

**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/55/2021

(IN APPLICATION NO. Advance Ruling/SGST&CGST/2021/AR/29)

Date: 18-10-2021

Name and address of the applicant	:	M/s J M Chemicals(Trade Name) Manjuben Rameshchandra Gupta (Legal Name), Plot No. 4315/1, Ground Floor, GIDC Ankleshwar, Bharuch-393002
GSTIN of the applicant	:	24ADBPG4461D1Z5
Date of application	:	16-8-21
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	:	Shri Darshan D. Jain, CA

BRIEF FACTS

M/s J M Chemicals, hereinafter referred to as 'M/s JM' for the sake of brevity, has purchased rights of the Industrial Plot situated at GIDC Panoli Industrial Estate bearing Plot No. 205/206/207/07 and admeasuring 2894.960 sq mts at Unit Price of Rs. 3706/-. The transferor M/s Ginni Filaments Ltd has charged GST @18% on the Sale of Transferring the Rights of the Industrial Plots by executing the deed of assignment dated 29.06.2020. M/s Ginni Filaments has developed the piece of Land with road, amenities and has made many plots in the said piece of Land. M/s. Ginni Filaments has done the conveyance of the said sub plots by deed of assignment of lease to its members.

2. The applicant submits that Long Term Lease premium is exempt from tax under Entry 41 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 issued under Section 11 of the GST Acts only in respect of grant of lease by State Government Industrial Development Corporations or Government entities. The transferee from GIDC herein named as M/s Ginni Filaments intends to charge GST and pay tax under the GST Acts on lease premium to be collected from JM for assignment of lease.

3. The applicant submit that they are eligible to input tax credit of tax paid on assignment of lease in terms of the provisions of Section 16 (1) of CGST Act if the leasehold land is used for business purpose and that the provisions of section 16(2) of the CGST Acts are fulfilled.

4. The applicant submits that Section 17 (5) (d) of CGST Act specify circumstance under which ITC is blocked and this clause is not applicable to the facts of the applicant. Section 17(5) (d) of the GST Acts reads as follows:

*17(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:—
(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;*

5. The applicant submit that section 17(5)(d) of the GST Acts restricts claim of input tax credit only in respect of goods or services used for construction of an immovable property. Whereas the applicant may undertake construction on the leasehold land obtained from Ginni filaments and obtaining lease from Ginni Filaments is not a service for construction of immovable property and thus in their opinion input tax credit cannot be disallowed to it.

6. JM sbmits that the Lease of land is absolutely not related to construction of building infact the building is constructed after land is acquired on lease by JM and obtaining land on lease cannot be considered to be a service used for construction of immovable property and thus input tax credit cannot be disallowed by relying upon section 17(5)(d) of the GST Acts.

Question on which Advance Ruling sought

7. Whether M/s. J.M. Chemicals is eligible to claim Input Tax Credit of GST paid on input services of Lease Premium paid to Ginni Filaments on which they have charged GST under the head miscellaneous receipt under SAC code No. 99979.

Personal Hearing

8. Shri Darshan D. Jain, CA appeared for the hearing (video conferencing) and reiterated the contents of the application. He informed that M/s JM obtained the lease hold right on the land on which its factory building including administrative block will be constructed.

DISCUSSION & FINDINGS

9. We have carefully considered all the submissions made by J M. 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. We find that JM has purchased rights of said industrial plot from transferor M/s Ginni and borne the GST @ 18% on the subject supply on receiving the Rights of the industrial plot on execution of the Deed of assignment. JM seeks Ruling whether said GST portion borne by it, is admissible as ITC.

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.

11.1 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;

12. 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 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 service of transferring of rights over land from M/s Ginni to JM revolves on and pertains to the said 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’.

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

13.1 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), there would have been a prima facie merit in the submission of the JM 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 factory shed/ administrative block, et al, on the said land, so that JM may pursue its business goals. Thus we hold that subject GST borne by JM is blocked credit under Section 17(5)(d) CGST Act for the land leased to it will be for the construction of Factory shed, administrative block, et al. Thus the plain meaning of the words of Section 17(5)(d) itself, blocks the subject amount from credit admissibility. Further, We rest on the dictum, ‘first things first’, that is to say, the land will be used for construction of the immovable property/ factory shed/ administrative block/ civil structures first. 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.

14. 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 area 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.”*

15. We find that GST Council is cognizant of this position of law that tax credit of GST on leasing of land is not available for construction of immovable property. 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.

16. In conspectus of aforementioned discussion and findings, We pass the Ruling based on the following four grounds:

- i. The expression 'plant and machinery' excludes land. As expounded at para 12 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 14 of this Ruling.

RULING

GST amount borne by M/s J M Chemicals on subject service received is blocked credit vide Section 17(5)(d) CGST Act and thereby ineligible for availment, for the four reasons summarised at para 15.

(SANJAY SAXENA)
MEMBER (S)

(ARUN RICHARD)
MEMBER (C)