THE MAHARASHTRA APPELLATE AUTHORITY FOR ADVANCE RULING FOR GOODS AND SERVICES TAX

(Constituted under Section 99 of the Maharashtra Goods and Services Tax Act, 2017)

ORDER NO. MAH/AAAR/SS-RJ/11/2019-20 Date- 24.10.2019

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri RajivJalota, MEMBER

GSTIN Number	27AAFCN5825Q1ZS
Legal Name of Appellant	Nagpur Integrated Township Pvt. Ltd.
Registered Address	H.No.D, Second Floor, 7th Block, Bloomdale, MIHAN SEZ Denotified area,Nagpur- 440 001.
Details of appeal	Appeal No. MAH/GST-AAAR-11/2019-20 dated 26.07.2019against Advance Ruling No. GST-ARA-107/2018-19/B-35 dated 02.04.2019
Jurisdictional Officer	State Tax Officer (NAG-BST-C-001), Nagpur Division

PROCEEDINGS

(Under Section 101 of the Central Goods and Services Tax Act, 2017 and the MaharashtraGoods and Services Tax Act, 2017)

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST 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 provisions under the MGST Act.

The present appeal has been filed under Section 100 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by Nagpur Integrated Township Pvt. Ltd. (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-107/2018-19/B-35 dated 02.04.2019.

Brief Facts of the Case

A. M/s. Nagpur Integrated Township Pvt Ltd., the Appellant, herein are registered under GST law, with Registration No. 27AAFCN5825Q1ZS under the jurisdiction of

Nagpur. The appellant wish to submit that since the provisions of CGST Act, 2017 and the rules and notifications issued there under are in parametria to corresponding provisions in the Maharashtra SGST Act, 2017 and the rules and notifications issued there under, the provisions of CGST law alone are referred to in this appeal, which would imply reference to corresponding provisions under the SGST law also, unless specified otherwise.

B. Maharashtra Airport Development Authority (hereinafter referred to as MADC), a company registered under the Companies Act, 1956 and having its registered office at 8th Floor, World Trade Centre, Cuffe Parade, Mumbai 400 005 is a special planning authority under the Maharashtra Regional and Town Planning Act, 1966, for the Multimodal International Hub Airport, Nagpur Project (MIHAN) which includes development of Nagpur Airport as an international hub, development of a Special Economic Zone and other facilities around the Nagpur Airport.

C. M/s.Chourangi Builders and Developers Pvt. Ltd. (formerly known as M/s Reatox Builders and Developers Pvt. Ltd.) have formed a Special Purpose Vehicle (SPV), along with M/s IJM Realty (Mauritius) Ltd., under the name and style of M/s Nagpur Integrated Township Pvt. Ltd., the appellant herein. MADC and the appellant have entered into a Development Agreement dated 08.12.2017, a copy of which is placed at Page Nos. 35 to 57 of this appeal. By virtue of this agreement, the appellant has been granted the right to design, finance, develop, a township project, comprising of residential apartments, commercial complexes, etc. in the land owned by MADC. As per the agreement, the appellant had been permitted only to grant long term lease of the residential apartments and commercial buildings and the same cannot be sold outright in favour of the buyers. The land in which the construction is undertaken is a leasehold land, which cannot be transferred. In pursuance of thereof, the appellant intend to grant long term lease of the residential apartments being constructed and a sample "Agreement for Lease" proposed to be entered with prospective lessees is placed at Page Nos. 58 to 88 of this appeal. It may be observed that the identified apartment unit in the residential complex is proposed to be given on long term lease for 99 years, expiring on 21.06.2105, against payment of lease consideration by the lessee to

the appellant. It may be noted that what is proposed to be given on lease is the identified apartment, as mentioned in Schedule C of the agreement. It may be further noted that the said "Agreements for Lease" would be entered into, as and when prospective lessees approach the appellant, during the state of construction of the complex, which fact is also noted in clause 1.3 of the agreement. The lease consideration is also payable in various installments as mentioned in Schedule D to the agreement, at various stages of construction.

D. Based on the above facts, the appellant has filed an application for advance ruling before the Maharashtra Authority for Advance Ruling (hereinafter referred to as the AAR), seeking a ruling as to whether the activity of granting long term lease of the residential apartments would amount to "transfer of immovable property" and hence not liable to GST? If not, what is the appropriate classification and applicable GST rate for the said activity? The appellant pleaded that the activity would amount to transfer of immovable property and hence not liable to GST levy at all. In the alternative, it was also claimed by the appellant that the activity is classifiable under Service Accounting Code 997211, as "Rental and leasing services involving own or leased residential property" and as per S.No. 12 of Notification 12/2017 Central Tax (Rate) Dt. 28.06.2017, "Services by way of renting of residential dwelling for use as residence" is exempted from payment of GST. During the hearing, the AAR required the appellant to produce the details of normal sale value of apartments in the area near to the appellant's project and the lease amounts charged by the appellant, which was also furnished by the appellant. Copy of the application filed by the appellant before the AAR and various written submissions filed before the authority are placed at Page Nos. 89 to 97 of this appeal.

E. The department was also represented before the AAR and written and oral submissions were made by the department also. The department claimed that the activity of the appellant is in the nature of works contract for construction of the apartment for the prospective lessee.

F. After due process of law, the AAR has passed the impugned Order No. GST-ARA-107/2018-19/B-35 Dated 02.04.2019 (Page Nos. 18 to 34 of this appeal). The AAR noted the following facts, which are not disputed.

(i) The appellant is granted the development rights on the property by MADC and also has rights to lease out the flats to the customers. In pursuance of the same, the appellant constructs residential apartments and give them on long term lease basis to its customers.

(ii) The customers would be paying 10 % of the lease premium as advance and pay the balance amounts in various installments based on progress on construction and the final 5 % will be paid on obtaining possession.

(iii) The maintenance of the flats would be the responsibility of the customer.

G. The AAR goes on to observe that generally lease agreements for flats would be entered into in respect of finished apartments and the monthly lease amount would be around 2 to 3 % of the property value, but in this case, lump sum lease amount is received during construction stage itself, similar to the case of sale of apartments, where the buyer would make stage wise payments. Then the AAR has proceeded to compare the information as to lease value and sale value of flats in the locality and made certain observations. Further, the AAR has also observed that normally in Maharashtra, the cost of maintenance of the flat is borne by the owners, whereas in the instant case, the same is borne by the lessees.

H. After making the above observations, the AAR has referred to Schedule II of the CGST Act and comes to a conclusion that in the subject case, there is a composite supply of works contract for construction of flat, which is intended to be handed over to the buyer, but the transaction is projected as if it is a lease transaction. The AAR also observes that the entire consideration would be received before issue of Completion Certificate for the project, which does not generally happen in a lease transaction. The AAR also observes that there is not much difference in the price charged for an outright sale of similar apartments in the area and the lease premium payable. Accordingly, the AAR has held that the activity would be in the nature of "works contract" as defined under Section 2 (119) of the Act and fall under SAC 9954 and attract GST @ 18%. The AAR has not at all examined the claim

of the appellant that the activity is classifiable under SAC 997211 and entitled for exemption. The AAR has also held that the appellant's first claim that the activity is not at all liable to levy of GST being a transaction in immovable property is also not sustainable.

I. Aggrieved by the above decision of the AAR, in so far as holding that the activity is classifiable under Service Accounting Code 9954 and attract 18 % GST and not dealing with the appellant's claim for classification under SAC 997211 and consequent exemption from payment of GST, the appellant is filing the present appeal before the Hon'ble Appellate Authority for Advance Ruling, Maharashtra, under Section 100 of the CGST Act, 2017 and Section 100 of the Maharashtra SGST Act, 2017, on the following grounds.

GROUNDS OF APPEAL

1. The Appellant submit that the impugned order passed by the Maharashtra Authority for Advance Ruling (AAR) is not in accordance with correct interpretation of law and/or facts involved in this case and hence liable to set aside for the following reasons.

2. The short question to be determined in this case whether the subject transactions are leasing of residential dwelling or provision of works contract service by the appellant in favor of their customers.

3. The relevant facts to decide the above issues are not in dispute and they are:

(i)The appellant has been granted the right to develop and construction residential apartments in the subject land, which is owned by MADC.

(ii)The land is not freehold land but only a lease hold land and there are restrictions on transferring the Land.

(iii)As per the agreement with MADC, the appellant can only allot the residential apartments to their customers on long term lease for 99 years and cannot effect a transfer by way of sale or otherwise.

(iv)The customers can approach the appellant for grant of such long term lease of the residential apartment at any stage, either during the construction stage or after completion of construction.

(v)The lease premium payable by the customer is a lump sum amount, payable in various installments, co-terminus with the stage of construction.

(vi)The customers (lessees) are responsible for proper upkeep and maintenance of the apartment.

(vii)The customers (lessees) use the apartment for their own dwelling or may give it on sub lease to others, subject to the conditions prescribed in this regard.

(viii)The lease is for a long period of 99 years.

(ix)The lease model is chosen by the appellant due to the statutory restrictions on obtaining the land on freehold basis and transferring the same and not with a view to avoid / evade any taxes.

4. The appellant wish to submit that the AAR has refused to accept the transaction as a lease transaction for the following reasons.

(i)Lease agreement is entered into during the stage of construction of the complex itself and payments are linked to stage of construction.

(ii)The lease premium payable is almost equal to sale price of flats in the locality.

(iii)The lessee have to bear the cost of maintenance of the apartment.

5. The appellant wish to submit that the above reasons are not at all relevant to disregard the genuine lease transaction entered into by the appellant. As already stated the appellant cannot effect transfer of the apartment by absolute sale, due to the restrictions on transfer of the land, both statutorily as well as in terms of the Development Agreement between the appellant and MADC (the owner of the land). Further, grant of such long-term lease is a normal practice in the industry wherever there are restrictions on absolute transfers. Further, entering into lease agreements during the stage of construction itself is also a common commercial phenomenon. For example, in case of commercial buildings, once lease agreements are entered into during the construction stage, according to the requirements of the lessee, suitable changes and additional works would be carried out by the builders. As the lease is for a considerably long period of 99 years, the lease premium payable would be comparable with the sale price of

similar apartments in the vicinity and this cannot deny the fact that the transaction remains only as a lease and not a sale. The mode of lease consideration, whether it is monthly or lump sum are determined by the parties, based on various parameters. When a house owner gives his flat on lease / rent to a tenant, normally the lease rental is payable on monthly basis and a returnable deposit would also be required to be paid by the tenant. But in long term lease transactions, the consideration is often payable in lump sum. Whether the cost of maintenance is to be borne by the lessor or the lessee is a matter to be decided mutually between the parties and there is no statutory stipulation in this regard. In a long- term lease transaction it is ideally the lessee who is liable to bear it, as the lessor's interest in the property after granting a long- term lease for 99 years, would be minimal. Thus, all the facts relied upon by the AAR to conclude that the subject transaction is not a lease transaction are totally extraneous facts and have no bearing on the decision as to whether the transaction is a lease or not. The AAR has completely ignored the statutory restrictions on effecting sale, prevalence of various methods of lease transactions in the field but has substituted its own restricted understanding of the term lease to the subject issue. The agreement between the appellant and their prospective customers is purely one of long -term lease and is in accordance with the relevant laws governing leasing of such properties and it cannot be wished away as a sham. Since the lease is for long period of 99 years, the lease premium payable by the lessee would be near to the sale price of such apartments in the vicinity, which is a commercial fact. Hence, all the facts based on which the AAR has come to a conclusion that the subject transaction is not a lease, are not at all relevant to decide whether the transaction is a lease or not and hence the Authority's conclusion is totally based on extraneous considerations and hence not sustainable in law.

6. The relevant Service Accounting Code 9972 is reproduced below.

220	Heading 9972	Real estate services
221	Group 99721	Real estate services involving owned or leased property
222	997211	Rental or leasing services involving own or leased residential property

223997212		Rental or leasing services involving own or leased non-residential property
224	997213	Trade services of buildings
225	997214	Trade services of time-share properties
226	997215	Trade services of vacant and subdivided land

7. The classification of Services under GST is based on United Nations classification where real estate services are classified under Section 72 (Page Nos. 98 to 100 of this appeal). It may be observed irrespective of the term of lease, leasing and rental services would fall under 9972 only. The AAR has not given any finding in the impugned order, as to why the activity of the appellant, in pursuance of the "Agreement for Lease" being entered into by them with their customers could not get classified under SAC 997211 above.

8. S.No.12 of Notification 12/2017 is reproduced below.

12	Heading 9963 or Heading 9972	Services by way of renting of residential dwelling for use as residence	Nil	Nil

9. The term "renting in relation to immovable property" is also defined in para 2 (zz) of the notification as,

(zz) "renting in relation to immovable property" means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property;

10. It may be observed from the above that the term renting is given a very wider meaning, which covers, leasing, licensing, etc. without any reference to the period for which such agreement is entered into. The intention of the legislature is not to subject renting or leasing of residential dwelling to levy of GST and by disregarding the real nature of transactions between the appellant and their customers, the AAR has negated such legislative intention.

11. Further, the appellant also wish to rely on CBIC's Circular No.44/18/2018 Dt. 02.05.2018 (Page No. 101 of this appeal), wherein it has been clarified that "grant of tenancy right in a residential dwelling for use as residence dwelling against tenancy premium or periodic rent or both is exempt vide S.No. 12 of Notification 12/2017, which would go prove that the mode of payment, whether it is lump sum or periodical is not relevant to claim the said exemption.

12. Further, the appellant wish to submit that the decision of the AAR that the activity is a works contract, falling under Service Accounting Code 9954 is not sustainable for the following reasons. The relevant classification is reproduced below:

Sr. No.	Chapter, Section, Heading or Group	Service Code (Tariff)	Service Description
(1)	(2)	(3)	(4)
1	Chapter 99		All Services
2	Section 5		Construction Services
3	Heading 9954		Construction services
4	Group 99541		Construction services of buildings
5		995411	Construction services of single dwelling or multi dwelling or multi-storied residential buildings
6		995412	Construction services of other residential buildings such as old age homes, homeless shelters, hostels and the like
7		995413	Construction services of industrial buildings such as buildings used for production activities

			(used for assembly line activities), workshops, storage buildings and other similar industrial buildings
8		995414	Construction services of commercial buildings such as office buildings, exhibition and marriage halls, malls, hotels, restaurants, airports, rail or road terminals, parking garages, petrol and service stations, theatres and other similar buildings
9		995415	Construction services of other non-residential buildings such as educational institutions, hospitals, clinics including veterinary clinics, religious establishments, courts, prisons, museums and other similar buildings
10		995416	Construction services of other buildings nowhere else classified
11		995419	Services involving repair, alterations, additions, replacements, renovation, maintenance or re-modelling of the buildings covered above

13. A careful perusal of the "Agreement for Lease" between the appellant and their lessees would reveal that the agreement is not at all for providing any construction service, as envisaged above. The agreement is purely for long term lease of an identified apartment as mentioned in Schedule C. The specifications of the apartment being constructed are mentioned in Schedule E of the agreement, which would be leased to the lessee, upon completion of construction.

14. Further, reference is also invited to the following entries under Schedule II of the CGST Act, 2017, which lays down as to whether certain activities would be treated as supply of goods or as supply of services.

SCHEDULE II

[See Section 7]

ACTIVITIES [OR TRANSACTIONS] TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

5. Supply of services

The following shall be treated as supply of services, namely: —

(a) renting of immovable property;

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Explanation. — For the purposes of this clause —

(1) the expression "competent authority" means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely :—

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

6. Composite supply

The following composite supplies shall be treated as a supply of services, namely: —

(a) works contract as defined in clause (119) of section 2.

15. As per entry 5 (b) above, during the stage of construction of a building, i.e. before issue of Completion Certificate, if any part of the consideration in respect of a building, which is intended for sale to a buyer the said activity would amount to supply of service. It may be noted that sale of an apartment after issue of Completion Certificate would be a transfer of immovable property and hence not

liable to GST. But, if any part of the sale price is received during construction stage, the same shall be considered as a supply of service. But, in the instant case, there is no intention to sell the apartment by the appellant to the lessee at all and the apartment is only leased out.

16. Further, the term "works contract" is defined in Section 2 (119) of the CGST Act as,"works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract

17. It may be observed from the above definition that in order to constitute works contract, there should be a transfer of property in goods, whether as goods or in some other form. In a case where an apartment is constructed for a buyer, there is an element of transfer of property in various goods such as cement, steel, wood, etc. during the course of such construction and handing over. In the instant case, the apartment is only leased out to the lessee, along with the proportionate share of undivided share of land and at the end of the lease period, the lessee is required hand over the property back to the lessor in as is where is condition. Thus there is no transfer of property in goods in the transaction between the appellant and the lessees. Hence, the AAR's conclusion that the subject activity is "works contract" is patently illegal and contrary to the statutory provisions.

18. Further, the appellant also wish to refer to S.No. 16 (ii) of Notification 11/2017 Central Tax (Rate), as introduced vide Notification 1/2018 Central Tax (Rate) Dt. 25.01.2018, which is reproduced below:

(1)	(2)	(3)	(4)	(5)
"16	Heading 9972	(i) Services by the Central Government,	Nil	-

		State Government, Union territory or local authority to governmental authority or government entity, by way of lease of land.		
		(ii) Supply of land or undivided share of land by way of lease or sub-lease where such supply is a part of composite supply of construction of flats, etc. specified in the entry in column (3), against serial number 3, at item (i); sub-item (b), sub-item (c), sub-item (d), sub-item (da) and sub-item (db) of item (iv); sub-item (b), sub-item (c), sub-item (d) and	Nil	-

		sub-item (da) of item (v); and sub-item (c) of item (vi). Provided that nothing contained in this entry shall apply to an amount charged for such lease and sub-lease in excess of one third of the total amount charged for the said composite supply. Total amount shall have the same meaning for the purpose of this proviso as given in paragraph 2 of this notification.		
		(iii) Real estate services other than (i) and (ii) above.	9	-"

19. It may be observed from the above that if the land / undivided share of land is given by way of long -term lease, and an agreement for construction of a building / apartment is entered into one third of the total value charged is exempted from

payment of GST. This is to create a level playing field between outright sale of apartments during construction, where one third of the total value is excluded towards land value and the balance two thirds value is subjected to Service Tax levy. In the instant case, since the agreement is purely for lease of apartment and not for any construction, this entry is not applicable. Further the above entry would apply only if the lease is for land / undivided share of land, whereas in the present case, the lease is that of the apartment itself. Assuming that the subject agreement involves lease as well as construction, as perSr.No. 16 (ii) of Notification 11/2017 above, one third of the total value is exempted. It may be noted that the said services are classified under 9972 and not under 9954. Once the composite service, which involves leasing as well as construction is thus classified under 9972, as the principal supply being lease, the benefit of Sr.No. 12 of Notification 12/2017, which also covers SAC 9972 can be claimed, as the leasing in this case is of residential unit.

20. The appellant also wish to submit that if the view of the AAR that the subject lease transaction is nothing but a sale of flat during construction and hence subjected to GST levy accordingly, the applicable GST shall also be equal to the GST applicable on sale of flat during construction. It may be noted that with effect from 01.04.2019, as per S.No.3 of Notification 11/2019, sale of apartments during construction attracts, 1.5 % GST on two thirds value (effective rate being 1 % on total value) in case of affordable residential apartments or 7.5 % GST on two thirds value (effective rate being 5 % on total value) in case of apartments other than affordable ones. But, as per the ruling of the AAR, the appellant would be liable to charge 18% GST on the whole amount, contrary to 5 % on the whole amount, which is liable in similar cases where the apartments are sold during construction. If the allegation of the AAR that the appellant has camouflaged the activity as a leasing only to claim exemption and if such camouflage is lifted, the appellant should be liable to pay same GST as other builders would be paying in case of sale of apartments during construction. But the AAR's ruling leads to a disastrous result, whereby the appellant is saddled with 18 % GST liability as against 5 % payable by typical builders.

21. For all the above reasons, the AAR's decision, classifying the activity undertaken by the appellant under SAC 9954 attracting 18% GST is not at all sustainable in law. The activity of the appellant is rightly classifiable only under Chapter 997211 and is entitled for exemption from payment of GST as per S.No. 12 of Notification 12/2017 Central Tax (Rate). Accordingly, the appellant wish to make the following prayer before the Hon'ble Maharashtra Appellate Authority for Advance Ruling.

PRAYER

22. In view of the foregoing, it is respectfully prayed that the impugned advance ruling order passed by the Maharashtra Authority for Advance Ruling be set aside or modified holding that the impugned activities undertaken by the appellant in pursuance of the Agreement for Lease entered with their buyers is classifiable under SAC 9972 and entitled for exemption from payment of GST as per Sr.No. 12 of Notification 12/2017 Central Tax (Rate) Dt. 28.06.2017 and corresponding SGST / IGST Notifications.

Respondent's Submissions

23. Maharashtra Airport Development Company Ltd. (MADC) is a special planning authority under the Maharashtra Regional and Town Planning Act 1966, for the Multi Modal International Hub Airport, Nagpur Project (MIHAN) which includes development of Nagpur Airport as an international Hub, development of a Special Economic Zone, and other facilities around the Nagpur Airport. MADC is the rightful owner of the land situated at MIHAN, admeasuring about 31 acres situated within the Registration Division & District Nagpur, Sub Division &Taluka Nagpur (Rural) Revenue Village Khapri (Rly)

24. M/s Chourangi Builders and Developers Pvt. Ltd., (formerly known as Mis. Reatox Builders & Developers Pvt. Ltd., hereinafter referred to as "Chourangi"), having its registered office at 31341, 1A, Rajiv CHSL, MadhusudanKaleikar Marg, Next to FDA, Bandra Kurla Complex, Bandra (E), Mumbai 400051 formed a Special Purpose

Vehicle (SPV), under the name and style of 'Mis Nagpur Integrated Township Pvt. Ltd.' (NITPL), with IJM Realty (Mauritius) Ltd., a company incorporated under the laws of Mauritius.

25. IJM, on behalf of NITPL has deposited through MADC and Chourangi a Onetime Settlement (OTS) amount to Mis Vijaya Bank towards the Settlement of loan amount, availed by Chourangi in respect of the development of the said Land.

26. In consideration of NITPL paying the OTS amount and agreed dues in respect of the development of the said Land, MADC had entered in for Development Agreement (DA) with NITPL on 8th December 2017 along with a Power of Attorney (POA) dated 8th December 2017 and thereby entrusted to NITPL the rights to design, finance and develop a township project, on the said Land comprising apartment units, commercial space and allied infrastructure thereof and to lease the same to the prospective lessees (hereinafter referred to as "Township Project/ First City Project") and by virtue of the said DA and POA the Developer named herein above is now therefore entitled to complete the said Township Project and to lease, assign and transfer the various residential and nonresidential units proposed to be constructed therein to the prospective lessees. Therefore, the Developer alone has the sole and exclusive right to allot on lease the residential and residential-cum commercial apartment (service apartments) units (hereinafter referred to as "Flats"), commercial space and allied infrastructure thereof in the said buildings to be constructed in the Township Project and to enter into agreement/s with the prospective lessee/s of the Flats in the said buildings and to receive the lease consideration in respect thereof.

27. The Developer is desirous of developing the entire Township Project in a phased manner and accordingly the Developer is presently developing under Phase-1 A, 2 buildings comprising of 3 84 flats in Symphony 1 & 2 along with a club house on the part of the said land, situated within the Registration Division & District Nagpur, Sub Division & Taluka Nagpur (Rural) Revenue Village Khapri (Rly) bearing Khasra Nos.12, 20(Part) and 22 (Part) total admeasuring to acres 5.50 cents, The remainder of the development on the balance of the said Land shall be made in future phases as the Developer may deem fit and proper, with necessary approvals from the concerned authorities.

28. The Prospective Lessee is interested to take the said Property in the said FCP-Phase-1A with the knowledge that the said Property is a Leasehold Property and not a Freehold Property, and pursuance of the same the Prospective Lessee has thoroughly inspected/verified all the documents of title relating to the said FCP-Phase-1A and the Township Project under the existing law applicable to the said FCP-Phase-1A and Township Project, including the relevant orders, and the approval of plans, designs and specifications prepared by the Developer's Architects and all other documents to his/her own satisfaction, for which the Developer had extended all possible co-operation to verify the rights of the Parties as well as the title of the said Property agreed to be taken on lease by the Prospective Lessee. The Developer has also granted inspection of all relevant building plans, including that of common areas as defined in section 2 (n) of the Real Estate (Regulation and Development) Act 2016.

29. The Prospective Lessee, by agreeing to the terms and conditions as set out in the application for booking/allotment, has applied to the Developer for the allotment of the said Property.

30. The developed units will be transferred to prospective customers through an agreement wherein the allotment is given to customer referred to as lessee. The lessee agrees to take on lease from Developer(Applicant) and Applicant agree to lease out to respective buyer the respective flat as mentioned specifically in the agreement. The lessee is not having any option to suggest any changes to the plan as approved. The prospective buyer would make an advance payment followed by instalments as prescribed. The buyer is liable to pay all applicable taxes including GST on the lease Consideration as applicable. The buyer is also liable to pay stamp duty and registration charges as applicable. The lease of property shall be registered in the name of buyer on full payment of consideration as scheduled. The deed is registered with right of inheritance of lease for the remaining period of lease as-is dependent on the situation. The payments from the buyers are described as lease Consideration. Authenticated copies of certificates showing nature of title of MADC and Developer is made available to the prospective buyer. Copy of sanctioned plan on basis of which construction is undertaken is also made available to the buyer.

31. From the abovementioned facts and paras of sample copy of lease agreement, it is revealed that developer is going to construct the said property for prospective lessee, which will be leased out as per agreement of lease. This entire transaction is verified in the light of provisions of Goods and Service Tax Act 2017 as under:-

As per statutory provisions of GST ACT -2017 Section 7 (1) (a) which is reproduced as under -

Supply includes-

All forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease, or disposal made or agreed to be made for a consideration by a person in the course of furtherance of business.

As per Schedule II (section 7) i.e. Activities (or transactions) to be treated as supply of goods or supply of services.

Schedule II (5) Supply of services;

(b) Construction of complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Schedule II (6) Composite supply:- The following composite supply shall be treated as supply of services, namely:- a) works contract as defined in clause (119) of section 2

32. From The above facts it is clear that it is a composite supply i.e. works contract as per Section 2(119) of GST Act -2017.

The meaning and scope of supply under GST can be understood in terms of following six parameters, which can be adopted to characterize a transaction as supply:

1. Supply of goods or services. Supply of anything other than goods or services does not attract GST.
2. Supply should be made for a consideration
3. Supply should be made in the course or furtherance of business
4. Supply should be made by a taxable person
5. Supply should be a taxable supply

While these five parameters describe the concept of supply. Any transaction involving supply of goods or services without consideration is not a supply, barring few

exceptions, in which a transaction is deemed to be a supply even without consideration. Further import of services for a consideration, whether or not in the course or furtherance of business is treated as supply.

33. From the facts of the case & paras of proposed lease agreement, transaction between developer and prospective lessee covers the concept 'supply' as it is for supply of construction services for a consideration. Basically, it is a works contract service and as per judgment of Hon'ble Apex Court in case of Larsen & Toubro Vs. State of Karnataka (2014) 1 SCC 708

The term works contract is broad and includes all obligations and all types of contract.

Works contract is a contract for undertaking or bringing into existence some works. Hence, lease agreement between applicants and prospective lessee is a works contract.

34. A perusal of the above authorities leads us to the conclusion that "Works" means the carrying out of construction activities involving labor along with the supply of materials. Further, there appears to be a close nexus between "works contract" and construction activities.

1. "Works" is largely interpreted as a building or a structure which has emerged as a result of labor;
2. Works contract is a contract for executing of any works along with the right to sue for breach;
3. There should be a transfer of property in goods involved in the execution of works contract.

35. From the final definition of "works contract", it becomes clear that to qualify as a "works contract", a contract shall not be a contract for mere supply of goods or supply of services; that is to say, the nature of contract executed shall be a composite supply involving supply of both goods and services which results in the creation or repair/ maintenance/ renovation / improvement etc. of an immovable property as a whole.

The answer to the above lies in the Schedule II appended to the CGST Act. This schedule categorically specifies whether a particular supply is a supply of goods or services.

Two entries under this Schedule are relevant:

I. Entry 5(b) which stated that - " The following shall be treated as supply of services, namely:-

(b) "construction of a complex, building, civil structure or a part thereof, including a complex or building for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier"

Explanation- For the purposes of this clause -

(1) the expression "competent authority" means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of nonrequirement of such certificate from such authority, from any of the following, namely:-

(I) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or

(II) a chartered engineer registered with the institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planningauthority;

(2) the expression "construction" includes additions, alterations, replacement or remodeling of any existing civil structure.

I. Entry 6 Composite supply

The following composite supplies shall be treated as a supply of services, namely:-

(a) Works contract as defined in clause (119) of section 2 under GST, the whole works contract is treated as a composite supply of Services and leviable to GST as Supply of Services.

As entire consideration will be paid by the prospective lessee before issuance of completion certificate or prior to occupation GST will be applicable.

36. From the facts of the case entire construction service is provided to prospective lessees in compliance of agreement of lease hence it is squarely covered in the ambit of GST Law.

Personal Hearing

37. A personal Hearing in the matter was conducted on 14.10.2019, which was attended by Shri G. Natarajan, Advocate, on behalf of the Appellant, as well as by Shri

Manish Puliye,the Jurisdictional Officer in the instant matter, who reiterated their respective written submissions filed before us.

Discussions and Findings

38. We have gone through the facts of the case, documents on record and submission made by the appellant as well as the jurisdictional officer. The MADC i.e. Maharashtra Airport Development Authority is a Special Planning Authority under the MRTP Act for the Multi Model International Hub Airport, Nagpur, Mihan which includes development of Nagpur Airport as an International Hub Development of SEZ etc.. It is seen that M/s. Chaurangi Builders and Developers have formed a Special Purpose Vehicle (SPV), along with M/s IJM Realty (Mauritius) Ltd., under the name and style of M/s Nagpur Integrated Township Pvt. Ltd., who is the appellant in the present case. Then agreement between MADC and the appellant dated 08.12.2017, the appellant is granted the right to design, finance and develop a township project comprising of residential apartments, commercial complexes, etc. on the land owned by MADC. As per the agreement, according to the appellant, they are permitted to grant long term lease of the residential apartments and commercial buildings and the same cannot be sold outright in favour of the buyers. The land on which construction is undertaken is a leasehold land. The appellant has submitted a draft "Agreement for Lease" which is proposed to be entered with prospective lessees. The have drawn attention to the fact that the identified apartment unit in the residential complex is proposed to be given on long term lease for 99 years, expiring on 2105, against payment of lease consideration by the lessee to the appellant. It is also seen that the agreement of lease entered into during the construction of the complex, and the lease consideration is also payable in various installments at various stages of construction.

39. The AAR had to give a ruling on as to whether the activity of granting long term lease of the residential apartment would amount to transfer of immovable property or not? It was argued by the appellant that the activity would amount to transfer of immovable property and hence not liable to GST. In the alternative, it was claimed that the activity is classifiable under SAC 997211 as "Rental and lease services involving owned or leased residential property and as per Sr.No.12 of Notification 12/2017, dt.28.06.2017, "Services by way of renting of residential

dwelling for used as residence is exempted from payment of GST. The AAR noted the following facts which are not disputed:-

a) The appellant is granted the development rights by MADC and also as rights to lease out the flats to the customers.

b) The customer would be paying 10% premium as lease advances and paying the balance in various installments.

c) The maintenance of the flats would be responsibility of the customers.

40. The AAR held that this is a composite supply of Works Contract for consideration of flats which is intended to be handed over to the buyer and the transaction is projected as if it is a lease transaction. The AAR based its ruling on the following arguments:-

A) Generally flats taken on lease are fully constructed flats with Occupancy Certificate which is not the case herein. In the present case, the lease amount are received during construction. The Lessee keeps paying installments on completion of slabs and this type of payment is only made when person has entered into an agreement for purchase of flat in an ongoing project.

B) The AAR called for details of lease amount charged to the customers towards the leasing of the flats in the proposed project. From the details submitted by the appellant, the AAR gave a finding that the lease amount payment over a certain time period is around 50% of the prices for right to move in flats. In respect of certain flats it was found that lease amount payment over a certain time period without having possession of the flats is an excess of 60% of the flat. This lease amount are going to be paid without using the flat and therefore it was concluded that the said transaction are given a colour of a lease transaction.

C) The Lessee have to pay the maintenance charges. Normally in lease transaction it is the flat owner who pay maintenance charges.

41. In view of the above, the AAR has concluded that the said supply is a taxable supply in the form of construction of complex/building/civil structure or a part thereof including a complexes or buildings for which consideration is received by the appellant in installments and therefore it is a composite supply of Works Contract covered u/s.2(119) of the CGST Act, 2017.

42. We agree with the findings of the AAR. Though the appellant in the draft agreement has projected the said transaction as a lease transaction of residential unit in an apartment/building and has also drafted agreement in such a way to project it as a lease transaction, the said transaction cannot be a lease transaction but it is an agreement for construction of residential flats. We say so because the clauses in the agreement though purported to be a lease agreement as clauses which are in complete disharmony with a normal lease transaction. The following issues immediately come into mind while reading the agreement placed by the appellant. Under the CGST Act, what is exempted from tax is services by way of renting of residential dwelling for used as residence. Therefore, when a flat/apartment is given on lease it is always a complete unit which is immediately handed over to the Lessee for use. The appellant has argued that the transaction purported to be undertaken by him will come within the purview of renting of residential dwelling for used as residence. However, in the present case, the agreement has taken place during the construction of the project and the lease payments are made slab wise before the completion of the project. This almost never happens in the lease of a flat or a unit.

43. The appellant has got the land on a long term lease from MADC, where in the developments happening out of the agreement have to abide by the basic tenets of the agreement with MADC. Thus the residential flats being booked by the appellant are flats with agreement to construct and cannot be colored by the 'lease agreement' word being used throughout the agreement under consideration.

44. It is also seen from the payment schedule for the prospective lease that the lessee has to give 0.5% of the lease consideration before signing and 9.5% within 30 days of booking. The rest of the amount is to be paid by him on completion of certain milestone in the construction of the project. So for example, on completion of foundation- 10% is to be given, after completion of third slab 15% is to be given and so on. As lease never comes under construction project, the above payment schedule is only seen when an agreement is entered into by a prospective buyer with a builder/developer for the construction of a building or complex. Therefore, it is seen that almost 95% of the amount comprising the lease consideration is paid before the possession of the apartment. It is difficult to believe that a Lessee will

commit such amount before moving or enjoying the flat. All these leads us to believe that this is nothing but a sale transaction projected as a lease transaction.

45. As per clause 5.2 of the draft agreement, the prospective Lessee also has to pay advance maintenance charges for the operation and maintenance of the common facilities in the township project.

46. As per clause 9.1 of the Agreement, it is stated that the developer shall facilitate formation of Society/Association of the prospective lessee of the flat. As per the said clause, all prospective lessee of the flats shall be entitled to join the said Association or Co-operative Society. This clause also goes on to prove that the appellant has built a complex or residential unit and the same is to be given on outright supply and not as a lease. We say so because it is only in the case of transfer of ownership where the flat owner is entitled to form an association or a Co-operative Society.

47. A similar case was decided by the Bombay High Court in the case (9717 OF 2018) with civil application no .683 OF 2018) of Lavasa Corporation Limited, The appeals were preferred, under Section 58 of the Real Estate (Regulation and Development) Act, 2016, (for short, "RERA"), by Lavasa Corporation, which is developing a Township Project to construct 'Lake Views' and which is registered under the RERA.. These Appeals are raising the common questions of law as to 'whether the provisions of the RERA would apply in case of an 'Agreement to Lease'?'; The Appellants are aggrieved by the three separate orders passed by the Maharashtra Real Estate Appellate Tribunal in three separate Appeals filed by the Respondents, under Section 43(5) of the RERA, against the orders passed by the 'Adjudicating Authority', under Section 18 of the said Act. By the impugned orders, the Appellate Tribunal had set aside the orders passed by the 'Adjudicating Authority' and held that, the provisions of the RERA are applicable even in case of 'Agreement of Lease' in the present case and, therefore, the Adjudicating Member of the Maharashtra Real Estate Regulatory Authority has jurisdiction to entertain the complaints filed by the Respondents. It was held so, despite the fact that, according to the Appellant, relationship between the Appellant and Respondents is of 'Lessor' and 'Lessee' and there is no sale and/or absolute transfer of right, title and interest in favour of the Respondents with respect to their respective apartments.

In the said case, the 'Agreements of Lease' came to be executed between Lavasa Corporation and the buyers of the property and as per the said 'Agreements', the Respondents have booked the apartments on the basis of lease for the period of 999 years in the Township Scheme of the Appellant. They had paid most of the consideration amount, which is, approximately, to the extent of 80% of the sale price. They had also paid substantial amount towards the stamp-duty and the registration charges. As per the 'Agreements of Lease' executed between the parties, the project was to be completed and the possession of the apartments was to be handed over to the Respondents within a period of 24 months. However after a long delay, the parties approached RERA authorities and the question arose whether, the provisions of the RERA are applicable to the 'Agreement of Lease' executed between the parties. The High Court went through the clauses of the agreement and held that though the agreement is shown to be of lease, it is an agreement of sale. It observed the following:-

> ...."In this context, vis-a-vis, these definitions given in the RERA, it would be essential to go through the 'Agreements' executed between the parties. No doubt, it is true, that the 'Agreements' are titled as 'Agreements of Lease'. The word "Rent" is also defined therein to mean 'the yearly rent amount payable by the customer to Lavasa, once the lease is actually granted in respect of the apartment'. The term 'Annual Rent' is defined to be Rs.1/- and the 'period of lease' is stated to be "999 years". Clause No.4(xi) of the 'Agreement' is relevant in that respect. It says that, 'under its Township Development Scheme, Lavasa proposes to construct 'Lake Views' on the 'Lots' identified by it and grant on lease, the apartments constructed therein for a period of 999 years on the notionally divided pieces of land termed as "Lots".'
>
> 43. Clause No.5.1 of the 'Agreement' further provides that, in consideration of the customer having expressly agreed to pay to Lavasa the lease premium, which is in the range of Rs.32 to 40 lakhs, as the case may be, and which is more than 80% of the total consideration amount Lavasa.doc and the annual lease rent of Rs.1/- for the said apartment, Lavasa agrees to grant to the customer a lease for a period of 999 years for the said apartment.
>
> 44. Clause No.5.2 of the 'Agreement' provides that, the 'Lease Deed' was to be executed only after the development and construction of the said apartment has been fully completed and all the lease premium amounts are paid by the customer to Lavasa. The lease term was to commence from the date of execution of the registration of the 'Lease Deed' by Lavasa in respect of the said apartment in favour of the customer.
>
> 45. Clause No.6 of the 'Agreement' lays down the 'Schedule of the Payment', which shows that the payment was to be made as per the progress in the

construction and except for some nominal amount, entire consideration was to be paid before possession was to be delivered. This clause is a typical clause, which is normally found in the 'Agreement of Sale' under MOFA. Clause No.9.1 states that, the possession of the apartment was to be handed over within a period of 24 months, on the customer depositing the entire lease premium installments.

46. Further clauses in the 'Agreement', like Clause No.10 pertaining to Common Amenities and Facilities'; Clause No.12.1 pertaining to 'Charges and Contributions towards the Maintenance and Amenities'; Clause No.13 relating to 'Statutory Payments' and even other clauses in the 'Agreement' are more or less the same like the ones which are necessarily found in the 'Agreement of Sale' executed under MOFA. As a matter of fact, though these Agreements are titled as 'Agreements of Lease', they are just the replicas of the 'Agreement of Sale', which is executed under the MOFA, except for the words 'lease' and 'rent' used therein.

47. Thus, if the entire 'Agreement' is perused as such, then it becomes apparent on the face of it also, that it cannot be termed or treated as an 'Agreement of Lease', but, in its real purport, it is an 'Agreement of Sale'. The very fact that more than 80% of the entire consideration amount is already paid by the Respondents to the Appellant and the lease premium agreed is only of Rs.1/- per annum, including the clause relating to the period of lease of 999 years, are self-speaking to prove that, in reality, the transaction entered into by the parties is an 'Agreement of Sale' and not an 'Agreement of Lease'; though it is titled as such. The law is well settled that the nomenclature of the document cannot be a true test of its real intent and the document has to be read as a whole to ascertain the intention of the parties.

48. Similar clauses can be found in the present agreement. The Payment Schedule found in Schedule D also shows payment made as per the stages in the completion of the construction. (Clause 4.1) Clause 4.2 says that 'the lessee shall also be liable to bear and pay all stamp duty and registration charges. As per clause 4.6 the developer has also agreed to facilitate the process of obtaining loan from the financing agency. As per Clause 5.2 the lessee also has to pay advance maintenance charges for operation and maintenance of the common facilities. The developer is to give the possession on or before the completion dates as decided. As per clause 6.3, if the developer fails to complete the construction within the period the developer has to pay interest to the lessee. Clause 12.6 says that it is agreed between both that the limited common areas and amenities are for common usage by the prospective lessee together with all the residents/ prospective lessee together. Thus clauses similar to the one in the case of Lavasa are found in the present case and the judgement is applicable on all fours.

49. The project is also registered under RERA. The object of the Act is as follows:-

> ..An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.]

Though the object of the Act is to regulate the sale of building, apartment or building, this project is RERA registered. This fact and the interpretation by the Bombay High Court in the case of Lavasa also shows that the said transaction is not a lease.

50. Thus, in view of the above discussion, we, hereby, pass the following order:

ORDER

We agree with the findings and order of the Advance ruling authority and find no reason to deviate from the conclusions derived by them.

(RAJIV JALOTA)
MEMBER

(SUNGITA SHARMA)
MEMBER

Copy to- 1. The Appellant
2. The AAR, Maharashtra
3. The Pr. Chief Commissioner, CGST and C.Ex., Mumbai
4. The Commissioner of State Tax, Maharashtra
5. The Respondent.
6. The Web Manager, WWW.GSTCOUNCIL.GOV.IN
7. Office copy

Copy to- 1. The Appellant
2. The AAR, Maharashtra
3. The Pr. Chief Commissioner, CGST and C.Ex., Mumbai
4. The Commissioner of State Tax, Maharashtra
5. The Jurisdictional Officer
7. The Web Manager, WWW.GSTCOUNCIL.GOV.IN