

GST-ADVANCE RULINGS

CA. C. B. Thakar, CA. Jinal Maru

Case: Mr. VILAS CHANDANMAL GANDHI [2020-TIOL-25] (MAHARASHTRA AAR)

The applicant received TDR / Additional FSI as compensation from Pune Municipal Corporation (PMC) for surrendering their rights in land. The applicant sold part of said TDR to another company M/s Vanoma Developers Pvt Ltd. The applicant sought for AAR for whether sale of TDR otherwise than for construction is classifiable as supply of Goods or Services and what is the rate of tax ?

The AAR held that GST is leviable on sale of Transferable Development Rights (TDR)/Floor Space Index (FSI) received as consideration for surrendering the joint rights in land in terms of Development Control Regulations by PMC. Classification of such supply would be under heading 9972 and the applicable rate of GST is 18% under reverse charge

Case: WEWORK INDIA MANAGEMENT PVT LTD [2019-TIOL-416-AAR-GST (KARNATAKA)]

Applicant is in the business of supplying shared workspace/office space to the freelancers, startups etc. applicant seeks to know whether they are eligible to avail ITC on the detachable 14mm Engineered wood with Oak Top wooden flooring & detachable sliding and stacking glass partition which is movable in nature and capitalized as 'furniture and fixture' and is not capitalized as 'immovable property'. The AAR held that as under :

- Detachable wooden flooring and sliding and stacking of glass partitions are fixed to the buildings to create the office spaces and hence is a sine qua non for letting out of the office spaces. There cannot be office space unless these are fixed and hence it can be said to be permanently fastened to the building. Since this activity amounts to addition or alteration to an immovable property, ITC is not available
- Oak top wooden flooring is concerned, the same can be easily detached and reused. It only adds to the value to the building and is not sine qua non for the office space unlike the partitions and it is not covered under 'construction of immovable property' - Therefore, ITC of GST is available.

Case: M/s ALCON CONSULTING ENGINEERS (INDIA) PVT LTD [2019-TIOL-378] (KARNATAKA AAR)

Applicant seeks advance ruling on applicability of GST on periodical reimbursement made to their employees for expenses incurred by them on behalf of the company such as as travelling, transportation, food, vehicle hire charges , boarding & lodging , printing stationery, Mobile and telephone charges etc. Also, it seeks ruling on applicability of GST under RCM on remuneration paid to Directors.

AAR held that Amounts paid to the employees as reimbursement of expenses incurred by them in the course of employment would not amount to consideration for the supplies received & are not liable to tax in view of Schedule III. Remuneration paid to Director is liable to tax under reverse charge mechanism in terms of s.9(3) r/w Entry no. 6 of 13/2017-CTR

Case: Mr. VILAS CHANDANMAL GANDHI [2020-TIOL-25] (MAHARASHTRA AAR)

Facts of the Case:

1. The applicant was owner of land situated within the limits of Pune Municipal Corporation (PMC). He entered into an agreement with M/s Amar Builders and Developers to develop the land jointly and share the profits of sale proceeds after development of the land by way of construction of commercial /residential project.
2. Vide this agreement, the applicant assigned/ transferred development rights in land to the Developer and agreed to receive 45% of the sale proceeds of the developed project.
3. These rights in land had a reservation in the light of Draft Development Plan for Pune City sanctioned by PMC. Since the applicant and developer realized that vacating/ removing reservation may not be possible, they decided to surrender their rights in the said land.
4. In lieu of surrendering the joint rights in land to PMC in terms of Development Control Regulations (DCR), PMC granted them TDR's/ Additional FSI as compensation.
5. The applicant and developer vide supplementary agreement, agreed to share the TDS/ Additional FSI in ratio of 73:27.

6. Subsequently, the applicant and developer decided to sell part of TDR/ Additional FSI to M/s Vamona Developers Pvt Ltd (VDPL) & share the sale proceeds in agreed ratio.

Questions before AAR:

1. Whether GST is leviable on sale of TDR/ FSI received as compensation for surrendering the rights in land in terms of DCR ?
2. If Yes, what will be the classification & applicable rate of GST ?

Arguments by Applicant :

1. That TDR / Additional FSI is benefit arising out of land. Sale of TDR/ Additional FSI does not amount to taxable supply, same being in nature of sale of land/ immovable property & covered under clause 5 of Schedule III of CGST Act.
2. Alternatively, they also made submissions that sale of TDR is taxable supply for the reasons as under :
 - The term “service” is vide enough and covers everything other than goods, money & securities.
 - The Government vide notification 4/2018-CTR dated 25th January,2018 intended to tax the transaction of transfer of TDR & provided for the incidence of taxable event in respect of TDR for construction . Although said notification was issued in context of joint development agreement, it appears that Government intended to tax all the TDR’s.
 - Exemption was granted from payment of GST on sale of TDR subject to conditions prescribed in notification 4/2019-CTR dated 29th March,2019
 - Further vide notification 5/2019 & 6/2019- CTR , promoter who receives development right was liable to pay GST under reverse charge on the date of issuance of completion certificate.
 - From above, sale of TDR appears to be liable to GST and to determine rate and SAC code notification 11/2019 CTR needs to be referred, wherein entry 35 – other miscellaneous services not elsewhere specified prescribed rate of 18% GST.

Decision of AAR

1. Ministry of Finance, Department of Revenue (TRU) has issued FAQ’s (Part II) on real estate vide F.No. 354/32/2019-TRU dated 14th may,2019. In said TRU, Sr. No.7 refers to what rate shall be taken to determine GST payable on TDR, wherein it is stated that GST on TDR/ FSI is payable @ 18% with ITC under Sl. No.16(iii) of notification 11/2017-CTR (heading 9972)
2. Reference to above FAQ’s Sr. No.7, Notification 4/2018-CTR, 4/2019-CTR, 5/2019-CT it is clear that sale of TDR , apart from TDR for construction is taxable @ 18% under Sl.No. 16 (heading 9972) in view of notification 11/2017-CTR.

Case: WEWORK INDIA MANAGEMENT PVT LTD [2019-TIOL-416-AAR-GST (KARNATAKA)]

Facts of the Case:

1. The applicant is in the business of supplying shared workspaces/ office spaces to the freelancers, start-ups, etc on rent. For this, they procure goods and services from various contractors for fitting out of the workspaces and pays GST on said inputs.
2. The 2 major components procured by applicant which are in the nature of furniture & fixtures are as under :
 - o Detachable 14mm Engineered wood with Oak top wooden flooring
 - o Detachable sliding and stacking glass partitions

Questions before AAR:

1. Whether ITC can be availed of above Wooden Flooring , which is movable in nature and capitalized as “Furniture & Fixture” & not capitalized as “Immovable Property”?
2. Whether ITC can be availed of above sliding and stacking glass partition, which is movable in nature and capitalized as “Furniture & Fixture” & not capitalized as “Immovable Property”?

Arguments by the Applicant:

1. They are eligible for ITC of above Furniture and Fixtures in view of section 16 , as same are being fitted in the building for the co-working space being let out to members and qualifies to be used in the course of furtherance of business.

2. That as per section 17(5) of CGST Act, a restriction is imposed with respect to ITC on procurement of goods or services or both received by taxable person for construction of immovable property. However, the term “construction” is limited to supplies to the extent capitalized to an immovable property
3. That section 17(5)(d) uses the word “for” construction and this term is more specific than “in relation to” and the word “for” generally means “for the purpose of”. Relied decision of Hon’ble SC in case of Mansukhlal Dhanraj Jain & Ors Vs. Eknath Vithal Ogale etc , wherein it was concluded that the word “relating to” has wider connotations than “for”.
4. Therefore, in order to be covered by the restrictions provided u/s 17(5)(d), the goods or services must be directly used for construction of immovable property.
5. The detachable Oak wooden flooring & detachable sliding & stacking glass partitions are not inextricably linked to construction itself. They are only an addition added above the flooring already present in the fully constructed building.
6. That they have capitalized the above flooring under “Furniture and Fixtures”, as they can be detached and re-used and are not considered to be permanent civil assets.
7. That above goods are movable and submits that anything embedded to the earth and which cannot be dismantled and moved strictly are covered under ambit of immovable property.
8. Detachable Oak wood flooring are fixed using streaped foam and detachable sliding are fixed with the help of nuts and bolts to the foundation. They are neither rooted nor embedded on earth & can be detached and re-used.
9. That it is understood that there are 2 types of fittings of the wooden flooring, one being glued down where the same cannot be dismantled and re-used , other being interlocked by using a polished streap foam where the wood can be removed without damaging the area where it is fixed and re-used.
10. Reliance placed on following :
 - a. AAR Uttarakhand in case of M/s Vindhya Telelinks Ltd, where held that it was ITC is available of goods or services used in erection of infrastructure which consist of steel tabular pole, galvanized iron wire, nuts, bolts etc for telecommunication service providers since the infrastructure provider by the applicant is different from “Telecommunication Tower”.
 - b. AAR in case of M/s BAHIL Paper Mills Ltd, Nipro India Corporation Pvt Ltd

Decision of AAR

1. The term ‘construction’ includes additions to the immovable property to the extent of capitalization. The certificate of CA shows that the additions are capitalized in books of accounts under the head “Furniture & Fixtures’. However, it is nowhere said that the capitalized amount needs to be declared as in the books of accounts within the value of immovable property i.e. buildings.
2. The Accounting Standards which enumerate the classes of Fixed Assets being land and buildings, furniture and fixtures, etc does not classify property as movable or immovable property and an asset classified as fixture could still be immovable property within its meaning.
3. It is pertinent to note that the office spaces which is provided is an immovable property and there is no dispute in this regard and these partitions are those which are attached to the building which separates the spaces given on rent. The character of the office space is of certain degree of permanence so that the office space of one tenant can be separated from the office space of another tenant and this needs certain degree of permanence, so that the same can be demarcated clearly in advance.
4. That these are fixed to the building to create the office spaces and hence is sine qua non for the letting out of the office space. Hence, the fixing of sliding and stacking glass partitions amounts to additions or alteration to the immovable property and hence are used for construction of an immovable property and hence ITC shall not be available.
5. The detachable oak wooden flooring only adds to the value to the building and is not sine qua non for the office space, unlike the partitions. There is no permanence involved in fastening of this flooring and no damage is done to the property at the time of detachment. Hence it is not covered under addition /alterations to the immovable property

Case: M/s ALCON CONSULTING ENGINEERS (INDIA) PVT LTD [2019-TIOL-378] (KARNATAKA AAR)

Facts of the Case:

1. The applicant are in the business of providing consultancy services like surface survey and map making, Project management consultancy services for construction projects, engineering advisory services, etc.
2. While providing the above services, their employees incur expenses such as travelling, transportation, food, vehicle hire charges , boarding & lodging , printing stationery, Mobile and telephone charges etc.
3. Since their employees are working at remote areas and there is no connectivity to reach or contact office on day to day basis, it is difficult to monitor at regular intervals whether the amount of such expenses exceeding Rs.5000/- in a day. The applicant reimburses their employees on periodical basis.

Questions before AAR:

1. Whether the expenses incurred by the Staff members on behalf of the company exceeding Rs.5,000/- per day & reimbursed to them are liable to GST ?
2. Whether RCM is applicable on remuneration paid to the Directors ?

Decision of AAR

1. Service by an employee to employer in the course of employment is covered under clause I of Schedule III – which relates to the activities which shall be treated as neither supply of goods nor supply of services.
2. The amount paid by the employee to the supplier of service is covered under the term “consideration” as if it is paid by the applicant for himself for the services received by them on behalf of the company. The amount reimbursed by the applicant to the employee later, would not amount to consideration for the supplies received.
3. If any tax is applicable, it is on the services received by the employee on behalf of the applicant in the course of his employment, irrespective of the fact that it is paid by the applicant or his employees and later reimbursed by applicant.
4. As regards remuneration to Directors paid by the applicant, their services are not covered under clause 1 of the Schedule III. The consideration paid to the Director is in relation to the services provided by the Director to the company & recipient of such service is the Company & supplier is the Director. The applicant is liable to pay tax under reverse charge on the remuneration paid to Director in view of entry 6 of notification 13/2017-CTR.