WEST BENGAL APPELLATE AUTHORITY FOR ADVANCE RULING
AT 14, BELIAGHATA ROAD, KOLKATA-700015

Before:

Mr Shrawan Kumar, Member
Mr Devi Prasad Karanam, Member

In the matter of

Appeal Case No. 01/WBAAAR/APPEAL/2025 dated 12.02.2025

- And -

In the matter of:

An Appeal filed under Section 100 (1) of the West Bengal Goods and Services Tax Act, 2017/ Central Goods and Services Tax Act, 2017, by Assistant Commissioner, Bidhan Nagar Division, CGST & CX, Kolkata North Commissionerate against the Ruling passed by the West Bengal Advance Ruling Authority vide Advance Ruling Order No - 18/WBAAR/24-25 dated 14.01.2025.

Present for the Appellant: Mr. Subrata Mallik, Assistant Commissioner, Bidhan Nagar Division, CGST & CX, Kolkata North Commissionerate

Present for the Respondent: Mr. Vikas Agarwal, Ld. CA & Mr. Priyajit Ghosh, Ld. CA.

Matter heard on: 17.04.2025

Date of Order: 13.05.2025

At the outset we would like to make it clear that the provisions of the Central Goods and Services Tax Act, 2017 and West Bengal Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act, 2017' and the 'SGST Act, 2017') are in pari materia and have the same provisions in like matter and differ from each other only on a few specific provisions. Therefore, unless a mention is particularly made to such dissimilar provisions, a reference to the CGST Act, 2017 would also mean reference to the corresponding similar provisions in the SGST Act, 2017.

1. The WBAAR vide order dated 14.01.2025 previously held that Supply of services as provided by the applicant would be covered by serial no 17(viii) of the Notification No. 11/2017– Central Tax (Rate) dated 28.06.2017 as leasing or rental services and as a mixed supply, would attract tax @ 18%.

2. Aggrieved by the said ruling given by the WBAAR, Assistant Commissioner, Bidhan Nagar Division, CGST & CX, Kolkata North Commissionerate (hereinafter referred to as "the Appellant") filed an appeal before the West Bengal Appellate Authority for Advance Ruling (hereinafter referred to as the WBAAAR) against the Ruling passed by the West Bengal Advance Ruling Authority vide Advance Ruling Order No - 18/WBAAR/24-25 dated 14.01.2025.

3. The respondent, TCG Urban Infrastructure Holdings Private Limited provides air conditioning system, fire sprinkler system, DG sets, electrical installations etc to various tenants of the properties held by their subsidiaries, Bengal Intelligent Parks Private Limited (BIPPL) and BIP Developers Private Limited (BIPDPL) and has classified such services under SAC heading 997314 in terms of serial no 17(iii) of the Notification No. 11/2017 Central Tax (Rate) dated 28.06.2017 and has been paying taxes @28% since inception of the GST regime.

4. The appellant filed the instant appeal on grounds that:

(i) WBAAR has pronounced that "supply of services as provided by the applicant would be covered by serial no. 17(viii) of the Notification11/2017 Central Tax (Rate) dated 28.06.2017 as leasing or rental services and as a mixed supply would attract tax @ 18%.

(ii) WBAAR has erred in observing that "The individual machinery as 'goods' is not leased out to those lessees" as even after installation, air conditioners, fire extinguishers etc retain their character. They can be dismantled and moved out from premises without demolishing the immovable property. They are mere fixtures and do not form part of immovable property thereby do not lose their character as 'goods. The WBAAR has thus erred in holding that these goods when installed, lose their character as goods.

(iii) In this occasion, the appellant has relied upon the judgement passed by the Hon'ble Supreme Court of India dated 20-11-2024 in the matter of M/s Bharati Airtel Ltd vs The Commissioner of Central

Excise, Pune [Neutral Citation: 2024 INSC 880] has laid down a test to determine whether something is to be treated as "goods".

(iv) Relevant paragraphs of the judgement have been quoted as below:

"11.8.1 We may summarise some of the principles applied by the Courts in the decisions referred to above to determine the nature of the property as follows:

1. Nature of annexation: This test ascertains how firmly a property is attached to earth. If the property is so attached that it cannot be removed or relocated without causing damage to it, it is an indication that it is immovable.

2. Object of annexation: If the attachment is for the permanent beneficial enjoyment of the land, the property is to be classified as immovable. Conversely, if the attachment is merely to facilitate the use of the item itself, it is to be treated as movable, even if the attachment is to an immovable property.

3. Intendment of the parties: the intention behind the attachment, which express or implied, can be determinative of the nature of the property. If the parties intend that the property in issue is for permanent addition to the immovable is not meant to be permanent, it indicates that it is movable.

4. Functionality Test: If the article is fixed to the ground to enhance the operational efficacy of the article and for making it stable and wobble free, it is an indication that such fixation is for the benefit of the article, such the property is movable.

5. Permanency test: If the property can be dismantled and relocated without any damage, the attachment cannot be said to be permanent but temporary and it can be considered to be movable.

6. Marketability Test: If the property, even if attached to the earth or to an immovable property, can be removed and sold in the market, it can be said to be movable."

"11.9.9 Applying the tests of permanency, intendment, functionality and marketability, it is quite clearly evident that these items are not immovable but movable within the meaning of Section 3 of the Transfer of Property Act read with Section 3(36) of the General Clause Act.

If we consider the nature of annexation of the tower to the earth, it is seen that the annexation is not for permanent annexation to the land or the building as the tower can be removed or relocated without using damage to it.

It is also to be noted that the attachment of the tower to the building or the land is not for the permanent enjoyment of the building or the land.

Further, the tower is fixed to the land or building for enhancing the operational efficacy and proper functioning of the antenna which is fixed on the tower by making it stable and wobble free.

The fact that the tower, if required can be removed, dismantled in the CKD and SKD and sold in the market is not disputed.

Application of the tests evolved and discussed above on these items clearly points to the movability as opposed to immovability of these items. We are, thus, of the view that mobile towers and PFBs are movable properties and hence, 'goods."

The ratio laid down in this judgement is squarely applicable in the instant matter as well, since by applying these test, air conditioners and other equipment provided on lease by the applicant in the instant issue are also movable properties and hence, 'good'.

(v) Consequent to the erroneous reasoning as outlined in para 3.2 the service has been held to fall under SI No. 17(viii) of the said Notification by the WBAAR. In fact, SI No 17(viii) thereto is the 'residual entry', when the services cannot be classified under clauses (i), (ii), (iii), (iv), (vi) and (vii)(a) of SI No 17 under SAC heading 9973 ["leasing or rental services, without operator"]

(vi) If the leased items had been correctly held as 'goods' as they should have been, as discussed above, the correct entry would have been either SI No. 17(iii) of the said Notification ["Transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration"] which applicant has self-classified from the inception of the GST or SI No. 17(vii)(a)[Leasing or renting of goods], depending of the contract. Either classification prescribes "the same rate of tax as on supply of like goods involving transfer of title in goods".

5. In course of personal hearing, the appellant reiterated the grounds of appeal as stated above.

6. The authorized representative of the respondent has also cited the judgement passed by the Hon'ble Supreme Court in M/s Bharati Airtel Ltd vs The Commissioner of Central Excise, Pune [2006 (3) TM1 – Supreme Court] along with a judgement in the case of Bharat Sanchar Nigam Ltd. Vs. Union of India [2006 (3) TM1 – SC].

7. The respondent has submitted that the with reference to the judgement passed by the Hon'ble Supreme Court of India in M/s Bharati Airtel Ltd vs The Commissioner of Central Excise, Pune, the applicability of the tests of permanency, functionality, intendment and marketability in this case can be analysed as follows:

Principle	**Facts in case of Telecom Tower**	**Facts in case of the respondent**
Nature of annexation	Towers and PFBs are attached to the earth but can be dismantled without damage	The subject assets and fitouts are permanently affixed to the building and cannot be removed without causing damage indicating their immovable nature.
Object of Annexation	Towers and PFBs are attached to the earth for stability and functionality, not for permanent enjoyment of the land.	The assets and fit-outs are intended for the permanent beneficial enjoyment of the building.
Intendment of	The intention is to	The intention is to

the Parties	provide stability to the antenna for effective functioning, not permanent attachment.	permanently integrate the assets and fit-outs with the building.
Functionality Test	Towers and PFBs are fixed to enhance the operational efficacy of antennas.	The assets and fit-outs are fixed to the building to become an integral part of it, not just for operational efficacy.
Permanency Test	Towers and PFBs can be dismantled and relocated without damage.	The assets and fit-outs cannot be dismantled and relocated without incurring substantial damage.
Marketability Test	Towers and PFBs can be dismantled and sold in the market.	The assets and fit-outs, once integrated, cannot be removed and sold separately in the market.

8. Thus, the respondent submitted that in view of the application of the above principles to the present facts, the subject assets are to be classified as immovable property. The fitted assets are permanently affixed, not intended for removal or independent use, and do not retain their marketability post-installation. Accordingly, such assets cannot be regarded as 'goods' for the purposes of the applicable legal provisions.

9. Moreover, the respondent argued that without prejudice to the submissions made above regarding the immovable nature of the fitted assets, even assuming that the fitted assets qualify as 'goods', the transactions in question do not involve a transfer of the right to use such goods. As such, the transactions do not fall within the scope of Entry No. 17(iii) of Notification No. 11/2017-Central Tax (Rate), dated 28th June 2017, which covers "Transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration."

10. In this regard, the respondent has relied on the landmark judgment of the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd. (BSNL) v. Union of India [2006 (3) TMI 1 – SC], wherein the Hon'ble Court laid down five essential tests that must be cumulatively satisfied for a transaction to qualify as a "transfer of the right

to use goods." These tests, as enunciated by Justice Dr. A.R. Lakshmanan, are as follows:

Principles enunciated in the SC BSNL Judgement	**Facts in case of the respondent**
There must be goods available for delivery	The assets and fit outs are part of the building's infrastructure and are neither delivered nor handed over to the lessees. They remain installed and maintained exclusively by TCGUIH.
There must be a consensus ad idem as to the identity of the goods;	In this case the consensus is not on the right to use the identified goods rather the ad idem is on the benefits from use of these goods. The lease charges include maintenance by TCGUIH. If it were a case of transfer of the right to use, the maintenance obligation would typically fall on the lessees.
There must be a consensus ad idem as to the identity of the goods;	In this case the consensus is not on the right to use the identified goods rather the ad idem is on the benefits from use of these goods. The lease charges include maintenance by TCGUIH. If it were a case of transfer of the right to use, the maintenance obligation would typically fall on the lessees.
For the period during which the transferee has such legal right, it has to be the exclusion to the transferor this is the necessary concomitant of the plain language of the statute - viz. a "transfer of the right	No exclusive possession is granted. The fit-outs are used by multiple tenants in common areas. TCGUIH retains all control and undertakes regular maintenance, thereby negating the possibility of exclusive right or control by any lessee.

to use" and not merely a licence to use the goods;	
Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others	The respondent continues to offer similar rights to other lessees, and the agreements clearly state that there is no transfer of legal possession. Clause 1.2 of the lease agreement explicitly provides that the assets remain in the legal possession of the lessor.

11. Thus, the respondent submits that the essential elements constituting a "transfer of the right to use goods," as laid down in the BSNL case, are not fulfilled in the present matter. The tenants neither obtain exclusive possession nor control, nor is there a delivery or legal transfer of any specific goods. Therefore, the transactions in question are in the nature of service agreements for the use of fitted assets, where the ownership, possession, and operational control of the fitted assets remain entirely with the respondent. The lease merely provides access to a facility outfitted with certain infrastructure, without conferring any transferable right to use goods in the legal sense.

12. Furthermore, the respondent relies on the previous WBAAR ruling passed vide Order No.29/WBAAR/2023-24 Dated: - 31-1-2024 in M/s. Sun Knowledge Private Limited Case No. WBAAR 20 of 2023 which dealt with exactly the same issue as in the present case. In that case, the WBAAR held that the supply of services by the respondent to Sun Knowledge Private Limited, would attract GST @ 18% under serial no 17(viii) of the Notification No. 11/2017– Central Tax (Rate) dated 28.06.2017. The revenue did not exercise its rights u/s 100 of CGST Act to file an appeal before the Hon'ble AAAR. Hence, the revenue has acquiesced to the position taken by the WBAAR and cannot now raise its objections in the present case, which involves the same facts and circumstances. The principle of consistency and finality of the advance rulings requires that the revenue should not be allowed to take a different stand in a subsequent case on the same issue.

13. In this context, it appears that the crux of the issue is whether the subject assets are to be classified as immovable property or as goods. Both the appellant and the

respondent had relied on judgements passed by Hon'ble Supreme Court arguing from both sides applying respective tests and principles.

14. The case of 29/WBAAR/2023-24 dated 31.01.2024, on similar issue has been pointed out by the respondent where the WBAAR has pronounced its ruling that supply on account of hiring of electrical equipment, sprinkler system comprising fire detectors for true ceiling, air conditioning system up to the floor Air Handling Unit with existing ducting and diffusers, DG set emergency power supply would attract tax @ 18%. No appeal appears to have been filed on this and it did not come before WBAAAR. A ruling in another case cannot be held to be binding precedent. Section 103 of the CGST Act, 2017 specifically stipulates that an Advance Ruling pronounced would be binding to that particular applicant who had sought it and the same cannot be a precedent and applied to others.

15. It is needless to mention that the entire issue depends on the various clauses of the agreement entered into between the concerned parties wherefrom the actual nature of use of the assets concerned is required to be ascertained, i.e. whether they remain to be goods or become a part of an immovable property, which is required to be examined in depth. Fact that respondent was already paying GST at the rate of 28% is also relevant here.

16. Thus, in light of the above, we deem it appropriate to remand the case to the Authority for Advance Ruling, i.e. the WBAAR for fresh decision. The WBAAR will take into consideration all aspects of the matter and decide the case afresh.

17. In view of the foregoing, we pronounce our ruling as under:

Ruling:

Without delving into the merit of the case, we set aside the Advance Ruling Order No. 18/WBAAR/24-25 dated 14.01.2025 issued by the WBAAR in the case of the appellant and remand the case to the WBAAR for fresh decision after considering all aspects of the matter.

Send a copy of this order to the Appellant and the Respondent for information.

Sd/-
(Devi Prasad Karanam)
Member, West Bengal Appellate
Authority for Advance Ruling

Sd/-
(Shrawan Kumar)
Member, West Bengal Appellate
Authority for Advance Ruling