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

Before:
Mr. A.P.S Suri, Member
Ms. Smaraki Mahapatra, Member

In the matter of

Appeal Case No. 01/WBAAAR/APPEAL/2019 dated 06.02.2019

- 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 the GGL Hotel and Resort Company Ltd.

Present for the Appellant:	Sri Rip Das, FCA , Sri Saurav Sharma, CS, Sri Rahul Gupta, FCA and Sri Vikash Agarwal, FCA
Present for the Respondent:	Sri Subrata Kar, Assistant Commissioner, CGST & CX, Chowringhee Division, North Commissionerate

Matter heard on: 11.04.2019
Date of Order: 03.05.2019

1. This Appeal has been filed by the GGL Hotel and Resort Company Ltd. (hereinafter referred to as "the Appellant") on 06.02.2019 against Advance Ruling No. 30/WBAAR/2018-19 dated 08.01.2019, pronounced by the West Bengal Authority for Advance Ruling in the matter of the M/s GGL Hotel and Resort Company Ltd.
2. GGL Hotel and Resort Company Ltd. located at Vishwakarma Building, 80C Topsia Road (S), Kolkata- 700046, holding GSTIN 19AABCG6133G1ZQ, stated to be a subsidiary of Ambuja Neotia Holdings Pvt. Ltd. is in the hospitality and real estate

business. The Appellant has embarked on a project of starting a Hotel and Banquet in the name of Buneau Vista in Eco Park, New Town, Kolkata. For the purpose of this project the Appellant has taken land measuring 20,039.75 sq. m. on lease from West Bengal Housing Infrastructure Development Corporation Limited (hereinafter referred to as "WBHIDCL") for 32 years on a lease premium of Rs.17,20,00,000/= with an annual lease rent @10% of the lease premium for the first two years, which will be escalated @5% per annum in the subsequent years from the start of the third year over the last annual lease rent per annum. The project is proposed to be completed within a period of 2 years and the lease rent paid during the aforesaid pre-operative period shall be capitalized in the books of accounts by the Appellant. The WBHIDCL will be charging GST @ 18% on the lease rent.

3. The Appellant sought an advance ruling under section 97 of the West Bengal Goods and Services Tax Act, 2017/ the Central Goods and Services Tax Act, 2017, (hereinafter collectively referred to as "the GST Act") on the following question:

   Whether credit is available on input tax paid on lease rent during pre-operative period for the leasehold land on which the resort is being constructed to be used for furtherance of business, when the same is capitalized and treated as capital expenditure.

4. The West Bengal Authority for Advance Ruling (hereinafter referred to as the WBAAR) pronounced its advance ruling by an order dated 08.01.2019, that input tax credit is not available to the Appellant for lease rent paid during pre-operative period for the leasehold land on which the resort is being constructed on his own account to be used for furtherance of business, when the same is capitalized and treated as capital expenditure.

5. The Appellant has filed the instant Appeal against the above Advance Ruling with the prayer to set aside/modify the impugned Advance Ruling passed by the WBAAR or pass any such further orders as may be deemed fit and proper in the facts and circumstances of the case on the following grounds:

   (i) The WBAAR erroneously disallowed Input Tax Credit on lease rental paid during the pre-operative period. In terms of sub-section (1) of section 16 of the GST Act, which deals with eligibility and conditions for taking Input Tax Credit, every registered person is entitled to take credit on any supply of goods or services or both which are used or intended to be used in the course of furtherance of business. Thus GST paid on input supplies during the pre-operative period are available even though the Appellant is not providing taxable output supply.

   (ii) The WBAAR erroneously interpreted the provisions of Section 17 of the GST Act which deals with apportionment of credit and blocked credit. In terms of clause (d) of sub-section (5) of section 17, input tax credit shall not be available in respect of those goods or services which have been received for construction

of an immovable property even if such supplies of goods or services are used in the course of furtherance of business. Further, in terms of explanation to clause (d), construction includes re-construction, renovation, addition or alterations or repairs, to the extent of capitalization to the said immovable property. However, the GST Act does not define the exact nature of goods and services received which are deemed to be related to the construction of immovable property. The lease rent is paid to acquire the rights to the land and can never be said that the same has been used for construction of immovable property. The WBAAR erroneously held that the prohibition under section 17(5)(d) of the GST Act, is not limited to the civil structure being constructed. It extends to the immovable property in general, and such supplies are essential for construction of the civil structure on the piece of land.

(iii) The WBAAR erroneously held that the construction of an immovable property is critically dependent on the supply of the leasing service and so there is an inseparable and direct nexus between lease rent of land and construction of the building. The lease rent if capitalized, will be capitalized under "Leasehold Land" and not under the "Building Block". Thus lease rent is not used for construction of the building. Further, the same cannot be used for construction of land since no development of land is taking place. There is no nexus between lease rent of land and construction of the building.

(iv) The WBAAR erred on the fact that the lease rental is a service and not a capital goods as defined under the GST Act. The Appellant will neither capitalize nor amortize the GST input in its books of account and hence sub-section (3) of section 16 of the GST Act is not applicable in the instant case.

(v) The WBAAR erroneously treated the lease rental paid during the pre-operative period as an integral part of the cost of immovable property. In terms of clause (xiii) of Para A at page no. 7 of the Indenture of Lease (hereinafter referred to as the Lease Agreement) dated 21.08.2013, the valuation of building shall be made by the Lessor on the basis of cost of construction of the building less depreciation at the usual rate or the market value thereof, whichever is less. The value of land would be the amount of premium paid by the Lessee. Thus land will not form an integral part of the building and the valuation for land and building would be done separately.

(vi) The WBAAR erroneously disallowed the entire input tax of lease rental. The building will be constructed on a part of lease holding (only 7,861.64 sq. m. out of 20,039.75 sq. m.) and the unconstructed area would be used for auxiliary services. Thus the lease rent is partly used for construction of immovable property and the GST on lease rental in respect of the area on which no immovable property is constructed would be eligible for input tax credit.

6. During the course of hearing the Appellant reiterated the points as stated in the Grounds of Appeal. The Appellant emphasized on the point that the Lease Rent paid is not used for construction of immovable property but to acquire rights in the land so that the hotel can be operated. As per Para A clause (xiii) of the Lease Agreement between the Appellant and the WBHIDCL, in case of termination of lease, the latter shall have the right of pre-emption and upon exercise of this right, it will take over the building constructed at market value or cost of construction less depreciation, whichever is less. The value of the Land will be the lease premium paid. Further on completion of lease tenure of 32 years, the Appellant would return the land to the WBHIDCL in its original form. So it is clear from the agreement that the WBHIDCL determines the value of land and building separately. In terms of Para 60 of the AS 10, land and building are recognized and accounted separately. The Appellant further submitted that for F.Y. 2014-15 and F.Y. 2015-16, the lease rent was transferred to Capital Work-in-Progress. Once the project is completed, then the lease rent for the pre-operative period of 2 years would be transferred to the block of Leasehold Land. Lease rent for F.Y. 2016-17 and F.Y. 2017-18 have been treated as Revenue Expenditure.

7. The Appellant emphasized on the scope and meaning of the word "for" in the provisions of clause (d) of sub-section (5) of section 17 of the GST Act. The Appellant submitted that "goods or services or both received by a taxable person for construction of an immovable property" means those goods or services which are directly used for construction of the hotel building. Lease rent was paid by the Appellant irrespective of construction taking place or not. The Appellant argues that as per agreement with the WBHIDCL, the former is providing two types of service to the latter, that is Designing and Building together being construction service in one part and Operating service in the other part. As per the provisions of clause (d) of sub-section (5) of section 17 of the GST Act input of supply for construction on own account only has been blocked. As the Appellant is providing construction service to the WBHIDCL and not on own account, hence the input on supply of construction should not be blocked. In support of this argument the Appellant emphasized on the insertion of clauses in Para A (v) and (vi) of the Agreement, whereby the Appellant is barred from excavation of land and removal of sub-soil except in the normal course of construction or alter the location of sewer/water connection.

8. The Respondent submitted that the availability of input tax credit on goods and services used for construction of immovable property except plant and machinery comes under blocked credit as per the provisions of clause (d) of sub-section (5) of section 17 of the GST Act. Further the Appellant's prayer for allowing proportionate credit of lease rental on the unconstructed area of the project only strengthen the point that input tax credit on lease rental is not available in case of construction of an immovable property.

9. The matter is examined and written and oral submissions made before us are considered. As the ruling of the WBAAR and the appeal petition is restricted to the question whether Input Tax Credit is available for lease rent paid during pre-operative period for the leasehold land on which the resort is being constructed to be used for furtherance of business, when the same is capitalized and treated as capital expenditure, the discussion in this forum is also restricted to the pre-operative period.

10. For the sake of clarity clause (d) of sub-section (5) of section 17 of the GST Act is reproduced below:

" 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 of 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 capitalization, to the said immovable property. "

11. The Appellant acquired the land on lease for the sole purpose of building an Eco Resort on DBO (Design, Built and Operate) Model in conformity with the development guidelines set by the WBHIDCL, who has been entrusted with the development of the entire area of ECO Park, New Town. WBHIDCL not only holds the title of the leased land but also is the town planner. Development/construction guidelines and restrictions are an integral part of town planning with an objective to conserve environment and eco-system and is not a unique feature of this particular Lease agreement between the Appellant and the WBHIDCL.

12. The project in discussion is building and operating a Hotel and Banquet with all added features in totality on the entire area of land measuring 20,039.75 sq. m. on lease. The Appellant's submission that it is providing two types of services to the WBHIDCL namely construction service and operating service is incorrect. As per the Lease Agreement the scope of the project is to Design, Built and Operate the Eco Resort. Now construction service is classified under SAC 9954 and the recipient of the service at the end of the construction also comes in possession of an asset in the manner of an immovable property. Para A clause (x) of the Lease Agreement stipulates that the Appellant "shall restore the land to its original condition before expiry of lease period" and again Para A clause (xx) stipulates that at the end of lease period the Appellant "shall make over peaceful vacant Khas possession of the demised land in as good a condition as the same is now " to the WBHIDCL. So it is clear that the WBHIDCL holds the ownership title of the land only and holding no proprietary interest in the immovable property constructed or being constructed on it. The Appellant is not providing any construction service to the WBHIDCL and also will not be operating the hotel on behalf of the latter. Further the Eco Resort comes not only with hotel building but also with swimming pool, cafeteria, outdoor barbeque, landscape gardens. The construction of

Resort is not limited to the hotel building only as a significant amount of construction is involved for creating swimming pools and landscaping. The area for auxiliary services as presented by the Appellant cannot be truncated from the area of the hotel building; the Resort and its facilities come under a single project. So the Appellant's argument of ownership of the project lies with the WBHIDCL is incorrect. Further the Appellant at the same time cannot capitalize the constructed property and not have ownership rights.

13. Every registered person is entitled to take credit on any supply of goods or services or both which are used or intended to be used in the course of furtherance of business in terms of sub-section (1) of section 16 of the GST Act, subject to the restrictions stipulated in Section 17 of the GST Act. The WBAAR never held lease rental to be capital good so discussion on sub-section (3) of section 16 of the GST Act is irrelevant.

14. Para A clause (i) of the Lease Agreement clearly stipulates that the Lessee shall use demised land exclusively for the purpose of constructing building at the cost of the Lessee. Further the Appellant is entitled to collect inter-alia all revenue from the project. So the Appellant's argument on the absence of any nexus, direct or indirect between lease rental and construction of the Project is incorrect. The Lease Rent paid during pre-operative period for the lease hold land, on which the construction activity had been taken for furtherance of business, has direct nexus between the Lease Rent and construction of resort. Had the appellant not paid the Lease Rent during pre-operative period they would not be able to take any construction activity thereon. Further, the asset will be capitalized in the books of accounts of the Appellant. So it is clear that the Appellant is building the Eco Resort on its own account for furtherance of business, and credit of Tax paid on input goods/service is debarred in terms of Section 17(5) (d) of GST Act.

15. The Appellant acquired land from the WBHIDCL on lease paying an upfront amount as premium and a yearly lease rental @10% on the premium with an escalation clause from the third year of lease. The premium paid by the Appellant is exempted under Sl. No. 41 (SAC 9972) of Notification No. 12/2017-CT(Rate) dated 28.06.2017, as amended vide Notification No. 32/2017-CT (Rate) dated 13.10.2017 and Notification No. 23/2018-CT (Rate) dated 20.09.2018. Whereas lease rental paid by the Appellant is taxable under Sl. No. 16 (iii) (SAC 9972) of Notification No. 11/2017-CT(Rate) dated 28.06.2017, as amended vide Notification No. 1/2018-CT (Rate) dated 25.01.2018. Lease premium and lease rental both are parts of the project cost, the former being one-time fixed amount and the latter being a variable cost. Both lease premium and lease rental are classified under SAC 9972 being Real Estate Services. As the lease premium paid by the Appellant is exempted under Sl. No. 41of the Rate Notification under GST Act on satisfaction of stipulated criteria the question of availing input tax credit does not arise. So the moot question is whether input tax credit on lease rental paid is available in the pre-operative period. It transpires from the above discussion that the Appellant is constructing the Eco

Resort on his own account in course of furtherance of its business of providing hospitality service, for which one of the input service availed is lease rental service. The ambit of the blocked credit as per clause (d) of sub-section (5) of section 17 is broad as it *includes* such goods or services or both when used in the course of furtherance of business. So clause (d) of sub-section (5) of section 17 restricts the Appellant from availing input tax credit on lease rental paid.

In view of above discussion we find no infirmity in the ruling pronounced by the West Bengal Authority for Advance Ruling.

The appeal thus fails and stands disposed accordingly.

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

(Smaraki Mahapatra)
Member
Wes Bengal Appellate Authority
for Advance Ruling

(A.P.S Suri)
Member
West Bengal Appellate Authority
for Advance Ruling