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WP-29788-2024

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE BINOD KUMAR DWIVEDI

ON THE 15th OF OCTOBER, 2024WRIT PETITION No. 29788 of 2024

*M/S CHIRANTAN ENTERPRISES LLP THROUGH PARTNER MR.
PREM SETHIA*

Versus

COMMISSIONER CGST AND CENTRAL EXCISE

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Appearance:

Shri Nitin Singh Bhati - Advocate for the petitioner.

Shri Prasanna Prasad - Advocate for the respondent.
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ORDER

Per. Justice Vivek Rusia

Heard on the question of admission and interim relief.

2. Petitioner has filed this present petition challenging the validity of show-cause notice No.22/DGGI/RUI/JD/GST/2023-24 dated 11.7.2023 issued by the respondent.

3. Facts of the case, in brief, are that the petitioner is engaged in construction of building and rental "Rental or leasing services involving own or leased non-residential property". The petitioner is having GST Registration No.23AAOFC4350R1Z0. The petitioner has constructed a building on own land for the purpose of giving it on lease to M/s Shishukunj Knowledge Society for running a school. For the purpose of construction of



building, various goods namely bricks, cement, electrical equipment, hardware, RMC, sanitary, steel, stone, tile, sand, paint, doors etc. were purchased. The petitioner availed the Input Tax Credit (ITC) charged on the purchase/supply of the aforesaid goods consumed and used in the construction of the said school building.

4. The petitioner received summon dated 11.2.2022 and 18.2.2022 from the office of Directorate General of GST Intelligence for production of account statements, details of ITC availed, reconciliation sheet for outward supply, ITC availed and ITC utilized. In compliance of the aforesaid summon, Shri Anil Kumar Somani, GM Accounts appeared and recorded his statement and the petitioner was made to reverse the ITC availed on civil work through DRC-03 on the same day. The petitioner reversed the ITC under protest to the tune of Rs.6,68,44,378/- of the financial year 2019-20, 2020-21 and 2021-22. Thereafter, the petitioner was served with the letter dated 21.2.2023 for payment of penalty and interest at the rate applicable on Rs.6,68,44,378/-. In compliance of the said summon, the statement of CEO of the petitioner was recorded on 9.3.2023. Petitioner submitted a detailed reply to the show-cause notice objecting the recovery of GST. In apprehension of the adverse order being passed by the respondent, the petitioner rushed to this Court by filing this petition stating that the petitioner is entitled to avail the Input Tax Credit under Section 17(5)(c) & (d) of the CGST Act.

5. The writ petition came up for hearing on 1.10.2024. Shri Prasanna Prasad Advocate appeared on advance notice on behalf of the respondent and



sought one day time to seek instructions from the respondent. 2.10.2024 was the holiday. Therefore, the writ petition was directed to be listed on 3.10.2024. On 3.10.2024 Shri Prasad informed this Court that the final order has already been passed on 30.9.2024. Shri Bhati, learned counsel appearing for the petitioner sought two day's time to produce the copy of the judgment to be passed by the Apex court on a similar issue. The petitioner filed the copy of judgment passed by the Apex Court in Civil Appeal No.2948/2023 (Chief Commissioner of Central Goods and Services Tax and others Vs. M/s Safari Retreats Private Ltd. and others).

6. Shri P. Prasad, learned counsel has filed copy of adjudication order bearing No. GEXCOM/ADJN/GST/JC/148/2024/Adjn/O/o Commr-Indore dated 30.9.2024 along with an application for taking additional documents on record and submitted that the petitioner is now having remedy to file appeal against the said order and the petition is liable to be dismissed.

7. Shri N.S. Bhati, learned counsel for the petitioner submits that the petitioner constructed a building for leasing out to M/s Shishukunj Knowledge Society for running school, therefore, the petitioner is entitled for ITC under Clause (c) & (d) of sub-section 5 of Section 17 of the CGST Act, as held by the Apex Court in the case of M/s Safari Retreats Private Ltd. (supra). Therefore, the impugned order be quashed.

8. The petitioner has only made statement in Para-2 of the writ petition that the petitioner has constructed a building on own land for the purpose of giving it on lease to M/s Shishukunj Knowledge Society for running school. No document has been filed to establish that any lease deed or rent deed has



been executed between the petitioner and M/s Shishukunj Knowledge Society before starting construction of building or after construction of building. The learned adjudicating authority in its final order mentioned that notices were issued for giving opportunity of personal hearing to the petitioner, but no one appeared on behalf of the noticee to attend the personal hearing on a given date. The noticee neither appeared on the stipulated date, only submitted a reply as mentioned above in their defence and further approached to the High Court by way of this writ petition. (*see Para 5.2 of the order*).

9. The matter of M/s Safari Retreats Private Ltd. (*supra*) is relating to the construction of the mall. The Apex Court has held that each mall is different, therefore, in each case fact finding enquiry is contemplated. The High Court has not decided whether the mall in question will satisfy the functionality test of being a plant. The matter has been remanded back to decide, whether, on facts, the mall in question satisfies the functionality test so that it can be termed as a plant within the meaning of bracketed portion in Section 17(5)(d). The same applies to warehouses or other buildings except hotels and cinema theatres. The Apex Court has held that if the building in which the premises are situated qualifies for the definition of plant, ITC can be allowed on goods and services used in setting up the immovable property, which is a plant. Para 54, 55 & 56 are reproduced below:-

"54. One of the arguments of learned ASG was that if different meanings were given to the words "plant and machinery" and "plant or machinery", it could result in discriminatory treatment. Clause (c) of Section 17(5) operates in a completely different field, as it applies only to works contract services supplied for the



construction of immovable property. Clause (d) deals with services received by a taxable person for the construction of an immovable property on his own account. As clauses (c) and (d) operates in substantially different areas, the argument of ASG relying on discrimination cannot be accepted.

55. Under the CGST Act, as observed earlier, renting or leasing immovable property is deemed to be a supply of service, and it can be taxed as output supply. Therefore, if the building in which the premises are situated qualifies for the definition of plant, ITC can be allowed on goods and services used in setting up the immovable property, which is a plant.

56. In the main appeal, which is the subject matter of this group, the High Court has not decided whether the mall in question will satisfy the functionality test of being a plant. The reason is that the High Court has done the exercise of reading down the provision. Each mall is different. Therefore, in each case, fact-finding enquiry is contemplated. Thus, in the facts of the case, we will have to send the case back to the High Court to decide whether, on facts, the mall in question satisfies the functionality test so that it can be termed as a plant within the meaning of bracketed portion in Section 17(5)(d). The same applies to warehouses or other buildings except hotels and cinema theatres. A developer may construct a mall predominantly to sell the premises therein after obtaining an occupation certificate. Therefore, it will be out of the purview of clause 5(b) of Schedule II. Each case will have to be tested on merits as the question whether an immovable property or a building is a plant is a factual question to be decided."

10. Therefore, the petitioner was required to satisfy adjudicating authority, whether the building in question qualifies for the definition of plant in order to avail the ITC, but the petitioner instead of submitting all these necessary documents chosen not to appear before the authority and directly approached this Court. Now the final order has been passed, which has not been challenged in this petition. The petitioner is having remedy to file an appeal against the said order. The petitioner is free to file an appeal



before the appellate authority, wherein the petitioner may file all the necessary documents and rely on the law laid down by the Apex Court in the case of *M/s Safari Retreats Private Ltd.* (supra).

11. The petition is accordingly dismissed with the aforesaid liberty.

(VIVEK RUSIA)
JUDGE

(BINOD KUMAR DWIVEDI)
JUDGE

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