

2024 (85) G.S.T.L. 104 (App. A.A.R. - GST - W.B.)

BEFORE THE APPELLATE AUTHORITY FOR ADVANCE RULING UNDER GST, WEST BENGAL

S/Shri Navneet Goel and Khalid Aizaz Anwar, Members

IN RE : MINDRILL SYSTEMS AND SOLUTIONS PVT. LTD.

Appeal Case No. 04/WBAAAR/APPEAL/2023, dated 24-1-2024

Input Tax Credit - Apportionment of credit and blocked credits - Non-availability of ITC - Construction of immovable property - Respondent-company had constructed a warehouse and had let it out to another company - On respondent's application for advance ruling, WBAAR held that applicant was not eligible for credit of input tax charged on inward supply of goods and services related to construction of warehouse which was capitalized in books of account, however, where construction expenses were not capitalized in books, claim of ITC was admissible - **HELD** : Provisions of clauses (c) and (d) to sub-section (5) of Section 17 of GST Act, 2017 clearly states that Input Tax Credit (ITC) is not available in respect of works contract services or goods or services or both received for construction of an immovable property and thus it will be a blocked credit - ITC for such portion of expenses pertaining to reconstruction, renovation, additions, alterations or repairs which are capitalized stands ineligible - Issue of 'capitalization' is applicable only in Explanation part to clauses (c) and (d) to sub-section (5) of Section 17 *ibid* i.e., only when reconstruction, renovation, additions, alterations or repairs arises and if such expenses are not capitalized in books, related ITC may be available - WBAAR had erred in applying conditions of capitalization both for construction as well as for reconstruction, renovation, additions or alterations or repairs - WBAAR's Ruling was thus to be modified - Section 17 of Central Goods and Services Tax Act, 2017 - Section 17 of West Bengal Goods and Services Tax Act, 2017. [paras 15 to 20]

Ruling in favour of department

CASE REVIEW

Mindrill Systems and Solutions Pvt. Ltd. — 2023 (75) G.S.T.L. 601 (A.A.R. - GST - W.B.) = (2023) 8 Centax 116 (A.A.R. - GST - W.B.) — **Modified** [Paras 1, 4, 5, 7, 18, 20]

CASE CITED

Safari Retreats Pvt. Ltd. v. Chief Commissioner — 2019 (25) G.S.T.L. 341 (Ori.) — **Distinguished** [Para 6]

REPRESENTED BY : S/Shri Bathula Mahesh Babu, Assistant Commissioner and Santanu Kumar Roy, Superintendent, for the Assessee.

S/Shri Anil Kumar Dugar, Advocate and Debabrata Bhowmik, Joint Commissioner of State Tax, for the Department

[Order]. - This Appeal has been filed by Shri B. Mahesh Babu, Assistant Commissioner, Shibpur Division, Howrah CGST & CX Commissionerate, in the matter of Mindrill Systems and Solutions Private Limited having GSTIN : 19AAECM3065G1ZG carrying on business under the trade name of Mindrill Systems and Solutions Private Limited at Domjur Mahiary Road, PO : Begri, Opposite Saraswati Complex, Howrah - 711411 against the Ruling passed by the West Bengal Advance Ruling Authority *vide* Order No. 08/WBAAR/2023-24, dated 26-6-2023 [2023 (75) G.S.T.L. 601 (A.A.R. - GST - W.B.) = [2023] 152 taxmann.com 274 (AAR - West Bengal)], pronounced by the West Bengal Authority for Advance Ruling (hereinafter referred to as the 'WBAAR').

2. The concerned respondent, M/s. Mindrill Systems and Solutions Private Limited [GSTIN-19AAECM3065G1ZG] has constructed a warehouse at Village: Mollarber, P.O. Dankuni Coal Complex, Durgapur Expressway, P.S. - Dankuni, Hooghly-712310 and has let it out to M/s. Zomato Hyperpure Private Limited, GST being paid on such supply.

3. The Respondent 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 issue of 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

(a) capitalized in books, and,

(b) not capitalized in books

4. The respondent taxpayer (*i.e.* applicant in WBAAR) contended before the WBAAR that as per provisions of clause (d) to sub-section (5) of Section 17 of the GST Act, registered persons are ineligible for claiming ITC on inward supplies of goods or services used for construction on account of own use and such provisions will not extend to including construction of immovable property for use by lessee or tenant.

5. The respondent taxpayer (*i.e.* applicant in WBAAR) further contended that pre-engineered steel structures were used for construction of the warehouse and thus the said warehouse does not fall within the purview of immovable property. Hence, the restriction imposed under clause (d) to sub-section (5) of Section 17 of the GST Act is not applicable in the instant case. Thus the benefit of input tax credit ought to be given on inward supply of input/input service used for construction of warehouse.

6. The respondent taxpayer (*i.e.* applicant in WBAAR) has referred to the judgment delivered by the Hon'ble Orissa High Court in the case of *Safari Retreats (P.) Ltd. v. Chief Commissioner of Central Goods & Services Tax* [2019 (25) G.S.T.L. 341 (Ori.) = [2019] 105 taxmann.com 324/74 GST 500 (Ori.)]. In this context, the WBAAR observed that 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. The WBAAR observed that the intention behind the construction of the warehouse, as 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. So, the

warehouse as constructed by the applicant, for its permanent characteristics and in absence of mobility like other goods, would be regarded as an immovable property. Further, admissibility of input tax credit to the extent of capitalization in the books of account was also not a subject of discussion in the *Safari Retreat* case. WBAAR thus found that the aforesaid case was not identical with the case being dealt with and opined that the ratio of the aforesaid judgment was not applicable to the present case.

7. WBAAR therefore held 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. However, where construction expenses are not capitalized in books, the claim of ITC is admissible.

8. The Appellant has filed the instant appeal against the above mentioned Advance Ruling dated 26-6-2023 on the following grounds :

(a) In the instant case, the respondent taxpayer had received inward supplies of goods and services both including works contract services to construct a warehouse/godown and has let it out to M/s. Zomato Hyperpure Private Limited. The issue involved in the instant case is related to admissibility of credit of input tax charged on aforesaid supplies received by the respondent taxpayer. The WBAAR has erred by restricting the input tax credit to the extent of construction expenses only which are capitalised in books of account.

(b) Clause (d) of sub-section (5) of Section 17 of the GST Act restricts input tax credit for construction of immovable property which deals with original construction.

(c) Further, explanation given under clause (d) of sub-section (5) of Section 17 of the GST Act clarifies that construction work includes re-construction/renovation/additions/alterations/repairs and in these cases the availability of input tax credit is restricted only to the extent of capitalization.

(d) In the instant case, the applicant taxpayer made *an original construction* work in form of a warehouse to let it out to M/s. Zomato Hyperpure Private Limited. Hence, irrespective of whether the construction expenses have been capitalised or not, the input tax credit shall not be available to the applicant taxpayer.

9. The Appeal petition was heard on 3-10-2023 in virtual mode and subsequently on 8-1-2024 on physical hearing mode on request of the respondent. Both the Appellant and the Respondent taxpayer along with the State Revenue Authority were asked to file their written submissions regarding the issue under consideration.

10. The appellant gave further written submission wherein he reiterated the submissions made in the Appeal application.

11. The respondent taxpayer filed a written submission wherein the following points were submitted :

(a) There is no merit in the ground ventilated by the Revenue that the Input Tax Credit shall not be available even if the construction expenses have been capitalised or not under clause (d)

of sub-section (5) of Section 17 of the GST Act because said provision restricts input tax credit for construction of immovable property which deals with original construction. There is no concept of "original construction" in said provision and clause (d) of sub-section (5) of Section 17 of the GST Act does not debar a person from claiming ITC on non-capitalised construction/reconstruction/renovation/additions/alterations/repairs expenses relating to immovable or movable property used in the course of or furtherance of business.

(b) Section 17 of the GST Act deals with apportionment of credit and blocked credits. Clauses (c) and (d) of sub-section (5) of Section 17 of the GST Act deal with non-availability of credit relating to immovable property in certain situation.

(c) Upon plain reading of the provisions of Section 17(5)(d) of the Act, it is amply clear that said provision in no manner deals with ITC on non-capitalised construction/reconstruction/renovation/ additions/alterations/repairs expenses relating to immovable or movable property used in the course of or furtherance of business.

(d) Therefore, in view of definitions provided under Section 2(19), 2(52), 2(59), 2(62), 2(102) and 2(119) of the GST Act, the taxpayer is entitled to claim ITC on non-capitalised construction/reconstruction/renovation/additions/alterations/repairs expenses relating to godown/warehouse given on rent.

12. The State Revenue Authority also filed a written submission wherein they expressed their complete agreement with the order/ruling passed by the WBAAR. They also mentioned that the concerned taxpayer issued invoice for supply of services to M/s. Zomato Hyperpure Pvt. Ltd. Mentioning SAC as 9972 12 (Rental or Leasing services involving own or leased non-residential property) under Real Estate Service (9972). By supplying real estate service, the applicant himself established the nature of such property is immovable one. So, revenue also echoed the view of WBAAR in this regard.

13. All the parties were duly heard and their submissions were carefully considered. In the instant case, the entire issue stands upon a very plain and simple reading of the provisions of clauses (c) and (d) to sub-section (5) of Section 17 of the GST Act.

14. For the sake of clarity, the provisions of clauses (c) and (d) to sub-section (5) of Section 17 of the GST Act is reproduced as below :

"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 :-

(a) & (b) xx xx xx

(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 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 purpose 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.”

15. The provisions of clauses (c) and (d) to sub-section (5) of Section 17 of the GST Act thus clearly states that Input Tax Credit is not available in respect of works contract services or goods or services or both received for construction of an immovable property. Therefore, for the purpose of construction, the law is unambiguous in the main clauses (c) and (d) to sub-section (5) of Section 17 of the GST Act that Input Tax Credit will not be available and thus it will be a blocked credit. It is only the *Explanation* part, where the law extends the ineligibility criteria for Input Tax Credit to the arena of reconstruction, renovation, additions, alterations or repairs and that too conditionally, *i.e.* Input Tax Credit for such portion of the expenses pertaining to reconstruction, renovation, additions, alterations or repairs which are capitalized stands ineligible.

16. The explanatory part actually is inclusive in nature which explains that the restrictions of Input Tax Credit as per clauses (c) and (d) to sub-section (5) of Section 17 of the GST Act is not only applicable on construction but also on reconstruction, renovation, additions, alterations or repairs. However, the condition in regard to capitalization is applicable only in respect of reconstruction, renovation, additions, alterations or repairs to the said immovable property.

17. Thus, to reiterate, the issue of “capitalization” is applicable only in the *Explanation* part to the clauses (c) and (d) to sub-section (5) of Section 17 of the GST Act *i.e.* only when the question of reconstruction, renovation, additions, alterations or repairs arises. If such expenses are not capitalised in the books, only under such circumstances the related Input Tax Credit may be available subject to fulfilment of other eligibility criteria. But for the purpose of “construction”, it is clear from the law that Input Tax Credit is blocked in all occasions and there is no scope of any other interpretation.

18. The WBAAR has erred in interpreting the afore-stated provisions by applying the conditions of capitalisation both for construction as well as for reconstruction, renovation, additions or alterations or repairs.

19. In view of above discussions, we are of the opinion that in the instant appeal case, the concerned respondent has constructed one warehouse and let it out. This being a ‘construction’, will attract the provisions of the clauses (c) and (d) to sub-section (5) of Section 17 of the GST Act and not the *Explanation* part for determining the eligibility criteria for Input Tax Credit. Thus, the input tax credit for such construction shall not be available to the respondent.

20. The WBAAR Ruling No. 08/WBAAR/2023-24, dated 26-6-2023 is thus modified and the Appeal stands confirmed.

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