

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



ADVANCE RULING NO. GUJ/GAAR/R/53/2021

(IN APPLICATION NO. Advance Ruling/SGST&CGST/2021/AR/28)

Date: 18-10-2021

Name and address of the applicant	:	M/s. GACL NALCO Alkalies & Chemical Pvt. Ltd., 401-403, Yashkamal Building, Sayajiganj, Vadodara-390005.
GSTIN of the applicant	:	24AAGCG2049A1Z7
Date of application	:	6-8-21
Clause(s) of Section 97(2) of CGST / GGST Act, 2017, under which the question(s) raised.	:	(d)
Date of Personal Hearing	:	23-9-21
Present for the applicant	:	1. Shri Ketan Shah, CEO, 2. Shri N. B. Tripathi, CFO, 3. Shri Dhruvit Shah, DM(F), 4. Shri Willingdon Christian, Advocate, 5. Shri R C Thakkar, CA, 6. Ms. Uruta Maheshwari, CA, 7. Shri Kiza Subramnyam, Consultant

BRIEF FACTS

M/s GACL-NALCO Alkalies & Chemicals Private Limited (hereinafter referred to as GNAL for the sake of brevity) is a joint venture of M/s. Gujarat Alkalies and Chemical Limited (hereinafter referred to as “GACL”) and National Aluminium Company Limited. GNAL is engaged in the production of caustic soda and submits that it is developing a Greenfield project of caustic soda plant.

2. GIDC leased/ allotted a plot of land at Dahej Industrial Estate to GACL . On 31-10-17, GACL approached GIDC for a sub-division of the plot and had surrendered its leasehold rights of 3,91,000 sq. mtrs. of land in favour of GNAL . Thus GNAL was allotted the said plot on long-term lease for developing a greenfield project of caustic soda plant vide Deed of Rectification executed between GIDC and GNAL on 8-1-18, for which GACL invoiced GNAL for Rs. 85,89,97,520/- (72,79,64,000/- as consideration plus GST of Rs. 13,10,33,520/-) for the act of agreeing to surrender/ transfer its leasehold rights of the plot in favour of GNAL.

3. GNAL submits as follows:

(i) One time consideration paid by GNAL to GACL cannot be taken as Sale Price of the Land on the ground that it is neither the Sale of Immovable Property nor is the Sub-Lease

of Property. As the ownership of the land remains with GIDC permanently and hence it is just an act of relinquishment of rights in the Leasehold Land. Hence, the said transaction doesn't fall under the purview of Section 17(5)(d).

(ii) The rights in the plot of land have been acquired by the GNAL for developing a Greenfield project for manufacturing caustic soda. Therefore, one can conclude that the consideration paid by the GNAL to GACL towards acquiring the rights over the plot of land is in the course of or for the furtherance of business.

4. GNAL has satisfied all the conditions laid down under Section 16 (2) of CGST Act in order to be eligible to claim Input Tax Credit and is of the view that the Input Tax Credit shall be available to it.

5. GNAL vide its letter dated 23-9-21, submitted as follows:

a) Kind attention is invited to Section 16(1), 2(17), 2(62), 2(63), 17(5)(d) of the CGST Act 2017. For the purposes of GST laws, it can be construed that ITC of tax charged on any supply of goods or services can be availed qua activities in relation to the business/ furtherance of its business. The Applicant company is engaged in the business of manufacture and supply of Caustic Soda and in order to undertake manufacturing of Caustic Soda, they have acquired the leasehold rights from its promoters as per the agreement of Joint shareholders agreement and is setting up Caustic Soda and Captive Power Plant on the leased property to manufacture Caustic Soda. After manufacturing of Caustic Soda through aforesaid two plants, the Caustic Soda which will be supplied to customers including its promoters, which qualifies as taxable outward supply under GST.

b) As the leasehold rights are acquired for setting-up including erection, installation and commissioning of the said two plants for rendering taxable outward supplies, ITC of GST chargeable on transfer of leasehold rights should be eligible in terms of Section 16 of the CGST Act as the same is to be used in the course or furtherance of business.

c) Section 17(5)(d) of the CGST Act provides for restriction on availment of ITC qua the goods and/or services received by a taxable person for construction of an immovable property on his own account including when such goods or services or both are used in the course or furtherance of business. However, the said provision carves out a specific exception for construction of 'Plant and Machinery'. Test of movability/immovability is, therefore, immaterial to determine the eligibility of ITC once the items in question qualify as 'Plant and machinery'. As the two plants are intended to be used for manufacture and supply of Caustic Soda by them, it qualifies as a 'Plant and Machinery'.

d) The said two plants once fully constructed, will be capitalized as a 'Plant and Machinery' in their Books of Accounts. Hence the facts of the present case do not fall under any of the exclusion category stipulated under the definition of 'Plant and machinery'. In other words, as Caustic Soda Plant & Power Plant qualify as a 'Plant and machinery', GST chargeable, if any, on transfer of leasehold rights is rightly admissible to them as the bar placed under Section

17(5)(d) of the CGST Act does not apply in a case where goods and/or services are procured for construction of a 'Plant and Machinery'.

e) The criteria for eligibility and conditions to take input tax credit of Central Goods and Service Tax ('CGST') and State Goods and Services Tax ('SGST') have been prescribed under Section 16 of the Central Goods and Services Tax Act, 2017 ('CGST Act') and Section 16 of the Gujarat State Goods and Services Tax, Act 2017 ('SGST Act') respectively. Section 16(1) of the CGST Act and SGST Act allows a registered person to take credit of input tax charged on any supply of goods or services to him which are used or intended to be used in the course or furtherance of his business. Therefore, in order to avail credit, the person should be a 'registered person' and the services supplied to him should be used in the course or furtherance of his business.

f) The words "input service" have been defined in section 2(16) the CGST Act, 2017 and SGST Act, 2017 as follows:

"input service" means any service used or intended to be used by a supplier in the course or furtherance of his business."

The definition of input service is inclusive and not exhaustive. The statute has enlarged the scope of input services by the usage of the word "any service". The definition does not provide for only specific activity relating to supply. Thus, all input services used in activities in relation to or for furtherance of business are 'input services', whatever may be its purpose. When it is so used, these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import, but also those things which the interpretation clause declares that they shall include. The definition of input service seeks to cover every conceivable service used in provision of outward supply. Therefore, the charges for lease of land is an input services in terms of section 2(16) of the CGST Act, 2017 and SGST Act, 2017.

g) The word "business" is to be understood as continuous activity and not confined or restricted to mere manufacture of the product or provision of a service. Activities in relation to the business cover all activities that are related to the functioning of the business. Words "in the course or furtherance" further widens the scope. The functions primarily encompass the entire gamut of activities involved in the process of manufacture of goods or provision of service. The other functions are in the realm of obligations – some self-imposed and others by way of laws enacted for the welfare of the working class. The definition of 'input services' clearly highlights the dichotomy of multifarious functions any business organization is required to undertake while pursuing their objectives. Therefore, it is apparently clear that the lease charges paid for land has been used in course of business and eligible for input credit under Section 16(1) of the CGST Act, 2017 and SGST Act, 2017.

h) GST is basically value added tax, which, in turn, is a destination based consumption tax. It is a consumption tax which ultimately must be borne by the consumer. It is operative through credit mechanism wherein the input relief is to neutralize cascading effect of tax. A "consumption tax" derives its name from the

fact that tax burden is ultimately borne by the final consumer and business does not bear the burden of the tax, since the business companies are allowed to take credit of tax paid on inputs supplied/received by them. If therefore input credit is denied to the input service received by the assessee, they will become burden to the assessee, which is against the very grain or principle of GST being a consumption tax. Therefore, the Applicants are eligible to avail input credit of GST paid on lease charges of land.

i) Section 16(2) of CGST Act and SGST Act lays down the pre-conditions to avail input tax credit. The conditions prescribed under Sec 16(2) of the Act are as follows:

- i) Possession of Tax Invoice : They are in possession of tax invoice issued by the lessor.
- ii) Receipt of Services: They entered into a long-term lease agreement with the lessor vide Lease Agreement dated 8th January 2018. Accordingly, the effective date of commencement of lease is 8th January, 2018. They have the legal right over the land and are in possession of land (for achieving their objective of furtherance of business by construction of plant and machineries for setting up the Caustic soda plant and Power Plant) with effect from 8th January 2018 and as such they are in receipt of services.
- iii) Payment of tax: They have already paid tax of Rs.13,10,33,520/- to the lessor and the payment of tax by the lessor to the Government is evident from the copy of GSTR-2A returns. The screenshot of the GSTR 2A return available online is attached herewith and marked Annexure-1.

j) Section 17(5) of the CGST Act, 2017 and SGST Act, 2017 provides the list of input services on which input credit is not available. Section 17(5) of the CGST Act, 2017 and SGST Act, 2017 is reproduced below for your ready reference.

“(5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

(a) motor vehicles and other conveyances except when they are used –

(i) for making the following taxable supplies, namely:-

(A) further supply of such vehicles or conveyances ; or

(B) transportation of passengers; or

(C) imparting training on driving, flying, navigating such vehicles or conveyances;

(ii) for transportation of goods;

(b) the following supply of goods or services or both:-

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre;

(iii) rent-a-cab, life insurance and health insurance except where —

(A) the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force; or

(B) such inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as part of a taxable composite or mixed supply; and

(iv) travel benefits extended to employees on vacation such as leave or home travel concession;

(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;

(e) goods or services or both on which tax has been paid under section 10;

(f) goods or services or both received by a non-resident taxable person except on goods imported by him;

(g) goods or services or both used for personal consumption;

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and

(i) any tax paid in accordance with the provisions of sections 74, 129 and 130.”

k) GST paid by the applicant company on the lease charges doesn't get covered in the ineligible list of input services as reproduced above. Moreover, the

Hon'ble Supreme Court in Bajaj Tempo Ltd. Mumbai v. CIT (1992) = 1992 (4) TMI 4 - SUPREME COURT observed that while interpreting the statute, provision granting incentives for promoting economic growth and development should be liberally construed. Restriction placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the objective of the provision. Therefore, the leasing service received by them is not an ineligible input service and they have rightfully availed services on the same.

l) Schedule III of the CGST Act, 2017 provides the list of activities or transactions which shall neither be treated as a supply of goods nor a supply of services. Clause 5 of Schedule III includes sale of land or building and as such sale of land will be regarded as outside the scope of GST. The activity of leasing of land is not included in Schedule III of Act and as such the activity of leasing of land amounts to Supply under Section 7 of the Act. Further, the activity of leasing of land has specifically been included in Schedule II of GST Act as supply of service and is thus liable to GST. In order to substantiate the same the Applicant would like to refer the recent judgement by Hon'ble High Court of Bombay in Builders Association of Navi Mumbai & Anr. Vs. Union of India and Ors [TS-108-HC-2018 (BOM) – NT] = 2018 (4) TMI 461 - BOMBAY HIGH COURT wherein the Hon'ble High Court held that :

“.....expression “supply” includes all forms of supply of goods and/or services made or agreed to be made for a consideration by a person in the course or furtherance of business, and activities enlisted under Schedule II either as supply of goods or services would also be included therein;.... As per Schedule II of CGST Act (Item No. 2), any lease, tenancy, license to occupy land and lease / letting out of a building for business is a supply of ‘service’,... “Once this law, in terms of the substantive provisions and the Schedule, treats the activity as supply of goods or supply of services, particularly in relation to land and building and includes a lease, then, the consideration therefore as a premium/one-time premium is a measure on which the tax is levied, assessed and recovered.”; it is entirely for the legislature to exercise powers conferred by Section 7(2) of CGST Act and issue requisite Notification sans which, merely going by status of CIDCO, it cannot be held that lease premium would not attract / invite liability to pay GST;

In view of the above judgement, it is clear that the activity of leasing of land is liable to GST as supply of service and accordingly, they are eligible to avail the GST levied by the lessor on supply of land on lease.

m) Thus, in the absence of any restriction on availment of credit under the GST Act on tax paid on leasing of land service (as an objective of furtherance of business for the construction of plant and machineries for setting up Caustic Soda plant, as explained above) and fulfilment of all the conditions to avail credit, the Applicants are eligible to avail credit of CGST and SGST paid to lessor on acquiring land on lease for business activities.

6. GNAL vide its letter dated 30-9-21, submitted as follows:
- i We have already obtained GST registration on 01.07.2017 and our Dahej Plant site address has been added as Additional Place of Business in our Registration Certificate. The copy of our Registration Certificate is submitted herewith as Annexure - 1.
 - ii We hereby confirm that, no residential colony has been constructed till date and the Company does not have any plan to construct any residential colony in future on the above land for the Project Site at Dahej for which GACL has agreed to surrender their leasehold rights in favour of GNAL.
 - iii The total area of land for the project site is 3,90,999.90 sq.mtrs. (aggregate of 35,830.50 Sq.mtr. for Plot No. D/II/9/1 & 3,55,169.40 sq.mtr. for Plot No.D/II/9/2). The land is utilised for the construction of Caustic Soda Plant & Power Plant as per the guidelines and compliances prescribed by GIDC and also required for the environment clearance by GPCB as well as the requirements of the Factories Act.
 - iv In order to operate and maintain the plant safely, the company has provided supervisory and controlled units for offices of supervisory staff required for safe operation and maintenance of the plants. The total area of land utilised exclusively for this purpose is 580 Sq.Mtrs. which is amounting to 0.148% (less than 1%) of the total land area of 3,90,999.90 Sq.Mtrs.
 - v Based on the above details, the proportion of the consideration paid to GACL and the GST amount has been worked out for (a) Land Area used for the construction of Caustic Soda Plant and Power Plant and (b) Land Area utilised for the construction of supervisory / controlled units are as under:

Particulars	Area in Sq. Mtr	Consideration amount (Rs.)	GST Amount. (Rs.)
Total land area acquired for setting up the CSP and Power plant by GNAL.	3,91,000	72,79,64,000/-	13,10,33,520/-
Area of land exclusively utilised for the construction of supervisory / controlled units.	580 (Merely 0.148%)	10,77,388/-	1,93,930/-

The relevant copy of Chartered Engineers and CA certificate is attached as Annexure- 2 & Annexure – 3.

- vi We would also like to inform you that the total project cost estimate is Rs.2300/- Cr., out of which the cost of plant and machinery is amounting to Rs.1950/- Cr. which is being spent for setting up Caustic Soda Plant and Power Plant at Dahej GIDC Plot No. D/II/9/1 & D/II/9/2.

Question on which Ruling sought

7. Whether GNAL is entitled to claim Input Tax Credit of the GST paid on the services provided by GACL in the form of agreeing to surrender/ relinquish its rights in the leasehold property in favour of GNAL?

Personal Hearing

8. GNAL vide its authorised representatives appeared for the hearing on 23-9-21 and reiterated the contents of the application.

DISCUSSION & FINDINGS

9. We have carefully considered all the submissions made by GNAL. At the outset, we would like to state that the provisions of both the CGST Act and the GGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the GGST Act.

10. GNAL seeks Ruling whether said GST portion borne by it, is admissible as ITC. We are not getting into the merit of SAC in the subject invoice raised by GACL on GNAL, but do hold that GACL has transferred its lease hold right on land to GNAL, for GNAL to further its caustic soda project. GNAL in written submission dated 23-9-21, at page 11 held the activity between GACL and GNAL as leasing of land liable to GST.

11. We refer to Section 16(1) CGST Act, reproduced as follows:

Section 16(1)

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.

12. Further we refer to the Non Obstante Section 17(5) CGST Act, which starts with the phrase 'Notwithstanding anything contained in section 16(1)..', i.e, provisions of section 17(5) overrides the provisions of section 16(1).

Section 17(5)(d) CGST Act, is reproduced as follows:

(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:—

*(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;

13. We find that the law makes it explicitly clear that '**plant and machinery**' excludes **land**, as laid down in explanation following Section 17(5) CGST Act. We note the following:

- i. Law has expressed that Plant and Machinery excludes land in Section 17(5) CGST Act.
- ii. The phrase Plant and Machinery is used in Section 17(5)(c) CGST Act and the words plant or machinery is used in section 17(5)(d) CGST Act. We hold that the phrase 'plant or machinery' in section 17(5)(d) may be read as 'plant and machinery'. Here, We find it apt to quote a relevant excerpt, as follows- In the case of an appeal filed by M/s. Tarun Realtors pvt.ltd. against Ruling dated 30-9-19 passed by the Authority of Advance Ruling of Karnataka (reported at 2020(35) G.S.T.438(App.AAR-GST-Kar.),

the Appellate Authority for Advance Ruling for Karnataka(in their Ruling No.KAR/AAAR-14/2019-20 dated 06.02.2020), while examining the aspect of eligibility for input tax credit of various goods of the appellants covered under the definition of plant and machinery held that the word 'or' in clause (d) of Section 17(5) of the CGST Act can be read as 'and' since it appears to give effect to the intention of the Legislature to allow input tax credit on the construction of plant and/or machinery. Relevant portion of the aforementioned Ruling reads as follows:

“15. It is the contention of the appellant that the definition of the expression ‘plant and machinery’ as used in Chapter V and Chapter VI of the CGST Act cannot be applied to interpret the words ‘plant or machinery’ used in clause(d) of Section 17(5) of the CGST Act. We find that in ordinary usage ‘and’ is conjunctive and ‘or’ disjunctive. From the well known dictum of the Supreme Court that grammar is a good guide to meaning but is a bad master to dictate, it will appear that there is no hard and fast rule as to the meaning of the word ‘or’ and this word gets its proper meaning from the particular context from which it has been used. Justice G.P.Singh in the principles of Statutory Interpretation(Thirteenth Edition) Chapter 7 page 485 has stated as follows:

“The word ‘or’ is normally disjunctive and ‘and’ is normally conjunctive but at times they are read as vice versa to give effect to the manifest intention of the Legislature as disclosed from the context. As stated by Scrutton L.J. “You do sometimes read ‘or’ as ‘and’ in a statute. But you do not do it unless you are obliged because ‘or’ does not generally mean ‘and’ and ‘and’ does not generally mean ‘or’. Further, as pointed out by Lord Halsbury, the reading of ‘or’ as ‘and’ is not to be resorted to, “unless some other part of the same statute or the clear intention of it requires that to be done”. Where provision is clear and unambiguous the word ‘or’ cannot be read as ‘and’ by applying the principle of reading down. But if the literal reading of the words produces an unintelligible or absurd result ‘and’ may be read for ‘or’ and ‘or’ for ‘and’ even though the result of so modifying the words is less favourable to the subject provided that the intention of the Legislature is otherwise quite clear. Conversely if reading of ‘and’ and ‘or’ produces grammatical distortion and makes no sense of the portion following ‘and’, ‘or’ cannot be read in place of ‘and’. The alternatives joined by ‘or’ need not always be mutually exclusive.”

16.Applying the above principle to the instant case, we are of the opinion that in this case, the word ‘or’ in clause(d) of Section 17(5) of the CGST Act can be read as ‘and’ since it appears to give effect to the intention of the Legislature to allow input tax credit on the construction of plant and/or machinery.”

- iii. The subject land leasing service from GACL to GNAL hinges on said leased land.
- iv. We cannot brush aside the position of law that Legislature has excluded 'land' from plant and machinery. There must be an intent of Legislature to explicitly exclude the word 'land' in the expression. **With this expression of Plant and Machinery excluding land, explicitly incorporated in the Blocked Credit section 17(5) CGST Act, We hold that Legislature has expressed its intent that ITC shall not be available in respect of services pertaining to land received by a taxable person for construction of an immovable property on his own account including when such services are used in the course or furtherance of business.**
- v. For if there was no such legislative intention, the word 'land' need not have been used in the said exclusion expression of 'plant and machinery'.

14. Further, besides the discussed legislative intent, the plain meaning of very wordings of Section 17(5)(d) itself blocks subject credit admissibility, detailed as follows:

i. We find that the words used in the said Section 17(5)(d) reads as: services received by a taxable person **for** construction of immovable property (other than plant or machinery). Hypothetically, if the word '**used**' was in the place of '**for**', then said Section 17(5)(d) would be read as: Services received by a taxable person (**used in**) construction of immovable property (other than plant or machinery).... In such a hypothetical case and limiting to the wordings of Section 17(5)(d) only, there would

have been a prima facie merit in the submission of the GNAL to consider that subject ITC is not blocked. But the word used in the said Parliamentary Act in said clause (d) is 'for' and not 'used'. The word 'for' indicates a purpose, an intended goal. Here, 'for' is to be construed to indicate the purpose to construct the buildings/ civil structures, administrative block et al on the leased land. The purpose to enter into the subject agreement with GACL for the subject land is to construct factory with administrative block, et al, so that GNAL may pursue its business.

14.1 With respect to the plant and **structural work**, GNAL submitted as follows :

Plant & Structural Works

The power plant civil and structural works shall cover all buildings, structures, equipment & structure foundations required for installation of the power plant.

Main Plant Building

The main plant building including the adjacent control room shall be a concrete framed structure (with a common column for power house building and control room building) supported over isolated/ combined foundations based on soil test data and loads. The roof over the power house building housing the turbine generator shall be of GI sheeting supported on structural steel arrangement. The crane girder shall be plate formed type considering all loads due to wheel loads and surge loads. All floors shall be of cast in-situ RCC slabs supported over RCC beams and RCC columns. The main Plant building shall be provided with windows and doors as required. Doors in the control room shall be made of extruded aluminium box frames fully or partly glazed. Partition walls in control room shall be provided for large openings meant for equipment entry. Large entry points shall be provided with electrically/ gear operated shutters. Main doors in the electrical and control rooms shall be seized considering the maximum size of panels.

14.2 Thus we hold that subject GST borne by GNAL is blocked credit under Section 17(5)(d) CGST Act for the land leased to it will be for the construction of civil structures, administrative block/ factory et al. Thus the plain meaning of the words of Section 17(5)(d) blocks the subject amount from credit admissibility.

15. GNAL during personal hearing informed that the construction activities and installation of their plant and machinery shall be capitalised and reflected in the financial accounts as 'Plant and Machinery'. We are of the opinion that treatment of capitalising an expenditure under 'Plant and Machinery' in the Balance Sheet does not have a bearing on the blocking of GST portion borne by GNAL for the subject leasing activity, as the subject leasing service received by a GNAL **for** the new construction of immovable property such as factory building/ shed/ administrative block, et al by GNAL. Also, GNAL have given us a faint impression that certain of their pipes fitted on supporting structures may be installed in the open, i.e, outside a shed but on a supporting structure. We are of the opinion that the proportion of plot area used for the construction of civil structures/ administrative block/ factory/ building sheds (having plant and machinery inside it)vis-à-vis the proportion of plot area used for installation of pipes fitted on supporting structures in the open on the land, if that be the case, cannot be taken as a basis for awarding a proportionate credit, for the CGST Act and Rules have not envisaged such a mechanism to award proportionate credit for GST in such cases.

16. We rest on the dictum, ‘first things first’, that is to say, the land will be used for construction of the immovable property such as civil structures/ administrative block/ sheds/ factory building. Further, We note that the explanation to said section 17(5) defines ‘plant & machinery’ as,

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.*

17. We note that this issue was raised in the 37th GST Council held on 20-9-21, wherein H’ble Punjab Finance Minister vide letter dated 25-2-19 Highlighted this issue, the enclosure 5 Page no 242 as available at <http://www.gstcouncil.gov.in/37th-gst-council-meeting>, is reproduced as follows:

“Enclosure 5

Request to exempt GST on long term lease of land for setting up of industrial parks:

Hon’ble Finance Minister from Punjab vide his letter dated 25.02.2019 has requested for GST exemption on long term lease of land for setting up of industrial parks by private entities. Levy of GST on long term lease of land has been referred by GST Council to the GoM on Real estate.

Present GST rate:

Vide Sl. No. 41 of the notification No. 12/2017- CT(R) dated 28.06.2017 GST exemption is available on upfront amount payable in respect of service by way of granting of long term lease of industrial plot or plot for development of infrastructure for financial business, provided by the State Government Industrial Development Corporation or undertaking or by any other entity having 50% or more ownership of Government. The entry reads as under:-

“Upfront amount (called as premium, salami, cost, price, development charges or by any other name) payable in respect of service by way of granting of long term lease of thirty years or more of industrial plot or plot for development of infrastructure for financial business, provided by the State Government Industrial Development Corporation or undertaking or by any other entity having 50% or more ownership of Central Government, State Government, Union Territory to the industrial unit or the developer in any industrial or financial business area.”

Justification for exemption (as mentioned in letter of the Hon’ble FM of Punjab):

- *India is now critically poised to attract foreign investments particularly by the possible relocation of many MNCs located in China in the context of ongoing tariff war and global economic recession. India offers an attractive destination for investment by way of FDI due to its high domestic consumption base.*

• ***GST on long term lease of land presently attracts GST of 18% along with stamp duty of 6-7% levied by states. This high rate of tax makes new projects unviable particularly when tax credit of GST on such leasing is not available for construction of immovable property.***

• *Taxation on leasing of land is the only are in GST where there is an overlap between GST and powers of States to levy a parallel tax. Similar concession has already been given to GIFT city.”*

18. We note that the GST Council is cognizant of this position of law that tax credit of GST on leasing of land, for construction of immovable property, is not available. Here we find it apt to reproduce the wordings of **H’ble Delhi High Court**, in the case of Manufacturers Traders Association vs UOI-2020 (43) G.S.T.L. 616 (Del.), at para 10:

*‘GST Council - Status of - This is a **Constitutional body** brought into existence by 101st Amendment and is **chaired by the Union Minister for Finance with Finance Minister of all States as members** - Rates of GST are jointly decided and recommendations made to Central and State Governments - It is **highest deliberative forum to resolve issues arising out of the implementation of the GST and the Council embodies the spirit of Co-operative Federalism**’. The H’ble Court further ruled that **it cannot sit in appeal** and postulate that the decision of the Council is not what they have unwaveringly held it to be.*

19. In conspectus of aforementioned discussion and findings, we pass the Ruling based on the following five grounds:

- i. The expression ‘plant and machinery’ excludes land. As expounded at para 13 of this Ruling, with this expression of Plant and Machinery excluding land, explicitly incorporated in the Blocked Credit section 17(5) CGST Act, We hold that Legislature has expressed its intent that ITC shall not be available in respect of services pertaining to land received by a taxable person for construction of an immovable property including when such services are used in the course or furtherance of business.
- ii. The word used by the Legislature in Section 17(5)(d) CGST Act is **‘for’** and **not ‘used’**, thereby the intention of Legislature was to block the credit of subject lease service received by Taxable person for construction of immovable property.
- iii. GST Council is seized of the matter that GST borne by a Taxable Person on such leasing is not available for construction of immovable property.
- iv. We abide by the decision of the GST Council, for it is legal and proper so to do, as also cited in said H’ble Delhi High Court’s Decision at paragraph 18 of this Ruling.
- v. For Reasons enunciated at para 14 & 15.

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.

(SANJAY SAXENA)
MEMBER (S)

(ARUN RICHARD)
MEMBER (C)