none">The methodology to evaluate eligibility for exemption under Sr. no. 3 or 3A of the Exemption Notification is in line with a plethora of rulings that have recently been passed. The West Bengal AAR, in the case of the <i>Ex-Servicemen Resettlement Society [Advance Ruling Order No. 38/WBAAR/2018-19, dated January 28, 2019]</i>, observed that eligibility under the Sr. no. 3 and 3A of the Exemption Notification should be examined from three aspects: (1) whether the service being supplied is pure service or composite supply; (2) whether the recipient is government, local authority, governmental authority or government entity; and (3) whether the services provided are classifiable as a function entrusted to a Panchayat or a Municipality under the Constitution.In the present case, though the consultancy services do not specifically fall within the scope of the functions to be performed by the Municipality, they are clearly in relation to the functions entrusted to the Panchayat / Municipality. Thus, the term 'in relation to', in essence, is significant in determining whether or not a particular service would be exempt or not.

National Anti-Profiteering Authority ('NAA') Orders:

3. Kerala State Committee on Anti-Profiteering v. VTWO Ventures³

Facts and contentions of the taxpayer

Facts:

- The taxpayer was a distributor engaged in the sale of luggage such as trolley bags / and suitcases ('the Product(s)').
- GST rate was reduced from 28% to 18% on the Product(s) with effect from November 15, 2017.
- The taxpayer increased the base price of the Product(s) after the reduction in GST rates.

Taxpayer's contentions:

- The taxpayer is a distributor of the Product(s) and followed the manufacturer's pricing structure. Their distributor-ship margin remained unchanged in the pre and post GST regime, as well as after November 15, 2017 when the GST rate was reduced from 28% to 18%.
- Tax rate on the Product(s) was 18% in the pre-GST regime and prices were determined accordingly and prices were not increased after the implementation of GST, when the rate of tax was 28%. The taxpayer absorbed the additional cost arising on account of the introduction of GST. The taxpayer also stated that the reduction in the tax rate was a correction, that came into effect from November 15, 2017, and the question of passing on the benefit of reduction in tax rates to the recipients (buyers) did not arise.

³ Case no. 31/2019 dated May 10, 2019



NAA Observations and Order	<p>NAA observations:</p> <ul style="list-style-type: none">• The taxpayer’s contentions are not tenable.• The taxpayer had increased the base prices of the Product(s) with effect from November 15, 2017 despite the reduction in the rate of GST from 28% to 18%. The taxpayer acted in contravention of the GST provisions since the taxpayer did not pass on the benefit of reduction in the rate of tax to the recipients by way of commensurate reduction in prices. <p>Order:</p> <ul style="list-style-type: none">• The National Anti-Profiteering Authority (‘NAA’) has held the taxpayer been indulged in profiteering.• Given that the taxpayer has claimed that they had been following the pricing structure of the manufacturing company, the Authority directed the Directorate General of Anti-Profiteering (‘DGAP’) to investigate the manufacturer.
Dhruva Comments / Observations	<ul style="list-style-type: none">• The Order follows the trend in several prior order(s) pronounced by the NAA.• The direction to initiate investigation against the manufacturer is a first, whereby investigations against other taxpayer(s) (in this case the manufacturer of the Product(s) in question), without a formal complaint against them. It seems that such actions emerged in terms of Rule 127 of the CGST Rules, 2017, i.e., the duties of the authority.

4. Ms. Pallavi Gulati & Sh. Abhimanyu Gulati v. Puri Constructions Private Limited⁴

Facts and contentions of the taxpayer	<p>Facts:</p> <ul style="list-style-type: none">• The applicant filed a complaint against the taxpayer, alleging profiteering in respect of the flat booked by him in the pre-GST regime in one of the residential projects launched by the taxpayer. <p>Taxpayer’s contentions:</p> <ul style="list-style-type: none">• The applicant withdrew the complaint as they were satisfied with the clarification given by the taxpayer, hence, the investigation should have been dropped.• The taxpayer had not denied his liability to pass on the GST benefits. However, an accurate benefits figure could not be computed before completion of the project, therefore, the taxpayer should be allowed to pass on the benefits after completion of the project.• As per GST law, construction activity is deemed to be the supply of a service liable to GST. Furthermore, sale of the building post-completion is considered as an exempt supply wherein the taxpayer is required to reverse the ITC as per the applicable GST provisions. Given that the taxpayer sold only 58% of the total saleable area, the taxpayer may be required to reverse the ITC in case the remaining flats are sold after the project is completed. It would be incorrect to infer that the entire ITC is the accrued benefit of the taxpayer.
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⁴ Case no. 30/2019 dated May 8, 2019



- As per the Real Estate Regulatory Authority (RERA) guidelines, the taxpayer cannot increase the price(s). Therefore, the taxpayer would not be able to recover the amount from the buyers in case excess benefit is passed on to the customers. This will prove to be a cost, if GST computed benefits are passed on pre-maturely.
- No methodology is prescribed under GST law for computing 'profiteering'.
- The DGAP had incorrectly included the GST amount in the profiteering amount.
- ITC benefits should not be passed on to customers who have not yet paid due instalments.
- The authority has travelled beyond its power by increasing the scope of investigation, i.e., questioning the taxpayer's other projects.
- The taxpayer had acted in a *bonafide* manner, hence, no penalty should be imposed on the taxpayer.

**NAA
Observations
and Order**

NAA observations:

- There is no provision under GST law to withdraw the complaint once it has been made by following the prescribed procedure. Accordingly, the investigation pursued by the DGAP is legally allowed as per GST provisions.
- The taxpayer cannot be allowed to enrich himself at the cost of the buyers and keep buyers waiting until the project is completed. The taxpayer is legally bound to periodically pass on benefits to the buyers.
- Any reversal of the ITC due to unsold flats can be factored into calculations during the calculation of the benefit and, in case any of the buyer(s) surrenders their allotment after availing the benefit of ITC, the same can be taken in to consideration while selling the flat to the subsequent buyer.
- As per GST provisions, the authority has the power to 'determine' not to 'prescribe', the methodology.
- The taxpayer voluntarily submitted details of their other projects to support the contention that they acted in a *bonafide* manner to pass on GST benefits to customers.
- ITC benefit is required to be passed on to buyers who have paid due instalments. Furthermore, benefit should be passed on to other buyers at a later stage when demand is raised against them and when payment is received.
- The profiteered amount computed by the DGAP is correct as the taxpayer forced buyers to pay higher prices by charging additional GST on the profiteered amount.
- The taxpayer had not acted in a *bonafide* manner as the taxpayer had not taken any effective steps to pass on the benefits till the current proceedings were launched against them.

Order:

- The taxpayer acted in contravention of Section 171 of the CGST Act, 2017 by collecting higher payment(s) from customers and thus, been held indulged in profiteering.
- The DGAP has been directed to investigate the other projects of the taxpayer to verify the taxpayer's claim that he has passed on the GST benefits with respect to other projects.



**Dhruva
Comments /
Observations**

- This order adds to the earlier orders pronounced by the NAA against companies in this sector. The NAA has not accepted any of the contentions put forth by the taxpayer and has adopted a stringent approach with regards to the application of the provisions.
- Interestingly, the Order highlights that there is no provision under GST law to allow or permit withdrawal of compliant once it has been filed.

Judgements under GST:

5. Safari Retreats Private Limited and Anr v. Chief Commissioner of CGST⁵

**Issue for
Consideration**

Whether the input tax credit ('ITC') is admissible on inputs and input services which are used for construction of Immovable Property which is intended to be used for letting out on rent, despite specific restriction in terms of Section 17(5)(d) of the CGST Act, 2017?

**Discussion &
Ruling**

Discussion:

- The Petitioner contended that the ITC should be allowed on inputs and input services which are used for construction of immovable property intended to be used for letting out on rent, primarily on the following grounds:
 - Section 17(5)(d) of the CGST Act contemplates and provides for a situation where inputs are consumed in the construction of an immovable property which is meant and intended to be sold, and so should not be applicable in the given situation;
 - In the event the constructed immovable property is rented out, the tax chain is not broken. On the contrary, it results in a fresh stream of GST revenues for the Exchequer on the rental income generated by the building;
 - Denial of ITC in such a situation would be completely arbitrary, unjust, and oppressive, and would be directly opposed to the basic rationale of GST itself, which is to prevent the cascading effect of multi-stage taxation and the inevitable increase in costs which is borne by the consumer;
 - The GST law seeks to allow ITC of inputs and input services to builders who sell units in the building before the issuance of a completion certificate and who are required to pay CGST / SGST on the amount of sale price that they receive. Denial of ITC to a person like the Petitioner is patently arbitrary and discriminatory and is violative of the Petitioner's fundamental right to equality guaranteed by and under Article 14 of the Constitution of India;
 - It is well settled law that that an interpretation which defeats the very intention of the legislature should be avoided and that the interpretation which advances the legislative intent will have to be accepted;
 - Reliance was placed on the decision of the Hon'ble Supreme Court in ***Eicher Motors Limited v. UOI [1999 (2) SCC 361]*** to argue that the instant case is a chain of transaction where GST is payable and paid on the commercial rent received on renting of building pursuant to the construction activity being carried out.
- The Revenue refuted the contentions of the Petitioner on the following grounds:
 - Denial of ITC to the Petitioner cannot be claimed as a matter of right and such denial cannot assailed as unconstitutional under Article 14 of the Constitution which can

⁵ WP(C) No. 20463 of 2018 - High Court of Orissa



be breached only when there is perversity or gross disparity resulting in clear and hostile discrimination practiced by the legislature;

- Section 17(5) of the CGST Act, 2017 prescribes denial of ITC for certain classes of taxpayers or certain class of inputs or input services. This would mean that the legislature has decided in its wisdom the credit of taxes which would be allowed as ITC and the tax that has not been allowed. It is the policy call of the Government, given effect through legislation, and such ITC which is denied by the legislature cannot be obtained through judicial review.

Decision:

- It was held that the narrow interpretation put forward by the Department is frustrating the very objective of the Act. The GST credit would have been allowed to the Petitioner if the property was disposed of prior to the issuance of the completion certificate. Relying on the decision of the Hon'ble Supreme Court in *Eicher Motors Limited (Supra)* it was held that the Petitioner should be allowed to avail ITC on inputs and input services used for construction of building in case where GST is levied and paid on the rental income.
- The Hon'ble High Court declined to declare the provision as ultra vires.

**Dhruva
Comments /
Observations**

- The decision of Odisha High Court to allow ITC of inputs and input services is in accordance with the object and intent of GST, which is to avoid cascading effect of taxes and allow ITC of goods / services that are consequential for provision of taxable output goods / services. Interestingly, the Odisha High Court has simply read down the provisions of section 17(5)(d) to be not applicable to the taxpayers who further utilize the immovable property for the supply of goods / services that are exigible to GST. The provisions, therefore, would still integrally be a part of the GST law and the taxpayers for each transaction would need to evaluate whether or not the principles espoused by the High Court are applicable to them. The same provisions have also been challenged by taxpayers before the Delhi High Court.
- Note that the decision is likely to be challenged before the Hon'ble Supreme Court primarily on the lines that the judiciary should have limited scope to review the policy decisions of the legislature. In ***Jayam and Company vs Assistant Commissioner [2018 (19) GSTL 3 (SC)]*** the Hon'ble Supreme Court held that input tax credit is a concession provided by the legislature which is available subject to specified conditions and restrictions and the registered tax payers should have no vested right but for Section 16 read with Section 17 of CGST Act, 2017.



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