MJP

GUJARAT APPELLATE AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX
D/5, RAJYA KAR BHAVAN, ASHRAM ROAD,
AHMEDABAD – 380 009.

ADVANCE RULING (APPEAL) NO. GUJ/GAAAR/APPEAL/2024/04
(IN APPLICATION NO. Advance Ruling/SGST&CGST/2021/AR/27)

Date 30.12.2024

Name and address of the appellant	:	M/s. GACL-NALCO Alkalies & Chemicals Private Limited, GACL Corporate Building, PO Ranoli, Vadodara, Gujarat – 391 350.
GSTIN of the appellant	:	24AAGCG2049A1Z7
Advance Ruling No. and Date	:	GUJ/GAAR/R/53/2021 dated 18.10.2021.
Jurisdiction Office	:	Office of the Assistant Commissioner of State Tax, Unit-40, Division-5, Range-10, Vadodara.
Date of appeal	:	26.11.2021
Date of Personal Hearing	:	15.10.2024
Present for the appellant	:	Shri N B Tripathi, CFO Shri Dhruvit Shah, Jt. Manager Shri Anmol Rathi, Manager Shri Hemant Desai, Advocate.

At the outset we would like to make it clear that the provisions of the Central Goods and Services Tax Act, 2017 and Gujarat Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act, 2017' and the 'GGST Act, 2017') are *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 GGST Act, 2017.

2. The present appeal has been filed under Section 100 of the CGST Act, 2017 and the GGST Act, 2017 by M/s. GACL-NALCO Alkalies & Chemicals Private Limited, (hereinafter referred to as 'appellant') against the Advance Ruling No. GUJ/GAAR/R/53/2021 dated 18.10.2021.

3. Briefly, the facts are enumerated below for ease of reference:

- the appellant is a joint venture between GACL & NALCO;
- the appellant during the course of proceedings before the GAAR [Gujarat Authority for Advance Ruling] stated that they intend to set up a caustic soda plant and captive power plant.
- GIDC had leased a plot of land to GACL;
- GACL requested for sub-division of the said plot; it surrendered 39 000 sq mtrs to appellant/GNAL on long term lease for the above green field project;
- that the deed of rectification was signed on 8.1.2018;
- that the consideration was Rs. 72.79 crores of which the GST amount was Rs. 13.10 crores.

4. In view of the foregoing facts, the appellant had sought Advance Ruling on the following questions, viz:

- *"Whether GNAL is entitled to claim ITC of the GST paid on the services provided by GACL in the form of agreeing to surrender/relinquish its right on leasehold property in favour of GNAL?"*

5. Consequent to hearing the applicant, the Gujarat Authority for Advance Ruling [GAAR], recorded the following findings *viz*

- GACL has transferred its lease hold right on land to GNAL;
- that though words used is plant or machinery in section 17(5)(d) of the CGST Act, 2017, in term of ruling by the Karnataka Appellate Authority for Advance Ruling, in the case of M/s. Tarun Realtors P ltd, the word 'or' can be read as 'and';
- Plant and machinery excludes land in terms of explanation to section 17(5), *ibid*;
- Legislature's intent is that ITC shall not be available in respect of services pertaining to land received by taxable person for construction of an immovable property;
- that had that not been the legislative intention the word 'land' would never have been used;
- that further the word 'for' in section 17(5)(d), *ibid*, indicates a purpose, the intended goal; that the word 'for' is to be construed to indicate the purpose to construct building/civil structure/administrative block;
- that the argument for proportionate credit fails as it cannot be taken as basis for awarding proportionate credit; that the act does not envisage mechanism to award proportionate credit for GST in such cases;
- that the GST council in its 37th meeting mentions that the high rate of GST makes new project unviable since credit of GST on leasing is not available for construction of immovable properties.

6. The GAAR, vide the impugned ruling dated 18.10.2021, held as follows:

RULING

GST amount borne by GNAL on subject service received is blocked credit vide Section 17(5)(d) CGST Act and thereby ineligible for availment, for the reasons summarised at para 19.

7. Aggrieved by the aforesaid advance ruling, the appellant is before us, raising the following contentions, *viz*

- goods manufactured by the appellant will be supplied to customers & is taxable under GST;
- appellant paid consideration to GACL for 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation or to do an act'; that the tax invoice issued is under HSN 999792;
- ITC of GST chargeable on relinquishment of rights/agreeing to surrender the rights should be eligible in terms of section 16 of CGST Act, 2017 as it is used in the course or furtherance of business;
- relinquishment of right does not get covered in the ineligible list of input services;
- that the service received by the appellant is not a leasing service;
- that the acquired land is to be used in the course of furtherance of business & not for the purpose of construction of immovable property;
- that it is a trite law that predominant test is to be applied; that as per the chartered engineer's certificate, 99.85% land would be utilized for the purpose of constructing plant and machinery;
- that the plants once fully constructed, will be capitalized as plant and machinery;
- that they would like rely on the case of Bajaj Tempo Ltd[1] wherein it was held that incentive for promoting economic growth & development should be liberally construed;
- that in the absence of definition of land under the GST Act, it should be strictly interpreted;
- that the services received by the appellant cannot be equated as land & hence the services received will not fall in the exclusion of definition of plant and machinery.

8. Personal hearing in the matter was held on 15.10.2024, wherein Shri N B Tripathi, CFO, Shri Dhruvit Shah, Jt. Manager, Shri Anmol Rathi, Manager and Shri Hemant Desai, Advocate appeared on behalf of the appellant. They submitted an amendment in the grounds of appeal and statement of facts along with the below mentioned documents *viz*

(i) Key plan & drawing approved by PESO
(ii) copy of approved GPCB plan

[1] 1992 (4) TMI 4

(iii) CCA order of GPCB
(iv) DISH approved plant
(v) Project completion certificate
(vi) Chartered Engineers certificate
(vii) photographs of plant site premises.

Further, the appellant also relied upon the below mentioned judgements *viz*

- Grasim Industries Ltd [2]
- Darshan Singh & Ors [3]
- Kantilal Trikamlal [4]
- A V Fernandez [5]
- Punjab Beverages P Ltd [6]
- Modi Sugar Mills [7]
- Darbari Lal [8]
- N Nagamanickam [9]
- Mohit Mineral P Ltd [10]
- Safari Retreats P Ltd [11]

8.1 The appellant in the additional submissions submitted during the course of personal hearing, requested insertion of various facts, *inter alia*

- that there is no break in the supply chain of the appellant and GACL;
- that GAAR failed to distinguish the difference between the right on land and the right attached to land meaning 'profit a prendre';
- that the license to occupy land is the supply of service which covers all commercial transactions; that the license to occupy is a benefit arising out of land & not supply of land itself; that any lease of a license to occupy land is defined as service;
- that not allowing ITC will burden the end consumer & shall lead to double taxation;
- that the leasehold right premium amount has been paid to occupying the right over land & engage in manufacturing;
- that in their view 'on his own account' means the immovable property is constructed for self-occupied use or non-commercial purposes; that license to occupy land must be dealt on profit of pende; that the leasehold plot has been used for furtherance of business and not on its own personal account such as self-occupied or a non-commercial object;
- that after acquiring leasehold right construction of immovable property has taken place in which manufacturing plant is erected

[2] 2002 128 STC 34[illegible]
[3] 1953 AIR 83
[4] 1974 (4) SCC 64[illegible]
[5] AIR 1957 SC 65[illegible]
[6] 1978 (2) SCC 14[illegible] (150)
[7] AIR 1961 SC 10[illegible]-1051
[8] AIR 1957 All 54[illegible]
[9] 1986 23 ELT 75
[10] 2022 (10) SCC [illegible]0
[11] 2024 INSC 756

which produces taxable goods & GST is charged on the outward supply of goods;
- the leasehold right if capitalized will be under 'leasehold right land' & not under 'building block'; that hence leasehold right consideration is not used for construction of the building;

8.2 Likewise, the appellant in the additional submissions, submitted during the course of personal hearing, requested insertion of the following grounds *viz*

- that the explanation incorporated in the section is an integral part of the statute & has no independent existence; that both are related to the supply of goods & nothing about the supply of services;
- that in terms of section 16(1), ibid, GST paid on input supplies during the pre-operative period is available even though appellant is not providing taxable out put supply;
- that the leasehold right consideration paid to acquire the rights to the land can never be said to be used for construction of immovable property to be blocked under section 17(5)(d), ibid;
- that leasehold right is service; that they will not capitalize nor amortize the GST input in their book & hence, section 16(3), ibid is not applicable;
- that the plant and building will be constructed on a part of lease holding premises & the unconstructed area will be used for auxiliary services; that if leasehold right is partly used for construction of an immovable property & then also GST on the leasehold right in respect of the area on which no immovable property is constructed would be eligible for ITC;
- that in terms of the ratio of Safari Retreat P Ltd, supra, ITC is held as legitimate.

FINDINGS

9. We have carefully gone through and considered the appeal papers, written submissions filed by the appellant, submissions made at the time of personal hearing, the Advance Ruling given by the GAAR and other materials available on record.

10. The primary issue to be decided is whether the appellant is eligible to claim ITC of the GST paid on the services provided by GACL.

11. Before dwelling on to the issue, we would like to reproduce relevant sections which govern availment/blocking of ITC under the CGST Act, 2017, *viz* [relevant extracts]

GUJARAT APPELLATE AUTHORITY FOR ADVANCE RULING GST-CGST AHMEDABAD

Section 16. Eligibility and conditions for taking input tax credit

(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled 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 in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

Section 17. Apportionment of credit and blocked credits

(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:-

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(d) 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 or 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 capitalisation, to the said immovable property;*

***Explanation**.- For the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes-*

(i) land, building or any other civil structures;

(ii) telecommunication towers; and

(iii) pipelines laid outside the factory premises.

12. The controversy in this appeal hinges to the aforementioned sub-sections. However, the Hon'ble Supreme Court, in a recent judgement in the case of M/s. Safari Retreats P Ltd, reported at [2024 INSC 756], while examining the above sub-sections has held as follows:

ANALYSIS OF CLAUSES (c) & (d)

31. Now, we analyse clauses (c) and (d) of Section 17(5). Clause (c) applies when works contract services are supplied for constructing immovable property. The definition of "works contract" under Section 2(119) is extensive. It reads thus:

"2. Definitions:-

(119) "works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement,

> *modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;"*

Thus, in the case of works contract services supplied for the construction of immovable property, the benefit of ITC is not available. *However, there are exceptions to clause (c). First is when goods or services, or both, are received by a taxable person for the construction of "plant and machinery", as defined in the explanation to Section 17. The second exception is where the works contract service supplied for the construction of immovable property is an input service for further supply of the works contract.*

32. Clause (d) of Section 17(5) is different from clause (c) in various aspects. Clause (d) seeks to exclude from the purview of sub-section (1) of Sections 16 and 18, goods or services or both received by a taxable person to construct an immovable property on his own account. There are two exceptions in clause (d) to the exclusion from ITC provided in the first part of Clause (d). The first exception is where goods or services or both are received by a taxable person to construct an immovable property consisting of a "plant or machinery". The second exception is where goods and services or both are received by a taxable person for the construction of an immovable property made not on his own account. ***Construction is said to be on a taxable person's "own account" when (i) it is made for his personal use and not for service or (ii) it is to be used by the person constructing as a setting in which business is carried out.*** *However, construction cannot said to be on a taxable person's "own account" if it is intended to be sold or given on lease or license.*

33. Section 17(5) incorporates an explanation which provides that the word "construction" used in clauses (c) and (d) includes reconstruction, renovation, additions, alterations or repairs, to the extent of capitalisation, to the immovable property. Thus, a very wide meaning has been assigned to the expression "construction" by the said explanation.

34. There is hardly a similarity between clauses (c) and (d) of Section 17(5) except for the fact that both clauses apply as an exception to sub-section (1) of Section 16. Perhaps the only other similarity is that both apply to the construction of an immovable property. Clause (c) uses the expression "plant and machinery", which is specifically defined in the explanation. Clause (d) uses an expression of "plant or machinery", which is not specifically defined.

35. Now, what is material is the explanation to Section 17, which reads thus:

> *"Explanation. For the purposes of this Chapter and Chapter VI, the expression —plant and machinery means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes*
>
> *(i) land, building or any other civil structures;*
> *(ii) telecommunication towers; and*
> *(iii) pipelines laid outside the factory premises."*

The explanation defines the meaning of the expression "plant and machinery". However, as stated earlier, the expression "plant or machinery" has not been defined under the CGST Act. It is pertinent to note that clauses (c) and (d) do not altogether exclude every class of immovable property from the applicability of ITC. In the case of clause (c), if the construction is of "plant and machinery" as defined,

> *the benefit of ITC will accrue. Similarly, under clause (d), if the construction is of a "plant or machinery", ITC will be available.*
>
> **[emphasis supplied]**

12.1 We find that the Hon'ble Supreme Court, while analyzing section 17(5)(c), *ibid*, has concluded that in the case of works contract, benefit of ITC is not available in respect of services supplied for the construction of immovable property, subject however to two exceptions [a] when the goods, services, or both, are received for construction of 'plant and machinery'; and [b] where the works contract service supplied for the construction of immovable property is an input service for further supply of the works contract.

12.2 Further, while analyzing section 17(5)(d), *ibid*, the Hon'ble Supreme Court has concluded that it seeks to exclude from the ambit of sub-sections 16(1) & 18(1), *ibid*, services received by a taxable person to construct an immovable property on his own account subject however, to two exceptions, where goods or services or both are received by a taxable person to

> [a]construct an immovable property consisting of a "plant or machinery"; and
> [b] for the construction of an immovable property made not on his own account;

The Hon'ble Supreme Court further, explains that construction is said to be on a taxable person's "own account" when (i) it is made for his personal use and not for services or (ii) it is to be used by the person constructing as a setting in which business is carried out, further stating that construction cannot be said to be on a taxable person's "own account" if it is intended to be sold or given on lease or license.

13. The Hon'ble Supreme Court, in the case of M/s. Safari Retreats P Ltd, *ibid*, while further analyzing has held as follows *viz*

> *43. ... .As the expression "plant or machinery" appears to be intentionally incorporated, it is not possible to accept the contention of the learned ASG that the word "or" in clause (d) should be read as "and". If the said contention is accepted, there will not be any difference between the expressions "plant and machinery" and "plant or machinery". This will defeat the legislative intent.*

> *46. The expression "plant or machinery" has a different connotation. It can be either a plant or machinery. Section 17(5)(d) deals with the construction of an immovable property. The very fact that the expression "immovable property other than "plants or machinery" is used shows that there could be a plant that is an immovable property. As the word 'plant' has not been defined under the CGST Act or the rules framed thereunder, its ordinary meaning in commercial terms will have to be attached to it.*
>
> *52. This Court has laid down the functionality test. This Court held that whether a building is a plant is a question of fact. This Court held that if it is found on facts that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance. The word 'plant' used in a bracketed portion of Section 17(5)(d) cannot be given the restricted meaning provided in the definition of "plant and machinery", which excludes land, buildings or any other civil structures. Therefore, in a given case, a building can also be treated as a plant, which is excluded from the purview of the exception carved out by Section 17(5)(d) as it will be covered by the expression "plant or machinery". We have discussed the provisions of the CGST Act earlier. To give a plain interpretation to clause (d) of Section 17(5), the word "plant" will have to be interpreted by taking recourse to the functionality test.*
>
> *53. One of the submissions of the learned ASG is that as the Union legislature cannot levy tax on land and buildings, the chain is broken once a building comes into existence by using goods and services. As discussed earlier, Schedule II of the CGST Act recognises the activity of renting or leasing buildings as a supply of service. Even the activity of the construction of a building intended for sale is a supply of service if the total consideration is accepted before the completion certificate is granted. Therefore, if a building qualifies to be a plant, ITC can be availed against the supply of services in the form of renting or leasing the building or premises, provided the other terms and conditions of the CGST Act and Rules framed thereunder are fulfilled. Therefore, the argument regarding breaking the chain cannot be accepted in its entirety. However, if the construction of a building by the recipient of service is for his own use, the chain will break, and therefore, ITC would not be available.*

14. We find that the Hon'ble Supreme Court while analyzing the expression plant **or** machinery, held that there could be a plant that is an immovable property; that the word 'plant' not having been defined under the Act, its ordinary meaning in commercial terms will have to be attached to it. The Hon'ble Court, thereafter laid down a functionality test, further concluding that if a building qualifies to be a plant, ITC can be availed against the supply of services in the form of renting or leasing the building or premises, provided the other terms and conditions of the CGST Act and Rules framed thereunder are fulfilled; that however, if the construction of a building by the recipient of service is for his own use, the chain will break, and ITC would not be available.

15. We find that the appellant has not denied the fact that construction activity has not been done on the leasehold land acquired from GACL. Though the averment is that the chartered engineers certificate states that 99.85% of the land would be utilized for construction of plant and machinery; that plant building will be constructed on a part of leaseholding premises and the unconstructed area will be used for auxiliary services. The aforementioned judgement lays down the law as far as section 17(5)(d), *ibid*, is concerned, ITC on services received for construction of immovable property on his own account is blocked subject however, to two exceptions, as listed supra. The Hon'ble Court further explains taxable person's "own account" to be when (i) it is made for his personal use and not for service or (ii) it is to be used by the person constructing as a setting in which business is carried out. On examining the applicant's case in light of the above, we find that the ITC of the leasehold land acquired from GACL on which construction is carried out by the appellant on his own account to set up a caustic soda plant, is hit by section 17(5)(d), *ibid* and therefore ITC is not eligible on this count.

16. Now on examining the matter as to whether it would fall within the other exception of 17(5)(d), *ibid*, ie construction of an immovable property consisting of a "plant or machinery", we find that the Hon'ble Court has laid down a functionality test, holding that if a building qualifies to be a plant, ITC can be availed. However, even on this count, if the construction of a building by the recipient of service is for his own use, the chain will break, and therefore, ITC would not be available. We have already held that in the present dispute, the appellant has not been in a position to prove that it is not on his own account. Going by the rationale of the judgement, *supra*, we hold that on this ground also, the appellant would not be eligible for ITC.

17. Now, as far as his averments regarding, payment of consideration to GACL for 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation or to do an act', falling under HSN 999792; that ITC of GST chargeable on relinquishment of rights/agreeing to surrender the rights is eligible under section 16, ibid, & is not covered in the ineligible list of input services; that the service received by the appellant is not a leasing service; that

the acquired land is to be used in the course of furtherance of business & not for the purpose of construction of immovable property; that in the absence of definition of land under the GST Act, it should be strictly interpreted, is concerned, in view of the foregoing judgement, the averments, are not legally tenable.

18. The numerous judgements relied upon by the appellant on how to read a statute, would not support his case, more so because, in paragraph 25 in the case of Safari Retreats P Ltd, *supra*, the Apex Court, has summarized the law regarding interpretation of taxation statutes and thereafter, passed the aforementioned judgement, which we have relied in coming to the aforementioned findings.

19. The other averments raised by the appellant, are not being gone into since in the judgement of Safari Retreats Pvt Ltd., the Hon'ble Apex Court has examined section 17(5)(d), *ibid*, in its entirety and has laid down the law, which in terms of Article 142 of Constitution of India, is the law of the land.

20. In view of the above findings, we reject the appeal filed by appellant M/s. GACL-NALCO Alkalies & Chemicals Private Limited, against the Advance Ruling No. GUJ/GAAR/R/53/2021 dated 18.10.2021, passed by the Gujarat Authority for Advance Ruling.

(Rajeev Topno)
Member (SGST)

(B V Siva Naga Kumari)
Member (CGST)

Place: Ahmedabad
Date: 30.12.2024