

ITC available on inputs and input services used for the construction of a mall to be used for leasing: Orissa HC

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Summary

The Orissa High Court (HC) in a recent case¹ has held that Input Tax Credit (ITC) shall be available on inputs and input services used for the construction of a shopping mall by a taxpayer engaged in the construction of a shopping mall to be used for leasing. The HC further held that the said ITC shall be available against GST payable on rent received from tenants.

Facts of the case

- The petitioner was engaged in the construction of shopping malls which were to be used for leasing. For the purpose of construction, the petitioner purchased various inputs² and inputs services³ and paid GST on them.
- The petitioner received lease rent from tenants of the shopping mall. It intended to claim ITC⁴ against the discharge of output GST liability on such lease rent.
- Accordingly, the petitioner approached the revenue authorities for claiming such ITC. The authorities suggested that claiming of ITC on inputs received for construction of immovable property was classifiable as a 'blocked credit'⁵ under the GST law and hence restricted.

¹ Safari Retreats Private Ltd. & Anrs. v Chief Commissioner of CGST [WP(C) No. 20463 of 2018]

² Like cement, sand, steel, aluminum, wires, plywood, paint, lifts, escalators, air conditioning plants, chillers, electrical equipment, special façade, DG sets, transformers, building automation systems, etc.

³ Like consultancy services, architectural services, legal and professional services, engineering services, etc.

⁴ amounting to INR 34.40 crore

⁵ Section 17(5)(d) of the Central Goods and Services Tax Act, 2017 (CGST Act)

- Accordingly, the authorities advised the petitioner to deposit the CGST and SGST without claiming ITC to avoid penal consequences.
- The petitioner filed a writ petition before the Orissa HC for declaring non-applicability of the aforesaid restriction on it. Further, the petitioner raised an alternate plea challenging the validity and/or legality of the restriction on the petitioner.

Issue before the HC

Under the extant GST law, ITC is not available on the following:

“goods or services or both received by a taxable person for construction of 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.”

Thus, the issue before the HC was whether ITC could be availed on inputs used for the construction of a building which was to be used for the purpose of letting out.

Contentions before the HC

Petitioner’s contention	Department’s contention
<ul style="list-style-type: none"> • Statutory entitlement for claiming ITC: The petitioner contended that being a registered dealer, it is statutorily entitled to avail ITC on input consumed for the construction of the shopping mall. 	<ul style="list-style-type: none"> • ITC cannot be claimed without the authority of law: The Department, referring to a Supreme Court’s judgement⁶, contended that the taxpayers cannot claim ITC without any authority of law. Further, it was argued that since ITC could not be claimed as a right, the question of depriving oneself of a right would not arise.

⁶ Indian Oil Corporation Ltd vs. State of Bihar [TS-347-SC-2017-VAT]

<ul style="list-style-type: none"> • Building intended to be let out is different from building intended to be sold: The petitioner submitted that a building intended to be let out is different from a building intended to be sold. It thus contended that the Department's approach results in adopting a similar treatment for both types of building. Hence, it argued that this approach runs counter to the basic intent of the law and would also be violative of the petitioners' fundamental right to carry on business⁷. 	<ul style="list-style-type: none"> • ITC is available only upon satisfaction of underlying conditions: The Department further contended that ITC is not available when it is restricted under the law. Further, it argued that the taxpayer is required to adhere to the underlying conditions⁸ in order to be eligible for claiming ITC. Thus, it was contended that the taxpayer could not challenge the restrictions imposed under the law claiming the same to be violative of the Constitution⁹.
<ul style="list-style-type: none"> • No break in the supply chain: The petitioner submitted that ITC was intended to be blocked in cases where GST is not payable on the sale of immovable property, thereby resulting in a break in the supply chain. Accordingly, the petitioner argued that, in the instant case, since GST was payable on rent received, there is no break in the supply chain so as to block the ITC. 	<ul style="list-style-type: none"> • Provisions should be interpreted literally: The Department submitted that the legislature in its wisdom has denied either fully or partially the ITC for certain class of taxpayers with certain conditions and limitations. Thus, it argued that the provisions should be interpreted on the basis of the language used in the said provision.

⁷ Under Article 19(1)(g) of the Constitution of India

⁸ Section 16 of the CGST Act

⁹ Guaranteed under Articles 14 and 19(l)(g) of the Constitution of India

Held by the HC

- The HC noted that GST law was introduced to avoid multiplicity of taxes. It observed that the interpretation suggested by the Department disturbs the very objective of the GST law as the petitioner has to pay a large amount of GST without any basis.
- Accordingly, the HC rejected the interpretation adopted by the Department and concluded that the very purpose of the tax credits is to give benefit to the assessee and hence provisions related to 'blocked credit' have to be read down.
- Thus, the HC held that ITC of the GST paid on inputs/input services consumed for construction of such malls is available if the petitioner is required to pay GST on the rental income.

Our comments

Ever since the introduction of GST, the real estate sector has been grappling with the issue of 'blocked credit'. It is a welcome ruling as the Court has drawn a distinction between property which is intended to be sold vis-à-vis property which is developed for the purpose of earning rentals. The ruling should address concerns around the availability of ITC for developers engaged in the construction of commercial spaces to be used for letting out.

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