

**AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICE TAX
UTTAR PRADESH
4, Vibhuti Khand, Gomti Nagar, Lucknow-**

ADVANCE RULING NO. UP ADRG 90 /2021

DATED 17/12 2021

PRESENT:

1. **Shri Abhishek Chauhan**
Additional Commissioner, Central Goods and Service Tax
Audit Commissionerate, LucknowMember (Central Tax)
2. **Shri Vivek Arya**
Joint Commissioner, State Goods and Service TaxMember (State Tax)

1.	Name of the Applicant	M/s KRBL INFRASTRUCTURE LIMITED C-32, Sector-62, Noida -201301
2.	GSTIN or User ID	09AACCK9643G1Z9
3.	Date of filing of Form GST ARA-01	22.09.2021
4.	Represented by	Mr. Niranjana Kumar Gupta and Ms. Medini Aggarwal, Authorized Representative
5.	Jurisdictional Authority-Centre	Range-1, Division-1 Noida
6.	Jurisdictional Authority-State	Noida Sector-9
7.	Whether the payment of fees discharged and if yes, the amount CIN	Yes HDFC21090900051029

ORDER UNDER SECTION 98(4) OF THE CGST ACT, 2017 & UNDER SECTION 98 (4) OF THE UPGST ACT, 2017

1. M/s KRBL INFRASTRUCTURE LIMITED, C-32, Sector-62, Noida -201301 (here in after referred to as the applicant) is a registered assessee under GST having GSTN: 09AACCK9643G1Z9.
2. The applicant is engaged in the business of constructing commercial complex, renovation, fabrication, furnishing and built out interiors works of the building for the purpose of letting to different tenants on rental basis.
3. The applicant has sought advance ruling on following questions-
 - I. "Whether the Applicant is eligible to take input tax credit in relation to expenditure incurred for 'Civil and Interior Works' in building located at C32, Sector-62, Noida, Gautam Buddha Nagar, Uttar Pradesh, 201301 at different floors, since the said property is further used for letting out to different tenants on rental basis viz. for furtherance of business?"
 - II. "Whether ITC on construction of commercial complex located at Plot No. 18, BLOCK C, SECTOR -153, NOIDA, Gautam Buddha Nagar, Uttar Pradesh, 201310, will be available to Applicant in case the said building is used for the purpose renting out?"
4. As per declaration given by the applicant in Form ARA-01, the issue raised by the applicant is neither pending nor decided in any proceedings under any of the provisions of the Act, against the applicant.
5. The applicant have submitted statement of facts as under-
 - (i) the applicant is having the principal place of business at C-32, Sector-62, Noida, Gautam Buddha Nagar, Uttar Pradesh, 201301 and having additional place of

business located at Plot No. 18, BLOCK C, SECTOR -153, NOIDA, Gautam Buddha Nagar, Uttar Pradesh, 201310.

- (ii) the Applicant is currently carrying out activities such as renovation, alteration repair & maintenance, fabrication, re- fabrication, furnishing, re-furnishing, interiors or civil works of existing building and other related activities for the purpose of letting out the building to different tenants on rental basis.
- (iii) the applicant is undertaking to construct of commercial complex at Plot No. 18, BLOCK C, SECTOR -153, NOIDA, Gautam Buddha Nagar, Uttar Pradesh, 201310, for the purpose of letting out.
- (iv) the applicant is discharging the applicable GST liability on rental income.
- (v) the Applicant for the purpose of carrying out the said outward supply, has taken various services in the nature of 'Civil and Interior Works' at different floors of the building of the registered premises of the applicant.
- (vi) the Applicant, to rent furnished floor to tenants, has agreed to renovate and built out interior of the Demised Office Space as per the specification of tenants and the said amount is recoverable from the tenants. The actual cost of renovation/furnishing/interior works, as mentioned under clause 6 of the agreement is agreed upon between the parties. The cost of such renovation would be part of rent which would be calculated by adding 10% profit element (as interest cost) over the actual expenditure of renovation/furnishing/interior works and it shall be recoverable within the span of maximum five years as a component of rent payable on monthly basis.
- (vii) the applicant, till date has incurred expenses in relation to interior and other civil works.
- (viii) the Applicant is also planning to undertake the activity of construction of a commercial complex for the purpose of renting out to prospective tenants for which the applicant would procure various goods & services to effectuate the ultimate outward supply of renting of commercial complex.

6. The applicant has submitted grounds for seeking advance ruling as under-

- (i) According to Section 16 (1) of the CGST Act, 2017, every registered person is 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 by him in the course or furtherance of his business.
- (ii) According to Section 16 (2) of the CGST Act, 2017 read with the second proviso to the section, among others, certain conditions need to be satisfied for the purpose of availing input tax credit.
- (iii) In addition to the above, there are certain restrictions imposed on availment of input tax credit under Section 17 (5) of the CGST Act, 2017.
- (iv) The provision of Section 17(5) suggests that no input tax credit would be available in respect of (i.) works contract services received for construction of an immovable property and (ii.) goods and/or services received for construction of an immovable property.
- (v) the activity of letting out floors in the building amounts to supply of service under the CGST Act and the Applicant is liable to pay GST on the said rental amounts.
- (vi) the Applicant has paid Goods and services Tax Rs. 25,89,210 in respect of goods and services purchase/receive for carrying out the 'Civil and Interior Works' in different floors of the building. Since all the inward supplies which are received by the Applicant are taxable under the GST Law, so, a very huge amount of tax is to be discharged by the Applicant in the instant case.
- (vii) in view of Section 7 of CGST Act read with paragraph – 2(b) of Schedule II, the activity of the Applicant of letting out floors of the building to different tenants amounts to "Supply" within the meaning of CGST Act and the Applicant squarely comes within the definition of "Supplier" as per Section 2(105) of the CGST Act and accordingly the Applicant is liable to pay GST on the rental amount received by him.
- (viii) in order to avoid the cascading effect of various input taxes, Section 16 of the CGST Act provides that every registered person shall, subject to such conditions and

restrictions as may be prescribed and in the manner specified in Section 49 of the CGST Act, be entitled to take credit of the input tax charged on supply of goods or services or both made 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

- (ix) in order to qualify any service as in course of business, the said service should be provided with the intention of deriving economic benefits. The 'Civil and Interior Works' done by the Applicant in different floors of the building is for the purpose of letting out to different tenants on rental basis and collection of rent from them. Thus, it fulfills the definition of 'Business' as per GST law and hence said service is in course or furtherance of business.
- (x) Section 17 (5) (d) of CGST Act which imposes the restriction on availment of ITC on construction of an immovable property clearly goes against the intention of legislature enacting the said CGST Act which emphasis on seamless flow of credit.
- (xi) Based on the facts and circumstances of the present case and in accordance with the well-settled principles of interpretation of statutes, the Applicant is paying GST on rent received from different tenants of the floors of building, which qualifies the definition of business and blocking of ITC of any activity which is in furtherance of business would defeat the intent of the GST Act.
- (xii) It is an undisputed fact that GST Act was implemented to obviate the cascading effect of various indirect taxes and to reduce multiplicity of indirect taxes.
- (xiii) Relying on the observations of the Apex court in the case of Eicher Motors Ltd. v. Union of India, reported in (1999) 2 SCC 361, the very purpose of the credit is to give benefit to the assessee. Therefore, if the Applicant is required to pay GST on the rental income on its outward supplies, then the benefit of input tax credit of the GST paid on the inward supplies must also be allowed.
- (xiv) The Applicant is also planning to undertake construction of commercial complex in future and wishes to know the availability of input tax credit of the GST paid for the 'Construction of Commercial Complex' which will be used for the purpose of renting out. Since, the activity of the Applicant of constructing the commercial complex for the purpose of renting out amounts to "Supply" within the meaning of Section 7 read with paragraph 2(b) of Schedule II of CGST Act and the Applicant falls within the definition of "Supplier" as per Section 2(105) of the CGST Act and accordingly the Applicant is liable to pay GST on the rental amount received by him.
- (xv) When the Commercial complex is constructed for the purpose of renting out, in that event, the tax chain is not broken and on the contrary, the construction of the complex will result in a fresh stream of GST revenues to the Government Exchequer on the rentals income generated by the complex. Thus, it fulfills the definition of 'Business' as per GST law and hence the said service is in course or furtherance of business.
- (xvi) If the benefit of credit of input tax under Section 16 of the CGST Act is denied to the Applicant by invoking Section 17 (5) (d) of the CGST Act, in that event, it would cause a sharp increase in the cost, which the owner of commercial complex would be compelled to incur and recover from the end consumer.
- (xvii) The Applicant has put reliance on the case of The Hon'ble Orissa High Court in M/s. Safari Retreats Private Limited Vs Chief Commissioner of Central Goods & Service tax in W.P. (C) No. 20463 of 2018 vide order dated April 17 2019.
- (xviii) section 17 (5) (d) of the CGST Act for the purpose of interpretation to give benefit to the person who has paid GST, it has to be interpreted in continuity of the transaction since rent income is arising out the building which are constructed after paying GST on different items. If input tax credit is denied on building meant and intended to be let out, it would amount to treating the transaction as identical to a building meant and intended to be sold. Further, treatment of these two different types of transactions as one for the purpose of GST, is contrary to the basic principles regarding classification of subject matter of tax levy and, therefore, violative of Article 14 of the Constitution.

7.1 The application for advance ruling was forwarded to the Jurisdictional GST Officer to offer their comments/views/verification report on the matter.

7.2 The Assistant Commissioner, CGST Div II, Noida vide his letter C.No.20-CGST/Advance Ruling/R-9/2021/565 dated 20.10.2021 has submitted that in terms of Section 17(5)(d) of CGST Act, 2017, availment of ITC is specifically barred in respect of 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. In view of above, the questions should be answered in negative.

7.3 The Additional Commissioner, Commercial Tax, Gautam Budh Nagar Zone, Noida vide his C.No. 118/2021-22/Adi. Comm. Va. Ka. Gau. Bu. Na. dated 26.10.2021 submitted that-

(i) 'Civil or interior work' is getting done by the applicant in his own building which will be given to tenants on rental basis. As the civil or interior work is getting done by the applicant in his own building (immovable property), the input tax credit is not admissible on the said expenditure as per Section 17(5)(d).

(ii) the applicant is getting building construction work done in own account which will be subsequently let out. As per Section 17(5)(d), input tax credit is blocked on goods or services or both received by a taxpayer person for construction of an immovable property (other than plant and machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

8. The applicant was granted a personal hearing on 06.12.2021 which was attended by Shri Niranjana Kumar Gupta and Ms. Medini Aggarwal, authorized representative. During personal hearing, they reiterated the submissions made in the application of advance ruling and requested to decide the case accordingly.

DISCUSSION AND FINDING

9. At the outset, we would like to make it clear that the provisions of both the CGST Act and the UPGST 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 provision under the UPGST Act. Further for the purposes of this Advance Ruling, a reference to such a similar provision under the CGST Act / UPGST Act would be mentioned as being under the 'CGST Act'.

10. We have gone through the submissions made by the applicant and have examined the explanation submitted by them. At the outset, we find that the issue raised in the application is squarely covered under Section 97(2)(a) of the CGST Act 2017 being a matter related to admissibility of input tax credit of tax paid or deemed to have been paid. We therefore, admit the application for consideration on merits.

11. We observe that the applicant has sought advance ruling on the issue-

I. "Whether the Applicant is eligible to take input tax credit in relation to expenditure incurred for 'Civil and Interior Works' in building located at C32, Sector-62, Noida, Gautam Buddha Nagar, Uttar Pradesh, 201301 at different floors, since the said property is further used for letting out to different tenants on rental basis viz. for furtherance of business?"

II. "Whether ITC on construction of commercial complex located at Plot No. 18, BLOCK C, SECTOR -153, NOIDA, Gautam Buddha Nagar, Uttar Pradesh, 201310, will be available to Applicant in case the said building is used for the purpose renting out?"

12. We find that applicant has agreed to renovate and built out interior of the Demised Office Space as per the specification of tenants and the cost of such renovation would be part of rent which would be calculated by adding 10% profit element (as interest cost) over the actual expenditure of renovation/furnishing/interior works and it shall be recoverable within the span of maximum five years as a component of rent payable on monthly basis.

13. We find that Section 16 of the CGST Act, 2017 is in respect of eligibility and conditions for taking input tax credit which is reproduced as under-

Section 16. (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.

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,-

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both.

Explanation.- For the purposes of this clause, it shall be deemed that the registered person has received the goods where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961.), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

14. We find that Section 17 of the CGST Act, 2017 provides for apportionment of credit and blocked credit. It is pertinent to have a look at the relevant legal provisions under Section 17(5) of the CGST Act. The same are given below:

“(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:—

(a)

(b)

(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 reconstruction, renovation, additions or alterations or repairs, to the extent of capitalization, 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.

15. According to Section 16 (1) of the CGST Act, 2017, every registered person is 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 by him in the course or furtherance of his business. We find that apart from conditions as laid down under Section 16 of the CGST Act, 2017; Section 17 provides for restrictions and factual position and situations where ITC would not be available.

16. Pursuant to the aforesaid legal provisions, the following conclusions can be drawn:

(1) ITC restricted in case of construction undertaken on own account

Clause (d) restricts input tax credit of goods and services used by a person for construction of an immovable property (except plant and machinery) on his own account. Thus, if a person purchases construction material and engages a labor contractor to provide the constructions services using the purchased material, ITC shall not be available of both the goods purchased and the services of the labor contractor procured;

(2) ITC restricted in case of works contract services only to the extent expenses are capitalized

Clause (c) and clause (d) use the word 'construction' and as per the Explanation to clause (c) and clause (d) construction is only to the extent of capitalization. Consequently, ITC of any expenditure related to construction that is capitalized in the books of accounts shall be blocked. This shall not only cover the value of materials and works contract services but also expenditure directly related to the construction like inward supply of services from real estate agent, architect, interior decorators as these are involved in the establishment of the immovable property.

(3) ITC eligible when works contract services used in respect of construction of plant and machinery

Clause (c) and (d) of section 17(5) restricts ITC in respect of works contract services and goods or services used towards construction of immovable property. However, both the clauses clearly exclude 'plant and machinery'. This means that the ITC restrictions are applicable only in case of immovable property. These restrictions are not applicable on plant and machinery

Thus, it becomes pertinent to understand what shall constitute plant and machinery under the Act. The Explanation to Section 17(5) has been reiterated below:

"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"

Immovable property is defined under Section 3(26) of the General Clauses Act as:

" immovable property" shall include land, benefits to arise out of the land, and things attached to the earth, or permanently fastened to anything attached to the earth

The effect of this explanation is that ITC on input of any goods or services including works contract service used towards construction of immovable property that is desired to be capitalized in the books of accounts shall not be admissible

17. We find that the applicant has placed reliance on the judgment of the Hon'ble High Court Orissa in the ease of M/s. Safari Retreats Pvt. Ltd., and another V/s Chief Commissioner of Central Goods & Service Tax, Bhubaneswar & others in WP (C) No. 20463 of 2018. In the said case, the party had constructed malls which were given further on lease. While holding that Section 17 (5) (d) was not ultra vires, the Hon'ble Court ruled that the party was eligible for credit. We find that the department has filed an appeal {SLP(C) No. 26696/2019} in against the said judgment of the Hon'ble Orissa High Court in Hon'ble Supreme Court, which is presently pending. The Hon'ble Supreme Court, in the case of Union of India V/s West Coast Paper Mills Ltd., as reported in [2004 (164) ELT375 (SC)], has held that *once a special leave to appeal is granted and appeal is admitted, the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the Court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.*

18. We find that clause (c) and (d) of section 17(5) restricts ITC in respect of works contract services and goods or services used towards construction of immovable property. As such, input tax credit (ITC) of GST paid in relation to 'civil and interior works' in building located at C-32, Sector-62, Noida and on 'construction of commercial complex' located at Plot No. 18, Block C, Sector-153, Noida does not seem to be admissible.

19. In view of the above discussions, we, both the members unanimously rule as under;

RULING

Question 1- Whether the Applicant is eligible to take input tax credit in relation to expenditure incurred for 'Civil and Interior Works' in building located at C32, Sector-62, Noida, Gautam Buddha Nagar, Uttar Pradesh, 201301 at different floors, since the said property is further used for letting out to different tenants on rental basis viz. for furtherance of business?

Answer 1- Replied in negative.

Question 2 Whether ITC on construction of commercial complex located at Plot No. 18, BLOCK C, SECTOR -153, NOIDA, Gautam Buddha Nagar, Uttar Pradesh, 201310, will be available to Applicant in case the said building is used for the purpose renting out?

Answer 2- Replied in negative.

19. This ruling is valid only within the jurisdiction of Authority for Advance Ruling Uttar Pradesh and subject to the provisions under Section 103(2) of the CGST Act, 2017 until and unless declared void under Section 104(1) of the Act.


(Vivek Arya)

Member of Authority for Advance Ruling


(Abhishek Chauhan)

Member of Authority for Advance Ruling

To,

M/s KRBL INFRASTRUCTURE LIMITED,
C-32, Sector-62, Noida -201301

AUTHORITY FOR ADVANCE RULING –UTTAR PRADESH

Copy to –

1. The Chief Commissioner, CGST & Central Excise, Lucknow, Member, Appellate Authority of Advance Ruling.
2. The Commissioner, Commercial Tax, Uttar Pradesh, Member, Appellate Authority of Advance Ruling.
3. The Commissioner, CGST & C. Excise, C-56/42, Sector-62, Noida, 201301.
4. The Deputy/Assistant Commissioner, CGST & C. Excise, Division-II, C-56/42, Renu Tower, Sector-62, Noida- 201301.
5. Through the Additional Commissioner, Commercial Tax, Gautam Budh Nagar Zone, Uttar Pradesh to jurisdictional tax assessing officers.

Note: An Appeal against this advance ruling order lies before the Uttar Pradesh Appellate Authority for Advance Ruling for Goods and Service Tax, 4, Vibhuti Khand, Gomti Nagar, Lucknow – 226010, within 30 days from the date of service of this order.