

ITC relating to Construction of Immovable Property - Safari Retreats (P.) Ltd.

GST law is new born baby and issues arising out of it have to be settled in Court of law. We have seen that Courts are taking decision contrary to Government intention. Even the retrospective amendments have also started in GST. But it will take many years to settle this law. One of issue of dispute is credit on inputs used in construction of malls which are ultimately rented out. This issue came up before Orissa High court. We are taking up this important case for discussion in today GST update.

Facts of the Cases

The petitioners were mainly engaged in business activity of constructing shopping malls for the purpose of letting out of the same. The petitioner claimed ITC on goods and services incurred in construction of mall and utilize the same in discharging outward tax liability of Renting of such outlets in shopping mall.

But the tax authorities denied the ITC on such inputs and service under Section 17(5)(d) of CGST Act, 2017 and asked the assesses to pay outward tax in cash.

Petitioner Contention:-

The restriction imposed in Section 17(5)(d) of CGST Act, 2017 was not applicable on them as this clauses restrict the ITC if the immovable property was for sale or on their own account. This is due to reason that the credit chain is broken if the property is sold after completion certificate. But this is continuous supply of services under Section 2(33) of CGST and OGST Acts as the construction of building and giving it on rent. The cascading effect due to non- allowance of credit should be avoided. When the credit is allowed to builder selling the flats in installments then the same should be allowed in this case also. The action of department is highly arbitrary and discriminatory and violative of fundamental rights under Article 19(1) (g) of Constitution.

The department contended that the contention of the assesses that it is violative of fundamental rights is not legally sustainable. The department contended that the credit should not be allowed in view of specific provision.

Judgement by High Court

After consideration the rival submissions, the High Court adhered to the contentions of appellant and allowed the credit.

Comments:- Many authors have commented on this decision and even many have opined that when the specific provision under Section 17(5)(d) has been given then the credit should not be denied. The department will not accept the decision but the matter will go to Highest Court.

But looking to the fact that there is no contrary decision on this score by any other High Court then this decision is applicable all over India or it will be applicable in the jurisdictional state only. This is also a debatable issue. Various High Courts has opined that it is applicable all over India. Even the Delhi High Court has opined in case of Home Solutions case that when there is no contrary decision of any other High Court then the decision is binding all over India. Following this analogy, all the mall developers can take credit on inputs used in construction of building.

However, this decision should be applied to Malls only. If an office building or a factory is constructed and the credit on the same should not be allowed based on this analogy. It is also being used for providing services which are taxable under GST. Hence, the chain should not be broken and credit should be allowed on the same. But this analogy will not be acceptable to the department.

But this decision is very important and will see many more rounds of litigation.