

WEST BENGAL AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX
14 Beliaghata Road, Kolkata – 700015
(Constituted under section 96 of the West Bengal Goods and Services Act, 2017)

BENCH

Ms Susmita Bhattacharya, Joint Commissioner, CGST & CX
Mr Parthasarathi Dey, Senior Joint Commissioner, SGST

Preamble

A person within the ambit of Section 100 (1) of the Central Goods and Services Act, 2017 or West Bengal Goods and Services Act, 2017 (hereinafter collectively called 'the GST Act'), if aggrieved by this Ruling, may appeal against it before the West Bengal Appellate Authority for Advance Ruling, constituted under Section 99 of the West Bengal Goods and Services Act, 2017, within a period of thirty days from the date of communication of this Ruling, or within such further time as mentioned in the proviso to Section 100 (2) of the GST Act.

Every such appeal shall be filed in accordance with Section 100 (3) of the GST Act and the Rules prescribed thereunder, and the Regulations prescribed by the West Bengal Authority for Advance Ruling Regulations, 2018.

Name of the applicant	Sri Rabi Sankar Tah
Address	Thakurbari, Fatakgora, Chandannagar, Hooghly - 712136
GSTIN	Unregistered
Case Number	34 of 2019
Date of application	August 13, 2019
Order No. & date	28/WBAAR/2019-20 dated 21/10/2019
Applicant's representative heard	Sri Rabi Sankar Tah

1. Admissibility of the Application

1.1 The Applicant is one of the co-owners of immovable property, jointly owned by three individuals. All three co-owners, including the Applicant, hold an equal share in the property. The property is let out to CGST & CX, Chandannagar Division (hereinafter the central authority). Total rental received exceeds the threshold provided under section 22(1) of the GST Act, but the share of each of the three co-owners does not cross the said threshold. The Applicant seeks a ruling on whether he and the other two co-owners are to be treated as an association of persons or a body of individuals and, therefore, a person as defined under section 2(84)(f) of the GST Act, who is required to be registered under section 22(1) of the Act.

1.2 Advance ruling is admissible on the above question under Section 97(2)(f) of the GST Act. The Applicant states that the question raised in the Application has neither been decided by nor is pending before any authority under any provision of the GST Act.

1.3 It appears from the documents attached to the Application that the central authority has, in response to a dispute regarding deduction of TDS in terms of section 51 of the GST Act, clarified that the Applicant, along with the other co-owners of the property, should be treated as a person as defined under section 2(84)(f) of the GST Act.

1.4 The Application is, therefore, admitted, treating the Applicant as an unregistered person. Being unregistered, neither the central nor the State tax administrations exercise ascertained administrative jurisdiction on the Applicant. Requirements under section 98(1) of the GST Act are, therefore, dispensed with.

2. Submissions of the Applicant

2.1. The Applicant submits that each of the co-owners receives the rental proportionate to his share in the immovable property and the income tax authority assesses him separately on the income so received. Merely because several persons jointly own an immovable property they cannot, therefore, be treated as 'an association of persons or a body of individuals'.

2.2 The co-owners, including the Applicant, have not been considered 'an association of persons or a body of individuals' for the purpose of Income Tax. These co-owners have not formed any association to provide taxable service.

2.3 The Applicant refers to the apex court's verdict in Indira Balkrishna [1960 (4) TMI 7 (SC)], where the court explores what constitutes an association of persons within the meaning of section 3 of the Income Tax Act. It is held that an association of persons must be the one in which two or more persons join a common purpose or common action, and as the words occur in a section which imposes a tax on income, one of the object of the association is to produce income, profits or gains. They are individuals engaged together in some joint enterprise but do not constitute partnerships etc.

2.4 The revenue is of the view that whether the shares are definite and specific or whether there is any scheme of management or not are all immaterial. A common source of income should be the real test for ascertaining the existence of an association of persons. The Applicant points out that the apex court has rejected the above view.

2.5 The Applicant also refers to several judicial pronouncements relating to the erstwhile Service Tax. They have all dealt with the question whether clubbing of the rental each co-owner receives for ascertaining the taxability is lawful [Deoram Vishrambhai Patel, 2015 (40) STR 1146 (Tri – Mumbai); Anil Saini, 2017 (51) STR 38 (Chandigarh); Luxmi Chaurasia, 2017 (49) STR 541 (Tri – All)]. In each of the above cases, the court has replied in the negative.

2.6 The Kerala AAR has answered a question similar to the one the Applicant has raised [Elambrancheri Khaldoon, 2018 (18) GSTL 152 (AAR – GST)]. It rules that the threshold exemptions will be applicable on individual earnings of the co-owners who are participants in a jointly held property.

2.7 The Applicant also argues that the clarification of the central authority (refer to para 1.3 above), whereby the Applicant and other co-owners of the property are treated as an association of persons, is based on an inadequate understanding of the law. It relies on Jaswant Singh Mann [2016 (45) STR 62 (P&H)], where the vires of section 65B (37) of the Finance Act, 2012 is challenged. The petitioner insists that the word 'person', which includes 'an association of persons or body of individuals' is contrary to section 3(42) of the General Clauses Act, 1897 and section 26 of the Income Tax Act, 1961. The High Court, however, holds that the Parliament has the legislative competence to define 'person' in a statute and that cannot be declared unconstitutional in the absence of it being arbitrary, discriminatory or violative of Art 14 of the Constitution.

3. Observations & findings of the Authority

3.1 Although the concerned officer from the Revenue, as understood in the context of section 98(1) of the GST Act, is not ascertainable for an unregistered person, who is not allotted to the administrative jurisdiction of either the central or the State tax administration, clarification of the central authority, as referred to in para 1.3, needs to be discussed in some detail.

3.2 The central authority believes that an association of persons means two or more persons who collaborate for a mutual determination with a vision to earn an income. It relies on *Jaswant Singh Mann (supra)* wherein the petitioners are owners of the premises in question and are receiving rental from the tenant, though individually. The High Court, according to the central authority, holds that the co-owners receiving rentals individually are 'persons' liable to pay service tax.

3.3 In *Jaswant Singh Mann (supra)* the High Court has confined itself to exploring the constitutionality of the provisions under section 65B(37)(vii) of the Finance Act, 2012, which has been challenged as being violative of section 26 of the Income Tax Act, 1961 and section 3(42) of the General Clauses Act, 1897.

3.4 Section 26 of the Income Tax Act, 1961 prohibits the assessment of the co-owners of a property consisting of buildings or buildings and land appurtenant thereto as an association of individuals if their respective shares in the property are definite and ascertainable. Shares of each such persons in the income from the property as computed in accordance with sections 22 to 25 shall be included in his total income. Section 3(42) of the General Clauses Act, 1897 defines the term 'person' for itself and for all Central Acts and Regulations to be made thereafter, unless there is anything repugnant in the subject or context. It defines a 'person' to include any company or body of individuals, whether incorporated or not.

3.5 The High Court holds that the Parliament has the legislative competence to define 'person' in a statute and that cannot be declared unconstitutional in the absence of it being arbitrary, discriminatory or violative of Art 14 of the Constitution. It declines to hold that the provisions under section 65B(37)(vii) of the Finance Act 2012 ultra vires. However, the court has not made any observation in *Jaswant Singh Mann (supra)* about the specific applicability of section 65B(37)(vii) of the Finance Act regarding co-owners jointly holding a property.

3.6 In *Suganthi Joy E (Order No. 40224 - 40240/2019 dated 21/01/2019)* the CESTAT (Chennai Bench) (hereinafter the Tribunal) has examined the question of applying section 65B(37)(vii) of the Finance Act 2012 in the context of threshold for service tax exemption on rent received by co-owners of a jointly-held property. It also discusses the relevance of *Jaswant Sing Mann (supra)* and the cases the Applicant has referred to, while disposing of appeals of similar nature by the above common order.

3.7 The issue involved in all these appeals is that the appellants are co-owners of their properties leased out to tenants. The properties are jointly held, and the rental received is assessed under the Income Tax Act 1961 separately for each co-owner.

3.8 The Revenue argues that the individual co-owners have come together to form associations of persons to rent out the property to the tenant. The service provided is, therefore, indivisible. It cannot be provided if one single co-owner recedes from the agreement for renting the property. The service provided flows along with the property leased to the tenant and, therefore, the co-owners have to be considered as an association of persons. Income from such renting is assessed under the Income Tax Act, 1961 at the hand of each co-owner separately is not the sufficient reason to

conclude that they are to be assessed separately for service tax as well. Law and practice under the IT Act should not be applied to decide a matter under the Service Tax.

3.9 The Tribunal observes that whether the individual co-owners are eligible for the threshold for exemption has been decided in Vishrambhai Patel (supra). In Sarojben Khusalchand [2017 (4) GSTL 159 (Tri – Ahmd)] the Tribunal had the occasion to analyse whether the co-owners could be treated as an association of persons.

3.10 The Tribunal finds the Revenue's argument based on the indivisibility of the property fallacious. Conceptually, service tax is levied on the service provided, which is an intangible thing and hence it is not necessary to be identified with the physical demarcation of the immovable property given on rent against individual co-owners. Once the value of the service provided by a service provider is ascertainable, the service tax is accordingly charged. CESTAT in similar facts and circumstances in the cases of Deoram Vishrambhai Patel (supra), Anil Saini (supra) and Luxmi Chaurasia (supra), after considering the issues raised, rejected the contention of the Revenue and allowed the benefit of exemption Notification No. 6/2005-S.T dated 1-3-2005, as amended, to individual co-owners who jointly owned the property and provided the service of renting of immovable property, and received the rent in proportion to the shares in the immovable property. In the case of Shri. A. Abdul Huq [2018 (10) T.M.I. 401 (Tri – Chennai)] the CESTAT followed the above decisions to hold that individual co-owners are eligible for SSI exemption while assessing their liability to discharge service tax.

3.11 Furthermore, the Tribunal holds when family members come together to rent property belonging to the family or inherited by operation of law, it cannot be considered as an association of persons. The levy of service tax on renting of immovable property is on the income received from the service provided. The co-owner can lease only that part of the property belonging to him.

3.12 In Jaswant Singh Mann (supra) the Tribunal observes that the High Court only considered the vires of the newly introduced section 65B(37)(vii) of the Finance Act, 2012 and the amendment was held to be valid. It has no further relevance or bearing to the present context than deciding the constitutional validity of the enactment.

3.13 The Applicant's case is similar to the ones the Tribunal has discussed above. The Applicant, along with the other co-owners, jointly owned an immovable property and rented it out to the central authority after executing a contract jointly to that effect. Each of the co-owners receives the rental proportionate to his share in the immovable property and the income tax authority assesses him separately on the income so received. Although the co-owners have jointly executed the contract and the service of renting the property cannot be supplied separately by any of the co-owners, it appears there is a judicial unanimity against treating the co-owners as an association of persons for taxation where their income from renting is separately ascertainable and assessed for income tax individually at the hand of each co-owner.

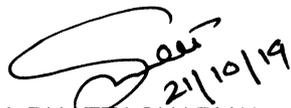
3.14 This Authority, therefore, concludes that the co-owners of a jointly held immovable property cannot be treated as an association of persons for determining the liability and requirement of registration under the GST Act where their income from renting is separately ascertainable and assessed for income tax individually at the hand of each co-owner. In so doing this Authority agrees with the views of the Kerala AAR in Elambrancheri Khaldoon (supra).

In view of the foregoing, we rule as under.

RULING

The Applicant and the other two co-owners cannot be treated as an association of persons and, therefore, as a person defined under section 2(84)(f) of the GST Act, where their income from renting is separately ascertainable and assessed for income tax individually at the hand of each co-owner. Whether the Applicant is required to be registered under section 22(1) of the GST Act will, therefore, depend on his gross turnover, ascertained separately from the other co-owners, exceeding the threshold as provided under the Act.

This Ruling is valid subject to the provisions under Section 103(2) until and unless declared void under Section 104(1) of the GST Act.



(SUSMITA BHATTACHARYA)

Member

West Bengal Authority for Advance Ruling



(PARTHASARATHI DEY)

Member

West Bengal Authority for Advance Ruling