



**N.A. SHAH ASSOCIATES LLP**  
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# **TAX JURISPRUDENCE**

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CASE LAW ALERT – OCT 2024 VOL.2

## INDIRECT TAX

### **Case - Chief Commissioner of Central Goods and Service Tax & Others vs M/s Safari Retreats Private Ltd. & Others, (Supreme Court C.A. No.2948/2023 decided on 03.10.2024)**

#### **Facts in brief & issues involved:**

- ♦ M/s Safari Retreats Private Ltd [hereinafter referred to as 'Respondent'] is engaged in the construction of shopping mall for the purpose of letting out premises to various tenants.
- ♦ Respondent had accumulated Input Tax Credit ['ITC'] from the purchase/supply of goods and services consumed and used in the construction of the mall. Respondent intended to utilise the accumulated input credit against GST payable on income from letting out mall premises.
- ♦ However, the GST authorities insisted for Respondent to deposit GST on rent without vailing ITC asserting that the ITC w.r.t to goods/services received for construction of immovable property is blocked under section 17(5)(d) of CGST Act, 2017.
- ♦ Respondent filed a writ petition before the Hon'ble Orissa High Court seeking a declaration that blockage of ITC does not apply to the construction of immovable property intended for letting out on rent and Section 17(5)(d) of CGST Act, must be read down.
- ♦ Hon'ble Orissa High Court disposed the petition in favour of Respondent and held that if Respondent is required to pay GST on the rental income from the mall, it is entitled to avail ITC on the GST paid on the construction of the mall as well. The high court found that restricting ITC in such cases would frustrate the objective of GST.
- ♦ Aggrieved by the decision of High Court, Chief Commissioner of Central Goods and Service Tax [hereinafter referred to as 'Petitioner'] filed the writ petition before the Hon'ble Supreme Court.

#### **Contention of the Petitioner (GST Authorities) :**


- ♦ Petitioner argued that CGST Act explicitly barred claiming of ITC on inputs and input services used in the construction of immovable property, as the property was built on Respondent's "own account".
- ♦ Petitioner further argued that the GST regime did not intend to allow ITC for goods and services used to create immovable properties, irrespective of their eventual use.

### Contention of the Respondent:

- ♦ Respondent argued that the purpose of ITC under the GST regime is to eliminate the cascading effect of tax.
- ♦ Denying ITC on GST paid during the construction of a mall which will be rented out and attract GST thereon, would defeat the purpose of the law.
- ♦ The Respondent also challenges the Constitutional Validity of Section 17(5)(d) as it denies ITC to those involved in leasing or renting, violating the constitutional right.

### Observation and Decision of Honorable Supreme Court:

- ♦ Hon'ble Supreme Court observed that clauses (c) and (d) of Section 17(5) of the CGST Act were constitutionally valid further stating that ITC is a statutory right, not a fundamental one.
- ♦ Hon'ble Supreme Court observed that blockage of ITC on construction of immovable property has two exceptions *viz*,
  - where goods or services or both are received by a taxable person to construct an immovable property consisting of a "plant or machinery", or
  - where goods and services or both are received by a taxable person for the construction of an immovable property made not on his own account.
- ♦ Hon'ble Court mentioned that construction cannot be said to be on a taxable person's "own account" if it is intended to be sold or given on lease or license but is said to be on a taxable person's "own account" when
  - (i) it is made for his personal use and not for service or
  - (ii) it is to be used by the person as a setting in which his business is carried out.
- ♦ On the argument that ITC should be disallowed as the expression "plant and machinery", which is already defined in the Act specifically excludes 'land and building', the Hon'ble Court clarified that the expression "plant **and** machinery" is defined in the Act whereas the expression used in the section is "plant **or** machinery".
- ♦ Hon'ble Court clarified that it cannot be said that there is no difference between the expressions "plant and machinery" and "plant or machinery" as it appears to be intentionally incorporated in the legislature. Hence, both the expressions cannot be given the same meaning as this will defeat the legislative intent.
- ♦ Hon'ble Supreme Court summarized that whether a mall, warehouse or any building other than a hotel or a cinema theatre can be classified as a plant within the meaning of the expression



“plant or machinery” is a factual question which has to be determined keeping in mind the business of the registered person and the role that building plays in the said business. If the construction of a building was essential for carrying out the activity of supplying services, such as renting or giving on lease or other transactions in respect of the building or a part thereof, the building could be held to be a plant.

- ♦ Hon’ble Supreme Court remanded the case back to High Court for the limited purpose of deciding whether the mall in question would satisfy the functionality test of being a “plant”.

**NASA Comments:**

- ♦ The decision of Hon’ble Supreme court gives relief in one hand but creates ambiguity about what would constitute a “plant”.
- ♦ As the case is remanded back to High Court, one must wait and watch how the events turn out. Meanwhile, it is prudent to avail the ITC in books as well as in electronic-credit ledger with respect to goods/services used for construction of such immovable property used for construction of malls, warehouses and other premises constructed for letting out. Hopefully CBIC may issue specific guidelines considering the judgement to ensure complete clarity and modalities in the matter.
- ♦ Needless to say, the ITC would not be eligible if the depreciation is claimed on the GST component of inward supplies received w.r.t. such immovable property.

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