THE MADHYA PRADESH APPELLATE AUTHORITY FOR ADVANCE RULING

OFFICE OF THE COMMISSIONER, COMMERCIAL TAX, MOTI BUNGLOW, MAHATMA GANDHI MARG, INDORE (M.P.) - 452007

BEFORE THE BENCH OF

(1) Shri V.K. SAXENA, MEMBER
(2) Shri RAGHWENDRA KUMAR SINGH, MEMBER

ORDER NO. MP/AAAR/03/2019/ 20 DATE: 14.01.2020

Name and address of the appellant	Jabalpur Entertainment Complexes Pvt. Ltd. registered office: South Avenue Mall, Narmada road, Jabalpur (M.P.) – 482008
GSTIN or User ID	23AABCJ6495J1ZA
Order of AAR under Appeal before AAAR	12/2018/MP/AAR/R-28/39 dated 27.08.2018

PROCEEDINGS

(Under section 101 of the Central Goods and Services Tax Act, 2017 and the Madhya Pradesh Goods and Services Tax Act, 2017)

1. At the outset, we would like to make it clear that the provisions of both the CGST Act and the MPGST Act are similar except for certain specific provisions. Therefore, unless a specific mention is made to such dissimilar provisions, a reference to the CGST Act would mean a reference to the similar provisions under the MPGST Act and vice-versa.

2. The present appeal has been filed under section 100 of the Central Goods and Service Tax Act, 2017 and the Madhya Pradesh Goods and Services Tax Act, 2017 [hereinafter also referred to as "the CGST Act and MPGST Act"] by Jabalpur Entertainment Complexes Pvt. Ltd. (hereinafter also referred to as the "appellant") against the order of Advance Ruling No. 12/2018/MP/AAR/R-28/39 dated 27.08.2018

1. BRIEF FACTS OF THE CASE

1. M/s. Jabalpur Entertainment Complexes Pvt. Ltd., Jabalpur, the appellant, has submitted that it is a private limited company operating a Mall and Multiplex in his building. The applicant is having a single GSTIN 23AABCJ6495J1ZA. The applicant is having following four operations in the company.

(i). Multiplex (cinemas) - operating a 3 movie screen multiplex and snack bar under movie magic banner;

(ii). Mall - applicant owns and operates the south avenue mall and has given space to several brands under rent revenue sharing basis, the applicant is also charging common area maintenance charges from tenants;

(iii). Food court operates a food court in the mall which is an air conditioned area with self-serve (dine-in) and takeaway arrangements;

(iv). SAM retail operates a franchise apparel retail store within the mall.

2. The appellant has stated before AAR (Authority for Advance Ruling) that he is charging GST on outward supply of goods and services as under:

(i). Sale of movie tickets - @28% (on tickets exceeding Rs 100/- in value) or @18 % (on tickets below Rs 100/- in value)

(ii). Renting of shops @18%

(iii). Common area maintenance charges @18%

(iv). Sale of food & drinks - @5% (without claiming ITC on the purchase of food items and beverages)

3. Further the appellant has stated before AAR that he is claiming ITC of GST paid on following inward supplies of goods & services:

(i). Movie distributor share bill - movie distributor is raising a bill against revenue share of sale of movie tickets of every movie;

(ii). Projector rental bills - the applicant has taken a projector on rent for screening of movies;

(iii). Advertising Bill- Relating to Advertisements of Movies published in local Newspapers;

(iv). Security agency & housekeeping bill - security and housekeeping services which are used for office area, public area and common area of multiplex.

It had been informed by the appellant to AAR that it is claiming full ITC on civil items purchased for maintenance and renovation of the building and the applicant is also engaging registered and unregistered contractors for works contract services for the purpose of maintenance and renovation of building.

2. QUESTIONS RAISED BEFORE AUTHORITY FOR ADVANCE RULING (AAR)

Relevant questions which have been decided against appellant (originally questions numbers 3 and 4) as were raised before AAR are as under: -

1. **Whether ITC of GST paid on goods purchased for the purpose of maintenance such as Vitrified Tiles, Marble, Granite, ACP Sheet, Steel Plates, TMT Tor (Saria), Bricks, Cement, Paint, Chemicals, Sanitary items like wash basin, urinal pots and toilets accessories can be claimed in full ?**
2. **Whether ITC of GST paid on Work contract service received from registered & unregistered Contractor for Maintenance Contract of building can be claimed in full?**

3. RULLING PRONOUNCED BY AUTHOURITY FOR ADVANCE RULING (AAR)

1. In respect of question no. 1 it was held

ITC of GST paid on goods purchased for the purpose of maintenance of Mall such as vitrified tiles marbles granite ACP sheet, steel plates, TMT TOR (saria) bricks cement paint chemicals sanitary items like wash basins, urinal pots and toilets accessories shall not be admissible to the applicant in terms of clause (c) of section 17(5) of GST ACT, 2017.

2. In respect of question no.2 it was held

the ITC of GST paid on works contract services received by the applicant for maintenance contract of building shall not be available to them in terms of clause (d) of section 17(5) of GST ACT, 2017.

4. QUESTIONS RAISED BEFORE THE APPELLATE AUTHOURITY FOR ADVANCE RULING (AAAR)

The following questions have been posed before the authority with reference to the activity undertaken by the applicant:

1. Whether ITC on GST paid on goods purchased for the purpose of maintenance such as vitrified tiles, marbles, granite, ACP sheets, steel plates, TMT TOR, bricks, cement, paint, chemicals sanitary items like wash basin urinal pots and toilet accessories can be claimed in full;

2. Whether ITC on GST paid on works contract services received from registered and unregistered contractor of building can be claimed in full?

5. Written Submissions of the Appellant:

At the outset, the appellant humbly wish to point out that the Authority for Advance Ruling has decided the question No. 3 in terms of clause (c) of Section 17(5) of GST Act, 2017, while in fact it should have been clause (d) of Section 17(5).

Similarly, the Authority for Advance Ruling has decided the question No. 4 in terms of clause (d) of Section 17(5) of GST Act, 2017, while in fact it should have been clause (c) of Section 17(5).

1. The appellant wish to reproduce hereunder the provisions of Clause (c) & (d) of Sec. 17(5) and the Explanation to Sec. 17(5).

Sec. 17(5) :

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

(a) .....

(b) .....

(c) 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.

2. It is humbly submitted that in this appeal the core issue is interpretation of the Explanation to Sec. 17(5), and more particularly the interpretation of the expression **"to the extent of capitalisation"** which is directly affecting the ruling of the AAR on Question No. 3 & 4.

3. It is a point for consideration that the expression **"to the extent of capitalisation"** is a term of commercial parlance and is not a legal term.

That is the reason that this expression has not been defined by the Legislature in GST Act & Rules.

Otherwise, if the Legislature has given definitions of well known and well defined terms like Audit, Chartered Accountant, Company Secretary, Cost Accountant, Credit note, Debit note, Motor vehicle, etc. then if there would have been any least doubt about the meaning of the term **"to the extent of capitalisation"** then the Legislature, could have also defined the term **"to the extent of capitalisation"**

4. It is humbly submitted that though the Legislature has not defined the expression **"to the extent of capitalisation"**, but, the Legislature has defined the expression 'Capital goods' u/s 2(19) of the GST Act, as under :

Sec. 2 (19) :

Capital goods means goods, the value of which is **capitalised in the books of account** of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business;

5. It is humbly submitted that the Authority for Advance Ruling has ignored the above definition of Capital goods given in Sec. 2(19), which is quite relevant for knowing the correct meaning of the expression **"to the extent of capitalisation"** used in the Explanation to Sec. 17(5).

6. It is humbly submitted that from the definition of Capital goods, the meaning of the expression **"to the extent of capitalisation"**, is quite clear that if the cost of any renovation, alteration or repair of any immovable property (building in our case) is **capitalised in the books of account**, then it will not be eligible for Input tax credit, however it is also highlighted that the hon'ble High Court Orissa has in its

judgment dated 17th April 2019 has even allowed ITC in Capitalization of Malls.

As a corollary to above, if expenses pertaining to renovation, alteration or repair of any immovable property (building in our case) **are not capitalised in the books of accounts**, but are charged to expenditure account, then the same must be eligible for input tax credit.

7. It is humbly submitted that ours is Commercial Building where there is heavy traffic of general public round the year, and due to that its repair and maintenance cost is higher as compared to any residential building.

Moreover, the building was constructed in 2009-10 and now it is about 7-8 years old. Therefore, even due to normal wear and tear, the repair and maintenance is unavoidable.

8. It is humbly submitted that the question raised by us before the Authority for Advance Ruling was as under –

Whether ITC of GST paid on goods purchased for the purpose of maintenance such as Vitrified Tiles, Marble, Granite, ACP Sheet, Steel Plates, TMT Tor (Saria), Bricks, Cement, Paint, Chemicals, Sanitary items like wash basin, urinal pots and toilets accessories can be claimed in full ?

It is humbly submitted that our above question is about the general principal regarding availability of ITC in respect of inputs pertaining to maintenance of building, and not in respect of invoice for any specific input or in respect of any specific maintenance work of the building.

Therefore, it was expected from the Authority for Advance Ruling to give a general principle about the eligibility of ITC in respect of various inputs used by us for maintenance of building from time to time.

The reply to the said question could be that –

The inputs used for maintenance of buildings (immovable property) are not eligible for Input Tax Credit **"to the extent of capitalisation".**

9. It is humbly submitted that before the Authority for Advance Ruling we duly submitted that Input Tax Credit can be claimed in respect of materials used for maintenance of building, if the cost of maintenance is not capitalized.

However, the Authority for Advance Ruling in Para 7.5 of the impugned order has mentioned that :

> Mere statement that expenditure is not capitalized cannot come to the rescue of Applicant. Be that as it may, the eligibility of ITC does not depend on the treatment given to the expenditure.

10. Thus, the Authority for Advance Ruling, instead of giving its ruling on the basis of nature of the maintenance (capital or revenue), ruled that "mere statement that expenditure is not capitalized cannot come to the rescue of Applicant. Be that as it may, the eligibility of ITC does not depend on the treatment given to the expenditure."

It is our humble submission that above view of the Authority for Advance Ruling as mentioned in Para 7.5 of the impugned order is not at all correct.

11. For kind perusal of the Hon'ble appellate authority, we wish to refer here Para 5.3 of the impugned order which is pertaining to the opinion of the Jurisdictional CGST Commissionerate about eligibility for ITC in respect of inputs used in maintenance of building.

> "5.3 .....
>
> The Jurisdictional CGST Commissionerate has opined that the Applicant does not appear to be entitled to avail ITC on aforesaid items because it has been specifically mentioned in the conditions for non-admissibility of ITC in clause (c) and clause (d) of sub-section (5) of Section 17 of the Act.
>
> .....
>
> Thus, it is clear from clause (d) above, that no ITC shall be admissible to the Applicant in respect of goods or services or both received by a taxable person for construction / maintenance of an immovable property. In the instant case, the applicant has declared that they had used the aforementioned civil items in the repair and maintenance of mall building, which is an immovable property and permanently attached to earth. Therefore it appears that the applicant is not entitled to avail ITC on

aforementioned civil items and ITC so availed needs to be reversed by the Applicant."

Your honour will observe from the above opinion of Jurisdictional CGST Commissionerate that in the said opinion there is no any reference or opinion about the expression **"to the extent of capitalisation"**, which is very vital for deciding the eligibility for ITC in respect of inputs used in maintenance of building.

12. We also wish to reproduce hereunder relevant extract of para 7.5 of the impugned order, in which also the Authority for Advance Ruling concluded that

7.5 .....

Thus we find that the materials in question are squarely covered by clause (d) as detailed above since the same is being admittedly used for repair/renovation/maintenance, etc. of the Mall building which is no doubt an immovable property. Explanation to the sub-section (5) has defined the term 'Construction' to encompass all the activities '..... to the extent of capitalization to the said immovable property.' Going by the said definition it has been argued that ITC of materials used for maintenance can be claimed in full if the cost of maintenance is not capitalized. We find that capitalization of expenditure depends on the nature of expenditure and the period of benefit from such expenditure. However, the Application falls pretty short in elucidating the nature of expenditure, i.e., capital or revenue. Thus, we are constrained to reach any definitive conclusion on this argument. Mere statement that expenditure is not capitalized cannot come to the rescue of Applicant. Be that as it may, **the eligibility of ITC does not depend on the treatment given to the expenditure.** If the expenditure is revenue in nature but subsequently capitalized in the books of account it would not make Applicant eligible to ITC on such goods. **Thus in view of the specific provisions of law, we are of the opinion that ITC on such goods used for maintenance/ repair/renovation of Mall building, an immovable property, shall not be available to the Applicant.**

It is humbly submitted the above logic of the Authority for Advance Ruling that **"the eligibility of ITC does not depend on the treatment given to the expenditure."** is absolutely incorrect and is against the crystal clear provisions of law.

13. It is also a point for consideration that the basic objective of the provisions pertaining to Advance Ruling is not to check the compliance of provisions of the GST law by the registered person filing an application for advance ruling.

Rather the basic purpose is to decide the issue referred by the applicant as per provisions of Sec. 97. It has nothing to do with the compliance of various provisions of GST Act & Rules by the registered person filing an application for advance ruling.

This is evident from the provisions of Sec. 97(1) which says that –

> (1) **An applicant desirous of obtaining an advance ruling** under this Chapter may make an application.....

In view of above, if the applicant avails any Input tax credit contrary to the provisions of the GST Act & Rules, then he is liable for penal consequences.

But, the Authority for Advance Ruling is not at all justified to state in Para 7.5 of its order that – _____

14. In support of our eligibility for ITC in respect of Inputs used for maintenance of building, we wish to refer here a decision of Hon'ble Orissa High Court in the case of *Safari Retreats Pvt. Ltd. v. Chief Commissioner of CGST (2019) 35 GSTJ 106 (Ori).*

In the said case petitioners constructed shopping malls for letting them out to numerous lessees. For construction of said Malls various goods and services like Cement, Sand, Steel, Aluminum, consultancy service, architectural service, etc. were procured by paying GST. The petitioner was denied ITC of GST paid on various inputs and input services on the basis of provisions of Sec. 17(5)(d) of GST Act.

The Orissa High Court held while considering provisions of Sec. 17(5)(d), the narrow interpretation put forward by the respondents is frustrating the very objective of the GST Act, inasmuch as the petitioner has to pay huge amount without any basis.

Thus, in the considered opinion of the Orissa High Court if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, he is eligible for ITC of GST paid on various inputs.

Therefore, the above decision is squarely applicable to the facts of this appeal.

It is a point for consideration that there is no any contrary decision of any other High Court or Supreme Court on this point.

15. **It is humbly submitted that as per said decision of Hon'ble Orissa High Court we are eligible for Input tax credit in respect of inputs even if the same is capitalised to Building account.**

But, for the purpose of this appeal, we are not making detailed submissions on that issue, and the said issue shall be raised / contested by us in the appropriate proceedings, or if required we may file a separate advance ruling application for the same.

16. For kind perusal of the Hon'ble appellate authority, we are submitting herewith a CA certificate pertaining to capital expenditures incurred by us pertaining to building.

From this certificate your honour can observe that, on the basis of correct classification of the expenses, if required even small amount has also been capitalised.

We are also submitting herewith a CA certificate along with a detail statement of the expenses pertaining to maintenance of building, along with the copies of some of the bills pertaining to such maintenance to enable the Hon'ble appellate authority to know the nature of the maintenance cost which has been treated by us as revenue expenditure.

17. It is also a point for consideration that ours is a company registered under Companies Act, and we have to mandatorily comply the Accounting Standards prescribed by the Institute of Chartered Accountants of India, and approved by the Ministry of Corporate Affairs.

On that basis only the maintenance expenses are classified into capital or revenue expenditure.

Moreover, normally most of the maintenance expenses are revenue expenditures, as they are of recurring nature, like replacement of broken or damaged tiles, wash basin, toilet seat, etc. These expenses cannot be classified as capital expenditure.

18. It is our humble submissions that all the above submissions are pertaining to the basic issue involved in this appeal that we are eligible for ITC on inputs used for maintenance of building, and which have not been capitalised.

Therefore, none of our above submissions should be treated as additional ground.

However, even if any of our above submissions is treated as additional ground,

then we humbly seek the permission of the Hon'ble appellate authority to kindly admit the same for deciding our appeal on the point of eligibility of ITC on inputs used for maintenance of building, which have not been capitalised.

On the point for additional ground, the appellant wish to rely upon the following decided case laws :

Ambika Refinery *v.* Asst. CCT (2012) 20 STJ 629 (MP);
National Thermal Power Co. Ltd. *v.* CIT (2005) 5 STJ 686 (SC);
CST *v.* Jalani Tools (India) Ltd. (2015) 26 STJ 94 (Bom).

19. In the case of *National Thermal Power Co. Ltd. v. CIT (2005) 5 STJ 686 (SC)*, the Supreme Court has held that where it is a question of law or if it has a bearing on the tax liability of the assessee and can be decided from the facts available on record, then there is no reason why such additional ground should not be allowed to be raised even if it has been raised for the first time at the time of hearing.

20. In view of above, it is humbly submitted that the appellant should be eligible for Input tax Credit in respect of inputs and input services used for maintenance of its Building, to the extent the same are not capitalised but are treated as revenue expenditure as per Accounting Standards prescribed by the Institute of Chartered Accountants of India, and approved by the Ministry of Corporate Affairs.

The appellant was called for personal hearing on 10.01.2020. Mr. B.V. Mahajan CA appeared on behalf of appellant. He reiterated all the issues again.

6. DISCUSSION AND FINDINGS –

1. At the outset the matter was looked into with respect to the wrong mentioning of clause in AAR's order. It is correct that clause (c) of sub-section (5) section 17 relates to construction of immovable property "by contractor" and clause (d) of sub-section (5) section 17 relates to construction of immovable property "on his own account". To this extent the mention of clause (c) in place of clause (d) and vice versa is found against the spirit of law.

2. The relevant clauses (c) and (d) of sub-section (5) of section 17 and explanation for the word "construction" are 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.

3. Appellant in the first question wants to know whether ITC of GST which is paid as input tax on goods purchased for the purpose of maintenance such as vitrified tiles etc., can be claimed? The goods are being purchased by the appellant for the maintenance of building which is housing his Mall, Theatre, Food Court and a retail apparel store. This transaction falls under clause (d) which stipulates that goods or services or both received by a taxable person for construction of an immovable property **on his own account** would be ineligible for ITC claim. The word "construction" has been explained by explanation appended to clause (c) and clause (d). As per explanation construction includes "re-construction, renovation, additions or alterations or repairs". The word repair simply means "to restore (something damaged, faulty, or worn) to a good condition. We are sure that that goods purchased for maintenance is nothing but for repair of the building which houses Mall, Theatre, Food Court and Retail apparel store. A building which has become old would certainly require inward supply of goods such as vitrified tiles, Marble, Granite, ACT sheets, Steel Plates, TMT Tor, bricks, Cement, Paint, Chemicals and other sanitary items like Urinal Pots, Wash Basins and Toilet accessories for restoring it to a usable condition. These purchases are being made in own account for repair of building which is immovable property. Where this repair work is carried out by registered or unregistered suppliers by providing services it would qualify for work contract services.

4. The extent of inclusion of these inward supplies of goods or services or both is limited to "to the extent of capitalization". Where these inward supplies of goods is received on own account or where supply services is received from work contractors and such expenses are capitalized, it would become ineligible for claim of Input Tax Credit.

5. "Capital Goods" have been defined in clause (19) of section 2. It says, "capital goods means goods, the value of which is capitalised in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business." It simply means that classification of any goods as capital goods would be dependent / at the sweet will of a taxpayer on making entry in his books of accounts. If the value of goods has been capitalised, it would become capital goods and if it is not capitalised, it would not become capital goods. In this particular case, the appellant has declared that the purchase of these goods is for the repair of building and has not been capitalised. Appellant has also explained on the basis of Accounting Standards that these expenses cannot be capitalised. Appellant has also submitted a certificate from Chartered Accountant to this effect. As far as GST law is concerned neither it has directed a taxpayer to follow Accounting Standard nor it has provided any penal consequence when Accounting Standards are not followed. Thus, it is entirely at the discretion of a taxpayer to treat these expenses either as Revenue or as Capital Expenditure. Capitalisation or Non-capitalisation of these expenses is certainly not a permanent indelible mark in the account books. These accounting entries may be modified, altered or deleted as per prevailing/ changing contingencies. These entries are not Static but dynamic.

6. Sub-section (2) of section 103 states as "The advance ruling referred to in sub-section (1) shall be binding unless the law, facts or circumstances supporting the original advance ruling have changed." In situations where a taxpayer or appellant alters or modifies the accounting entry, his eligibility to claim ITC also changes. This would become a matter of compliance and subject of enforcement etc.

9. ORDER

1. In respect of question 1

Input Tax Credit of Input Tax paid on goods purchased for the purpose of repair of building such as vitrified tiles, marbles, granite, ACP sheet, steel plates, TMT TOR (saria), bricks, cement, paint, chemicals, sanitary items like wash basins, urinal pots and toilets accessories are not eligible for Input Tax Credit to the extent of capitalization to the appellant in terms of clause (d) of section 17(5) of GST ACT, 2017.

2. In respect of question 2 it is held

The Input Tax Credit of Input Tax paid on works contract services received by the appellant for repair of building is ineligible to the extent of capitalization in terms of clause (c) of section 17(5) of GST ACT, 2017.

V.K. Saxena
(Member)
Madhya Pradesh Appellate Authority

Raghwendra kumar singh
(Member)
Madhya Pradesh Appellate Authority

No. 03/20 /A.A.A.R./ 08

Indore, dated - 14.01.2020

Copy to:-

1. The Appellant
2. The AAR, Madhya pradesh
3. The Principal Chief Commissioner, CGST & Central Excise, Bhopal Zone, Bhopal
4. The Commissioner of State Tax, Madhya Pradesh
5. The Commissioner, CGST and Central excise, Indore
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