TELANGANA STATE AUTHORITY FOR ADVANCE RULING
CT Complex, M.J Road, Nampally, Hyderabad-500001.
(Constituted under Section 96(1) of TGST Act, 2017)

Present:

Sri S.V. Kasi Visweswara Rao, Additional Commissioner (State Tax)
Sri Sahil Inamdar, (I.R.S.), Additional Commissioner (Central Tax)

A.R.Com/21/2022 **Date:15.11.2023**

TSAAR Order No.22/2023

[ORDER UNDER SECTION 98(4) OF THE CENTRAL GOODS AND SERVICES TAX ACT, 2017 AND UNDER SECTION 98(4) OF THE TELANGANA GOODS AND SERVICES TAX ACT, 2017.]

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1. M/s. Kirby Building Systems & Structures India Private Limited, Plot No. 8 To 15, IDA, Phase-III, Pashamylaram, Sangareddy, Telangana- 502 307 (36AACCK5926G2ZH) has filed an application in FORM GST ARA-01 under Section 97(1) of TGST Act, 2017 read with Rule 104 of CGST/TGST Rules.

2. At the outset, it is made clear that the provisions of both the CGST Act and the TGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to any dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the TGST Act. Further, for the purposes of this Advance Ruling, the expression 'GST Act' would be a common reference to both CGST Act and TGST Act.

3. It is observed that the queries raised by the applicant fall within the ambit of Section 97 of the GST ACT. The Applicant enclosed copies of challans as proof of payment of Rs. 5,000/- for SGST and Rs. 5,000/- for CGST towards the fee for Advance Ruling. The Applicant has declared that the questions raised in the application have neither been decided by nor are pending before any authority under any provisions of the GST Act. The application is therefore, admitted.

4. Brief facts of the case and averments of the applicant:

4.1 The applicant M/s. Kirby Building Systems & Structures India Private Limited, Sangareddy are into the manufacture & supply of pre-engineered buildings and storage racking systems. The applicant averred that they are providing canteen and transportation facilities to its employees at subsidized rates as per the terms of the employment agreement entered between the applicant and the employee. The applicant provided copies of employment agreement in Annexure-3 to the application. At Para 8.2 of the agreement it is enshrined that the "Company will provide transportation and canteen facility at subsidized rates as per the policy from time to time".

In light of the above agreement, the applicant further submits that by virtue of Section 46 of the Factories Act, 1948, they are obliged to run and maintain a canteen for their employees. That for this purpose the applicant is procuring canteen services from a third party who inturn is issuing invoice to the applicant by charging GST at a rate of 5%. In this scenario:

i. According to the applicant the canteen facilities provided to its employees do not qualify as supply u/s 7 of the CGST Act and therefore no GST is leviable on the same.
ii. The applicant further relies on clarification provided by CBIC in Circular No. 172/04/2022 dt: 06.07.2022 and the press release no. 73/2017 dt: 10.07.2017 wherein it was clarified by the CBIC that prerequisites provided by the employer to its employees in terms of contractual agreement will not be subjected to GST.
iii. Further the applicant claims eligibility to ITC on the GST paid on canteen services in terms of provisio to Section 17(5)(b) of the CGST Act, 2017 wherein it is provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

The applicant further submitted that they are arranging for transportation facility of the employees and recovering nominal amounts from the employee's salaries towards the cost incurred for providing such transportation facility without any commercial objective and therefore that

i. Such supply of transportation service shall not be treated as supply in terms of Section 17 of the CGST Act, 2017.
ii. That vide Notification No. 12/2017 dt: 28.06.2017, the intra-state supply of transport of passengers in non-air conditioned contract carriage, excluding tourism shall be exempted from the payment of Central tax; and that they are providing a service for transport of passengers in non-air conditioned contract carriage and therefore the service provided by them is exempt from tax.
iii. That the applicant is procuring bus services to facilitate smooth functioning of his business in the course of furtherance of his business and the cost incurred by the applicant pertaining to the transport facility provided to its employees is the expenditure incurred by the applicant in terms of the contract between the employer and employee. Therefore that the applicant is eligible for the input tax credit on the tax paid on hire of such vehicles.

4.2 Company Background:

Kirby Building Systems is a 100% subsidiary of Kuwait- based Alghanim Industries.

Kirby's product list consists of pre-engineered steel buildings (PEB) applicable for factories, warehouses, metro rails, supermarkets, aircraft hangars, sports stadiums, auditoriums, etc. Other products include structural steel, sandwich panels, storage solutions, Kirby Roof (KR), Kirby Wall (KW), Kirby Deep Decking Panel and Kirby Standing Seam Panel (KSS-600).

5. Questions raised:

1. Whether GST is liable to be discharged on the recoveries being made by the applicant from its employees towards the canteen and transportation facilities provided to them?
2. Whether the applicant is eligible to avail input tax credit in respect of the GST paid on inward supplies used for providing canteen and transportation facilities?

6. Personal Hearing:

The Authorized representatives of the unit namely G. Jagannath, Advocate and P. Veera Reddy, General Manager attended the personal hearing held on 15.12.2022. The authorized representatives reiterated their averments in the application submitted.

Opinion expressed by Sri S.V. Kasi Visweswara Rao, Additional Commissioner (State Member), on the issues raised by the applicant.

7. Discussion & Findings:

1. Canteen Services:

As seen from the contentions of the applicant they are obligated to provide canteen facility to their employees under Section 46 of the Factories Act, 1948 and also under

the contractual obligation entered with the employees at clause 8.3 of the copy of the employment agreement provided by them.

The Section 46 of the Factories Act, 1948 prescribes for maintaining the canteens by factories as follows:

"Canteens—
(1) The State Government may make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers."

As seen from the above statutory provisions of the Factories Act, 1948, the factories with a specified number of employees are mandated to provide and maintain a canteen for such employees. Further CBIC in Circular No. 172/04/2022 dt: 06.07.2022 clarified that prerequisites provided by the employer to its employees in terms of contractual agreement will not be subjected to GST. Canteen services being such a prerequisite under Section 46 of the Factories Act, 1948 and also a contractual obligation in terms of employment contract and clause 8.3 therein discussed above, the supply of canteen services by the factory to its employees is exempt from GST.

It is seen from the statement of facts of the applicant and the documentary evidence annexed that they are recovering the amount for providing meals to its employees. They are entitled to recover the same under Rule 68 of AP Factories Rules, 1950 adopted as Telangana Factories Rules. The Rule 68 of the said Factory Rules is abstracted here under:

Rule 68 of AP Factory Rules, 1950

Prices to be charged

(1) Food, drinks and other items served in the canteen shall be served on a non-profit basis and the prices charged shall be subject to the approval of the Canteen Managing Committee.

Provided that, where the canteen is managed by a Worker's Co-operative Society in accordance with the provisions of sub-rule (6) of Rule 70, such society may be allowed to include in the working charges to be incurred for the food, the food stuff served, a profit up to five per cent on its working capital employed in running the canteen.

(2) In computing the prices referred to in sub-rule (1) the following items of expenditure shall not be taken into consideration, but will be borne by the occupier

(a) the rent for the land and building;

(b) the depreciation and maintenance charges of the building and equipment provided for the canteen;

(c) the cost of purchase, repairs and replacement of equipment including furniture, crockery, cutlery, and utensils;

(d) the water charges and expenses for providing lighting and ventilation

(e) the interest for the amount spent on the provision and maintenance of the building, furniture and equipment provided for the canteen;

(f) the cost of fuel required for cooking or for heating stuffs or water; and

(g) the wages to the employees servicing of the canteen and the cost of uniforms, if any provided to them

(3) The charges per quantity of foods stuffs, beverages and any other item served in the canteen shall be conspicuously displayed in the language understood by the majority of workers.

If the applicant has recovered all the above costs from the employees by availing the above facility in Rule 68 of Factories Rules, then it would not be a cost to the company and hence not an input on which input tax credit can be claimed. However if the applicant has recovered only nominal amounts and the applicant has recorded these costs borne by them in their books of accounts for providing the canteen services then they are eligible for input tax credit as enumerated in the proviso to Section 17(5)(b).

2. Transportation services:
The Notification No. 12/2017 dt:28.06.2017 at serial no. 15 exempts transport of passengers by non-air conditioned contract carriage as well as stage carriage. Therefore the supply of transport services by the applicant to their employees is exempt under this notification.

However the applicant is not under any statutory obligation to provide these services to his employees. Therefore the proviso to Section 17(5)(b) is not applicable for claiming input tax credit on services engaged by him from third party for this purpose.

8. In view of the foregoing, the ruling is given by State Member as under:

Questions	Ruling
1. Whether GST is liable to be discharged on the recoveries being made by the applicant from its employees towards the canteen and transportation facilities provided to them?	Please see detailed discussion above.
2. Whether the applicant is eligible to avail input tax credit in respect of the GST paid on inward supplies used for providing canteen and transportation facilities?	Please see detailed discussion above
3. Whether GST is liable to be discharged on the recoveries being made by the applicant from its employees towards the transportation facilities provided to them	Please see detailed discussion above
4. Whether the applicant is eligible to avail input tax credit in respect of the GST paid on inward supplies used for providing transportation facilities?	Please see detailed discussion above

(S.V. KASI VISWESWARA RAO)
ADDL.COMMISSIONER(STATETAX)

Opinion expressed by Sri Sahil Inamdar, Additional Commissioner, (Central Member), on the issues raised by the applicant are as given below.

9. Discussion & Findings:

9.1 Canteen Services:

M/s. Kirby Building Systems & Structures India Private Limited, Sangareddy contended that they are obligated to provide canteen facility to their employees under Section 46 of the Factories Act, 1948 and also under the contractual obligation entered with the employees at clause 8.3 of the copy of the employment agreement provided by them.

9.2 The Section 46 of the Factories Act, 1948 prescribes for maintaining the canteens by factories as follows:

> *"Canteens—*
> *(1) The State Government may make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers."*

As seen from the above statutory provisions of the Factories Act, 1948, the factories with a specified number of employees are mandated to provide and maintain a canteen for such employees.

9.3 Clarification on various issues of section 17(5) of the CGST Act as per point no.3 of Circular No. 172/04/2022-GST dated 6 th July, 2022 issued by CBIC is produced below:

> *Whether the proviso at the end of clause (b) of sub-section (5) of section 17 of the CGST Act is applicable to the entire clause (b) or the said proviso is applicable only to sub-clause (iii) of clause (b)?*
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> 1. *Vide the Central Goods and Service Tax (Amendment Act) 2018, clause (b) of sub-section (5) of section 17 of the CGST Act was substituted with effect from 01.02.2019. After the said substitution, the proviso after subclause (iii) of clause (b) of sub-section (5) of section 17 of the CGST Act provides as under: "Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force."*
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> 2. *The said amendment in sub-section (5) of section 17 of the CGST Act was made based on the recommendations of GST Council in its 28th meeting. The intent of the said amendment in subsection (5) of section 17, as recommended by the GST Council in its 28th meeting, was made known to the trade and industry through the Press Note on Recommendations made during the 28th meeting of the GST Council, dated 21.07.2018. It had been clarified "that scope of input tax credit is being widened, and it would now be made available in respect of Goods or services which are obligatory for an employer to provide to its employees, under any law for the time being in force."*
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> 3. *Accordingly, it is clarified that the proviso after sub-clause (iii) of clause (b) of sub-section (5) of section 17 of the CGST Act is applicable to the whole of clause (b) of sub-section (5) of section 17 of the CGST Act.*

9.4 Section 17(5)(b) of CGST/TGST Act'2017 states:

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:—

(b) [the following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.]

9.5 As per Section 17(5)(b) of CGST/TGST Act'2017 input tax credit in respect of such canteen facilities shall be available, where it is obligatory for an employer to provide the same to its employees under Factories Act, 1948 being in force. The same is clarified by Circular No. 172/04/2022-GST dated 6 th July, 2022. As stated by the taxpayer he is a registered unit under Factories Act, 1948.

9.6 Perquisites provided by employer to the employees as per contractual agreement as per point no.5 of Circular No. 172/04/2022-GST dated 6th July, 2022 is produced below:

Whether various perquisites provided by the employer to its employees in terms of contractual agreement entered into between the employer and the employee are liable for GST?

1. Schedule III to the CGST Act provides that "services by employee to the employer in the course of or in relation to his employment" will not be considered as supply of goods or services and hence GST is not applicable on services rendered by employee to employer provided they are in the course of or in relation to employment.

Any perquisites provided by the employer to its employees in terms of contractual agreement entered into between the employer and the employee are in lieu of the services provided by employee to the employer in relation to his employment. It follows there from that perquisites provided by the employer to the employee in terms of contractual agreement entered into between the employer and the employee, will not be subjected to GST when the same are provided in terms of the contract between the employer and employee.

9.7 CBIC as per point no.5 of Circular No. 172/04/2022 dt: 06.07.2022, as detailed supra, clarified that perquisites provided by the employer to its employees in terms of contractual agreement will not be subjected to GST. Thus the Canteen services, in the present case, which are offered as a perquisite as stated by the

taxpayer to their employees in terms of employment contract and clause 8.3 therein discussed above and which is maintained under Section 46 of the Factories Act, 1948 as a contractual obligation, is exempt from payment of GST.

9.8.1 Transportation services rendered to employees:

The applicant submitted that they are arranging transportation facility to the employees and recovering nominal amounts from their salaries towards the cost incurred for providing such transportation facility without any commercial objective.

However the applicant is not under any statutory obligation to provide these services to his employees. Therefore the proviso to Section 17(5)(b) is not applicable for claiming input tax credit on services engaged by him from third party for this purpose.

9.8.2 Section 17(5) of CGST/TGST Act'2017 states:

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) [motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:—

(A) further supply of such motor vehicles; or

(B) transportation of passengers; or

(C) imparting training on driving such motor vehicles;

(aa) vessels and aircraft except when they are used—

(i) for making the following taxable supplies, namely:—

(A) further supply of such vessels or aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

(D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):

Provided that the input tax credit in respect of such services shall be available—

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;

(ii) where received by a taxable person engaged—

(I) in the manufacture of such motor vehicles, vessels or aircraft; or

(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;]

(b) [the following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of

the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(iv) membership of a club, health and fitness centre; and

(v) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.]

(g) goods or services or both used for personal consumption;

9.9 The facility of transportation provided by the applicant to their employees is merely in the nature of service for personal use.

9.10 The transportation of employees by picking them from their residence to the office premises is not an activity which could be said to be a part of business activity done by the applicant. It is merely for personal convenience of the employees to enable them to reach the premises of the office so as to participate in the Business activity.

9.11 Hon'ble High court of Bombay in Solar Industries India Limited Vs Commissioner, Central Excise, Customs and Service Tax (Bombay High Court) held that Cenvat Credit is not eligible on facility of transportation provided by the appellant to its employees as same was merely in the nature of service for personal use or consumption of its employees. The substantial question of law involved in the judgement is:

1. Whether the services provided by a Manufacturer of transportation of its employees, from their designated pick up points to their workplace, by Bus, would amount to a service for personal use or consumption of any of the employees?"

2. Whether the activity of providing bus transport services to its employees, at the cost of the Manufacturer, to reach factory in time and the expenses incurred by the Manufacturer in providing such service, (which amount is taken into consideration, while determining the final price of the product) can be said to be a component leading to the manufacturing activity, so as to entitle the Manufacturer, the benefit of Cenvat Credit ?

<u>The view held by Hon'ble High court is produced below:</u>

"The transportation of employees from distance of about 40 kms for reaching factory is not an activity which could be said to be a part of manufacturing activity. It is merely for personal convenience of the employees to enable them to reach the premises of the factory so as to thereafter participate in the manufacturing activity.

In this regard, the reliance is placed on the judgment of the Karnataka High Court in Toyota Kirloskar Motor Private Limited vs THE COMMISSIONER OF CENTRAL TAX wherein food and beverages were provided by the appellant therein to its employees by engaging the services of an outdoor caterer. This was sought to be treated as "input service" since there was a statutory duty on the appellant to establish a canteen for its employees. Considering the effect of definition of "input service" after 01.04.2011 it was found that establishment of such canteen was primarily for personal use or consumption of the employees

and after such amendment no cenvat credit could be availed. This view has been upheld by the Hon'ble Supreme Court while dismissing the Special Leave Petition on 18.11.2021 preferred by the said appellant. The facts of the present case also indicate that the facility of transportation provided by the appellant to its employees was merely in the nature of service for personal use or consumption of its employees."

9.12 It is pertinent to note that the Hon'ble high court held its view on the nature of services, under contention between taxpayer and department, not withstanding that they are not explicitly categorized as service for personal use or consumption of its employees under the provisions of the existing laws. Thus we find that the ratio of court judgment is applicable in the current taxation regime and particularly to the present issue contended by the taxpayer.

9.13 Section 17(5)(g) of CGST/TGST Act'2017 states that input tax credit shall not be available in respect of goods or services or both used for personal consumption.

9.14 As per Section 2(60) of CGST/TGST Act'2017 "'input service' means any service used or intended to be used by a supplier in the course or furtherance of business;"

9.15 Provision of service of transportation of employees from residence to office premises doesn't come under definition of 'input service' as it is for personal consumption or comfort of employees but not used in the course of business as the business of the applicant is to manufacture & supply of pre-engineered buildings and storage racking systems but not supply of transportation of employees or passengers.

9.16 The service of transportation of employees by employer is not an 'input service' as per Section 2(60) of CGST/TGST Act'2017. The applicant is not under any statutory obligation to provide these services to his employees and the services provided comes under category of personal consumption which makes the applicant ineligible to avail input tax credit on the invoices issued to him by the transporter for transportation of employees as per Section 2(60) of CGST/TGST Act'2017 read with Section 17(5)(g) of CGST/TGST Act'2017.

10 In view of the foregoing, the ruling is given by Central Member as under:

Questions	Ruling
1. Whether GST is liable to be discharged on the recoveries being made by the applicant from its employees towards the canteen facilities provided to them?	The perquisites provided by the employer, canteen services in the present case, to their employees in terms of the contractual agreement between the employer and his employees as submitted by them, are in lieu of the services provided by them to their employees in relation to employment. Therefore the perquisites provided by the employer to the employee, in terms of contractual agreement, will not be subjected to GST. However if the employer makes taxable supply of canteen services to employees by charging consideration for the purpose of business, instead of providing them as a perquisite, the same will be subject to payment of GST, at prescribed rates, as per provisions of CGST/TGST Act'2017.
2. Whether the applicant is eligible to avail input tax credit in respect of the GST paid on inward supplies used for providing canteen facilities?	As per Section 17(5)(b) of CGST/TGST Act'2017 input tax credit in respect of such canteen facilities shall be available, where it is obligatory for an employer to provide the same to its employees under Factories Act, 1948.

3. Whether GST is liable to be discharged on the recoveries being made by the applicant from its employees towards the transportation facilities provided to them?	The transportation services, if provided as a perquisite by the employer to the employee, in terms of contractual agreement between the employer and employee, will not be subjected to GST. However if the employer makes taxable supply of transportation services to employees by charging consideration for the purpose of business, instead of providing them as a perquisite, the same will be subject to payment of GST, at prescribed rates, as per provisions of CGST/TGST Act'2017.
4. Whether the applicant is eligible to avail input tax credit in respect of the GST paid on inward supplies used for providing transportation facilities?	Provision of service of transportation of employees from residence to office premises is for personal consumption or comfort of employees but not an activity which is part of business as the business of the applicant is to manufacture & supply of pre-engineered buildings and storage racking systems but not supply of transportation of employees or passengers. Input tax credit shall not be available in respect of goods or services or both used for personal consumption as per Section 17(5)(g) of CGST/TGST Act'2017.

(SAHIL INAMDAR)
ADDL.COMMISSIONER(CENTRAL TAX)

From the above, the Authority for Advance Ruling concurred in the Ruling and has discussed it independently.

[Under Section 100(1) of the CGST/TGST Act, 2017, any person aggrieved by this order can prefer an appeal before the Telangana State Appellate Authority for Advance Ruling, Hyderabad, within 30 days from the date of receipt of this Order]

To
M/s. Kirby Building Systems & Structures
India Private Limited, Plot No. 8 To 15,
IDA, Phase-III, Pashamylaram, Sangareddy,
Telangana- 502 307.

Copy submitted to :
1. The Commissioner (State Tax) for information.
2. The Commissioner (Central Tax) Medchal Commissionerate, III Floor, Medchal GST Bhavan, 11-4-649/B, Lakdikapul, Hyderabad – 500 004

Copy to:
3. The Assistant Commissioner (ST) Jeedimetla -I Circle.