MAHARASHTRA AUTHORITY FOR ADVANCE RULING
GST Bhavan, Room No.107, 1st floor, B-Wing, Old Building, Mazgaon, Mumbai – 400010.
(Constituted under Section 96 of the Maharashtra Goods and Services Tax Act, 2017)
BEFORE THE BENCH OF

(1) Shri. Dipak Gojamgunde, Joint Commissioner of State Tax, (Member)
(2) Smt. Himani Dhamija, Joint Commissioner of Central Tax, (Member)

ARA No.		
GSTIN Number, if any/ User-id		**27ACXPK5947K1ZN**
Legal Name of Applicant		**M/s. Sunil Vishvasrao Khune**
Registered Address/Address provided while obtaining user id		Mr.Sunil Vishvasrao Khune, Sr. No. 715,B/84, Plot No.84, Kulkarni Bag, College Road, Nashik – 422 005.
Details of application		GST-ARA, Application No. 54 Dated 03.12.2020
Concerned officer		**Commissionerate - Nahsik, Division-I, Godavari-Range**
Nature of activity(s) (proposed/present) in respect of which advance ruling sought		
A	Category	**Service Provider**
B	Description (in brief)	Constructing/developing of commercial premises/ units on their personal capital asset (i.e. vacant plot of land), partly for purpose of sale and partly for giving it on rent.
Issue/s on which advance ruling required		➢ Admissibility of inputs tax credit of tax paid or deemed to have been paid. ➢ Determination of the liability to pay tax on any goods or services or both ➢ whether any particular thing done by the applicant with respect to any goods and/or services or both, amounts to or results in a supply of goods and/ or services or both, within the meaning of that term
Question(s) on which advance ruling is required		As reproduced in para 01 of the Proceedings below

PROCEEDINGS

(Under Section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

The present application has been filed under section 97 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act" respectively] by **M/s. Sunil Vishvasrao Khune** the applicant, seeking an advance ruling in respect of the following questions.

1. **Whether the activity of construction / developing commercial units on vacant plot of land being acquired as capital asset out of surplus funds be treated as in the course or furtherance of business in respect of income generated on account of following transactions:**

   a. **Sale of commercial units to prospective buyers**

   b. **Rent received on leasing of commercial units**

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2. If yes, whether input tax credit be eligible for inputs & input services used for the construction of commercial units in case of above transactions i.e.

a. Sale of commercial units to prospective buyers

b. Rent received on leasing of commercial units

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to any dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the MGST Act. Further to the earlier, henceforth for the purposes of this Advance Ruling, the expression 'GST Act' would mean CGST Act and MGST Act.

1. FACTS AND CONTENTION – AS PER THE APPLICANT

1.1 Mr. Sunil Khune (herein after referred to the applicants) in his Individual capacity worked/served as a City Engineer (employee) at Nashik Municipal Corporation. He opted for retirement in the year March 2017 and now receives monthly pension from Nashik Municipal Corporation. Besides, he also receives his share of income from M/S KHUNE AGRO FARM which is an AOP and constituted by him and his wife Mrs. Charulata Sunil Khune. The said AOP is engaged in cultivation and sale of agricultural produce. The copies of Balance sheet and Income Tax return acknowledgement for last 3 years L.e. FY 2017-18, 2018-19 & 2019-20 are enclosed with this application.

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1.2 The applicant and his wife, out of the surplus/ saving funds jointly purchased a property / plot of land admeasuring 989.49 sq mtrs along with bungalow structure thereon located at Plot No. 37 & 38, S. No. 712/2A/2D/37/38, Nashik Shiwar from M/s Galaxy Knives Pvt Ltd & M/s Galaxy Saws Pvt Ltd vide execution of sale deed dated 23rd July, 2003. The said plot property are recognized as capital asset in the personal Balance sheet of the applicant and his wife till date.

1.3 The bungalow structure on the above plot were let out to M/s Prestige Hospitality and the applicant and his wife earned rental income from them, which was shared amongst themselves as per their holding ratio. However, the leave and license agreement with the tenant was terminated effective from July 2018 and the structure was demolished thereafter.

1.4 It may be noted that the applicant & his wife does not carry out any business activity in their individual capacity.

1.5 The applicant and his wife with an intention to earn fixed monthly income in form of rentals post their retirement, proposed to develop the above plot of land and re-construct the structure thereon (i.e. new commercial building). In order to meet the financial requirements for said construction, the applicant has decided to sale few units and generate funds.

1.6 Accordingly plans were drawn for construction & they purchased TDR of 1140,37 sq mtrs from Mr. Sandip Jadhav by executing TDR sale deed dated 14 March 2019. Also,

all the necessary formalities and permission required from Municipal authorities were obtained for development of said commercial project. The plan for construction was submitted to Town planning Division of Nashik Municipal Corporation and Building permission and Commencement certificate bearing no. LND/BP/A1/22/2019 dated 6 June 2019 was obtained by the applicant.

1.7 They also obtained registration bearing no. P51600025992 under MAHA RERA for the said project in the name "ONE GANGAPUR", in order to comply with RERA Act, 2016 which requires registration under RERA if the number of units constructed exceeds B or the area of land exceeds 500 sq mtrs in view of section 3[2](a) of the said Act.

1.8 An MOU dated 29 May 2020 was executed between applicant and his wife for carrying out the construction/development of the above co-owned immovable property and to allocate/distribute between themselves the shop/ office units in constructed property.

1.9 The applicant and his wife are of the view that since they are not engaged in doing any business activity and it is only sale of their investment held in form of above immovable property, the amount received on sale / let out of said units to prospective buyers shall not be liable to GST, since the transaction is not in course or furtherance of business.

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2. STATEMENT CONTAINING APPLICANT'S INTERPRETATION OF LAW

Development of vacant land into commercial project and sale of units thereon only for limited purpose of arrangement of funds is not in the course furtherance of business and thereby not covered within definition of supply.

2.1 The applicant is a retired employee of Nashik Municipal Corporation & an agriculturist. Out of savings/ surplus funds, he and his wife jointly purchased a plot of land at Nashik as discussed herein above way back in the year 2003.

2.2 The said plot of land along with structure thereon is recognized as capital asset in his personal books of accounts while filling come tax returns for past years and rental income received from leasing of the bungalow / structure on the plot of land was offered to income tax under the head of "Income from House Property and is assessed accordingly under the Income Tax Act, 1961 in the preceding years. The lease agreement with M/s Prestige Hospitality for running a restaurant was terminated in July 2018 with mutual consent of both the parties.

2.3 The above plot of land was purchased & held as an investment with the intention of earning a return on the investment by way of rental income in his old age post retirement. After termination of the lease agreement there was no income generated from the said plot of land and structure thereon. Further, the structure on the land was constructed way back in 1990 and therefore almost in dilapidated condition and the lay out of the structure was also fit only for the limited purpose of restaurant business. Hence, the applicant and his wife mutually decided to demolish the old structure &

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develop a commercial building on said plot of land having smaller units for letting out to various small lessees. The intention is to generate periodical rental income from said property for their livelihood in old age & post retirement. There is absolutely no Intention to carry on this activity as business activity by applicant.

2.4 Approval of necessary permissions from the local municipal authorities and registration under RERA are obtained only to develop the land into commercial project & not to engage into any business activity of that of a builder/ construction of commercial units. In any case these permissions/registrations were mandatory. It may be noted that RERA registration is mandatory when construction exceeds threshold limit of 8 units or 500 sq. mtrs area of land, irrespective whether there is any intention to carry it as business activity or for investment purpose. In fact, the applicant proposes to sale a few units only to meet his requirements for funds for construction of the entire building and not with an intention do any business activity or adventure in sale of commercial units.

2.5 The applicant has never carried on any business activity during his life time and was working as salaried employee of Nashik Municipal corporation. He purchased the above plot of land as an Investment asset and held the same as a capital asset in his personal financial statement, which were submitted while filling income tax returns year on years. The said investment is like any other investment such as Bank FD investment in shares, mutual fund, Jewellery etc. The income earned out of investments is not regarded as Business income under income tax for so many years.

2.6 The said plot of land and the construction cost of the commercial project are recognized as capital assets in books of accounts of appellant and not as stock in trade.

2.7 Also, the applicant has neither purchased any other plot of land and developed it in the past, nor there is any such intention to carry out such activities in the future, which indicate that his intention is not to engage into any business activity.

2.8 Analogy can be drawn from various judicial precedents vis-a vis Income Tax Law that determine whether an income is to be taxed as business income or under other heads of income such as capital gains etc.

2.9 Hon'ble Punjab & Haryana High Court in case of CIT Vs. Sushila Devi Jain (2004) 191 CTR held that when the land was acquired on the basis of a will on the death of assessee's husband & she sold the same in parcels because the huge area could not be sold in one transaction. Such an activity could not amount to trade or business within the meaning of the Act. The income earned by the assessee was taxable under the head "Capital gains" The relevant para of the decision is reproduced herein as under:

> 2. *The Tribunal and the Commissioner of Income-tax (Appeals) have both rightly held that the sale of land by the assessee was not in the nature of business because there is no continuous activity. It is true that even a single venture could be regarded as a*

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trade or business but there have to be circumstances which should give rise to such a conclusion. There are no such circumstances existing in the present case. What is necessary is to find out the intention of the assessee at the time of the purchase of land in the case before us, the land was never purchased by her. She acquired the same on the basis of a will on the death of her husband. She sold the same in parcels because the huge area could not be sold in one go. Such an activity, in our opinion cannot amount to trade or business within the meaning of the Act. Both the Commissioner and the Tribunal have followed the correct principles of low and no factual or legal error could be pointed out by the Department. In this view of the matter, we are of the opinion that no substantial question of law arises from the order of the Tribunal so as to warrant the entertainment of this appeal.

2.10 Hon'ble Madhya Pradesh High Court in case of CIT Vs. Suresh Chand Goyal (2007) 209 CTR held that the assessee received some property, which is agricultural land, as gift and thereafter he got it diverted from agricultural to non-agricultural and developed as many as 40 plots in the name of Goyal Colony, after developing the plots like making roads, providing pipe lines for water drainage system etc. A gifted land, which was developed and sold after converting into the plots with a view of secure the better price, cannot come within the purview of adventure in the nature of trade and business being the isolated activity. The main earning on the sale of the land was in the nature of capital gain and, therefore, not assessable as income from business That selling of own land after plotting it out in order to secure better price is not an adventure in the nature of trade or business An isolated transaction or activity can also be part of business, but to consider the question of business, there must be regular activity of purchasing and selling. In this case, there is nothing on record to show that the land was purchased for the purpose of selling into plots.

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2.11 Hon'ble Delhi ITAT in case of Asst. CIT Vs. Om Prakash Arora (2011) 16 taxmann.com 396 while determining that whether sale of shares is taxable as business income or capital gains laid down following principles that can be applied to find out 01 whether transactions are in the nature of trade or are merely for investment purposes:

- The intention of the assessee at the time of purchase of the shares or any other item, which can be found out from the treatment it gives to such purchase in its books of account.
- Whether assessee has borrowed money to purchase. Normally, money is borrowed to purchase goods for the purposes of trade and not for investing in an asset for retaining.
- What is the frequency of such purchases and disposal in that particular item? Whether purchase and sale is for realizing profit or purchases are made for retention

and appreciation in its value. Former will indicate intention of trade and latter, an investment.

- What are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them?

2.12 Hon'ble Mumbai ITAT in the case of Management Structure & System Pvt.Ltd. V/s. ITO (ITA No.6966/Mum/2007) has held the intention of the assessee cannot be read from his mind but it reflects in his conduct and the way he treats the transactions.

2.13 The applicant humbly submits that the above decisions though pronounced in respect of the provisions of the Income Tax Act, same can be applied in determining whether the impugned activity of the applicant be considered in the course or furtherance of business for the purpose of levy of GST. This is more so because an activity which has been treated in one taxation law cannot be treated differently for other taxation laws. In other words, if an activity or receipt from sale of capital asset is not treated as income from business activity under income tax act then for the purpose of GST it would be absurd to treat the said activity being carried out in the course of furtherance of business. This is more elaborated and explained in the succeeding paras.

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2.14 In view of above applicant humbly submits that the activity sale of units in the commercial building for meeting financial requirements for the construction of the said building is not in the course or furtherance of business and does not get covered within definition of supply as per section 7 of the CGST Act,2017.

Income earned out of renting/leasing of units is not in the course of furtherance of business and thereby not covered within definition of supply.

2.15 The activity of giving the constructed units on lease/ rent by the applicant is also not in the course or furtherance of his business activity. This is because the land and commercial units built thereon are held as investment and capital assets. Further, the applicant does not do this activity on regular basis. Earning income out of rent of said units does not mean that it is a business activity. On the contrary it is return on an investment.

2.16 The applicant and his wife are the joint owner of the land and the commercial building thereon. The rental income received previously from so many years from letting out of structure on the land was also assessed as "Income from House Property under Income Tax and never held as business income. The applicant received this income as ancillary Source of income besides drawing salary.

2.17 Therefore, it is can be safely inferred that the rental income receivable from letting out of the commercial units in newly constructed building also does not alter the situation and character of transaction. It will also be source of income post his retirement.

2.18 Further, it is humbly submitted that the applicant has never purchased any other properties with the intention of develop or let out the same. This supports the

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contention that he is not into any business which need activity to be carried out recurring, systematically and in organized manner.

2.19 It is an investment income generated by passive involvement of applicant. The applicant has never engaged in any kind of business activity earlier nor has any experience in this kind of activity. Besides this is the sole construction undertaken by applicant.

2.20 Further, the applicant proposes to sale only few units for purpose of meeting requirements of fund / finance as against borrowing funds from financial institutions etc. The business men generally meet his funds requirements by taking recourse of borrowing frequently.

2.21 In view of above applicant humbly submits that their impugned activity of let out of commercial units out of the property held by him as Investment is not in the course or furtherance of business and does not get covered within definition of supply as per section 7 of the CGST Act, 2017.

Once the activity is not in the course or furtherance of business. It dose not get covered within the ambit of term "Supply" to invoke levy of GST.

2.22 Section 9 of the CGST Act, 2017 (hereinafter referred to as "the Act") stipulates the taxable event for levy of GST as supply of goods or services. Section 7 of the Act defines the term "supply, the relevant excerpts of which is reproduced herein below:

7. (1) For the purposes of this Act, the expression supply includes ---

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(b) import of services for a consideration whether or not in the course or furtherance of business, and

(c) the activities specified in Schedule 1 made or agreed to be made without a consideration

(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II……..

2.23 Section 2(17) of the Act defines the term Business, the relevant excerpts of which is reproduced as under:

(17) "business includes-

a) any trade, commerce, manufacture, profession, vocation, adventure, wager or and 13 other similar activity, whether or not it is for a pecuniary benefit

(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a):

(c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction:

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c).....

d).....

e).....

.....

(i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities

2.24 From the above relevant provisions of the CGST Act, it can be Inferred that for an activity to fall within the ambit of the term "supply it should be carried out in the course or in furtherance of business. And further, an activity can be referred as business activity if it is in nature of trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity.

2.25 Here, it is also very important to take cognizance of definition of the term "business as defined in Income Tax Act, 1961. Section 2(13) of the said Act defines the term as under:

(13) "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacturer;

2.26 The term "business" as defined in the erstwhile Sales tax i.e. Central Sales Tax Act is also reproduced herein below:

2(aa) "business" includes

(i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern; and

(ii) any transaction in connection with or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern;

2.27 It is pertinent to note that the main and former part of the definition of the term "business in all the above laws i.e. CGST Act, IT Act, erstwhile CST Act were almost similar i.e. "it includes trade, commerce or manufacture or any adventure... Thus, an activity carried out by a person which fits within the term "business" under one taxation law, it would be inferred as business activity for other laws as well. Similarly, the converse is also true meaning thereby that an activity if fails to be treated as business activity in one of the taxation laws then it cannot be construed as business activity for other taxation laws.

2.28 The judicial precedents supra vis-a-vis Income Tax Act, clearly state that when the person is holding the asset as capital asset and has no intention to carry on the business activity with that particular asset, then sale of such asset cannot be termed as "business activity" as it does not get included under trade, commerce or adventure etc.

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2.29 It is humbly submitted that if the intention of the legislature was to tax every sale or purchase irrespective of the object of the activities there was no necessity to incorporate the term "in the course or furtherance of the business in the statute.

2.30 Secondly, the other important criteria for getting covered within the term supply is the activity undertaken by a person shall be in the course or furtherance of business.

2.31 The phrase "in the course of means an activity done in on going or during the business & the phrase "in furtherance of business" means an activity carried out should be helpful for furtherance (development/ success) of business to be achieved.

2.32 Hon'ble Supreme Court in the case of State of Gujarat Vs Raipur Manufacturing Co. Ltd. (1967) 19 STC 1 has observed that in taxing statutes, the word "business" is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure. Whether or not a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transaction must ordinarily be entered into with a profit motive. Such motive must pervade the whole series of transactions elected by the person in the course of his activity. To infer from a course of transactions that it is intended thereby to carry on business ordinarily the characteristics of volume, frequency, continuity and regularity indicating an intention to continue the activity of carrying on the transaction must exist.

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2.33 The applicant's instant activity cannot be treated as in the course of business as he was never engaged into any business activity in the past nor is he intending to carry on business that of builder/developer. The development of said commercial building on his own land is one-time affair for him to earn monthly rental income being source for his survival in retired life. So, there is absolutely no question of this transaction being done in course or furtherance of business.

2.34 The applicant humbly submits that any supplies made by an individual in his personal Capacity cannot be treated as in the course or furtherance of business Infact in the Press Release dated July 13, 2017, the Government clarified that the sale of old gold by an individual, does not attract GST as it is not in the course of furtherance of his business because individual was not into the business of sale of old jewellery.

2.35 To view of the above explanations, applicant is of the view that their impugned activity does not fall within the ambit of term "SUPPLY and therefore not leviable to GST.

Without prejudice to above, of above activities of applicant is considered to be in the course or furtherance of business, then input tax credit on various goods/ services purchased during the course of construction shall be allowed in terms of section 16 of CGST Act.

2.36 As stated in foregoing paras, applicant is of the view that the below activities are not liable to GST as they are not in the course or furtherance of business:

a) Sale of commercial units to prospective buyers

b) Rent received on leasing of commercial units

2.37 Nonetheless, if your honour holds it otherwise and decides that the said activities are liable to GST, then the applicant most humbly submit that they should be allowed ITC on the various expenses incurred on purchase of goods and services for construction of the commercial project.

2.38 Section 16(1) of the CGST Act provides that registered person is entitled to take ITC on Inputs and input services which are used or intended to be used in the course or furtherance of his business. The relevant excerpts of said section are reproduced herein below:

(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

2.39 During the course of developing and construction of commercial projects applicant Incurs various expenses for purchase of materials, labour, administration expenses etc. on which GST is paid by him to his vendors. The said expenses would then be said to be incurred in the course or furtherance of business and hence GST paid on said inputs, input services and capital goods be eligible for ITC.

2.40 The applicant places reliance on the decision of Hon'ble Orissa High Court in the of M/s Safari Retreats Pvt. Ltd. Vs. chief Commissioner of CGST (2019) 5 TMI 1 wherein the court has categorically held that if the assessee is required to pay GST or rental income arising out of the investment on which he has paid GST, it is required to the input credit on the GST, which is required to pay under Section 17(5)(d) of the CGST The provision of Section 17(5)(d) is to be read down and the narrow restriction as imp reading of the provision by the Department is not required to be accepted. The relevant of the decision is reproduced herein below:

19. The very purpose of the Act is to make the uniform provision for levy collection of tax, intra state supply of goods and services both central or State and to prevent multi taxation.

Therefore, the contention which has been raised by the learned counsel for the petitioners keeping in mind the provisions of Section 16(1)(2) where restriction has been put forward by the legislation for claiming eligibility for input credit has been described in Section 16(1) and the benefit of apportionment is subject to Section 17(1) and While considering the provisions of Section 17(5)(d). (2) W the narrow construction of interpretation put forward by the Department a frustrating the very

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objective of the Act, inasmuch as the petitioner in that case has to pay huge amount without any basis Further, the petitioner would have paid GST if it disposed of the property after the completion certificate is granted and in case the property is sold prior to completion certificate he would not he required to pay GST. But here he is retaining the property and is not using for his own purpose but he is letting out the property on which he is covered under the GST, but still he has to pay huge amount of GST to which he is not liable.

2.41 In view of above, applicant humbly submit that he should be allowed ITC on various Inputs, input services and capital goods procured at the time of construction of commercial project to offset his GST liability which may arise on out of rent received on leasing of commercial units and provision u/s 17(5)(C) & (d) shall not apply.

3. CONTENTION – AS PER THE CONCERNED OFFICER:

Whether the activity of construction/developing commercial units on vacant plot of land being acquired as capital asset out of surplus funds be treated as in the course or furtherance of business in respect of income generated on account of following transactions:

a. Sale of commercial units to prospective buyers:-

b. Rent received on leasing of commercial units:-



i. The business of the applicant in the present case inter alia consists of Sale of commercial units to prospective buyers: -

The said activity of construction and sale of commercial units to prospective buyers, is taxable under the ambit of CGST Act,2017, in view of Section 7 of CGST Act,2017 read with Paragraph-5(b) of Schedule II.

Further, the activity of the Petitioner of sale of commercial units to prospective buyers amounts to "Supply" and as such the Petitioner squarely comes within the definition of 'supplier' as appearing in Section 2(105) of the aforesaid Act and accordingly the Petitioner is liable to pay CGST on the said amounts for Sale of commercial units to prospective buyers received by it.

ii. Rent received on leasing of commercial units: -

The activity of receiving rent on leasing of commercial units appears is taxable under the ambit of CGST Act,2017, in view of Section 7 of CGST Act,2017 read with Paragraph-2(b)/5(a) of Schedule II.

Further the activity of the Petitioner of receiving Rent on leasing of commercial units amounts to "Supply" and as such the Petitioner squarely comes within the definition of 'supplier' as appearing in Section 2(105) of the aforesaid Act and accordingly the Petitioner is liable to pay CGST on the said rental amounts received by it.

If yes, whether input tax credit be eligible for inputs & input services used for the construction of commercial units in case of above transactions i.e

a. Sale of commercial units to prospective buyers: -

b. Rent received on leasing of commercial units: -

Eligibility of cenvat credit is governed by the provisions of Chapter V of the CGST Act consisting of Sections 16 to 21. While Section 16 mentions the eligibility and conditions for taking input tax credit, Section 17 speaks about apportionment of credit and blocked credit. Section 17(5) states that 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 certain cases.

Section (17)(5)(d) bars a taxable person, in the subject case the applicant, from taking input tax credit for construction of immovable property (as in the subject case) which is on his own account, even when such goods or services or both are used in the course or furtherance of business (in the subject case, renting of the said property). Further, it is also seen from the submissions that the immovable property in the subject case is neither a plant or machinery. Thus Section 17(5)(d) provides that no ITC is available in respect of any goods or services received by a taxable person for construction of an immovable property on his own account even if such inputs and input services are used in the course and furtherance of business. Therefore, as per Section 17(5)(d), no ITC is available on any goods or services received by him for such construction and the same cannot be claimed by him. Thus, the provisions of Section (17)(5)(d) squarely apply in the subject case and thus the applicant cannot avail input tax credit.

4. HEARING

Preliminary e-hearing in the matter was held on 28.09.2021. The Authorized representative of the applicant, Mr. Rajive Luthia and Ms. Jinal Maru, C.A., were present. The Jurisdictional officer was absent. The Authorized Representatives made oral submission with respect to admission of their application.

The application was admitted and called for final hearing on 30.10.2025. Mr. Mr. Rajiv Luthia, C.A., authorized representative appeared made oral and written submissions. The Jurisdictional Officer Mr. Sumeet Kumar, Superintendent of CGST was appeared. We heard both the sides.

5. OBSERVATIONS AND FINDINGS:

5.1. We have gone through the records of the case and the submissions made by the applicant in the application and the submissions made at the time of the personal hearing. We have also gone through the submissions of the jurisdictional officer vide letter dated 17.6.2022.

5.2. The issue to be decided in this case is whether the activity of construction/developing commercial unit on vacant plot of land and sale of such commercial units to prospective buyers amounts to supply under GST and whether GST is payable on such supply. Further, the applicant seeks ruling whether the activity of renting/leasing out the commercial premises on rent can be held to be an activity in furtherance of business. Further, the applicant has sought a ruling whether they would be entitled to avail input tax credit for input and input services used for the construction of commercial units where the units are sold to prospective buyers and/or

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leased out on rental basis. In this regard, it becomes important to understand the term meaning of the term 'furtherance of business'. As per Section 2(17) of the CGST Act, 2017, the term business is defined as under:-

"business" includes -

(a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);

(c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

(d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;

(e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;

(f) admission, for a consideration, of persons to any premises;

(g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;

(h) activities of a race club including by way of totalisator or a license to book maker or activities of a licensed book maker in such club; and

(i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;

Thus, from the above definition, it is clear that any trade or commerce or similar activity would amount to a business, whether or not it is for a pecuniary benefit. The word Commerce has not been defined under the CGST Act. However, as per general parlance, commerce is the exchange of goods or services on a large scale between two persons. The Collins Dictionary defines Commerce as the activities and procedures involved in buying and selling things. Further, we find that the clause c of the definition of business under Section 2(17) further points out that any activity or transaction in the nature trade or commerce, whether or not there is volume, frequency, continuity or regularity of such transaction would also be considered as a business. The literal meaning of the phrase 'in the course of or furtherance of 'is 'during the act of or in continuation of carrying out such activities in future'. Thus, in the course or furtherance of Business means either of the following :

Anything was done in relation to business while carrying out business

Or

simply a revenue-generating ordinary activity of that organization/concern.

Further, as per Section 7 of the CGST Act, 2017 the expression 'Supply' includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course of furtherance of business.

5.3. The activity of construction of a commercial premises/property for sale to prospective buyers is a supply and GST is payable on such construction activity. As per Notification No.11/2017 CT (Rate) dated 28.6.2017, as amended construction services are classified under Chapter Heading 9954 and is chargable to tax at 18% under S.No.3(if). However, when the entire consideration has been received after issue of completion certificate of the property from the competent authority, no GST would be applicable on such commercial units sold to buyers.

5.4. The activity of sale of units of a under construction commercial premises/property to prospective buyers would be classified as a business under GST and such an activity would amount to supply under GST. Further, leasing of the said premises on rent is also a commercial activity which amounts to supply under GST. The source of the fund for construction of the said premises is irrelevant and would not be a point to be taken into consideration while deciding whether any activity is a supply under GST and whether the said activity is in furtherance of business. The source of funds may be individual savings, bank borrowings or any other source and it is immaterial to understand whether any activity is a supply under GST and whether it is in the furtherance of business or otherwise. Further as per the definition of business under GST, the scale, volume or frequency of the activity would be immaterial.

5.5. We further find that the activity of sale of commercial unit has been classified under Service Accounting Code 9954. Further, the activity of leasing out of commercial property has been classified under Service Accounting Code 9972. Therefore, in terms of Section 7 of the CGST Act, 2017, read with Section 2(17) of the CGST Act, 2017, the activity undertaken by the applicant of sale of commercial unit to prospective buyers and leasing out of commercial unit on rent amount to supply which is in furtherance of business. The case laws relied upon by the applicant are in connection with the Income Tax Act and when the term business is clearly defined under the CGST Act, 2017, there is no need to rely upon the definition of business under any other law or the general meaning of the said term. Accordingly, we hold that the case laws relied upon by the applicant are not relevant to the facts of this case. Further, the applicant had relied upon Flyer issued by CBIC to the effect that sale of second hand jewellery by an un registered person would not amount to supply. In this regard, we find that such cases, the jewellery was purchased for personal use by the said person and then sold after use. In such cases, the intention of such person is not to do business but to dispose of used goods, in their possession. Such transactions are not for commercial purpose and therefore they are not covered under GST. Such situations cannot be co-related to this instant case where the intention to construct the commercial property was to sell the commercial units for profit and to lease out the remaining commercial unit for rental income. The rental income from the said commercial units leased out is received on a regular basis. Such an activity would be treated as a business activity.

5.6. The applicant has sought a ruling whether they would be entitled to avail ITC of the GST paid on the input and input services used for construction of the commercial premises for payment of tax on sale of commercial units or for payment of tax on rent received by leasing of

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commercial units. In this regard, Section 16 of the CGST Act, 2017, states that every registered person shall, subject to such conditions and restrictions as may be prescribed shall be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person. Section 17 of the CGST Act, 2017, lays down the conditions and restrictions where the input tax credit would not be available to any person. Section 17(5)(d) of the CGST Act, 2017, reads as under: -

(5) 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:-

d) goods or services or both received by a taxable person for construction of an 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.

Explanation: For the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes-

(i) land, building or any other civil structures;

(ii) telecommunication towers; and

(iii) pipelines laid outside the factory premises.

Thus, it is seen that input tax credit is not available on the goods or services received by a taxable person for construction of an immovable property on his own account, including when such goods or services or both are used in the course of furtherance of business. The only exclusion to this is plant and machinery. Further, plant and machinery has been defined under the said Section which excludes land, building or any other civil structures. It is amply clear from the application that the applicant has constructed a commercial building out of which certain units have been sold and the remaining units have been leased out for rent. Since the expression plant and machinery does not include any land, building or civil structures, the applicant would not be entitled to avail the input tax credit on the inputs i.e. good or services or both received by him for construction of the commercial immovable property on his own account, even if the said inputs are used in the course of furtherance of business.

5.7. The applicant has relied upon the decision of the Hon'ble Orissa High Court in the case of M/s. Safari Retreats Pvt. Ltd. Vs. Chief Commissioner of CGST. In this regard, we find that the words 'plant or machinery' in clause 5(d) of Section 17 was retrospectively amended to 'plant and machinery' by Section 124 of the Finance Act, 2025. The Hon'ble Supreme Court in the case of Chief Commissioner of CGST & Ors. Vs. M/s Safari Retreats Private Ltd. & Ors. (Civil Appeal No. 2948 OF 2023) had held that since the term 'plant or machinery' has not been defined under the CGST Act, 2017, the general meaning of the word plant or machinery has to be taken into consideration and in this regard, in the process of defining plant and machinery in commercial/general parlance, they stated that the functionality test has to be applied to

understand whether any immovable property can be considered as a plant or machinery. However, in view of the retrospective amendment to Section 17(5)(d), the decision of the Hon'ble Supreme Court in the said case is no longer relevant. Since there is a definition of the term 'plant and machinery' in Section 17 which is now applicable to the words 'plant and machinery' in Section 17(5)(d), there is no need to refer to the general / commercial of the term plant or machinery and therefore, the question of using the functionality test prescribed by the Hon'ble Supreme Court in the said case, does not arise in the circumstances. In fact, the definition of 'plant and machinery' as defined under section 17 will take precedence and the said definition clearly excludes land, buildings and civil structure. Since the property developed by the applicant would appropriately be treated as building and a civil structure, it is excluded from the term 'plant and machinery' and being an immovable property, the input tax credit of the goods and services used for construction of the same would not be available in terms of Section 17(5)(d) of the CGST Act, 2017. Therefore, we find that the applicant is not eligible to avail input tax credit on the GST paid on the goods or services or both used for the construction of the immovable property.

5.8. With regard to the issue whether ITC is available on the sale of commercial property to prospective buyers, we find that the ITC is available on the inputs and input services used in the construction of commercial property which is sold to customers before receipt of the Occupation Certificate/Completion Certificate from the concerned municipal authorities. The applicant would be entitled to avail ITC on the inputs used in the construction of the commercial property proportionate to the property sold to customers prior to the receipt of the Occupation Certificate out of the total property constructed.

6. In view of the extensive deliberations as held hereinabove, we pass an order as follows:

MEMBER ADVANCE RULING AUTHORITY ★ MAHARASHTRA STATE, MUMBAI ★

ORDER

(Under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

NO.GST-ARA- 54/2020-21/B- 51 **Mumbai, dt.** 30/03/2026

For reasons as discussed in the body of the order, the questions are answered thus –

Question 1: - Whether the activity of construction / developing commercial units on vacant plot of land being acquired as capital asset out of surplus funds be treated as in the course or furtherance of business in respect of income generated on account of following transactions:

a. Sale of commercial units to prospective buyers

b. Rent received on leasing of commercial units

Answer:- Yes. Sale of commercial unit to prospective buyers will be treated as in the course of furtherance of business. However, sale of commercial units to prospective customers where the entire consideration is received after the receipt of completion certificate from the competent authority would not

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be subject to GST. Further, rent received on leasing of commercial units will be treated as in the course of furtherance of business and will be subject to GST.

Question 2: - If yes, whether input tax credit be eligible for inputs & input services used for the construction of commercial units in case of above transactions i.e.

a. Sale of commercial units to prospective buyers

b. Rent received on leasing of commercial units

Answer:- **a) ITC is available on the inputs and input services used for construction of commercial units sold to prospective buyers, prior to receipt of Occupation Certificate/Completion Certificate from the concerned municipal authorities.**

b) No ITC is available on the input and input services used for construction of commercial units which are leased out on rental basis.

MEMBER ADVANCE RULING AUTHORITY ★ MAHARASHTRA STATE, MUMBAI ★ सत्यमेव जयते

DIPAK GOJAMGUNDE
(MEMBER)

HIMANI DHAMIJA
(MEMBER)

PLACE - Mumbai

Copy to: -

1. The applicant
2. The concerned Central / State officer
3. The Commissioner of State Tax, Maharashtra State, Mumbai
4. The Chief Commissioner of Central Tax, Churchgate, Mumbai
5. Joint commissioner of State Tax, Mahavikas for Website.

Note: -An Appeal against this advance ruling order shall be made before The Maharashtra Appellate Authority for Advance Ruling for Goods and Services Tax, 15th floor, Air India Building, Nariman Point, Mumbai – 400021. Online facility is available on **gst.gov.in** for online appeal application against order passed by Advance Ruling Authority.