


GUJARAT AUTHORITY FOR ADVANCE RULING GOODS AND SERVICES TAX D/5, RAJYA KAR BHAVAN, ASHRAM ROAD, AHMEDABAD – 380 009.	
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ADVANCE RULING NO. GUJ/GAAR/R/2023/29
(IN APPLICATION NO. Advance Ruling/SGST&CGST/2023/AR/04)

Date: - 24.08.2023

Name and address of the applicant	:	M/s. Bayer Vapi P Ltd Plot No. 306/3, 2 nd Phase,, GIDC Vapi, Valsad, Gujarat-396195
GSTIN of the applicant	:	24AABCB2100L1ZA
Date of application	:	24.01.2023
Clause(s) of Section 97(2) of CGST / GGST Act, 2017, under which the question(s) raised.	:	(d)
Date of Personal Hearing	:	23.3.2023 & 8.5.2023
Present for the applicant	:	Ms. Khushboo Kundalia, Shri Ranjan Khatavkar & Shri Nrupesh Machchhar

Brief facts:

M/s. Bayer Vapi Private Ltd., Plot No. 306/3, 2nd Phase, GIDC Vapi, GIDC, Valsad, Gujarat 396195 is registered with the department and their GST registration number is 24AABCB2100L1ZA.

2. The applicant, is engaged in the manufacture of chemicals for agriculture & environmental health science applications which are mainly classified into active ingredients & intermediates. The applicant has entered into an MoU on 24.12.2021 with M/s. Vapi Enterprises Ltd [VEL] to transfer leasehold rights in Industrial plot located at Phase 2, GIDC, Vapi, Gujaat 396 195 bearing plot no. 298/1, 2/3 & 299 admeasuring 32440 sq mtrs..

3. VEL had entered into a lease agreement with Gujarat Industrial Development Corporation [GIDC] for setting up an industrial plant. The said lease was for 99 years & GIDC had collected an upfront premium & was also entitled to periodical lease rentals. VEL being desirous of vacating the premises intended to transfer the leasehold rights in the said land for the balance period of lease with GIDC ie for 52 years to the applicant.



4. In terms of the said MoU, applicant is required to deposit an advance equivalent to 40% of the total consideration at the time of signing along with applicable GST; that tax invoice will be issued by VEL on receipt of Final Transfer Order from GIDC. The applicant intends to use the land for setting up/expanding its manufacturing facility for manufacture of chemicals to be used by the applicant in the course or furtherance of its business of manufacturing.

5. The primary reason for filing the application before the authority is to know their eligibility to claim ITC of the GST paid by them to VEL, post receipt of final tax invoices.

6. On merits, the appellant has contended as follows:

- Section 16 of the CGST Act governs entitlement of ITC; that the section covers under its ambit the goods/services which have been used and are intended to be used in the course or furtherance of business;
- a combined reading of sections 16(1), 2(17), 2(52) & 2(102) *ibid*, shows that all goods/services used in activities in relation to or furtherance of business whether used or intended to be used, as also the goods/services availed prior to commencement of operations are covered within the scope of section 16(1) of the CGST Act, 2017;
- the words 'in the course or furtherance', includes activities in relation to set up of business/manufacturing facilities for furtherance of business; that the term 'business' is to be understood as continuous activity & is not confined or restricted to mere manufacturing of product/proviso of a service;
- CGST & SGST paid on supply of goods & services is covered under the scope of 'input tax' & hence the credit can be availed u/s 16, *ibid*;
- that in terms of section 16(1), tax ought to be charged & secondly, goods/services, should be intended to be used in the course or furtherance of its business ie nexus/connection between the said services by the applicant & the manufacturing activity is required to be proved;
- that the land belonging to GIDC in respect of which the applicant has obtained leasehold rights from M/s. VEL in terms of an MoU, is an industrial plot, adjacent to their existing manufacturing plant & the applicant intends to set up a new manufacturing plant/expand its existing manufacturing plant;
- M/s. VEL, has levied GST on advance amount paid by the applicant in terms of the MoU; that they have used HSN code 999792 relating to services; that the GST paid is for procurement of input services to be used by applicant in the course of furtherance of its business & therefore they are eligible for the ITC;
- that the definition of input service is inclusive; that the words used are 'any service'; that all input services used in activities in relation to or for furtherance of business are 'input service';
- that the word business is to be understood as continuous activity & not confined to mere manufacture of product or provision of service;
- that the applicant is/would be fulfilling all the conditions prescribed under section 16(2), *ibid*;
- that as far as restrictions enumerated u/s 17(5)(d) is concerned, it is to deny ITC with respect to the goods & services received for construction of immovable property; that this restriction is for goods & services received for a specific purpose of construction of immovable property; that this can cover goods/services *viz* cement, steel, construction contractor, electrical, plumbing, engineering, architect, etc *ie* goods/services which are consumed in the course of construction of immovable property; that this may include services directly or indirectly used for construction of immovable property- the services in question transfer of leasehold rights over the land cannot be construed for construction



of an immovable property because if it is so, then most of the activities of a business would be covered under the said restriction entry, leading to an absurd interpretation of law;

- that the intention to disallow the credit is only for the actual and physical activity of construction; that the definition of construction does not cover activity which is preceding construction;
- the term 'for' used in section 17(5), *ibid*, would encompass only such goods & services inextricably linked with construction;
- further, at the time of procuring the leasehold land, the applicant had not thought about whether the land will be used for construction of immovable property or not;
- it cannot also be construed that VEL is providing services of construction of immovable property; that only rights in the land stands transferred; that at best they have merely transferred the rights in the land & therefore should not get covered u/s 17(5)(d) of the CGST Act, 2017;
- they wish to rely on the Advance Ruling order in the case of Kamrajar Port Ltd [2022-VII-223-AAR], M/s. Enfield Apparels Ltd [Case 6/2020]; that in view of these orders, payments towards land owned by State Industrial Development Corporations leased by them by whatever name called such as upfront premium, lease rent or transfer fees are all towards the supply of renting of immovable property & not for construction of immovable property;
- that even otherwise, transfer of leasehold rights cannot happen without consent from GIDC; that post transfer of leasehold rights, the applicant would step into the shoes of VEL; that the applicant would pay the periodical rentals to GIDC; that the sum paid to VEL is like a part of compensation of the upfront amount by VEL to GIDC at the time of original lease; that amount paid by VEL is nothing but supply of renting of immovable property service.

7. The applicant vide the aforesaid application, has sought advance ruling in respect of the following question *viz*

Whether the applicant is entitled to take ITC of the CGST & SGST paid by them on the services received from Vapi Enterprise Ltd in the form of transfer of its rights in the leasehold land owned by GIDC in favour of the applicant which is to be used by the applicant in the course or furtherance of its business in terms of the provisions prescribed under the CGST & SGST Act.

8. Personal hearing was held on 23.3.2023 wherein Ms. Khushboo Kundalia, Shri Ranjan Khatavkar & Shri Nrupesh Machchhar appeared and reiterated the grounds raised in the application. A further hearing was held on 8.5.2023 wherein they relied upon the additional submission dated 12.4.2023.

9. The applicant, thereafter vide letter dated 12.4.2023, submitted the following additional submissions *viz*

- that they have no existing plans or projections for any development / construction on the vacant land;



- that the leasehold right is in course of business; that there is no proposal of construction of immovable property over the said land; that the land may also be put for other uses or even further transferred to some other party;
- the applicant would fulfill all the conditions prescribed u/s 16(1) and 16(2), *ibid*, for availing the ITC of the GST paid on the leasehold rights;
- that the restriction u/s 17(5)(d), *ibid*, is not relevant to the facts of their case; that only credit of tax paid on goods or services received on own account, for construction of immovable property is restricted; that their MoU is for acquiring leasehold rights of the land for the business purpose;
- that a plain reading of section 17(5)(d), *ibid*, shows that the word/phrase '**for construction**' means '**used for construction**' of immovable property and hence would include goods/services such as bricks, cement, steel, architect services, engineer services, construction services, etc.; that only those goods and services which are used in the creation of immovable property should be covered by the restriction; that other goods / services received pre-facto i.e. prior to the creation of immovable property would not be covered under the restriction, e.g. real estate agent services, leasehold rights, etc.
- that the primary qualification is that goods & services should have inextricable link with 'immovable property,' & should result in 'immovable property';
- that '*transfer fee*' and '*leasehold rights*' are similar in nature i.e. both are pre-facto (preceding) services and do not result in or are not used for construction of immovable property;
- that clauses 17(5)(c) & (d) both deal with procurements for construction of immovable property; that clause (c) seeks to cover a situation where there is a turnkey contract covering goods and services, whereas clause (d) covers the situation of goods/services being separately procured for construction of immovable property; that the intention as per the clause is to restrict the ITC of the GST paid on the goods/services, whether procured as a single, whole or independently, when used for construction of immovable property which further finds accord in the term 'on his own account' at clause (d);
- that for GST, lease of rights in the land is not treated at par with land/immovable property; that when a factory is taken on lease along with the underlying land, there is no dispute on the eligibility to ITC; similarly, when there is only a leasehold rights in the land it cannot be treated differently, so as to restrict the eligibility to ITC;
- that the GST law exempts grant of leasehold rights by State Industrial Development Corporation with an intent to support new industries; that if the ITC is disallowed to the second lessee, it will amount to discrimination between the first & second lessee when there is no difference in the nature of the transaction;
- that from an accounting standards perspective, goods/services used for construction of building are capitalized under 'Buildings' while Leasehold rights in land are capitalized under 'Leasehold Land'; that leasehold rights will not become a part of immovable property in terms of building & hence cannot be treated as part of immovable property or as a service for construction of immovable property;
- that the stamp duty of value of a building without underlying land is provided separately and specifically in stamp duty legislations; that even if a building is constructed, the underlying land, if on lease, need not be a part of immovable property;
- that the case of GNAL, is distinguishable from the facts in the present case, in as much as
 - GNAL acquired the leasehold rights and was setting up Caustic Soda and captive power plant on the leased property to manufacture Caustic Soda;
 - The leasehold rights were acquired for setting-up including erection, installation and commissioning of the said two plants.
- that AAR in the above judgement misread the restriction that goods or services for construction of land is not allowed to hold that land is procured for construction of immovable property;
- that further reliance placed in advance ruling on the GST Council Minutes is incorrect, as it does not lay down the position of law and is only reflective of the discussion of the GST Council.



10. In the meantime, a communication dated 26.5.2023 was received from Deputy Director, DGCEI, RU, Vapi, informing

- that an inquiry was being conducted by them against the applicant on issue of non-admissibility of ITC in respect of transfer of leasehold right;
- that the applicant had filed an application before AAR;
- that they have filed a refund application for refund of GST on the belief that transactions related to transfer of leasehold right of Industrial plot are not under the purview of GST;
- that the taxpayer have already availed the said ITC & has approached AAR seeking clarity about admissibility of ITC in respect of acquisition of leasehold rights.

11. The applicant was provided a copy of the aforementioned letter of DGCEI & asked to offer his comments in the matter. The applicant, vide their letter dated 25.7.2023 stated as follows:

- that the application for advance ruling was filed on 24.1.23;
- the hearing was held on 24.3.23;
- that the ITC in respect of acquisition of leasehold rights was inadvertently availed in the GSTR 3B for the month of March 2023 filed on 20 April 2023; that they have not availed ITC in respect of acquisition of leasehold rights before the filing of the application;
- that the inquiry proceedings were intimated by DGGI to AAR on 06.05.2023 & that there was no proceeding/inquiry pending in the case of the applicant with respect to the question raised in the application for advance ruling;
- that the CGST/SGST Act does not preclude the registered persons from filing an application for advance ruling with respect to availment of ITC on a particular transaction from claiming the ITC pertaining to the said transaction till the time the application is decided;
- that they had not claimed refund of the ITC in respect of acquisition of leasehold rights, as they had never availed of the ITC at the time of filing the refund claim; that the applicant filed a refund claim on 9.12.2022; that even in the refund claim, it was categorically stated that no ITC was availed on the amount claimed as refund.
- that the applicant has already reversed the ITC vide DRC 03 dated 24.05.2003; that there is no loss to the Government, as they had sufficient ITC balance throughout the period of availment of the ITC.

Discussion and findings

12. At the outset, we would like to state that the provisions of both the CGST Act and the GGST 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 GGST Act.

13. We have considered the submissions made by the Applicant in their application for advance ruling as well as the submissions made during the course of personal hearing. We have also considered the issue involved, the relevant facts & the applicant's submission/interpretation of law in respect of question on which the advance ruling is sought.



14. Before advertng to the submissions made by the applicant, we would like to reproduce the relevant provisions/circular for ease of reference:

Section 2. Definitions.-

(17) "**business**" 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) ²[activities of a race club including by way of totalisator or a license to book maker or activities of a licensed 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;

(52) "**goods**" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

(62) "**input tax**" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes-

- (a) the integrated goods and services tax charged on import of goods;
 - (b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;
 - (c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;
 - (d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or
 - (e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act,
- but does not include the tax paid under the composition levy;

(102) "**services**" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

²[Explanation.- For the removal of doubts, it is hereby clarified that the expression "services" includes facilitating or arranging transactions in securities;]

***Section 16. Eligibility and conditions for taking input tax credit.-**

(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.



(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless, -

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

¹[*aa*] the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;

(b) he has received the goods or services or both.

²[**Explanation** - For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services-
(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;
(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person;]

³[*ba*] the details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted;]

(c) subject to the provisions of ⁴[section 41 ⁵[***]], the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39;

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the ⁶[thirtieth day of November] following the end of financial year to which such invoice or ⁷[****] debit note pertains or furnishing of the relevant annual return, whichever is earlier.

⁸[**Provided** that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such



debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019.]

Section 17. Apportionment of credit and blocked credits.-

(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:-

(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. The applicant has sought ruling on the admissibility of ITC, as is mentioned at para 7 *supra*. 'Goods' as defined u/s 2(52), CGST Act, 2017, means every kind of **movable property** other than money and securities. Goods however, includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply. Likewise, 'services' as defined under section 2(102), means anything other than goods, money and securities. Services, however, includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged. The definition gets further clarified via an explanation which states that "services" also includes facilitating or arranging transactions in securities.

16. 'Immovable property' is not defined under the CGST Act, 2017. However, we find that section 3(26) of the General Clauses Act, 1897, defines "immovable property" as under:

"immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

As is evident, the definition of "immovable property" is inclusive and includes amongst other things everything attached to the earth or permanently fastened to anything attached to the earth.



17. Now moving on to section 17 which talks about apportionment of credit and blocked credits, we find that sub-clause (c) to sub section 5, *ibid*, which restricts ITC on 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. Further, sub-clause (d) to the sub-section, restricts ITC on 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 are used in the course or furtherance of business.

18. A conjoint reading leads us to a conclusion, that

[a] land being immovable property, is not goods;

[b] land does not fall within the ambit of services also;

[c] that the credit being sought is in respect of leasehold rights paid by the applicant on upfront amount to M/e. VEL;

[d] section 16(1) clearly states that ITC subject to conditions & restrictions can be availed of input tax charged on any supply of goods or services or both which are used or intended to be used in the course or furtherance of business;

[e] what stands excluded is [a] ITC on works contract services when supplied for construction of an immovable property [other than P&M] and [b] goods or services received for construction of an immovable property (other than P&M) on his own account including when such goods or services are used in the course or furtherance of business.

19. 'Supply' as defined u/s 7(1)(a), *ibid*, includes all forms of supply made in the course or furtherance of business. Further section 7(1A) read with entry No. 2(a) of Schedule II, *ibid*, states that any lease or license to occupy land is a supply of services. While, section 7(2)(a) read with Entry No. 5 of Schedule III, *ibid* provides that sale of land and sale of building shall not be regarded as supply. Thus, these provisions state that the sale of land and completed building shall not attract GST.

20. As far as GIDC is concerned, it initially grants a license i.e., right to enter upon its land for a particular purpose and subsequently grants a lease (right to possess the industrial plot) for a period of 99 years. The consideration for



such rights given by GIDC is paid through upfront premium and nominal yearly lease rent. GIDC, however, reserves the right to repossess the plot in case of a breach in any of the condition. Thus, GIDC does not part with the full ownership rights & hence, the transaction cannot qualify as 'sale of land' to be excluded from the levy of GST by virtue of Entry No. 5 of Schedule III. Even otherwise, 'supply' as discussed *supra* includes supply by way of licence or lease of land.

21. Now as far as assignment of the leasehold rights for the balance period by the original allottee, is concerned, the lease deed permits the said assignment subject to approval from GIDC. The assignment shall result in creating a lessor and lessee relationship between GIDC and the second allottee without any formal execution of a new lease deed. It replaces the original lessee for the new lessee on the same terms for the balance period of the lease. It is an undisputed fact that the said assignment will fall within the broad scope of the term 'supply'.

22. The aforementioned view is also upheld by the Hon'ble Bombay High Court in the case of Builders Association of Navi Mumbai [2018 (12) G.S.T.L. 232 (Bom.)] wherein it was held that the once the law treats a transaction as a supply, particularly in relation to land and building and includes a lease, then, the consideration therefor as a premium/one-time premium is a measure on which the tax is levied, assessed and recovered and hence the Court cannot then probe into the legislation any further. The said decision of the Hon'ble Bombay High Court has been affirmed by the Hon'ble SC vide order dated 09.11.2022 (Special Leave to Appeal (c) No. 23068/2018) keeping the following two issues open viz.

- (a) question of exemption granted by notification No. 12/2017-CT(Rate) dated 28.06.2017 and
- (b) scope and ambit of the expression in Clause 2 (a) of Schedule-II "licence to occupy land is a supply of services".

23. It is in this background that the transaction needs to be examined. Invariably, it is undisputed that the applicant by entering into an MOU with VEL to acquire leasehold rights of GIDC land on payment of a consideration for the balance lease period of 52 years as per the GIDC norms, is in receipt of service from VEL. Now we find that the applicant in para 8 of Annexure II to his application has stated that that the land belonging to GIDC in respect of which the applicant has obtained leasehold rights from M/s. VEL in terms of an MoU, is an



industrial plot, adjacent to their existing manufacturing plant & as per the applicant, they intend to set up a new manufacturing plant/expand its existing manufacturing plant. This further finds a re-affirmation in para R of Annexure III. However, moving forward in para DD in Annexure III, the applicant states that at the time of procuring the leasehold land, the applicant had not thought about whether the land will be used for construction of immovable property or not. The averment we therefore find, is contradictory.

24. Thus it is clear that the applicant wishes to use the service received from M/s VEL, in the form of leasehold rights to land of GIDC and intends to set up a new manufacturing plant/expand its existing manufacturing plant. This being the fact, clearly shows that the service of leasehold rights to land was received and is a precursor to construction being carried out on the said land to set up a new manufacturing plant/expand existing manufacturing facility. It is clearly hit by 17(5)(d) of CGST Act, 2017 also bringing the *non obstante* clause into play. For repetition, 17(5)(d), *ibid*, as already stated, bars ITC on services received by a taxable person for construction of an immovable property (other than P&M) on his own account including when such services are used in the course or furtherance of business. Therefore, we believe that as far as the applicant is concerned, his ITC stands blocked in terms of section 17(5), *ibid*.

25. Now we would like to address the other grounds raised in the application as well as in the additional submission filed by the applicant.

26. The applicant states that restrictions enumerated u/s 17(5)(d), *ibid*, is to deny ITC with respect to the goods & services, inextricably linked with construction of immovable property; that the intention is to disallow the credit for the actual and physical activity of construction; that the services in question ie transfer of leasehold rights over the land cannot be construed as -for construction of an immovable property. We have already held that the applicant himself has admitted that the leasehold rights of the land have been acquired for setting up/expanding its manufacturing facility for manufacture of chemicals which implies that there will be construction on the said land. This being the case, the services in question is to be utilized subsequently for construction of an immovable



property (other than P&M) on his own account. The ITC therefore would clearly be hit in terms of section 17(5)(d) of CGST Act, 2017.

27. The applicant, thereafter has argued that other goods/services received pre-facto i.e. prior to the creation of immovable property would not be covered under the restriction. We have examined the argument. The argument belies legal basis and hence is not tenable. The applicant has thereafter raised an argument that even from an accounting standards perspective, goods/services used for construction of building are capitalized under 'Buildings' while Leasehold rights in land are capitalized under 'Leasehold Land'; that leasehold rights will not become a part of immovable property in terms of building & hence cannot be treated as part of immovable property or as a service for construction of immovable property. Even this argument on being examined under the threshold of section 17(5)(d), *ibid*, read with the explanation concerned, is not legally tenable.

28. We further find that on a similar issue, GAAR has already given its ruling [Advance Ruling No. Guj/GAAR/R/53/2021 dated 18.10.2021] in the case of M/s. GACL NALCO Alkalies & Chemicals P Ltd. The applicant has tried to distinguish the ruling. We have gone through the said ruling & find that the following paragraphs are relevant to the issue at hand and therefore for ease of understanding reproduce the same viz.

16. Applying the above principle to the instant case, we are of the opinion that in this case, the word 'or' in clause(d) of Section 17(5) of the CGST Act can be read as 'and' since it appears to give effect to the intention of the Legislature to allow input tax credit on the construction of plant and/or machinery."

*iii. The subject land leasing service from GACL to GNAL hinges on said leased land.
iv. We cannot brush aside the position of law that Legislature has excluded 'land' from plant and machinery. There must be an intent of Legislature to explicitly exclude the word 'land' in the expression. With this expression of Plant and Machinery excluding land, explicitly incorporated in the Blocked Credit section 17(5) CGST Act, We hold that Legislature has expressed its intent that ITC shall not be available in respect of services pertaining to land received by a taxable person for construction of an immovable property on his own account including when such services are used in the course or furtherance of business.*

v.....

14. Further, besides the discussed legislative intent, the plain meaning of very wordings of Section 17(5)(d) itself blocks subject credit admissibility, detailed as follows:

i. We find that the words used in the said Section 17(5)(d) reads as: services received by a taxable person for construction of immovable property (other than plant or machinery). Hypothetically, if the word 'used' was in the place of 'for', then said Section 17(5)(d) would be read as: Services received by a taxable person (used in) construction of



immovable property (other than plant or machinery).... In such a hypothetical case and limiting to the wordings of Section 17(5)(d) only, there would have been a prima facie merit in the submission of the GNAL to consider that subject ITC is not blocked. But the word used in the said Parliamentary Act in said clause (d) is 'for' and not 'used'. The word 'for' indicates a purpose, an intended goal. Here, 'for' is to be construed to indicate the purpose to construct the buildings/ civil structures, administrative block et al on the leased land. The purpose to enter into the subject agreement with GACL for the subject land is to construct factory with administrative block, et al, so that GNAL may pursue its business.

14.2 Thus we hold that subject GST borne by GNAL is blocked credit under Section 17(5)(d) CGST Act for the land leased to it will be for the construction of civil structures, administrative block/ factory et al. Thus the plain meaning of the words of Section 17(5)(d) blocks the subject amount from credit admissibility

18. We note that the GST Council is cognizant of this position of law that tax credit of GST on leasing of land, for construction of immovable property, is not available. Here we find it apt to reproduce the wordings of H'ble Delhi High Court, in the case of Manufacturers Traders Association vs UOI-2020 (43) G.S.T.L. 616 (Del.), at para 10:

'GST Council - Status of - This is a Constitutional body brought into existence by 101st Amendment and is chaired by the Union Minister for Finance with Finance Minister of all States as members - Rates of GST are jointly decided and recommendations made to Central and State Governments - It is highest deliberative forum to resolve issues arising out of the implementation of the GST and the Council embodies the spirit of Co-operative Federalism'. The H'ble Court further ruled that it cannot sit in appeal and postulate that the decision of the Council is not what they have unwaveringly held it to be.

19. In conspectus of aforementioned discussion and findings, we pass the Ruling based on the following five grounds:

- i. The expression 'plant and machinery' excludes land. As expounded at para 13 of this Ruling, with this expression of Plant and Machinery excluding land, explicitly incorporated in the Blocked Credit section 17(5) CGST Act, We hold that Legislature has expressed its intent that ITC shall not be available in respect of services pertaining to land received by a taxable person for construction of an immovable property including when such services are used in the course or furtherance of business.*
- ii. The word used by the Legislature in Section 17(5)(d) CGST Act is 'for' and not 'used', thereby the intention of Legislature was to block the credit of subject lease service received by Taxable person for construction of immovable property.*
- iii. GST Council is seized of the matter that GST borne by a Taxable Person on such leasing is not available for construction of immovable property.*
- iv. We abide by the decision of the GST Council, for it is legal and proper so to do, as also cited in said H'ble Delhi High Court's Decision at paragraph 18 of this Ruling.*
- v. For Reasons enunciated at para 14 & 15.*

As is already mentioned supra, the applicant is on record that they intend to use the land adjacent to their existing manufacturing plant, for setting up/expanding its manufacturing facility for manufacture of chemicals. The facts in the case of M/s. GACL -NALCO Alkalies & Chemical P Ltd is the same and therefore, our findings is substantiated vide the the aforementioned ruling.



29. Our view is also substantiated by the ruling of Telangana State Authority for Advance Ruling in the case of M/s. Daicel Chiral Technologies (India) P Ltd vide TSAAR order No. 6/2020 dated 24.6.2020.

30. We find that the applicant has relied upon two rulings. We would now like to discuss the same viz

[a] Kamrajar Port Ltd [2022-VII.-223-AAR]. For the sake of ease of reference, we would like to reproduce certain facts from the ruling:

2.1 The applicant has stated that the Chennai Port Trust has allotted covered space to an extent of 267 sq.m at Ground floor – North wing of Jawahar building on Upfront Premium for Long Term Lease Basis to the applicant till 31.08.2045 from the date of handing over of the premises by Chennai Port Trust. The space is intended to be used by the applicant as an extended corporate office. The prevailing rate as per Schedule of Rates for the above building premises at Rajaji Salai is Rs. 740/- (for January 2021) per Sq.m per month or part thereof which is arrived after effecting the compoundable annual escalation of 5% on every year basis. The Details of the allotment and Upfront premium calculation are as below:

8.2 The State Jurisdictional authority has stated that input tax credit is ineligible in the instant case under Section 17(5) (d) of the CGST Act, 2017. The relevant provisions of the Section is extracted below:

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:-

(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.

From the above provisions it is seen that in respect of immovable property the Credit of tax paid on goods or services received on own account, for construction of immovable property is available only when such immovable property is a 'Plant and Machinery'. In the instant case the contract is a lease contract of the built-building for use as an extended corporate office for accommodation of record & as documentation room and it is for the business purpose of the applicant. The lease allotment letter do not spell of lease for any construction activity on the closed space leased for business purposes. Hence, the upfront premium made is the lease rentals as per the allotment order/letter of Chennai Port Trusts and it is nothing but lease rentals paid for the services of 'Renting of Immovable property' for business purpose. From the material on record, we observe that the upfront premium paid is not related to any construction activity of such covered space but against the rental value for the period of rent calculated for the period of lease and collected upfront. Thus, provisions of Section 17(5) (d) is not applicable to the instant case.

As is evident the facts are totally different to the present dispute. The reliance therefore to the aforementioned ruling is not tenable.



[b]M/s. Enfield Apparels Ltd [Case 6/2020]. For the sake of ease of reference, we would like to reproduce certain facts from the ruling:

1.2 One of the assets under liquidation is the leasehold factory unit along with car parking space situated at Paridhan Garment Park at 19 Canal South Road, Kolkata – 700015 (hereinafter the Demised Premises). The West Bengal Industrial Development Corporation Ltd (hereafter the Sub-lessor) granted the applicant possession of the Demised Premises for ninety-nine years under a registered deed of sub-lease dated 06/08/2010 (hereinafter the Deed) on payment of an up-front premium of Rs 5.07 crore and monthly lease rental of Rs 21,000/-. According to clause 12.28 of the Deed, the applicant, after the expiry of at least five years from the date of the Deed coming into force, is entitled to assign to another person the unexpired residual period of the sub-lease after taking written approval of the Sublessor and on payment of transfer fee, being 10% of the prevailing market value of the property as assessed by the Registering Authority of the State Government.

1.3 The Liquidator wants to know whether GST is payable on the consideration receivable on such assignment. If so, what should be the SAC and the rate applicable? He also seeks clarity on whether he can claim input tax credit for the GST paid on the transfer fee. Both the questions are admissible under section 97 (2) (a), (b), (d) & (e) of the GST Act.

4.7 Similarly, the transfer fee charged by the Sub-lessor is in the nature of a consideration for tolerating an act that the applicant is otherwise refrained from doing in terms of clause 12.28 of the Deed. It is also a service classifiable under „Other miscellaneous service“ (SAC 999794) and taxable @ 18% under Sl No. 35 of the Rate Notification. It is the consideration payable to the Sub-lessor for providing a service in the course or furtherance of business, more specifically because business includes supply or acquisition of goods or services in connection with the closure of a business in terms of section 2 (17) (d) of the GST Act. The GST to be paid on such transfer fee is, therefore, admissible as input tax credit.

Again the facts being different to the present dispute, the reliance to the aforementioned ruling is not legally tenable.

31. In the light of the foregoing, we rule as under:

RULING

The applicant is not entitled to take ITC of the CGST & SGST paid by them on the services received from Vapi Enterprise Ltd in the form of transfer of its rights in the leasehold land owned by GIDC in terms of Section 17(5)(d) of the CGST Act, 2017.

(MILIND KAVATKAR)
MEMBER (SGST)

(AMIT KUMAR MISHRA)
MEMBER (CGST)



Place: Ahmedabad

Date: 24/08/2023