AUTHORITY FOR ADVANCE RULING –UTTAR PRADESH
4, Vibhuti Khand, Gomti Nagar, Lucknow

PROCEEDING OF THE AUTHORITY FOR ADVANCE RULING U/S 98 OF THE GOODS AND SERVICES TAX ACT, 2017

Sub:- GST ACT, 2017 – Advance Ruling U/s 98 – liability to tax under GST Act in respect to application dated 24.09.2019 of M/s Dwarikesh Sugar Industries Limited, P.O.- Medpurasultan, Najibabad, Nagina Road, Bundki, Bijnor, Uttar Pradesh - Order– Reg.

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1) M/s Dwarikesh Sugar Industries Limited, P.O.- Medpurasultan, Najibabad, Nagina Road, Bundki, Bijnor, Uttar Pradesh- 246 762 (here in after called the applicant) is a registered assessee under GST having GSTIN: 09AABCD8192N1Z0.

2) The applicant is a company incorporated under the Companies Act, 2013 and engaged in the business of manufacture and sale of sugar and allied products. In order to comply with the Corporate Social Responsibility (CSR) in terms of Section 135 of the Companies Act, the applicant undertakes following activities:

- Construction of school building, additional rooms, laboratories, etc.;
- Free supply of furniture / fittings such as tables, chairs etc., to be used in the school;
- Free supply of electrical goods for use in school; and
- Other expenses such as provision of goods / services to Registered Charitable Trusts / NGO's

In order to undertake the above-mentioned CSR activities, the applicant procures various goods and services on which GST is charged by the supplier.

3). Accordingly, following questions have been posted by the applicant, in his application dated 24.09.2019 (application completed in all aspect received by the Authority on 25.10.2019), before the Authority: –

i. Whether expenses incurred by the Company in order to comply with requirements of Corporate Social Responsibility (CSR) under the Companies Act, 2013 ('CSR Expenses') qualify as being incurred in the course of business and eligible for input tax credit ('ITC') in terms of the Section 16 of the Central Goods and Services Tax Act, 2017 ('CGST Act, 2017')?

ii. Whether ITC in relation to CSR activities which have been obligated under a law are restricted under Section 17 (5) of CGST Act, 2017? If yes,

a. Whether free supply of goods as a part of CSR activities is restricted under Section 17 (5) (h) of CGST Act, 2017?

b. Whether goods and services used for construction of school building which is not capitalized in the books of accounts is restricted under Section 17 (5) (c) / 17 (5) (d) of CGST Act, 2017?

4). The applicant further submitted that :-

i. "In the course of business" includes all activities which are incidental / ancillary to the business which are incurred during the course of business. Any activity which needs to be incurred as a part of some process in a business is to be treated as "in the course of business". A Company is compulsorily required to undertake CSR activities in order to run its business. As a result, they become an essential part of the business process as a whole and thus are treated to be incurred "in the course of business".

ii. Considering the wide definition of the term 'business', there is no requirement to establish a direct one to one linkage in order to avail ITC. Even incidental / ancillary activities are treated as 'in the course of business' and procurements made for undertaking such activities are eligible for ITC.

iii. CSR activities undertaken by them to comply with the requirements of Companies Act, 2013 are incurred in the course of business. Since these activities are incurred in the course of business, they are eligible for ITC in terms of the provisions of CGST Act, 2017.

iv. CSR expenses are incurred for the purpose of business / in the course of business however its actual benefits are reaped by the intended recipients and not by the Company (for its own personal use). Since the benefits are rendered to the society and not the Company, restrictions under Section 17 (5) does not apply.

v. CSR expenses incurred by the applicant have been mandated under the Companies Act, 2013. It is the applicant's obligation to incur such expenses in order to be in compliant with the law. Since, CSR expenses are not incurred voluntarily, it is hereby submitted that these expenses do not qualify as 'gifts' and therefore its credit is not restricted under Section 17(5).

vi. Since CSR credit is not restricted under Section 17 (5) of CGST Act, 2017, the same is eligible for ITC.

5). The application for advance ruling was forwarded to the Jurisdictional GST Officer to offer his comments/views/verification report in the matter, which was

received in this office vide letter C. No. V(30)Div-Bij/Misc/60/18-19/10 dated 02.01.2020, wherein it has been reported that on the basis of restrictive provisions under Section 17(5)(c & d), ITC in respect of inward supplies of goods & Services for construction of school building, furniture and electrical fittings for school building, is not available to the applicant irrespective of activities being carried out for corporate social responsibilities.

6). The applicant was granted a personal hearing on 21.01.2020. Shri Manoj Agarwal, Chief Manager (Taxation) and Sh. K. Sivarajan, Chartered Accountant, Authorized representatives of the applicant, appeared for hearing on the given date.

During the personal hearing, they reiterated the submissions already made vide their advance ruling application dated 24th September and submitted details of some case laws in the matter.

DISCUSSION AND FINDING

7). *At the outset, we would like to make it clear that the provisions of both the CGST Act and the UPGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the UPGST Act. Further to the earlier, henceforth for the purposes of this Advance Ruling, a reference to such a similar provision under the CGST Act / UPGST Act would be mentioned as being under the 'CGST Act' 2017.*

8). *We have gone through the submissions made by the applicant and have examined the explanation submitted by them. At the outset, we find that the issue raised in the application is squarely covered under Section 97(2)(d) of the CGST Act 2017 being a matter related to admissibility of input tax credit of tax paid or deemed to have been paid. We therefore, admit the application for consideration on merits.*

9). We have gone through the submissions made by the applicant and have examined the explanation submitted by them. Section 16(1) of the CGST Act, 2017 defines the eligibility for taking input tax credit, which is as sunder:-

"16 (1) - Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in Section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person"

Further, the term "Business", as defined under Section 2(17) of the CGST Act, 2017, includes:-

(a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);

(c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

(d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;

(e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;

(f) admission, for a consideration, of persons to any premises;

(g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;

(h) services provided by a race club by way of totalisator or a licence to book maker in such club ; and

(i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities".

10). As per Section 135 (1) of Companies Act, 2013, *"Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during the immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director."*

And as per Sub Section (5) of the Section 135 of the Companies Act, 2013, *"The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years or where the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy".*

Further Sub Section (7) of the Section 135 of the Companies Act, 2013, specifies that *"If a company contravenes the provisions of sub-section (5) or sub-section (6), the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees and every officer of such company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both".*

Accordingly we observe that any Company, who meets the criteria for CSR, is mandatorily required to incur in CSR activities to be in compliant with the Companies Act, 2013 and non-compliance of these provisions may lead to business disruptions.

11). Now coming to the question whether CSR activity is to be considered "used or intended to be used in the course or furtherance of business", we observe that Hon'ble CESTAT Mumbai, in the case of M/s Essel Propack Ltd. Vs. Commissioner of CGST, Bhiwandi {2018(362) E.L.T. 833 (Tri.-Mumbai)}, has observed that :-

"CSR not only holistic approach but integrating core business strategy since same address well being of all stake holders and not just company's shareholders, also CSR not charity as same having direct bearing on manufacturing activity of company that is largely dependent on smooth supply of raw materials- CSR also augmenting credit rating of company as well as its standing in corporate world- Hence, sustainability of company dependent on CSR without which companies cannot operate smoothly for long period as they are dependent on various stakeholders to conduct business in economically, socially and environmentally sustainable manner".

Hon'ble Tribunal has further observed that *"CSR which was a mandatory requirement for the public sector undertakings, has been made obligatory also for the private sector and unless the same is to be treated as input service in respect of activities relating to business, production and sustainability of the company itself would be at stake."*

12). Further, Hon'ble High Court of Karnataka, in its judgment, in the case of M/s Commissioner of Central Excise, Bangalore Vs. Millipore India (P) Ltd., has observed that, *"... now the concept of corporate social responsibility is also relevant. It is to discharge a statutory obligation, when the employer spends money to maintain their factory premises in an eco-friendly, manner, certainly, the tax paid on such services would form part of the costs of the final products, Tribunal was right in holding that the service tax paid in all these cases would fall within the input services and the assessee is entitled to the benefit thereof.."*

In view of this, we observe that the applicant is compulsorily required to undertake CSR activities in order to run its business and accordingly, it becomes an essential part of his business process as a whole. Therefore the said CSR activities are to be treated as incurred "in the course of business".

13). As regard to the question whether free supply of goods as a part of CSR activities is restricted under Section 17 (5) (h) of CGST Act, 2017, we observe that the applicant supplies of furnitures / fittings such as tables, chairs etc. and

electrical goods to be used in the school under the CSR activity, free of cost. In this regard, we observe that Section 17 of the CGST Act, 2017 talks about apportionment of credit and blocked credits. Further, as per Section 17(5)(h) of the CGST Act, 2017, input tax credit shall not be available in respect of "*goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples.*" The aforesaid section restricted credit of the goods which were written off or disposed off by way of gift or free samples. Now the moot question before us is to decide whether the furniture / fittings such as tables, chairs etc. and electrical goods supplied by the applicant are to be treated as gift or not. The term "Gift' has not been defined under the CGST Act, 2017, however in common parlance gift is provided to someone occasionally, without consideration and which is voluntary in nature. Further, the applicant has also relied upon the Judgment of Hon'ble Supreme Court of India, in the case of Ku. Sonia Bhatia v. State of UP, wherein Hon'ble Court has cited the definition of 'gift' from Corpus Juris Secundum, Volume 38 in the following words: "A 'gift' is commonly defined as a voluntary transfer of property by one to another, without any consideration or compensation therefor. A 'gift' is a gratuity and an act of generosity and not only does not require a consideration, but there can be none." Citing the definition, it has been observed by the Hon'ble Court that "*The concept of gift is diametrically opposed to the presence of any consideration or compensation. A gift has aptly been described as a gratuity and an act of generosity and stress has been laid on the fact that if there is any consideration then the transaction cease to be a gift.*"

In view of above discussion, we are in unison with the applicant that a clear distinction needs to be drawn between goods given as 'gift' and those provided /supplied as a part of CSR activities. While the former is voluntary and occasional, the later is obligatory and regular in nature. CSR expenses incurred by the applicant have been mandated under the Companies Act, 2013. It is the applicant's obligation to incur such expenses in order to be in compliant with the law. Since CSR expenses are not incurred voluntarily, accordingly, we are of the opinion that they do not qualify as 'gifts' and therefore its credit is not restricted under Section 17(5) of the CGST Act, 2017.

14). As regard to the second question of the applicant that whether goods and services used for construction of school building which is not capitalized in the books of accounts is restricted under Section 17 (5) (c) / 17 (5) (d) of CGST Act, 2017, we observe that Section 17 (5) (c) and 17 (5) (d) of CGST Act, 2017 has restricted the credit on construction/Work Contract services, which is as under:-

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(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;

15). In this regard we observe that the Authority for Advance Ruling-Rajasthan, in the case of M/s Rambagh Palace Hotels Pvt Ltd, has observed that, "*In view of above facts, we find that, input tax credit in general is not available for construction, reconstruction, renovation, addition, alteration or repair of an immovable property even when such goods or services or both are used in course or furtherance of business. However, the limitation in such a scenario is extent of capitalization.*" Observing this the Authority, on the question whether GST paid on building material meant for repair of building and labour supply for carrying out repair of building shall be available for ITC, has ruled that "ITC will not be available to the extent of capitalization of building material /GST on labour supply.

From the above discussion we are of the opinion that the Section 17 (5) (c) & (d) of the CGST Act, 2017 has specifically restricted the ITC on construction /work contract service to the extent of capitalisation. Accordingly, we observe that the ITC of goods and services used for construction of school building will not be available to the applicant to the extent of capitalisation.

16). In view of the above discussions, we, both the members unanimously rule as under;

RULING

Question 1:- Whether expenses incurred by the Company in order to comply with requirements of Corporate Social Responsibility (CSR) under the Companies Act, 2013 ('CSR Expenses') qualify as being incurred in the course of business and eligible for input tax credit ('ITC') in terms of the Section 16 of the Central Goods and Services Tax Act, 2017 ('CGST Act, 2017')?

Answer:- Yes.

Question 2:- Whether free supply of goods as a part of CSR activities is restricted under Section 17 (5) (h) of CGST Act, 2017?

Answer:- No

Question 3:- Whether goods and services used for construction of school building which is not capitalized in the books of accounts is restricted under Section 17 (5) (c) / 17 (5) (d) of CGST Act, 2017 ?

Answer:- ITC is not available to the extent of capitalisation.

17) This ruling is valid subject to the provisions under Section 103(2) until and unless declared void under Section 104(1) of the CGST Act, 2017.

(Ajay Kumar Misra)
Member of Authority for Advance Ruling

(Dinesh Kumar Verma)
Member of Authority for Advance Ruling

To,

M/s Dwarikesh Sugar Industries Limited,
P.O.- Medpurasultan, Najibabad,
Nagina Road, Bundki,
Bijnor, Uttar Pradesh.

AUTHORITY FOR ADVANCE RULING –UTTAR PRADESH

Order No. 52 Date: 22-01-2020

Copy to –

1. The Chief Commissioner, CGST & Central Excise, Lucknow, Member, Appellate Authority of Advance Ruling.

2. The Commissioner, Commercial Tax, Uttar Pradesh, Member, Appellate Authority of Advance Ruling.

3. The Commissioner, CGST & CX, Meerut, Uttar Pradesh.

4. The Assistant Commissioner, CGST & Central Excise, Division-Bijnor, Chandna Bhawan, Dayal Kunj, Kiratpur Road, Bijnor, Uttar Pradesh.

5. Through the Additional Commissioner Grade-I, Commercial Tax, Moradabad, Uttar Pradesh to Jurisdictional Tax assessing officers.

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