WEST BENGAL-AAR

Advance Ruling No. 08/WBAAR/2023-24

Mindrill Systems and Solutions Private Limited-Appellant

Coram:(SARTHAK SAXENA) (JOYJIT BANIK)

Date of order: 26/06/2023

Decision- Case Decided

Held that-

Question: Whether input tax credit against inward supply of input/input service used for construction of warehouse can be claimed and utilized to pay tax on the outward supply of services provided by way of renting of said warehouse in case such construction expenses are capitalized in books?

Answer: The applicant is not eligible for input tax credit in such cases.

Question: Whether input tax credit against inward supply of input/input service used for construction of warehouse can be claimed and utilized to pay tax on the outward supply of services provided by way of renting of said warehouse in case such construction expenses are not capitalized in books?

Answer: Input tax credit is admissible if such construction expenses are not capitalized in books.

Appearance:

Mr. Anil Dugar , Authorized Advocate for the Petitioner.

JUDGMENT

1.1 At the outset, we would like to make it clear that the Central Goods and Services Tax Act, 2017 (the CGST Act, for short) and the West Bengal Goods and Services Tax Act, 2017 (the WBGST Act, for short) have the same provisions in like matter except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the WBGST Act. Further to the earlier,

henceforth for the purposes of these proceedings, the expression 'GST Act' would mean the CGST Act and the WBGST Act both.

1.2 The applicant is stated to be engaged primarily in the business of manufacturing of pneumatic rock drills, jack hammers, equipment, spare parts and accessories used in mining/construction industry.

1.3 The applicant submits that as a part of its business expansion plan, it decided to construct warehouse / godown at Village Mollarber, Post Office-Dankuni Coal Complex, Durgapur Expressway, P.S. Dankuni, Hooghly, West Bengal-712310, with sole intention to provide the same on rent. Accordingly, the applicant has constructed one warehouse and let it out to "Zomato Hyperpure Private Limited" and has been paying tax on such supply.

1.4 The applicant has made this application under sub section (1) of section 97 of the GST Act and the rules made there under raising following questions vide serial number 14 of the application in FORM GST ARA-01:-

(i) Whether input tax credit (in brevity "ITC") against inward supply of said input/input service used for construction of warehouse can be claimed and utilized to pay tax on the outward supply of services provided by way of renting of said warehouse in case such construction expenses are capitalized in books?

(ii) Whether input tax credit (in brevity "ITC") against inward supply of said input/input service used for construction of warehouse can be claimed and utilized to pay tax on the outward supply of services provided by way of renting of said warehouse in case such construction expenses are not capitalized in books?

1.5 The aforesaid question on which the advance ruling is sought for is found to be covered under clause (d) of sub-section (2) of section 97 of the GST Act.

1.6 The applicant states that the question raised in the application has neither been decided by nor is pending before any authority under any provision of the GST Act.

1.7 The officer concerned from the revenue has raised no objection to the admission of the application.

1.8 The application is, therefore, admitted.

2. Submission of the Applicant

2.1 The applicant submits that he has constructed a warehouse / godown at Village Mollarber, Post Office-Dankuni Coal Complex, Durgapur Expressway, P.S. Dankuni, Hooghly, West Bengal-712310 with sole intention to provide the same on rent and earn "Rental income" benefits. The applicant accordingly has constructed one warehouse and let it out to "Zomato Hyperpure Private Limited".

2.2 The applicant has received following inward supplies amongst others during the F.Y. 2020-2021 and 2021-2022 to construct the said warehouse:-

I. Prefabricated steel building

II. Structural installation of prefabricated building

III. Works contract services like painting, plumbing, structural erection, electrical installation, etc.

IV. Consultancy service

V. Cement, marble, paver block, shutter door, electrical equipment, fire protection system and insulation, etc.

2.3 The applicant states that inward supplies received for construction of the said warehouse has following attributions:-

I. Inward supplies relating to construction of building (i.e. construction service provided by builders, developers & contractor);

II. Inward supplies relating to goods & services, which are directly used for construction of building;

III. Inward supplies relating to expenses in the form of repairs & maintenance, additions, alterations etc., which are capitalized in the books of account;

Inward supplies relating to expenses in the form of repairs & maintenance, additions, alterations etc., which are not capitalised in the books of account. The applicant company had paid IGST, CGST and WBGST of Rs.4179658.75, Rs.2090857.37 and Rs.2090857.37 respectively on inward supply of said input/input services used for construction of said ware house.

2.4 According to the applicant, while section 16 of the GST Act entitles any registered person to take credit of tax paid by it on inputs/input service that are to be used in the course or furtherance of its business, section 17(5)(d) of the GST Act restricts availment of ITC which reads as under:-

"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:

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(d) Goods or Services or both received by a taxable person for construction of an immovable property (other than Plant and 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 reconstruction, renovation, additions or alterations or repairs, to the extent of "capitalization, to the said immovable property:"

2.5 Therefore, registered persons are ineligible for ITC on inward supply of goods or services used for construction of an immovable property i.e. ware house for 'own use' even when such immovable property is used in the course or in furtherance of business (such as leasing, renting etc.).

2.6 The applicant submits that that the term 'on his own account' is to be given priority. Reasonable inference drawn to this term would say that the intention is to disallow credit of the inputs to any person constructs the immovable property to his own use. Since the phrase "on his own account" has not been defined, the legal aid has to be taken from dictionary meaning of the said phrase.-

As per Merriam Webster Dictionary, on one's (his) own account means on one's own behalf or on one's own;

As per Longman Dictionary, on one's (his) own account means by oneself or for oneself;

As per Macmillan Dictionary, on one's (his) own account means by oneself or for oneself rather than with or for someone else.

Therefore, the phrase 'on his own account' used in section 17(5) of the GST Act could by no stretch of imagination be extended to include the construction of an immovable property i.e., warehouse in the instant case for use by lessee or tenant. An example of construction on own account would include construction of office building for one's own use, factory building for one's own manufacturing of goods, warehouse to storew one's own goods.

2.7 Further, the explanation here clarifies that the term construction will only include reconstruction, renovation, additions, alterations and repairs to the extent they are capitalized and added to the value of immovable property. Hence any expense made for construction which is not capitalized or debited in the revenue account will not form a part of section 17(5)(d) of the GST Act.

2.8 The applicant contends that that pre-engineered steel structures were used with nut bolt technology to a foundation of civil structure for construction of the said warehouse and said structures can be detached and dismantled without any damage. The warehouse which has been constructed by use of pre-engineered steel structural, one of the unique features of such construction is that the same can easily be and conveniently dismantled without any damage or deterioration and is capable of being re-erected at another site. Therefore, the warehouse constructed by the applicant does not fall within the purview of the "immovable property" and hence, the restriction imposed under section 17(5)(d) of the Act is not applicable in this case.

2.9 In support of the contention that the pre-engineered steel structures can easily and conveniently be dismantled without any damage or deterioration and is capable of being reerected at another site, applicant relies upon the website https://www.tdlccs.com/pre-engineered-buildings, though the list is endless, which defines the feature of said as "Preengineered buildings are factory-built buildings of steel that are shipped to site and bolted together. What distinguishes them from other buildings is that the contractor also designs the building – a practice called design & build. This style of construction is ideally suited to industrial buildings and warehouses; it is cheap, very fast to erect, and can also be dismantled and moved to another site – more on that later. These structures are sometimes called 'metal boxes' or 'tin sheds' by laymen – they are essentially rectangular boxes enclosed in a skin of corrugated metal sheeting".

2.10 Further, the applicant, in support of his contention that pre-engineered steel structures are not "immovable property", has relied upon the judgement delivered by the Hon'ble Supreme Court in the case of CCE vs v. Solid & Correct Engg. Works [2010] 95 SCC 122. Relevant paras [Para 17-20 and 24] are reproduced as under:-

"17. Section 3 of the Transfer of Property Act, 1882 does not spell out an exhaustive definition of the expression "immovable property". It simply provides that unless there is something repugnant in the subject or context 'immovable property1 under

the Transfer of Property Act, 1882 does not include standing timber, growing crops or grass. Section 3(26) of the General Clauses Act, 1897, similarly does not provide an exhaustive definition of the said expression. It reads: “Section 3(26):

“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.”

18. It is not the case of the respondents that plants in question are per se immoveable property. What is argued is that they become immovable as they are permanently imbedded in earth in as much as they are fixed to a foundation imbedded in earth no matter only 1= feet deep.

That argument needs to be tested on the touch stone of the provisions referred to above. Section 3(26) of the General Clauses Act includes within the definition of the term “immovable property” things attached to the earth or permanently fastened to anything attached to the earth.

The term “attached to the earth” has not been defined in the General Clauses Act, 1897. Section 3 of the Transfer of Property Act, however, gives the following meaning to the expression “attached to the earth”:-

“(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls and buildings;

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.”

19. It is evident from the above that the expression “attached to the earth” has three distinct dimensions, viz.-

(a) rooted in the earth as in the case of trees and shrubs

(b) imbedded in the earth as in the case of walls or buildings or

(c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached.

Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1= feet deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above. That is because attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not synonymous to imbedding in earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be 1 detached without demolition. Imbedding of a wall in the earth is also in no way comparable to attachment of a plant to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation. So also the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of that to which the plant is attached.

20. It is nobody's case that the attachment of the plant to the foundation is meant for permanent beneficial enjoyment of either the foundation or the land in which the same is imbedded.

24. Applying the above tests to the case at hand, we have no difficulty in holding that the manufacture of the plants in 2 question do not constitute annexation hence cannot be termed as immovable property for the following reasons:- (i) The plants in question are not per se immovable property. (ii) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act. (iii) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free. (iv) The setting up of the plant itself is not intended to be permanent at a given place.The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed."

2.11 The applicant has also placed his reliance on the judgement delivered by the Hon'ble Orissa High Court in the case of Safari Retreats (P.) Ltd. v. Chief Commissioner of Central Goods & Service Tax [2019] 105 taxmann.com 324 where the Hon'ble Court has held as follows:-

A. Therefore, the contention which has been raised by the learned counsel for the petitioners keeping in mind the provisions of Section 16(1)(2) where restriction has been put forward by the Legislation for claiming eligibility for ITC has been described in Section 16(1) and the benefit of apportionment is subject to Section 17(1) and (2). While considering the provisions of Section 17(5)(d), the narrow construction of interpretation put forward by the Department is frustrating the very objective of the Act, inasmuch as the petitioner in that case has to pay huge amount without any basis. Further, the petitioner would have paid GST if it disposed of the property after the completion certificate is granted and in case the property is sold prior to completion certificate he would not be required to pay GST. But here he is retaining the property and is not using for his own purpose but he is letting out the property on which he is covered under the GST, but still he has to pay huge amount of GST, to which he is not liable.

B…. if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST, which is required to pay under Section 17(5)(d) of the CGST Act.

2.12 In view of above facts, the applicant submits that as the warehouse was constructed in the course or furtherance of its business and not constructed for own use of applicant company and said warehouse was made of prefabricated /engineered building, which is not immovable property, the applicant company is entitled to use /utilise input tax credit (in brevity "ITC") availed on inward supply of said input/input service received and used for construction of warehouse, to pay tax on the outward supply of services provided by way of renting of said warehouse, whether such expenses on account of inward supply are capitalized / not capitalised in books.

3. Submission of the Revenue

3.1 The concerned officer from the revenue has not expressed any view on the issue raised by the applicant.

4. Observations & Findings of the Authority

4.1 We have gone through the records of the issue as well as submissions made by the authorised advocate of the applicant during the course of personal hearing.

4.2 As seen from the facts of the case, the applicant has constructed a warehouse / godown and has let it out to “Zomato Hyperpure Private Limited”. Further, since the activity of letting out the warehouse amounts to supply of services under the GST Act, the applicant has been paying tax on such supply.

4.3 The applicant, to construct the warehouse, has received inward supplies of goods and services both including works contract services. The issue invoved in the instant case is related to admissibility of credit of input tax charged on aforesaid supplies received by the applicant.

4.4 Sub-section (1) of section 16 entitles every registered person 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 by him in the course or furtherance of his business. On the other hand, clause (c) and clasue (d) of sub-section (5) of section 17 of the GST Act restricts input tax credit in respect of works contract services and goods or services used towards construction of an immovable property to the extent of capitalization, to the said immovable property.

4.5 The applicant contends that the aforesaid restrictions are not applicable in his case and the applicant is therefore entitled to take credit of input tax charged on such supplies by his suppliers on the following grounds:-

(i) Clause (d) of sub-section (5) of section 17 restricts input tax credit where inward supplies are received by a taxable person for construction of an immovable property on his own account meaning thereby input tax credit shall not be allowed in respect of inward supplies where such supplies are received to construct of an immovable property for ‘own use’ by the taxable person. However, since the applicant has constructed the warehouse and let it out to another person against rent, it cannot be said that the applicant has received the inward supplies for construction of the warehouse on his own account.

(ii) The aforesaid clause denies input tax credit in respect of an immovable property. However, the warehouse constructed by the applicant cannot be regarded as ‘immovable property’ since the warehouse is constructed by use of pre-engineered steel structures to a foundation of civil structure which can be detached and dismantled without any damage and is capable of being re-erected at another site. In support of his contention, the applicant has placed his reliance upon the judgement delivered by the Hon’ble Supreme Court in the case of CCE vs v. Solid & Correct Engg. Works.

(iii) The ratio of the judgement delivered by the Hon’ble Orissa High Court in the case of Safari Retreats (P.) Ltd. v. Chief Commissioner of Central Goods & Service Tax is applicable in his case as the applicant is also paying GST on the rent amount received against letting out of the warehouse and therefore he is entitled to take input tax credit.

4.6 We will deal with the aforesaid points raised by the applicant one by one. The applicant submits that the phrase “on his own account” has not been defined under the GST Act. So, the applicant has taken legal aid from dictionary meaning of the said phrase to argue that on one’s (his) own account means on one’s own behalf or on one’s own. The applicant thus contends that since he has constructed the warehouse for letting it out to other persons, the warehouse has not been

constructed on his own account. We are unable to accept this argument of the applicant. In Collins English Dictionary, the meaning of the phrase 'on one's own account' is found to be as follows:-

If you take part in a business activity on your own account, you do it for yourself, and not as a representative or employee of a company'

If you do something on your own account, you do it because you want to and without being asked, and you take responsibility for your own action.

In Free Dictionary, the meaning of the said phrase reads as under:-

Without requiring or having been given instruction, prompting or guidance from others; by one's own effort or energy.

We further find that in the case of State of West Bengal Vs. O.P. Lodha & Anr., M/s. Chowringhee Sales Bureau Private Ltd. [1997], the Hon'ble Supreme Court of India has observed as follows:-

'It is true that unlike some other state Acts, the Bengal Finance (Sales Tax) Act has not defined 'turnover" specifically to include sales made by a dealer whether on his own account or on account of somebody else. That, in my judgment, does not make any difference. If a person sells goods on his own account, he is liable not as an agent but as seller. But when he sells on behalf of somebody else or on account of somebody else, then he sells the goods as an agent of the principal. '

It thus appears that when any purchase or sales claimed to have been made by a person 'on his own account', it means the person is not making such purchases or sales on behalf of others and the person accounts for the expenses/income in his books. In the instant case, admittedly the applicant has constructed the warehouse and has accounted for the same in his books of accounts and retains the owenership/ title of the said warehouse. Further, the said waresouse is being used by the applicant for providing outward supplies of warehousing service and/or renting or leasing service. We are therefore of the view that the warehouse has been constructed in the applicant's own account and the contention of the applicant in this regard is not acceptable. Further, the submission of the applicant that since the goods stored in the warehourse belong to another person who is occupying the premises on rent, is also not acceptable since the fact that the applicant is providing outward supplies of warehousing service and/or renting or leasing service on his own account cannot be denied.

4.7 We now proceed to decide whether the warehouse constructed by the applicant can be regared as an immovable property or not. The applicant contends that the warehouse is constructed by use of pre-engineered steel structures which can easily and conveniently be dismantled without any damage or deterioration and is capable of being re-erected at another site and for this reason, the warehouse so constructed, cannot be termed as 'immovable property'. The applicant in support of his argument has placed reliance on the judgement delivered by the Hon'ble Supreme Court of India in the matter of Solid and Correct Engineering Works [2010 (252) E.L.T. 481 (S.C.)] In the said judgement, the Hon'ble Apex Court observed that attachment of the plant in question with the help of nuts and bolts to a foundation intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth. The court further held that manufacture of the plants in question do not constitute annexation hence cannot be termed as immovable property for the following reasons:-

"(i) The plants in question are not per se immovable property.

(ii) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.

(iii) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.

(iv)The setting up of the plant itself is not intended to be permanent at a given place.

The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed."

4.8 However, in the instant case, the applicant himself has submitted that construction of warehouse involves goods like cement, marble, paver block, shutter door, electrical equipment, fire protection system, prefabricated steel building and structural installation thereof along with works contract services like painting, plumbing, electrical installation, etc. Contrary to the observation made by the Hon'ble court that 'the plant can be moved and is indeed moved after the road construction or repair project', we find that the warehouse of the applicant is not intended to be moved and indeed has not been moved after construction of the same at a given place. Further, while constructing the warehouse, goods e.g., cement, marble, paver block, shutter door, electrical equipment etc. do not get transferred as a chattel to chattel.

In light of this fact, the relevant extract of the same judgement is reproduced:-

Paras.- 22 & 23 (relevant extract) :

22. The English law attaches greater importance to the object of annexation which is determined by the circumstances of each case. One of the important considerations is founded on the interest in the land wherein the person who caused the annexation possesses articles that may be removed without structural damage and even articles merely resting on their own weight are fixtures only if they are attached with the intention of permanently improving the premises.

The Indian law has developed on similar lines and the mode of annexation and object of annexation have been applied as relevant tests in this country also…..

Para.-23 (relevant extract) :

23. The courts in this country have applied the test whether the annexation is with the object of permanent beneficial enjoyment of the land or building.

What is evident from the observations mentioned in paras. 22 & 23 that the object or intention of annexation is the pertinent test to determine whether something is for 'permanent beneficial enjoyment. Further, para. 22 also implies that this would be determined on the basis of the 'circumstances of each case'.

In the instant case, it is not the case that the applicant and nor the intention, that if he desires so, he can remove the entire warehouse with its flooring without any damage or deterioration and re-erect it on other piece of vacant land. The intention behind the construction of the warehouse, as it has been submitted by the applicant, is to let it out and earn rental income from it, i.e., to provide outward supplies of warehousing service and/or renting or leasing service. This submission establishes

the fact that construction of the warehouse itself is intended to be permanent at a given place and the applicant would not shift it from one place to another. We are therefore of the view that the warehouse as constructed by the applicant, for its permanent characteristics and in absence of mobility like other goods, would be regarded as immovable property and therefore we do not incline to accept the contention of the applicant in this regard.

4.9 We now left with the point to decide whether the ratio of the judgement delivered by the Hon'ble Orissa High Court in the case of Safari Retreats (P.) Ltd. v. Chief Commissioner of Central Goods & Service Tax is applicable in the case in hand. The applicant has contended that benefit of input tax credit has to be given on inward supply of input/input service used for construction of warehouse. We find that in Safari Retreat case, the issue before the Hon'ble Orissa High Court was to decide whether the petitioner is eligible for input tax credit in respect of inward supply of goods and services received by him and used for construction of shopping mall. Issues like whether the shopping mall can be regarded as immovable property or not and whether the petitioner has received such inward supplies on his own account or not were not a matter of dispute before the Hon'ble court. However, in the case in our hand, the applicant has contended that since the warehouse has been constructed for the purpose of let it out to another person against rent, it cannot be said that the applicant has received the inward supplies for construction of the warehouse on his own account. The applicant has also argued that the warehouse so constructed by him cannot be regarded as immovbale property. We have already expressed our views on these points. Further, admissibility of input tax credit to the extent of capitalization in the books of accounts was also not a subject of discussion in the Safari Retreat case. We thus find that the aforesaid case is not identical with the case we are dealing with and therefore we are of the opinion that the ratio of the aforesaid judgment is not applicable to the present case, as it is distinguishable on the basis of facts.

4.10 It is also learnt that the department has filed an appeal before the Hon'ble Supreme Court of India against the said judgment and the Hon'ble Supreme Court has granted leave against impugned order on 18.04.2023.In this context, we like to reproduce the observation of the Uttar Pradesh Authority for Advance Ruling in the case of KRBL Infrastructure Ltd reported in [2022] 138 taxmann.com 93. In para 17, learned Members have observed as follows:

"17. We find that the applicant has placed reliance on the judgment of the Hon'ble High Court Orissa in the case of Safari Retreats (P.) Ltd. (supra). In the said case, the party had constructed malls which were given further on lease. While holding that section 17(5)(d) was not ultra vires, the Hon'ble Court ruled that the party was eligible for credit. We find that the department has filed an appeal (SLP(C) No. 26696/2019) in against the said judgment of the Hon'ble Orissa High Court in Hon'ble Supreme Court, which is presently pending. The Hon'ble Supreme Court, in the case of Union of India v. West Coast Paper Mills Ltd. 2004 (164) ELT 375 has held that once a special leave to appeal is granted and appeal is admitted, the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the Court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy."

4.11 We therefore hold that the restriction under clause (d) of sub-section (5) of section 17 of the GST Act in respect of input tax credit on goods or services received by the applicant for construction of warehouse is applicable in the instant case i.e., the applicant is not eligible for credit of input tax charged on inward

supply of goods and services related to construction of warehouse which is capitalized in the books of account.

In view of the above discussions, we rule as under:

RULING

Question: Whether input tax credit against inward supply of input/input service used for construction of warehouse can be claimed and utilized to pay tax on the outward supply of services provided by way of renting of said warehouse in case such construction expenses are capitalized in books?

Answer: The applicant is not eligible for input tax credit in such cases.

Question: Whether input tax credit against inward supply of input/input service used for construction of warehouse can be claimed and utilized to pay tax on the outward supply of services provided by way of renting of said warehouse in case such construction expenses are not capitalized in books?

Answer: Input tax credit is admissible if such construction expenses are not capitalized in books.