THE ODISHA APPELLATE AUTHORITY FOR ADVANCE RULING FOR

GOODS AND SERVICES TAX

(CONSTITUTED UNDER SECTION 99 OF THE ODISHA GOODS AND SERVICES TAX ACT, 2017)

ORDER NO.**02-03**/ODISHA-AAAR/2018-19, DATED:**21.01.2019**

BEFORE THE BENCH OF

(1) Shri Rakesh Kumar Sharma, Member (Chief Commissioner, GST, CX & Customs, Bhubaneswar Zone)

(2) Shri Saswat Mishra, Member (Commissioner, Commercial Taxes & GST Odisha)

Legal Name of Appellant	1.M/s. National Aluminium Company Limited (Appellant-I) (GSTIN Number-21AAACN7449M1Z9) 2. The Commissioner, GST & CX, Bhubaneswar (Appellant-II).
Details of Appeal	1.Appeal No-02/2018/AAAR-ODISHA. 2.Appeal No-03/2018/AAAR-ODISHA. Filed against Advance Ruling No.02/ODISHA-AAR/2018-19 dated 28.09.2018.
Jurisdictional Officer	Additional Commissioner, CT & GST, Bhubaneswar

Present For the Appellants

1. Shri P.K. Sahu, Advocate (For Appellant-I)
2. Dr. Kedarnath Tripathy, Advocate (For Appellant-I)
3. Shri M.M. Mishra, Sr. Manager (Finance), NALCO (For Appellant-I)
4. Shri P. Suna, DGM (Taxation Cell), NALCO (For Appellant-I)
5. Shri Sribas Nath, Asstt. Commissioner, GST & CX, Bhubaneswar-I (For Appellant-II)
6. Shri K.C. Satapathy, Dy. Commissioner, CT & GST, Odisha (For jurisdictional officer)

Matter heard on: 07.01.2019
Date of Order: 21.01.2019

M/s. National Aluminium Company Limited (Appellant-I), aggrieved by the Advance Ruling No.02/ODISHA-AAR/18-19, dated 28.09.2018, pronounced by the Odisha Authority for Advance Ruling, Bhubaneswar (AAR), has filed an appeal before AAAR, Odisha, on 05.11.2018, under Section 100 of the Odisha Goods and Services Tax Act, 2017 / CGST Act, 2017. Commissioner, CX & GST, Bhubaneswar (Appellant-II) has also filed an appeal against the said Advance Ruling No.02/ODISHA-AAR/18-

19 dated 28.09.2018. Since both the appeals have arisen out of the same order, this authority intends to dispose of both the appeals vide this common order.

2.0. M/S National Aluminium Company Limited (Appellant-I) having GSTIN 21AAACN7449M1Z9 is registered in Bhubaneswar, Odisha and falls within the jurisdiction of State of Odisha. The Appellant-I is stated to be a manufacturer of aluminium metal through its refinery located at Damanjodi & Smelter Plant at Angul (Odisha). It has townships at Angul, Damonjodi and Bhubaneswar for its employees. It also runs hospitals at Damanjodi and Angul for its employees and has guest houses for touring employees and guests. In its appeal petition, it has requested to set aside / modify the impugned Advance Ruling No.02/ODISHA-AAR/2018-19 dated 28.09.2018 and allow input tax credit on inputs and input services used by them for maintenance of their township, security services and horticulture meant for township.

2.1. On the other hand, Commissioner, CX & GST, Bhubaneswar (Appellant-II) in his appeal petition, has submitted that the order passed by the AAR is not legal & proper to the extent of :-

(i) Allowing the input tax credit of the services utilized for maintenance of Guest House, Transit House and Trainee Hostel.

(ii) Allowing the input tax credit for the service utilized for plantation and gardening within the plant area including the mining area and the premises of other establishment like administrative building, guest house, transit house and training hostel.

3.0. The issue has arisen for adjudication consequent upon the Appellant-I seeking advance ruling vide application dated 05.11.2018 in respect of its entitlement of taking credit of tax paid on input & input services used for maintenance of its township/residential colony, guest house/transit house/training hostel, hospital, horticulture and maintenance & security service in townships claiming that these are used in furtherance of its business.

3.1. After examining the contract details and the service details, as said to be received by the Appellant-I, the AAR Odisha vide their aforesaid ruling has held as follows:-

(i) The inward supplies received by way of management, repair, renovation, alteration or maintenance service or goods received for furnishing the residential

colony shall not qualify for input tax credit in terms of Section 17(2) of the CGST/OGST Act as residential accommodation is an exempted supply.

(ii) Input tax credit shall not be available to the Appellant-I in respect of services and goods procured for maintenance of hospitals and pharmacy outlet as such services, being nil rated, fall under exempt supplies.

(iii) Plantation and maintenance of such plantation outside the plant area, being for non-business use, will not qualify for input tax credit in terms of Section 17(1) of the CGST/OGST Act, 2017. Similarly, the service availed in relation to plant & garden in the residential colony will not qualify for input tax credit.

(iv) The Appellant-I is entitled to input tax credit of the tax paid on inward supply of input and input service for maintenance of the guest house, transit house & training hostel but excluding the food & beverages provided in such establishment.

(v) Services availed in relation to plantation and gardening within the plant area including mining area and the premises of other business establishments will qualify for input tax credit.

4.0. M/s. National Aluminium Company Limited, (**Appellant-I**) in its grounds of Appeal, has assailed the ruling of AAR, inter-alia, on the following grounds.

(i) The AAR has wrongly held that the appellant's activities of management, maintenance or repair of the townships are not for or in relation to its core business while denying the credit of the tax paid on the goods and services used for management, maintenance or repair of the township of its employees, and Horticulture in township. The appellant undertakes such activities for its business in the course or furtherance of business and, therefore, it is entitled to take credit of tax paid on such services.

(ii) The AAR has not rebutted the appellant's submission as made in its application and additional written submissions. Hence, the impugned order is liable to be set aside being non-speaking order because the AAR has not duly applied their mind to all the points and contentions raised by the appellant. Further, the AAR has overlooked the binding decisions. Hence, it has breached the judicial discipline.

(iii) The infrastructure of township at Angul, Damanjodi and Bhubaneswar are necessary to run large scale business of manufacturing, where thousands of employees are working. The fact that business plan for establishment plant

included setting of the township as well, which show that township are integral part of smooth and effective functioning of the manufacturing activities.

(iv) In view of the provisions under Section 16 of the CGST Act, 2017 prescribing eligible condition for taking input tax credit read with Section 2(17) of CGST Act, 2017, where the word 'business' has been defined, an activity or transaction in connection with or incidental or ancillary to sub-clause (a) of Section 2(17) of CGST Act, 2017 are also covered under the scope and ambit of the definition of business. Not only the manufacturing activity but any incidental or ancillary activities thereof are also covered within the expression "business" in the GST laws. Maintenance of various facilities in residential townships is integrally related to the business activities of the appellant and not a welfare activity undertaken by the appellant.

(v) The services received by the appellant for management, maintenance or repairs of its properties in the course of business are covered within the expression "used or intended to be used in the course or furtherance of business".The AAR has not given any reasoning as to why activities of management, maintenance or repair of residential colony of the employees for serving the employees cannot be considered as activities undertaken in the course or furtherance of business.

(vi) The appellant submits that rulings on interpretation of the definition of "input" and "input service" under the Cenvat Credit Rules, 2004, or "input" under the respective state VAT laws can be applied in the present case because credit was under the erstwhile laws, against the respective sphere of tax liability. But after integration of all the indirect taxes into GST, there is no requirement to make such demarcation of input and input service and, therefore, credit of tax paid on all the supplies received by the applicant in the course or furtherance of business is admissible without any whisper of doubt.

(vii) The AAR has ignored various rulings under the erstwhile Cenvat Credit Rules, 2004, wherein the credit of the tax paid on various services or duty paid on the goods has been allowed even if such services or goods are not directly used for providing taxable service or manufacturing of goods. The ratio of these rulings is squarely applicable in the present GST regime as provisions of tax credit in the present GST are more extensive than the provisions of the Cenvat Credit Rules, 2004.

(viii) A comparative reading of the provisions of the erstwhile cenvat credit rules and input tax credit in the present GST regime, it can be appreciated that earlier tax

provisions were restrictive as compared to present tax provision. Hence, tax credit in terms of section 16 of CGST Act, 2017 cannot be denied when such credit were allowed in the old regime. Hence, the AAR has wrongly and deliberately ignored the various rulings without appreciating that the ratio of these rulings which are squarely applicable in the present case of the appellant.

(ix) The AAR has ignored the appellant's submissions that the credit of GST paid on garden maintenance service will also be available whether such services availed is to comply with statutory requirement or to improve the efficiency of the employee. The garden is maintained because of statutory requirement to comply with pollution laws or for increase in the efficiency of employees and hence these services are used in course or furtherance of business.

(x) The AAR has wrongly held that the appellant had provided residential accommodation service and that these are exempted from tax being provided to the employees. The appellant is not providing these services to the employees but these are remuneration (perquisite) paid by the appellant to its employees in lieu of services received by him in connection with smooth & effective running of its business of the appellant. The main purpose of appellant in providing such facilities is for the benefit of its own business.

(xi) The appellant's activities cannot be roped in as taxable supply for residential service by invoking paragraph 2 of Schedule I for the various reasons. The appellant has contended that there is no supply of goods or services to the employees. The appellant runs factories for manufacturing purposes, which are to be manned 24 hours every day. For efficient operation of the manufacturing activity in the factories, the appellant has made arrangement in the residential colonies near the factories, so that the employees can easily reach the workplace and readily available in the event of emergency situation. Thus, the residential colonies have been set-up and are being maintained by the appellant in the interest of its business. Therefore, facilities of maintenance in residential colonies, is integral part of the business of the appellant. Operation and maintenance of these facilities are in the nature of in-house activities that enable the ultimate business objective of manufacturing and sale of its products. Accordingly, these activities would not constitute supply of goods and services by the appellant to those availing the facilities in the residential colonies.

5.0. The Commissioner, CX & GST, BBSR (**Appellant-II**) in his grounds of appeal, has submitted that the residential colonies are built for the welfare and benefit of the employees of the Appellant-I and extending any sort of benefit to the employees cannot be treated as something used or intended to be used in the course or furtherance of business. Since guest house, transit house and training hostel are also meant for welfare and benefit of the employees, treating them as business requirement, as related to the core business, does not appear to be correct. It is also submitted by the Appellant-II that the ruling of the AAR holding that utility of service provided through plantation & gardening within the plant area including mining area and the premises of other business establishment will qualify for input service credit appears to be incorrect. These services do not pass the legal test i.e. used or intended to be used in course or furtherance of business. The plantation and gardening within the plant area or the mines area of the applicant have no nexus with the manufacturing of Aluminium sheets and coils.

6.0. Appellant-I was given an opportunity to submit its objections and counter to the appeal filed by the Appellant-II. The Appellant-I in its counter, has submitted that section 16 of CGST Act entitles a registered person to take credit of input tax charged on any supply of services, which are used or intended to be used in the course or furtherance of his business.

7.0. During the course of the hearing on 07.01.2019, Shri P.K Sahu, Advocate on behalf of the Appellant-I reiterated the points as stated in its Grounds of Appeal and submitted an extract of relevant provisions of the CGST Act, 2017 and copy of some judicial pronouncements relied upon by him. He further stated that the activities pertain to furtherance of the business activity of Appellant-I and hence ITC should be allowed in respect of tax paid on services used for such activities. The representatives of Appellant-II & jurisdictional officer argued that since these activities did not relate directly to the business activity, credit should not be allowed.

8.0. Before proceeding further, we deem it fit to discuss the relevant provisions of CGST / OGST Acts, 2017, as operative during the period.

8.1. Section 16 of the OGST/CGST Act provides for eligibility and conditions for taking input tax credit. In terms of sub-section (1) to Section 16 of the said Act, every registered person is entitled to take credit of input tax charged on any supply of goods

or services or both, which are used or intended to be used in the course or furtherance of his business subject to such conditions and restrictions. "Input tax", as defined in Section 2(62) of the said Act, inter-alia, means the Central tax, State tax, Integrated tax or Union territory tax charged on any supply of goods or services or both, made to him. In terms of clause 17 to Section 2 of the OGST/CGST Act, 2017, "Business" inter-alia includes any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit and activity or transaction in connection with or incidental or ancillary thereto.

8.2. As per Section 17(5) (c) of the CGST / OGST Act, input tax credit shall not be available against 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. Further, in terms of Section 17 (5) (d), input tax credit shall not be available in respect of goods or services or both received by a taxable person for construction of immovable property (other than plant & 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 capitalization, to the said immovable property;

8.3. Section 17 of the OGST/CGST Act prescribes apportionment of credit in different situations and blocked credits i.e. ineligibility of input tax credit on different supply of goods and services. Section 17(5) (g) of the OGST/CGST Act specifically excludes input tax credit in respect of goods or services or both used for personal consumption i.e. credit is not admissible for private or personal consumption to the extent they are so consumed. This restriction is absolute and shall not be available under any situation/circumstances.

8.4. We find from Section 7 (1) (c) that the expression supply includes the activities specified in Schedule-I, made or agreed to be made without a consideration. Supply of goods or services or both between related persons, when made without a consideration and in the course or furtherance of business is listed at Sl.No.2 of the said Schedule-I. Explanation to Section 15 of the OGST/CGST Act specifies that employer and employees are deemed to be "related persons". Proviso to Sl. No.2 of the said Schedule-

I says that gifts not exceeding fifty thousand rupees in value in a financial year by an employee (without consideration) shall not be treated as supply of goods or services or both.

8.5. The appellant has also brought to our notice the clarification dated 10-07-2017 issued by Ministry of Finance, Government of India, Press Information Bureau, wherein it is clarified as follows. To quote:-

> *"It is being reported that gifts and perquisites supplied by companies to their employees will be taxed under GST. Gifts upto a value of Rs 50,000/- per year by an employer to his employee are outside the ambit of GST. However, gifts of value more than Rs 50,000/- made without consideration are subject to GST, when made in the course or furtherance of business.*
>
> *The question arises as to what constitutes a gift. Gift has not been defined in the GST law. In common parlance, gift is made without consideration, is voluntary in nature and is made occasionally. It cannot be demanded as a matter of right by the employee and the employee cannot move a court of law for obtaining a gift.*
>
> *Another issue is the taxation of perquisites. It is pertinent to point out here that the servicesby an employee to the employer in the course of or in relation to his employment is outside the scope of GST (neither supply of goods or supply of services). It follows therefrom that supply by the employer to the employee in terms of contractual agreement entered into between the employer and the employee, will not be subjected to GST. Further, the Input Tax Credit (ITC) Scheme under GST does not allow ITC of membership of a club, health and fitness centre [section 17 (5) (b) (ii)]. It follows, therefore, that if such services are provided free of charge to all the employees by the employer then the same will not be subjected to GST, provided appropriate GST was paid when procured by the employer. The same would hold true for free housing to the employees, when the same is provided in terms of the contract*

between the employer and employee and is part and parcel of the cost-to-company (C2C)."

(However the aforesaid clarification is of no help to the appellant-I, as discussed subsequently in this order).

8.6. Section 17(5) opens with a non obstante clause i.e. *"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:- ....."*. In view of the aforesaid non-obstante clause, what is provided in Section 16 (1) and 18 (1) is subject to the restrictions contained in Section 17 (5).

9.0. We have given careful consideration to the submissions made by both the appellants. We have examined the relevant provisions of the OGST/CGST Acts. We have also gone through the judicial pronouncements referred to by the Appellant-I. Our findings are given below.

9.1. The ruling of the AAR that inward supplies received by the Appellant-I by way of management, repair, renovation, alteration or maintenance service or goods received for furnishing the residential colony shall not qualify for input tax credit is found to be correct. Expenditure incurred by the Appellant-I towards contruction, reconstruction, renovation, additions or alterations or repairs to the residential colony is not eligible for input tax benefit if the said expenditure has been capitalized. Moreover, provision of housing to its employees by the Appellant-I is nothing but a perquisite. This is admitted by the Appellant-I themselves in Para-C of page 25 of his appeal petition. As clarified by the CBIC vide its Press Release dated 10.10.2017, referred to by the Appellant-I, perquisites are not subjected to GST. Therefore, since the perquisites are outside the scope of GST, input tax credit shall not be available to the Appellant-I in respect of tax paid on goods and services procured by it for management, repair, renovation, alteration or maintenance services (including watch and ward services, security services, Plantation/Gardening/Landscaping services, etc.) pertaining to residential accommodation for its employees in township/colony.

9.2. Perquisites are generally meant for the comfort, convenience and welfare of the employees. In the previous para, it has been stated that since perquisites are outside the scope of GST, benefit of input tax credit cannot be allowed to the Appellant-I

pertaining to inward tax-paid supply of goods and/or services availed for providing the perquisites to its employees. However, for academic interest, even if it is argued that perquisites do fall within the scope of GST; the benefit of input tax credit still cannot be allowed, as any activity for the comfort, convenience and welfare of its employees cannot be treated as having been done in course or furtherance of business. This has been held by the Hon'ble Bombay High Court (Nagpur Bench), in its Order dated 11.10.2010 in the **Central Excise Appeal No. 22 of 2008** in the case of **Commissioner of Central Excise, Nagpur – Vrs- M/s Manikgarh Cement [2010 (20) S.T.R. 456 (Bom)]**. Paras 8 and 9 of the said order are quoted below.

> *"8. In our opinion, establishing a residential colony for the employees and rendering taxable services in that residential colony may be a welfare activity undertaken while carrying on the business and such expenditure may be allowable under the Income Tax Act. However, to qualify as an input service, the activity must have nexus with the business of the assessee. The expression 'relating to business' in Rule 2 (l) of CENVAT Credit Rules, 2004 refers to activities which are integrally related to the business activity of the assessee and not welfare activities undertaken by the assessee.*
>
> *9. Applying the ratio laid down by the Hon'ble Apex Court in the case of Maruti Suzuki Limited V. Commissioner of Central Excise, Delhi (supra), we hold that unless the nexux is established between the services rendered and the business carried on by the assessee, the benefit of CENVAT credit is not allowable. In the present case, in our opinion, rendering taxable services at the residential colony established by the assessee for the benefit of the employees, is not an activity integrally connected with the business of the assessee and therefore, the tribunal was not justified in holding that the services such as repairs, maintenance and civil construction rendered at the residential colony constitutes 'input service' so as to claim credit of service tax paid on such services under Rule 2 (l) of the CENVAT Credit Rules, 2004."*

9.3. In view of the above, we find that the ratio of the aforesaid judgement of Hon'ble Bombay High Court is squarely applicable to the facts of the case and hence

the appeal filed by the Appellant-I is not legally sustainable and hence is liable to be rejected and we hold accordingly.

9.4. However, the ruling of the AAR that the Appellant-I is entitled to input tax credit of the tax paid on inward supply of input and input services for maintenance of guest house, transit house and trainee hostel is found to be not correct. As discussed in the previous paragraph, the provision of residential accommodation through transit house / trainee hostel is also a perquisite in favour of the employees and hence tax paid on inward supplies of goods and services for the transit house/trainee hostel cannot be allowed the benefit of input tax credit. The guest house of the Appellant-I is used for temporary accommodation of its employees as well as non-employees. Though the provision of guest house may not be treated as a perquisite, it cannot also be treated as an activity integrally related to the business of the Appellant-I. That means, the guest house service provided by the Appellant-I to its employees as well as non-employees cannot be treated as an activity in course or furtherance of its business. Hence, we are of the view that tax paid on inward supplies of goods and services in connection with the guest house cannot be allowed the benefit of input tax credit. To this extent, the appeal filed by the Appellant-II is sustainable and hence allowed.

9.5. The ruling of the AAR that services availed in relation to plantation and gardening within the plant area including mining area and the premises of other business establishments will qualify for input tax credit is found to be correct. Creation and maintenance of green area/zone inside plant/mining/office premises is a business necessity for controlling pollution as well as atmospheric temperature. It is also a requirement for preventing soil erosion. This is also mandated in various laws under which the Appellant-I conducts its business such as the Forest Conservation Act, the Environment Protection Act, etc. Therefore, such activities are integral to the business activity of the Appellant-I and hence can be treated as activities in course or furtherance of its business. To this extent, the appeal filed by the Appellant-II is not sustainable and hence liable to be rejected.

10.0. While making its argument, the Appellant-I has cited Order of Hon'ble Bombay High Court in the case of **Coca Cola India Pvt. Ltd.-Vrs- CCE 2009(15) S.T.R 657(Bom)**, wherein the Hon'ble High Court had observed that whatever forms cost of production of the final goods, according to the Standards of Cost Accountancy, would

be regarded as input/input service. The Appellant-I has thus argued that the tax paid on expenditure incurred by him for the input/input services (which are held by us as not eligible for input tax credit) are taken into consideration for calculation of the cost of its final products and hence benefit of input tax credit should be available on such input/input services. In this regard, we just want to place on record the fact that the Hon'ble Bombay High Court, vide a subsequent order dated 25.10.2010 in Central Excise Appeal No. 7 of 2010 in the case of Commissioner Central Excise Vs M/s. Ultratech Cement Ltd. [2010(260) E.L.T. 369(Bom.)], has interpreted the correct meaning of the order of the Hon'ble High Court in the Coca Cola case. The relevant paras of the said order are extracted below :-

> *"37. In the case of Coca Cola India Pvt. Ltd. (Supra) a Division Bench of this Court has considered scope of the expression "input service' as defined in rule 2(l) of 2004 Rules. In that case, the question for consideration was, whether a manufacturer of non alcoholic beverage bases (concentrates) is eligible to avail credit of service tax paid on advertisement, sales promotion, market research etc. The argument of the revenue in that case was that the advertisements are not relatable to the concentrate manufactured by Coca Cola Pvt. Ltd. (supra) and hence, the credit in respect thereof cannot be allowed. Considering the Finance Minister's Budget Speech for 2004-05, press note issued by the Ministry of finance along with the Draft 2004 Rules and various decisions of the Apex Court, this Court held that the expression 'activities in relation to business' in the inclusive part of the definition of 'input service' further widens the scope of input service so as to cover all services used in the business of manufacturing the final products and that the said definition is not restricted to the services enumerated in the definition of input service itself. The Court rejected the contention of the revenue that a service to qualify as an input service must be used in or in relation to the manufacture of the final products and held that any service used in relation to the business of manufacturing the final product would be an eligible input service.*

38. We concur with the above decision of this Court in the case of Coca Cola India Pvt. Ltd. (supra). However, in that case, this Court has also held that the cost of any input service that forms part of value of final products would be eligible for CENVAT credit. That observation of the Division Bench is made in the context of a service which is held to be integrally connected with the business of manufacturing the final product. Therefore, the observation of the Division Bench in the case of Coca Cola India Pvt. Ltd. (supra) has to be construed to mean that where the input service used is integrally connected with the business of manufacturing the final product and the cost of that input service forms part of the cost of the final product, then credit of service tax paid on such input service would be allowable."

10.1. From the above, it is established that to claim input tax credit, an input service must be integrally connected with the business of manufacturing the final product. Cost of an input service forming part of the cost of final product alone cannot be a condition to allow the benefit of input tax credit. Our decision, as mentioned in Para 9 above, is based on this principle as laid down by the Hon'ble Bombay High Court in the Ultratech Cement case (supra).

11.0. In view of our findings as aforementioned, the appeal filed by M/s.National Aluminium Company Ltd (Appellant-I) fails, whereas the appeal filed by the Commissioner of CX & GST, Bhubaneswar (Appellant-II) succeeds partially. The ruling of the Odisha Authority for Advance Ruling, pronounced vide its Order No.02/ODISHA-AAR/2018-19, dated 28.09.2018, is thus modified to the extent discussed above. Needless to say that rulings of the AAR, which are not challenged by the Appellants, shall remain valid. Both the appeals stand disposed of accordingly.

21.1.19

(Saswat Mishra)
Member
ODISHA APPELLATE AUTHORITY
FOR ADVANCE RULING

21/01/2019

(Rakesh Kumar Sharma)
Member
ODISHA APPELLATE AUTHORITY
FOR ADVANCE RULING