

**BEFORE THE APPELLATE AUTHORITY FOR ADVANCE RULING IN
GOODS AND SERVICE TAX, IN THE STATE OF HARYANA, PANCHKULA**

Appeal Case No. : HAAAR/2020-21/03

Dated: 30.09.2020

GSTIN of the Applicant	06AAECD3007B1ZG
Name	M/s Dhingra Trucking Pvt. Ltd
Address / Registered Address	1/43, Shivaji Nagar, Gurugram, Haryana - 122001
Present for the Applicant	CS Monika Goyal

**Order under Section 101 of Central Goods and Service Tax Act, 2017
/ Haryana Goods and Service Tax Act, 2017**

The present appeal has been filed under Section 100 (1) of Central Goods and Service Tax Act, 2017 / Haryana Goods and Service Tax Act, 2017 (hereinafter referred to as CGST Act / HGST Act, respectively) by M/s Dhingra Trucking Pvt. Ltd against the Advance Ruling No. HAR/HAAR/R/2019-20/10 issued vide Memo No. 1050/AAR dated 28.08.2020, in Application No. 10/1920 dated 18.07.2019.



A copy of order of the Advance Ruling Authority issued on 28.08.2020 was received by the appellant on 03.09.2020 and the appeal has been filed on 30.09.2020 which is within time in terms of Section 100(2) of the CGST Act 2017.

I. BRIEF FACTS OF THE CASE:

M/s Dhingra Trucking Pvt. Ltd., Gurugram is a registered taxpayer under GST and has constructed 50000 Sq. Feet of Logistic Facility Space (warehouse) in Haryana and would be constructing additional 3,50,000 Sq. feet more. A company engaged in manufacturing and trading of 2 wheelers was interested in leasing of the space and has entered in contract with the Appellant.

The proposed contract requires the Applicant to undertake: -

- a.) To create multilevel storage facility with fabricated sheets fixed on the nuts and bolts as requirement of the Lessee for storage of two wheelers in the warehouse;
- b.) To provide to the Lessee the loading and unloading ramps for the vehicles as per standards of Lessee;
- c.) To provide full electricity backup at the premises at all times for which the Applicant has installed a generator with required load capacity and shall also be responsible for the upkeep and maintenance of the generator (including the fuel);
- d.) To maintain the premises inclusive of service-lift and other electrical equipment on its own cost in good condition, including cleaning and housekeeping.

Question for Advance Ruling:

Appellant had raised the following questions for Advance Ruling before the Authority for Advance Ruling:

1. Whether Input Tax Credit of GST in respect of inputs/ Capital Goods used or intended to be used for creation of covered logistics facility space (warehouse) to be rented out for storage purposes be eligible input tax credit under the provisions of Sections 16 and 17 of the CGST Act 2017?
2. Whether Input Tax Credit of GST in respect of inputs in form of goods and services be eligible if the goods and services are consumed and used in construction of covered logistic facility space when the said Input Tax Credit would be utilized in order to discharge and pay CGST and HGST/IGST on rent received from tenants of the warehouse.

Ruling by Authority for Advance Ruling:

The Authority pronounced the Ruling as under:

1. "The applicant is not eligible to input tax credit in respect of inputs/ capital goods used or intended to be used for creation of covered logistics facility space (warehouse) to be rented out for storage purposes."
2. "Since no credit of input tax in respect of input goods or services consumed and used in the construction of covered logistics facility space is available, there arises no possibility of utilization of the same."

II. GROUNDS OF APPEAL:

The Appellant has submitted the following in the 'Grounds of Appeal':

1. The ruling by the AAR (Advance Ruling Authority) is incorrect both on facts and the law.
2. The Orissa High Court decision in 'Safari Retreats Pvt. Ltd. vs. Chief Commissioner has been incorrectly interpreted by AAR to imply that for Section 17(5) has to be struck down for the ITC to be so admissible.
3. Section 17(5) contemplates that since inputs are consumed in the construction of immovable property and in GST there is no provision for charging GST on the immovable property and accordingly on the inputs/ goods so consumed, the tax chain breaks and the Input Tax Credit (ITC) has to be denied. Whereas in their case the position is different viz. the property is being constructed for leasing out only. That, denial of ITC here shall be arbitrary/ unjust and oppressive and also against the GST rationale of removing cascading effect of the taxation.



4. Hon'ble Andhra Pradesh High Court decision in pre-GST era is relevant wherein CENVAT credit was upheld as admissible on Cement and TMT Bars used for construction of a warehouse on the reasoning that without the use of these items storage and warehousing services could not be provided.

5. In their case the warehouse is not being constructed on the Appellant's *own account*. The warehouse has been constructed as per the requirement of the lessee. The Agreement has been entered into with a single party for 5 years. There is no alternative use of the warehouse. (Thus Section 17(5)(d) is not attracted).

For ready reference, Section 17(5)(d) is being reproduced here:

"(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:—

(a)

(b)

(c)

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation.—For the purposes of clauses (c) and (d), the expression 'construction' includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;"

6. In the light Hon'ble Supreme Court's decision in *Hussainbhai vs. Alath Factory Thejilali Union* [(1978) 4 SCC 257] that an employer has economic control over workers' subsistence therefore they would be laid off if the employer ceases to use their services, in their case there being no alternative use of the warehousing facility these cannot be said to be constructed on the Appellant's '*own account*'.

7. That, purpose of Section 17(5) is to restrict ITC where property is supplied post the issue of Completion Certificate as this supply doesn't attract GST. However for renting of immovable property the ITC shall be available.

8. Where an immovable property is constructed for leasing out the tax chain is not broken and the credit shall be available.

9. CBIC Circular 74/2018 dated 8.12.2018 states that credit shall be available where completion certificate *has not been issued*. That, it is so as the Building ceases to be '*goods*' after issue of completion certificate.

10. Hon'ble Supreme court has held that where output is taxable the inputs and services are eligible for credit, in Eicher Motors Ltd. vs. UOI [(1999) 2 SCC 361].

Hon'ble Apex Court had held therein that a right accrues to the manufacturer when he paid tax on the raw materials and that right shall continue until those goods existed.. "*We have no hesitation to hold that Rule cannot be applied to the goods manufactured prior to 16.03.1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods.*"

11. Similar view has been taken in the case of CCE vs. Dai IchiKarkaria Ltd. [(1999) 7 SCC 448], "*It should be noted that there is no correlation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product ta is manufactured out of the particular raw material to which the credit is related..*"

12. The Punjab AAR has ruled in K P H Dream Cricket Pvt. Ltd. [2018 (18) GST 278 (AAR-GST)] credit shall be available on the providing of complementary tickets.

13. Therefore the leasing being a taxable service the credit shall be available.

14. That, Hon'ble Supreme Court has validated *purposeful interpretation* of a statutory provision in Oxford University Press vs. CIT [(2001) 3 SCCC 359].

15. In K P Verghese vs. Income Tax Officer [Vol.131 (1981) ITR 597] it has been held that literal interpretation in certain cases lead to absurd interpretation.

16. That, accordingly, the restriction of Section 17(5)(d) is not applicable to the Appellant's case.

17. The Appellant has heavily relied on the Orrisa High Court's decision in Safari Retreats. The facts are similar to their case.

18. That, thus, the AAR has violated the judicial discipline.

19. The Bombay High Court has, in CIT Vidarbha vs. Godavari Devi Saraf, held that law laid down by the High Court, even in it is of a different state, ought to be respected.

20. In CCE vs. Valson Dyeing Bleaching and Printing Works [2010 (259) ELT 33 (Bom.)] the Bombay High Court had upheld the Tribunal decision wherein Tribunal had followed a decision of Madras High Court treating as binding.

In this case the Tribunal had no jurisdiction to examine the validity of Notification 42/98 but relying on Madras High Court decision the Tribunal held that the notification was ultra vires the provisions of the Act.



21. In Panipat Coop Sugar Mills 2013 (293) ELT 66 (Tri-Del.) the Tribunal had relied on the decisions of 3 High Courts.
22. There was no decision on the relevant issue of the jurisdictional High Court, in the Panipat Coop Sugar Mills case. Similarly there being no contrary decision of the jurisdictional High Court the decision by the Orrisa High Court is binding on the Advance Ruling Authority.
23. In Shalu Synthetics Pvt. Ltd. 2017 (346) ELT 413 (Tri.-Ahmd) it's been held that High Court decision are required to be preferred over larger bench decision of Tribunal.
24. Thus Authority has erred in not relying on the Orrisa High Court decision in Safari Retreats.
25. The Department has challenged this decision in Supreme Court vide an SLP and Hon'ble Apex Court has issued notice.
26. However no stay has been granted by Hon'ble Supreme Court.
27. That, Hon'ble Supreme Court has held in Kunhayammed and Others vs. State of Kerala [AIR 2000 SC 2587 (1)] that a judgment continues to be binding unless an order staying or suspending the operation is issued.
28. In SanyogitaRane 2013 (7) ALIMR 633 (Bom.) a judgment has been held to be effective where it is not stayed.
29. In Tata Motors Ltd. 2008 (56) BLJR 2903 it's been held that mere pendency of SLP does not amount to stay.
30. In Dream Loanz 2017 (6) GSTL 443 (Tri.-Chennai) ratio of other High Courts' decision has been followed by the Tribunal as the said decisions had not been stayed.
31. In the above case the Tribunal followed the '*judicial discipline*'.
32. In Hope Plantations Ltd. (1999) 5 SCC 590, Hon'ble Supreme Court explained scope of finality of a decision that "*decision pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by the Appellant authority.*"
33. Thus till it is set aside or stayed, the order is operative and binding.
34. The impugned Order is barred on jurisdiction as the same has been pronounced beyond the period of 90 days. Therefore it is liable to be declared void.

Further, briefly, in the "*Statement Containing Applicant's Interpretation of Law and Facts...*" which forms the grounds of Appeal and has been adduced as Annexure C to the Appeal, the applicant has submitted the following: -



1. The leasing out of premises for renting is a supply in terms of Section 7 of CGST Act and Applicant is a Supplier and is thus liable to pay GST on the lease rentals;
2. That, they are registered and duly entitled to the ITC of inputs/ services and capital goods;
3. Section 17(5)(d) excludes the following from admissibility of ITC:-

“(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation.—For the purposes of clauses (c) and (d), the expression —construction includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;

The Explanation to sub-Section 17(5) is also relevant and is reproduced below: -

Explanation.—For the purposes of this Chapter and Chapter VI, the expression “plant and machinery” means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes—

- (i) land, building or any other civil structures;
- (ii) telecommunication towers; and
- (iii) pipelines laid outside the factory premises.”

4. That, the exclusion is when the Immovable Property is meant to be sold post issuance of a completion certificate since such levy does not attract GST; that since there is a break in the tax-chain and no GST would be payable the denial of ITC is justified;
5. In their case the property is not meant to be sold but is to be leased out on payment of GST; the denial of ITC would be arbitrary;
6. Para 5 of the Schedule-II to the CGST Act 2017 provides that construction of a building etc. intended for sale to a buyer before issuance of completion certificate is a supply of service; thus making the intention of the supplier a decisive factor. Accordingly a building intended for renting should also be entitled for admissibility of ITC otherwise the provisions shall be highly arbitrary;
7. The warehouse constructed for the purpose of letting out shall not come under the mischief of Section 17(5)(d); That the words, “on his own account” are not attracted in their case where immovable property is intended to be let out;
8. Hon’ble Odisha High Court decision dated 17 April 2019 in M/s. Safari Retreats Pvt. Ltd. v Chief Commissioner of Central Goods

&Service Tax [W.P. (C) 20463 of 2018] applies to their case and ITC has been allowed;

9. Hon'ble Andhra Pradesh High Court in CCE v SaiSamhita Storages has also allowed CENVAT Credit on Cement and TMT Bars used for construction of a warehouse holding that without the use of these items assessee could not provide storage and warehousing service;

III. RECORD OF PERSONAL HEARING:

CS Monika Goyal attended the hearing on 25.08.2021 through webex on behalf of the appellant M/s Dhingra Trucking Pvt Ltd. She reiterated the grounds already mentioned in the memorandum of the Appeal.

IV. DISCUSSION AND FINDING:

We have considered the material on record including the appellant's grounds of Appeals, other submissions, the statutory provisions, etc.

In terms of Section 101(1) of the CGST Act, this Appellate Authority is mandated to pass such order as it thinks fit, confirming or modifying the ruling appealed against.

We now proceed to record our discussion and findings.

Appellant's plea

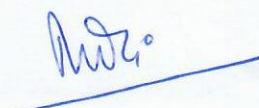
In a nutshell, the Appellant's appeal and the ground of appeal are that the restriction imposed under Section 17(5)(d) doesn't come in the way of admissibility of the Input Tax Credit since the same applies only where a construction of immovable property is in one's "own account". And, there's being a construction specifically oriented towards further leasing out of the premises, the ITC shall be admissible in accordance with the Hon'ble Orrisa High Court's decision and this decision is binding on the lower appellate authorities, despite it having been passed by a High Court of difference jurisdiction.

Legal Position

The legislative intent is abundantly clear from Section 17(5)(d) which is reproduced here again for ready reference:

"(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation.—For the purposes of clauses (c) and (d), the expression —construction includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immovable property;



As may be seen, the ITC is not admissible where the immovable property is constructed on the taxpayer's own account, and is meant for furtherance of business. Hence there is clearly a break on the admissibility of ITC when an immovable property comes into existence; unless the same is constructed for a prospective buyer and element of construction service is involved.

The Appellant has pleaded that the multilevel storage facility developed with fabricated sheets fixed on nuts and bolts are 'input' for warehouse building. That, since the property has been constructed strictly in accordance with the prospective lessee's requirements as ingrained in the terms of the agreement between the 2 parties, the same has not been constructed on their *own account*. That, thus, the restriction under Section 17(5)(d) doesn't come in the way of admissibility of the Input Tax Credit (ITC).

In this regard Hon'ble Supreme Court of India has, in the case of UOI Vs. M/s. Ind Swift Laboratories [2011(265) ELT 3 (SC)] held, "*A taxing statute must be interpreted in the light what is clearly expressed*"

In the instant case, the construction has been done by the Appellant for itself i.e. with all intentions to retain its ownership rights, and is only going to lease it to the other party. Thus the construction has been done, without any doubt, in the Appellant's own account. The same, in the light of what is clearly expressed in Section 17, sub-Section (5), clause (d) *ibid*, is not entitled to ITC on the inputs/ input services.

Thus, the AAR has correctly observed that the applicant was engaged in the business of logistic services including warehouses constructed for the applicant's business of letting out; that, Section 17(5)(d) renders ITC unavailable in respect of goods and services received for construction of immovable property (other than Plant and Machinery) on Taxpayer's own account, including when such goods or services or both are used in the course of furtherance of business.

We note that Hon'ble Orrisa High Court's decision is summed up in the Division Bench's observation that the interpretation put forward by the department is frustrating the very objective of the Act viz. to prevent multi taxation (Para 19 of the Order). However Hon'ble court has concluded that they do not intend to hold it [the provision of Section 17(5)(d)] as ultra-vires (Para 20 of the Order). Thus it is clear that the Hon'ble High Court has provided a liberal construction and the same as such is not law, particularly as the Department has challenged the same in the Hon'ble Supreme Court. The Appellant has itself admitted that the Hon'ble Apex Court has issued the notice. Thus the case shall be listed for arguments. The CBIC in the Instruction F. No. 276/114/2015-CX.8A, dated 9-2-2016 has observed: -

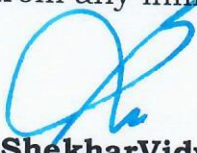
"The Apex Court in Kunhayammedv. State of Kerala - 2001 (129) E.L.T. 11 (S.C.) has dwelt extensively upon the aspect as to when a decision of the Court in a SLP would be binding and when not. The


Supreme Court observed that there are two distinct stages: (a) Granting of special leave to appeal; and (b) Hearing the appeal. If the SLP is dismissed at the stage of special leave without a speaking or reasoned order, there is no res judicata, no merger of the lower order and the petitioner retains the statutory right, if available of seeking relief in review jurisdiction of the High Court. If the SLP is dismissed at the first stage by speaking a reasoned order, there is still no merger but rule of judicial discipline and declaration of law under Article 141 of the Constitution will apply. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. **Once leave is granted but SLP converted into appeal is dismissed with or without reasons, merger results and law is declared."**

The department has filed an appeal against the said judgment of the Hon'ble Orissa High Court vide SLP (C) Diary No. 37367/2019 dated 09.11.2019, in case of Safari Retreats Private Limited. The case is presently pending after notice of admission. In view of the CBIC's ibid instruction, the case has not attained finality. The same is therefore not binding on us.

V. RULING:

In view of the above discussions and findings, we dismiss the appeal and upheld the Advance Ruling dated 28.08.2020 as the same does not suffer from any infirmity or illegality.


(Shekhar Vidyarthi)
Member (SGST)


(Rajesh Sodhi)
Member (CGST)

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3. Deputy Excise and Taxation Commissioner (ST), Gurugram

