

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

BENCH

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

Preamble

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

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

| | |
|----------------------------------|--|
| Name of the applicant | M/s Enfield Apparels Ltd |
| Address | A-202, Premises No. 19, Canal South Road, Kolkata – 700015 (correspondence address: Kanchan Dutta, KGRS & CO, Chatterjee International Centre, 17 th Floor, Room No. 13, 33A J L Nehru Road, Kolkata – 700071) |
| GSTIN | 19AABCE8762F4ZC |
| Case Number | 06 of 2020 |
| ARN | AD190620001791D |
| Date of application | 15/6/2020 |
| Order number and date | 05/WBAAR/2020-21 dated 10/08/2020 |
| Applicant's representative heard | Arup Dasgupta, FCA |

1. Admissibility of the Application

1.1 The National Company Law Tribunal (hereinafter NCLT), Kolkata Bench, passed an order on 06/08/2018, initiating the corporate insolvency resolution process (hereinafter CIRP), admitting the applicant as the corporate debtor, and appointed Sri Kanchan Duatta as Interim Resolution Professional (IRP). The Committee of Creditors (hereinafter CoC) subsequently confirmed Sri Dutta as the Resolution Professional (RP). During the CIRP, the RP and the CoC did not receive any resolution plan. The NCLT, therefore, passed another order on 04/04/2019 under section 33 of the Insolvency & Bankruptcy Code, 2016 (hereinafter the IBC) to start the process of liquidating the corporate debtor and appointed Sri Dutta as the Liquidator. He has obtained separate registration as a distinct person (GSTIN

19AABCE8762F4ZC) in terms of Notification No. 11/2020 – Central Tax dated 21/03/2020).

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 Sub-lessor 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.

1.4 The applicant declares that the questions raised are not pending before or disposed of by any authority in any proceedings under the GST Act. The concerned officer from the revenue does not object to the admission of the application. The application is, therefore, admitted.

2. Submissions of the Applicant

2.1 The applicant submits that leasehold right to immovable property is an immovable property. He refers to section 3 (26) of the General Clauses Act, 1897, which defines immovable property to include land, benefits to arise out of the land and things attached to the earth, or permanently fastened to anything attached to the earth. The phrase 'benefits to arise out of land' is relevant. According to the applicant, it means the interest in land. Even the transfer of development rights in the land through joint development is treated as the sale of land. The applicant refers to several case laws in support of his argument [Mati Lal Daga and Ors vs (Sri Sri) Iswar Radha Damodar, AIR 1936 Cal 727; Girnar Traders vs State of Maharashtra, (2011) 3 SCC 1; Chheda Housing Development vs Bibijan Shaikh Farid and Ors, (2007) 3 MhLJ 402].

2.2 The applicant, therefore, concludes that lease simpliciter alone should attract levy of GST. Assignment of leasehold rights on land, on the other hand, is nothing but the transfer of immovable property akin to the sale of land and buildings, and no GST is leviable on such assignments. 'Sale' means the transfer of property or title for a price. Assignment of the leasehold rights effectively transfers possession and title to the assignee for a price. It is nothing but a sale of the building.

2.3 At this point the applicant tries to distinguish his case from the judgments in Builders Association of Navi Mumbai [(2018) 12 GSTL 232 (Bom)] and Greater

Noida Industrial Development Authority [(2015) 40 STR 95]. He contends that the High Courts in the above cases have dealt with leasing, which is different from the assignment of leasehold rights. The rulings pronounced based on those two judgments [Greentech Mega Food Park Pvt Ltd, (2019) 27 GSTL 143 (AAR, Rajasthan) and Goa Tourism Development Corporation Ltd, (2018) 19 GSTL 700 (AAR, Goa)], therefore, are not tenable.

2.4 The applicant now draws attention to the question of admissibility of the input tax credit, being the GST to be paid on the transfer fee. According to the applicant, such transfer fee is the consideration payable to the Sub-lessor for rendering service in the course or furtherance of business, more specifically because business includes in terms of section 2 (17) (d) of the GST Act supply or acquisition of goods or services in connection with the closure of a business. The applicant, therefore, argues that GST to be paid on such transfer fee is admissible as input tax credit in the event it is ruled that the assignment of leasehold right is a supply of taxable service.

3. Submissions of the concerned officer from the revenue

3.1 The applicant's argument described in paragraphs 2.1 to 2.3 above is not discussed in the submissions of the concerned officer from the revenue. He submits that the assigning of the sub-lease is a service classifiable under the heading 'Other Miscellaneous Services' (SAC 99979) and taxed accordingly.

4. Observations and findings of the Authority

4.1 Section 3(26) of the General Clauses Act, 1897 defines "immovable property" as to include land, benefits to arise out of the land, and things attached to the earth, or permanently fastened to anything attached to the earth. Applicability of the General Clauses Act, 1897 in the context of a Special Act like the CGST Act, 2017, however, is limited to areas where no express provisions are made under the said Special Act.

4.2 Scope of supply under section 7 (1) of the GST Act includes all forms of supply of goods and services, including a sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made. Section 7 (1A) read with Schedule II under the GST Act provides which of such supplies shall be treated as supply of goods or services. Paragraph 2 of Schedule II provides that with respect to transactions relating to land and buildings, any lease, tenancy, easement, license to occupy the land, letting out of a building including a commercial, industrial or residential complex for business or commerce is the supply of services. In other words, benefits arising from land in the forms specified in paragraph 2 of Schedule II are not to be treated as transactions in immovable property but as the supply of service for the purpose of the GST Act. The Deed, therefore, confers upon the applicant no better title to the Demised Premises other than a service contract of lease. He can, therefore, transfer to the assignee only his right to receive the service of the lease for the unexpired period after obtaining prior approval of the Sub-lessor on payment of the transfer fee.

4.3 Clause 11 of the Deed provides the rights of the Sub-lessee. They include the right to have peaceful possession of the Demised Premises on regular payment of

the lease rental and compliance to the conditions and restrictions enumerated under clause 12 of the Deed. A conjoint reading of the two clauses makes it clear that the Sub-lessor allows the applicant possession of the Demised Premises for the manufacture of garments and textiles. The Demised Premises shall not be used for residential use or any unlawful activity, nor shall be structurally altered in any way. The sub-lease may be terminated if the Sub-lessee fails to pay the lease rental or maintenance charges, fails or delays in commencing commercial operation, discontinues the business, fails to maintain good labour practice or breaches any terms of the Deed.

4.4 It is evident from the above discussion that the applicant, apart from the conditional possession of the Demised Premises, enjoys no title or ownership, which is central to sale of any immovable property within the meaning of section 54 of the Transfer of Property Act, 1882. The applicant's interest in the benefits arising out of the Demised Premises is limited to sub-leasing in terms of the Deed, and he is capable of transferring the benefits only to that extent. The assignment, therefore, does not amount to transfer of any benefit other than leasehold rights in terms of the Deed for the unexpired period of the lease and is no transfer of any immovable property in the context of the GST Act.

4.5 The applicant's reference to the case laws where joint development right is treated as the sale of an immovable property (refer to para 2.1 above) needs to be distinguished. None of those cases is decided in the context of the GST Act, where the provisions of paragraph 2 of Schedule II carve out certain benefits arising out of the land from the realm of immovable property and treat them as 'service' for the purpose of the GST Act. The reference to the above case laws is, therefore, not relevant.

4.6 The activity of assignment is in the nature of agreeing to transfer one's leasehold rights. It does not amount to further sub-leasing, as the applicant's rights as per the Deed stands extinguished. Neither does it create fresh benefit from land other than the leasehold right. It is like a compensation for agreeing to do the transfer of the applicant's rights in favour of the assignee. It is a service classifiable under 'Other miscellaneous service' (SAC 999792) and taxable @ 18% under SI No. 35 of Notification No. 11/2017 – CT (Rate) dated 28/06/2017 (State Notification No. 1135-FT dated 28/06/2017), as amended from time to time (hereinafter collectively called the Rate Notification).

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 SI 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.

Based on the above discussion, we rule as under,

RULING

The activity of assignment is in the nature of agreeing to transfer one's leasehold rights. It does not amount to further sub-leasing, as the applicant's rights as per the Deed of sub-lease stands extinguished after assignment. Neither does it create fresh benefit from the land. It is in the nature of compensation for agreeing to do the transfer of the applicant's rights in favour of the assignee. It is a service classifiable under 'Other miscellaneous service' (SAC 999792) and taxable @ 18% under SI No. 35 of Notification No. 11/2017 – CT (Rate) dated 28/06/2017 (State Notification No. 1135-FT dated 28/06/2017), as amended from time to time.

The transfer fee charged by the Sub-lessor 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.

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

(SUSMITA BHATTACHARYA)

Member

West Bengal Authority for Advance Ruling

(PARTHASARATHI DEY)

Member

West Bengal Authority for Advance Ruling