WORKS CONTRACT

- CA DR ARPIT HALDIA

Relevant Definition and Schedule II of CGST Act, 2017

Definition of Works Contract

(119) "works contract" means a contract for

a) building,
b) construction,
c) fabrication,
d) completion,
e) erection,
f) installation,
g) fitting out,
h) improvement,
i) modification,
j) repair,
k) maintenance,
l) renovation,
m) alteration or
n) commissioning

of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract.

SCHEDULE II .
ACTIVITIES OR TRANSACTIONS TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

5. Supply of services

The following shall be treated as supply of services, namely:-

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

6. Composite supply

The following composite supplies shall be treated as a supply of services, namely:-

(a) works contract as defined in clause (119) of section 2;

M/S Larsen & Toubro Limited & Anr vs State Of Karnataka & Anr on 26 September, 2013 (SC)

The expression “in some other form” in the bracket is of utmost significance as by this expression the ordinary understanding of the term ‘goods’ has been enlarged by bringing within its fold goods in a form other than goods. Goods in some other form would thus mean goods which have ceased to be chattels or movables or merchandise and become attached or embedded to earth. In other words, goods which have by incorporation become part of immovable property are deemed as goods. The definition of ‘tax on the sale or purchase of goods’ includes a tax on the transfer or property in the goods as goods or which have lost its form as goods and have acquired some other form involved in the execution of a works contract.

CBEC vide F. No. 332/22/2015-TRU dated 05.09.2016

The Two Competing Entries

Clause 66E(b)-construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority

Clause 66E(h) service portion in the execution of a works contract;

It was clarified that

Considering the fact that construction of a complex, building, civil structure etc is a works contract, which involves not only transfer of property in goods, but also in immovable property*, a higher abatement from the amount charged for providing such service has been provided under Notification No 1/2006 for the period from 01.07.2010 to 30.06.2012 and under Notification No 26/2012 for the period with effect from 01.07.2012.*

It can be seen from Sections 65(105)(zzzh) and 65(105)(zzzza) for the period from 01.07.2010 to 30.06.2012 and Sections 66E(b) and 66E(h) of the Finance Act, 1994 for the period with effect from 01.07.2012, that Sections 65(105)(zzzh) and 66E(b) of the Finance Act, 1994 ***provide a more specific description of the activity of the applicant than the definition of Works Contract in Section 65(105)(zzzza) and Section 66E(h) of the Finance Act, 1994****. Therefore, in terms of Section 65(A)(2)(a) for the period from 01.07.2010 to 30.06.2012 and Section 65F (with effect from 01.07.2012), the services by way of construction of complex, building, civil structure etc is eligible for abatement as provided in Notification No 1/2006 ST (Sl No 10(a)) for the period from 01.07.2010 to 30.06.2012 and Notification No 26/2012 ST (Sl No 12) for the period post 01.07.2012, subject to fulfilment of the conditions prescribed therein.*

Education Guide of 2012 released by CBEC

6.2 Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of certificate of completion by a competent authority.

Answer-This service is already taxable as part of construction of residential complex service under clause (zzzh) of sub-section 105 of section 65 of the Act and as part of service in relation to commercial or industrial construction under clause (zzq) of sub-section 105 of section 65 of the Act. This entry covers the services provided by builders or developers or any other person, where building complexes, civil structure or part thereof are offered for sale but the payment for such building or complex or part thereof is received before the issuance of completion certificate by a competent authority.

Reference to Clause 5(b) of Schedule II-Reference in Rule 42 and 43 reflects the intention of legislature

Reference is made to Explanation to Rule 42(1)(f) of CGST Rules, 2017 which provides that

"Explanation: For the purpose of this clause, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act, value of T4 shall be zero during the construction phase because inputs and input services will be commonly used for construction of apartments booked on or before the date of issuance of completion certificate or first occupation of the project, whichever is earlier, and those which are not booked by the said date."

Reference can also be made to Proviso to Rule 42(1)(i) of CGST Rules, 2017 which provides that

Provided that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the Act, the value of ‗E/F' for a tax period shall be calculated for each project separately, taking value of E and F as under:-

E= aggregate carpet area of the apartments, construction of which is exempt from tax plus aggregate carpet area of the apartments, construction of which is not exempt from tax, but are identified by the promoter to be sold after issue of completion certificate or first occupation, whichever is earlier;

F= aggregate carpet area of the apartments in the project

Reference can be made to Rule 42(3) of CGST Rules, 2017 which provides that

In case of supply of services covered by clause (b) of paragraph 5 of the Schedule II of the Act, the input tax determined under sub-rule (1) shall be calculated finally, for each ongoing project or project which commences on or after 1st April, 2019, which did not undergo or did not require transition of input tax credit consequent to change of rates of tax on 1st April, 2019 in accordance with notification No. 11/2017- Central Tax (Rate), dated the 28th June, 2017, published vide GSR No. 690(E) dated the 28th June, 2017, as amended for the entire period from the commencement of the project or 1stJuly, 2017, whichever is later, to the completion or first occupation of the project, whichever is earlier, before the due date for furnishing of the return for the month of September following the end of financial year in which the completion certificate is issued or first occupation takes place of the project, in the manner prescribed in the said sub-rule, with the modification that value of E/F shall be calculated taking value of E and F as under…

This intent of legislature that entry 5(b) pertains to Builders and developers is also reflected from reference to Rule 42(4), Explanation to Rule 43(1)(b), Proviso to Rule 43(1)(g), Rule 43(2) of CGST Rules. These rules can be readily referred and have not been inserted in the submission for the sake of brevity.

IMMOVABLE PROPERTY

Immovable Property - Bench Mark Adopted in GST

a) CBEC Circular Number 58/1/2002-CX, dated 15/1/2002 where in para (e) it has been clarified that

If items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as movable and will, therefore, not be excisable goods.

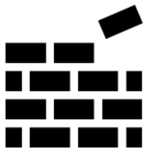
b) Definition of Immovable Property in Clause 3(26) of General Clauses Act, 1887

"Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

c) Definition of "attached to earth" in Section 3 of Transfer of Property Act, 1882

The term "attached to the earth" means

- ✓ rooted in the earth, as in the case of trees and shrubs,
- ✓ embedded in the earth, as in the case of walls or buildings, and
- ✓ attached to what is so embedded for permanent beneficial enjoyment of that to which it is attached.



Immovable Property-Supreme Court Decision

Commnr. Of Central Excise, .. vs Solid & Correct Engg. Works & Ors on 8 April, 2010

Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1= feet deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above.

Takeaway-1-Attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth.

Takeaway-2-It is also not synonymous to imbedding in earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be detached without demolition.

Takeaway-3-Imbedding of a wall in the earth is also in no way comparable to attachment of a plant to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation.

Takeaway-4-So also the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of that to which the plant is attached. It is nobody's case that the attachment of the plant to the foundation is meant for permanent beneficial enjoyment of either the foundation or the land in which the same is imbedded.

The Indian law has developed on similar lines and the mode of annexation and object of annexation have been applied as relevant test in this country also.

Eaxample-1-There are cases where machinery installed by monthly tenant was held to be moveable property as in cases where the lease itself contemplated the removal of the machinery by the tenant at the end of the tenancy.

The mode of annexation has been similarly given considerable significance by the courts in this country in order to be treated as fixture. Attachment to the earth must be as defined in Section 3 of the Transfer of Property Act.

Eaxmple-2-For instance a hut is an immovable property, even if it is sold with the option to pull it down. A mortgage of the super structure of a house though expressed to be exclusive of the land beneath, creates an interest in immovable property, for it is permanently attached to the ground on which it is built.

Immovable Property-Supreme Court Decision

Commnr. Of Central Excise, .. vs Solid & Correct Engg. Works & Ors on 8 April, 2010

The courts in this country have applied the test whether the annexation is with the object of permanent beneficial enjoyment of the land or building. Machinery for metal-shaping and electro-plating which was attached by bolts to special concrete bases and could not be easily removed, was not treated to be a part of structure or the soil beneath it, as the attachment was not for more beneficial enjoyment of either the soil or concrete.

Takeaway-5-Attachment in order to qualify the expression attached to the earth, must be for the beneficial attachment of that to which it is attached. Doors, windows and shutters of a house are attached to the house, which is imbedded in the earth. They are attached to the house which is imbedded in the earth for the beneficial enjoyment of the house. They have no separate existence from the house. Articles attached that do not form part of the house such as window blinds, and sashes, and ornamental articles such as glasses and tapestry fixed by tenant, are not affixtures.

It is noteworthy that in none of the cases relied upon by the assessee referred to above was there any element of installation of the machine for a given period of time as is the position in the instant case.

The machines in question were by their very nature intended to be fixed permanently to the structures which were embedded in the earth. The structures were also custom made for the fixing of such machines without which the same could not become functional. The machines thus becoming a part and parcel of the structures in which they were fitted were no longer moveable goods. It was in those peculiar circumstances that the installation and erection of machines at site were held to be by this Court, to be immovable property that ceased to remain moveable or marketable as they were at the time of their purchase.

Once such a machine is fixed, embedded or assimilated in a permanent structure, the movable character of the machine becomes extinct. The same cannot thereafter be treated as moveable so as to be dutiable under the Excise Act. But cases in which there is no assimilation of the machine with the structure permanently, would stand on a different footing. In the instant case all that has been said by the assessee is that the machine is fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth but because a foundation was necessary to provide a wobble free operation to the machine. An attachment of this kind without the necessary intent of making the same permanent cannot, in our opinion, constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently. In that view of the matter we see no difficulty in holding that the plants in question were not immovable property so as to be immune from the levy of excise duty.

Immovable Property-Supreme Court Decision

Triveni Engineering & Industries vs Commissioner Of Central Excise-

Something required to be dismantled before being removed will be treated as immovable and fails its test of marketability

Whether an article is permanently fastened to anything attached to the earth require determination of both the intention as well as the factum of fastening to anything attached to the earth. And this has to be ascertained from the facts and circumstances of each case. In our view, the findings recorded do not justify the conclusion of the Tribunal inasmuch as on removal a turbo alternator gets dismantled into its components steam turbine and alternator. It appears that the Tribunal did not keep in mind the distinction between a turbo alternator and its components. Thus, in our view, the test of permanency fails. The marketability test requires that the goods as such should be in a position to be taken to the market and sold and from the above findings it follows that to take it to the market the turbo alternator has to be separated into its components -- turbine and the other alternator -- but then it would not remain turbo alternator, therefore, the test is incorrectly applied.

Municipal Corporation of Greater Bombay & Ors. Vs. Indian Oil Corporation Ltd. (1991 Suppl. (2) SCC 18)

Petrol tank resting on earth on its own weight will be treated immovable property?

One of the questions considered by the Court was whether a petrol tank, resting on earth on its own weight without being fixed with nuts and bolts, had been erected permanently without being shifted from place to place. It was pointed out that the test was one of permanency; if the chattel was movable to another place of use in the same position or liable to be dismantled and re-erected at the later place, if the answer to the former is in the positive it must be a movable property but if the answer to the latter part is in the positive then it would be treated as permanently attached to the earth.

Quality Steel Tubes (P) Ltd. vs. Collector of Central Excise, U.P. (1995 (2) SCC 372)

Something embedded to the earth will be treated as immoveable property as it is not transportable or transferable nor it could be sold?

While re-stating the test, namely, first the article must be goods and secondly that it should be marketable or capable of being brought to market, it was held that goods which are attached to the earth and thus become immovable did not satisfy the test of being goods within the meaning of the Central Excise Act nor can be said to be capable of being brought to the market for being sold. In that case, it was found that both the tests were not satisfied and, therefore, the tube mill and welding head erected by the appellant were not exigible to excise duty.

Immovable Property-Supreme Court Decision

Mittal Engineering Works (P) Ltd. vs. Collector of Central Excise, Meerut (1997 (1) SCC 203)

Machinery not capable of being sold as it is will be treated as immovable

Court pointed out that the mono vertical crystalliser, had to be assembled, erected and attached to the earth by a foundation at the site of the sugar factory and it was not capable of being sold as it is, without anything more. The erection and installation of a plant is not excisable and to so hold would, impermissibly, bring into the net of excise duty all manner of plants and installations.

Sirpur Paper Mills Ltd. vs. Collector of Central Excise, Hyderabad (1998 (1) SCC 400)

Machinery attached to earth to prevent wobble and to secure maximum operational efficiency will not be treated as immovable

CEGAT recorded finding that whole purpose behind attaching machine to a concrete base was to prevent wobbling of machine and to secure maximum operational efficiency and also for safety. Supreme Court held that in view of those findings it was not possible to hold that the machinery assembled and erected by the appellant at its factory site was immovable property as something attached to earth like a building or a tree. The test, it was noted, would be whether paper-making machine could be sold in market and as Tribunal had found as a fact that it could be sold, so machine was held to be not a part immovable property of the company.

It appears of that the aforementioned two cases -- Mittal Engineering Works (P) Ltd. and Quality Steel Tubes (P) Ltd. (supra), -- were not referred to in Sirpur Paper Mills Ltd.s case

Essar Telecom Infrastructure Pvt. Ltd.

How does the length of time works to decide about the immovable nature of the property

On Mobile Towers by Karnataka High Court, which differed with the view of Bombay High Court’s judgment in Hutchison Max Telecom P Ltd [(2008) 224 ELT 191 (Bom)]. However mobile towers are standalone entities erected usually on roof-tops after an agreement with the owner of the building for using the space for a limited period of time, subject to periodic renewals. On the other hand, the Tower Package involves the erection of a series of towers on acquired land for use in perpetuity. In contrast to the time-bound nature of the agreements for using building spaces for erecting mobile towers, the Tower Package is not being constructed with the contemplation of such relocation. The judgment of Karnataka High Court in the matter of Essar Telecom Infrastructure P. Ltd. (supra) is, therefore, not applicable in the present context.

T.T.G. Industries Ltd. V. CCE, Raipur 2004 (167) ELT 501 (SC)

Relevance of Weight, volume and process involved in erection and installation

The machinery was erected at the site by the assessee on a specially made concrete platform at a level of 25 ft. height. Considering the weight and volume of the machine and the processes involved in its erection and installation, this Court held that the same was immovable property which could not be shifted without dismantling the same.

Input Tax Credit

Section 17(5)(c) & (d)-Blocked ITC regarding Immovable Property

(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:—

(c) 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;

(c) Goods or services or both received by a taxable person for construction of an immovable property (other than plant or 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 capitalisation, to the said immovable property;

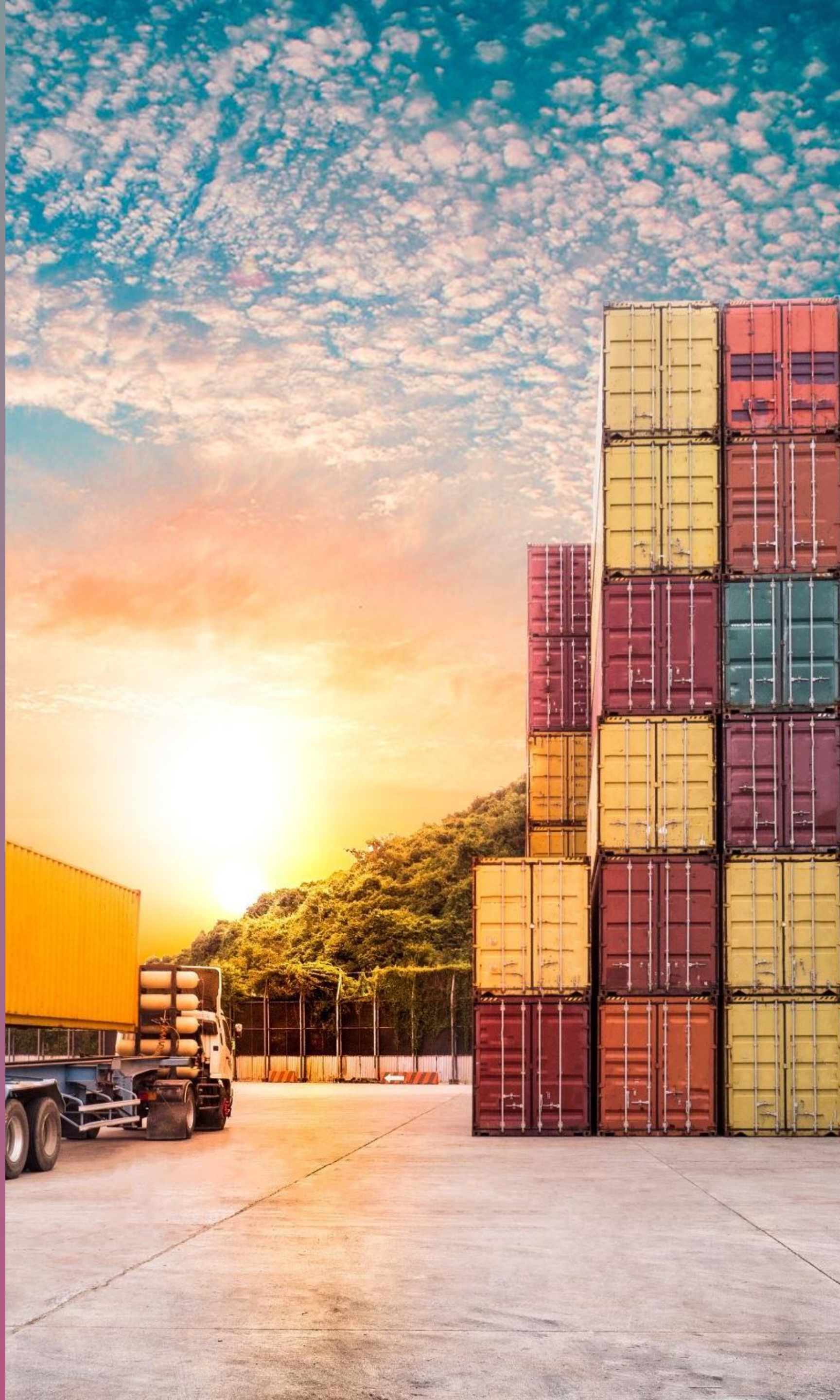
Explanation.— For the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural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

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

(ii) telecommunication towers; and

(iii) pipelines laid outside the factory premises.

Place of Supply



Place of Supply of Service relating to Immoveable Property: Section 12 (3)

(3) The place of supply of services,—

(a) ***directly in relation to an immovable property***, including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents, any service provided by way of grant of rights to use immovable property or for carrying out or co-ordination of construction work; or

(b) ***by way of lodging accommodation by*** a hotel, inn, guest house, home stay, club or campsite, by whatever name called, and including a house boat or any other vessel; or

(c) ***by way of accommodation in any immovable property*** for organising any marriage or reception or matters related thereto, official, social, cultural, religious or business function including services provided in relation to such function at such property; or

(d) ***any services ancillary to the services referred*** to in clauses (a), (b) and (c),

shall be the location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located:

Provided that if the location of the immovable property or boat or vessel is located or intended to be located outside India, the place of supply shall be the location of the recipient.

GENERALLY, THE FOLLOWING CRITERIA WILL BE USED TO DETERMINE IF A SERVICE IS IN RESPECT OF IMMOVABLE PROPERTY LOCATED IN THE TAXABLE TERRITORY-CBEC EDUCATION GUIDE DATED 20 JUNE 2012

i) The service consists of **lease, or a right of use, occupation, enjoyment or exploitation** of an immovable property;

ii) the service is **physically performed or agreed to be performed on an immovable property** (e.g. maintenance) or property to come into existence (e.g. construction);

iii) the **direct object of the service is the immovable property in the sense that the service enhances the value of the property, affects the nature of the property, relates to preparing the property for development or redevelopment or the environment within the limits of the property** (e.g. engineering, architectural services, surveying and sub-dividing, management services, security services etc);

iv) the purpose of the service is:

a) ***the transfer or conveyance of the property or the proposed transfer or conveyance of the property*** *(e.g., real estate services in relation to the actual or proposed acquisition, lease or rental of property, legal services rendered to the owner or beneficiary or potential owner or beneficiary of property as a result of a will or testament);*

b) b) the determination of title to the property.

*"****There must be more than a mere indirect or incidental connection between a service provided in relation to an immovable property, and the underlying immovable property.*** *For example, a legal firm's general opinion with respect to the capital gains tax liability arising from the sale of a commercial property in India is basically advice on taxation legislation in general even though it relates to the subject of an immovable property. This will not be treated as a service in respect of the immovable property."*

5.5.4 WHAT IF A SERVICE IS NOT DIRECTLY RELATED TO IMMOVABLE PROPERTY?

The place of provision of services rule applies only to services which relate directly to specific sites of land or property. In other words, the immovable property must be clearly identifiable to be the one from where, or in respect of which, a service is being provided. Thus, there needs to be a very close link or association between the service and the immovable property. **Needless to say, this rule does not apply if a provision of service has only an indirect connection with the immovable property, or if the service is only an incidental component of a more comprehensive supply of services.**

For example, the services of an architect contracted to design the landscaping of a particular resort hotel in Goa would be land-related. However, if an interior decorator is engaged by a retail chain to design a common décor for all its stores in India, this service would not be land related.

5.5.5 Examples of services which are not land-related

i) Repair and maintenance of machinery which is not permanently installed. This is a service related to goods.

ii) Advice or information relating to land prices or property markets because they do not relate to specific sites.

iii) Land or Real Estate Feasibility studies, say in respect of the investment potential of a developing suburb, since this service does not relate to a specific property or site.

iv) Services of a Tax Return Preparer in simply calculating a tax return from figures provided by a business in respect of rental income from commercial property.

MEANING OF THE WORDS " IN RELATION TO"

Hon'ble Apex Court in the matter of **Doypack Systems Pvt Ltd v. Union of India: AIR 1988 SC 782,** observed meaning of expressions "in relation to" as under:-

"49. The expression "in relation to" (so also "pertaining to"), is a very broad expression which presupposes another subject matter. These are words of comprehensiveness which might both have a direct significance as well as an indirect significance depending on the context..." "...

In this connection reference may be made to 76 Corpus Juris Secundum at pages 620 and 621 where it is stated that the term "relate" is also defined as meaning to bring into association or connection with. ***It has been clearly mentioned that "relating to" has been held to be equivalent to or synonymous with as to "concerning with" and "pertaining to". The expression "pertaining to" is an expression of expansion and not of contraction." (emphasis supplied)***

SECTION 13(4)

Place of Supply of Service relating to Immoveable Property: Sub-section (4) of Section 13 of IGST Act, 2017

(4) The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators, ***shall be the place where the immovable property is located or intended to be located.***

SECOND PROVISO TO SECTION 16(2)-

RULE OF 180 DAYS FOR RETENTION MONEY

Second Proviso to Section 16(2)-Condition for 180 Days Payment

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Part-I-Waiver of Performance shall be deemed to be Performed

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(d) A owes B, under. a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B"s demand.

Part-2-Retention Money-Is this in the nature of Deposit

It is holding of an amount towards completion of the contract as deposit treating that amount towards invoice being paid with the consent of the supplier and thus provisions of second proviso to Section 16(2) of CGST Act, 2017 being treated as complied.

Part-3-Doctrine of Impossibility

Once the supplier himself has waived off the right to receive the payment, then asking the recipient to pay the invoice within 180 days of the invoice is asking the recipient to do the impossible.

Part-4-The amount shall be treated as due when the retention money becomes payable

Since the right to claim payment in case of retention arises at the time of satisfaction of the condition as per the contract and not from the date of raising of the invoices, therefore the period of 180 days shall be calculated from the date when the payment of retention money becomes due and not from the date of invoice.

Commissioner Of Income-Tax vs Simplex Concrete Piles (India) ... on 5 December, 1988 Equivalent citations: 1989 179 ITR 8 Cal wherein it was held by the hon'ble Court that the payment of retention money is deferred and is contingent on the satisfactory completion of the work and removal of defects and payment of damages, if any. Till then, there is no admission of liability and no right to receive any part of the retention money accrues to the assessee.

Part 5-Government illegally witholding the money even when the same has been deposited

That the provision are ultra vires per se as tax in the instant case has already been deposited with the Government and the Government is disallowing the Input Tax Credit citing superficial reasons even in cases wherein both the supplier and recipient have agreed for a payment beyond the stipulated time period of 180 days.

Part 6-Retention money has been withheld with the consent of the supplier and amount paid by us to the supplier is more than the entire tax amount of the entire invoice, therefore it should be treated that we have complied with the provision of payment to the supplier within 180 days of the issue of the invoice.

Hindustan Zinc Limited [(2014) 34 S.T.R. 440 (Tri-Del) has held that Rule 4(7) would be applicable only in a situation where the service provider has issued the invoice but he has not paid the service tax. But where there is no dispute that service tax has been paid by the service provider on the full invoice value, even though he has not received full payment from the service recipient and part of the payment due to him has been withheld by the service recipient due to some reason, this rule would not be applicable.

Governmental Authority, Government Entity and Local Authority

Definition of Government Entity

(zfa) "Government Entity" means an authority or a board or any other body including a society, trust, corporation,-

(i) set up by an Act of Parliament or State Legislature; or

(ii) established by any Government, with 90 percent. or more participation by way of equity or control,

to carry out a function entrusted by the Central Government, State Government, Union Territory or a local authority.

-Whether the long line is applicable to both clause (i) and (ii) or only to (ii)- Reference to Circular no. Circular No. 76/50/2018-GST dated 31st December 2018

Definition of Governmental Authority

"Governmental authority" means an authority or a board or any other body, -

(i) set up by an Act of Parliament or a State Legislature; or

(ii) established by any Government, with ninety per cent. or more participation by way of equity or control,

to carry out any function entrusted to a Panchayat under article 243G or to a municipality under article 243W of the Constitution;

-Whether the long line is applicable to both clause (i) and (ii) or only to (ii)- Reference to Circular no. Circular No. 76/50/2018-GST dated 31st December 2018

Definition of Local Authority

(69) "local authority" means-

(a) a "Panchayat" as defined in clause (d) of article 243 of the Constitution;

(b) a "Municipality" as defined in clause (e) of article 243P of the Constitution;

(c) a Municipal Committee, a Zilla Parishad, a District Board, and any other authority legally entitled to, or entrusted by the Central Government or any State Government with the control or management of a municipal or local fund;

(d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006 (41 of 2006);

(e) a Regional Council or a District Council constituted under the Sixth Schedule to the Constitution;

(f) a Development Board constituted under article 371 [8][and article 371J] of the Constitution; or

(g) a Regional Council constituted under article 371A of the Constitution;

a) What are "Panchayat" in simple language-

-Panchayats at Village:- Panchayat at Village Level is commonly known as Gram Panchayat.
-Panchayat at block/taluk/mandal:- Panchayat at Intermediary level are commonly known as Mandals or Taluka Panchayat or Block Panchayats, or Panchayat Samiti.
-Panchayats are District Levels:- Panchayat at District Level is Commonly known as Zila Parishad or Zila Panchayat or District Council or District Panchayat.

b) What are "Municipality" in simple language

-**Nagar Panchayat is commonly known as Nagar Palika.**
-Muncipal Council is commonly known as Nagar Parishad.
-Municipal Corporation is commonly known as Nagar Nigam or Mahanagar Palika.

c) What are Cantonment Board

Any place or places alongwith boundaries as may be notified as a cantonment through notification by the Central Government
a) In which any part of the Forces is quartered, or
b) Which, being in the vicinity of any such place or places, is or are required for the service of such forces.

d) Whats is a Regional Council or a District Council constituted under the Sixth Schedule to the Constitution

Sixth Schedule of the Constitution relates to administration and control of States of Assam, Meghalaya, Tripura and Mizoram. Sixth Schedule to the Constitution contains provisions for constitution of district and regional councils for the administration of tribal areas.

e) What is a Development Board constituted under article 371 and article 371J of the Constitution

Article 371 relates to establishment of separate development boards for Vidarbha, Marathwada, and the rest of Maharashtra or, as the case may be, Saurashtra, Kutch and the rest of Gujarat. Under **Article 371J**, President is empowered to provide that the Governor of Karnataka would have special responsibility for establishment of a separate development board for the Hyderabad-Karnataka region.

f) a Regional Council constituted under article 371A of the Constitution

Article 371A further lists that notwithstanding anything contained in any other provisions of Constitution of India, provisions contained in Article 371A(2) would be operative for Tuensang district for a period of 10 years, from the formation of the state of Nagaland or for a further period as specified by Governor, on recommendations of the regional council.

f) What are "Municipal Committee, a Zilla Parishad, a District Board, and any other authority legally entitled to, or entrusted by the Central Government or any State Government with the control or management of a municipal or local fund" in simple language-

-Municipal Committee, District Board- Hon'ble Apex Court in the matter of ***Agricultural Produce Market Committee Narela Vs. Commissioner of Income Tax and Another :: (2008) 305 ITR 1(SC)***

In our view, the Municipal Committee and District Board in the said Explanation are used out of abundant caution. In 1897 when General Clause Act was enacted there existed in India Municipal Committees and District Boards. They continued even thereafter. In some remote place it is possible that there exists a Municipal Committee or a District Board.

-Zila Parishad:

It is not very clear that why Zila Parishad have been specified when they are covered under Panchayat under sub-clause(a) of clause (69) of section 2 of CGST Act under the entry. Thus, reference to Zila Parishad Separately in this sub-clause (c) of section 2(69) of CGST Act, 2017 when it is already covered under sub-clause (a) of section 2(69) of CGST Act, 2017 requires clarification and what purpose it serves. Further it would be apt to highlight that sub-clause similar to the sub-clause (c) of section 2(69) of CGST Act, 2017 founds mention in the definition of local authority under the Income Tax Act, 1961 but there it does not contain any reference to Zila Parishad. However, still Zila Parishad falls under the definition of Local Authority.

-Any other authority legally entitled to, or entrusted by the Central Government or any State Government with the control or management of a municipal or local fund

Definition of Local Authority in General Clauses Act-Local Authority shall mean a Municipal Committee, District Board, Body of Port Commissioners or other authority legally entitled to, or entrusted by the Government with the control or management of a municipal or local fund".

Hon'ble Apex Court in the landmark decision in the matter of Union of India & Ors vs R. C. Jain & Ors on 17 February, 1981 provided guidelines while holding Delhi Development Authority as Local Authority

1.The authorities must have **separate legal existence as Corporate bodies**. They must not be mere Governmental agencies but must be legally independent entities.
2.They **must function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area**.
3.They must **enjoy a certain degree of autonomy**, with freedom to decide for themselves questions of policy affecting the area administered by them. The autonomy may not be complete and the degree of the dependence may vary considerably but, an appreciable measure of autonomy there must be.
4.They must be entrusted by Statute with such Governmental functions and duties as are usually entrusted to municipal bodies, such as those connected with providing amenities to the inhabitants of the locality, like health and education services, water and sewerage, town planning and development, roads, markets, transportation, social welfare services etc. etc. **Broadly we may say that they may be entrusted with the performance of civic duties and functions which would otherwise be Governmental duties and functions**.
5.They must have the power to raise funds for the furtherance of their activities and the fulfillment of their projects by levying taxes, rates, charges, or fees. This may be in addition to moneys provided by Government or obtained by borrowing or otherwise. What is essential is that control or management of the fund must vest in the authority.

In Valjibhai Muljibhai Soneji and Anr. v. The State of Bombay (Now Gujarat) & Ors. one of the questions was whether the **State Trading Corporation** was a local Authority as defined by Sec. 3(31) of the General Clauses Act, 1897. It was held that it was not, because it was not an authority legally entitled to or entrusted by the Government with, control or management of a local fund. **It was observed that though the Corporation was furnished with funds by the Government for commencing its business that would not make the funds of the Corporation 'local funds'.**

Hon'ble Apex Court in the matter of **The Commissioner Of Income Tax, … vs U.P. Forest Corporation on 2 March, 1998** held **that U.P. Forest Corporation** is not a local authority under the Income Tax Act. It would be apt here to clarify that definition of local authority under section 10(20) of the Income Tax Act has been inserted with effect from 01.04.2003 for that section. Prior to that the term "local authority" was not defined under Income Tax Act and reference had to be made to definition as provided under the General Clauses Act, 1897.

Hon'ble Apex Court in the matter of **Calcutta State Transport … vs Commissioner Of Income-Tax, West … on 4 April, 1996** following the decision of Apex Court in the matter of R.C. Jain held that **Calcutta State Road Transportation** is not a local authority under the Income Tax Act referring to the definition of "Local Authority" under the General Clause Act.

Clarification issued by CBEC under Sectoral FAQ contrary to decision of Apex Court in the matter of Union of India & Ors vs R. C. Jain & Ors on 17 February, 1981-The clarification issued by CBEC in Sectoral FAQ of Government Services is reproduced herein below:

Question 5: Are all local bodies constituted by a State or Central Law regarded as local authorities for the purposes of the GST Acts?

Answer: No. The definition of 'local authority' is very specific and means only those bodies which are mentioned as 'local authorities' in clause (69) of section 2 of the CGST Act, 2017. It would not include other bodies which are merely described as a 'local body' by virtue of a local law. ***For example, State Governments have setup local developmental authorities to undertake developmental works like infrastructure, housing, residential & commercial development, construction of houses, etc. The Governments setup these authorities under the Town and Planning Act****. Examples of such developmental authorities are Delhi Development Authority, Ahmedabad Development Authority, Bangalore Development Authority, Chennai Metropolitan Development Authority, Bihar Industrial Area Development Authority, etc. Such developmental authorities formed under the Town and Planning Act are not qualified as local authorities for the purposes of the GST Acts.*

Why Delhi Development Authority is not a Local Authority under the Income Tax Act, 1961-It's the word "any other authority" which plays a significant role in interpreting which institutions are local authority covered by this clause and which institutions fall out of the same. Explanation to Section 10(20) of Income Tax Act, 1961 defines local authority as follows:
Explanation.—For the purposes of this clause, the expression "local authority" means—

(i) Panchayat as referred to in clause (d) of article 243 of the Constitution; or
(ii) Municipality as referred to in clause (e) of article 243P of the Constitution; or
(iii) Municipal Committee and District Board, legally entitled to, or entrusted by the Government with, the control or management of a Municipal or local fund; or
(iv) Cantonment Board as defined in section 3 of the Cantonments Act, 1924 (2 of 1924);

Now if we compare the definition of "Local Authority" under the General Clauses Act, 1897 vis-a vis definition of Local Authority under Income Tax, it would be clear that why such Institutions have fallen out of the purview of Local Authority under the Income Tax Act and still are Local Authority under the General Clauses Act, 1897.

Hon'ble Apex Court in the matter of ***Agricultural Produce Market Committee Narela Vs. Commissioner of Income Tax and Another :: (2008) 305 ITR 1(SC).Hon'ble Apex Court in the given matter was faced with the issue that***

Certain glaring features can be deciphered from the above comparative chart. Under Section 3(31)of the General Clauses Act, 1897, "local authority" was defined to mean "a municipal committee, district board, body of port commissioners or other authority legally entitled to the control or management of a municipal or local fund. The words "other authority" in Section 3(31)of the 1897 Act has been omitted by Parliament in the Explanation/definition clause inserted in Section 10(20)of the 1961 Act vide Finance Act, 2002. Therefore, in our view, it would not be correct to say that the entire definition of the word "local authority" is bodily lifted from Section 3(31) of the 1897 Act and incorporated, by Parliament, in the said Explanation to Section 10(20) of the 1961 Act. This deliberate omission is important. It may be noted that various High Courts had taken the view prior to Finance Act, 2002 that AMC(s) is a "local authority". That was because there was no definition of the word "local authority" in the 1961 Act. Those judgments proceeded primarily on the functional tests as laid down in the judgment of this Court vide para `2' in the case of R.C. Jain (supra)

Hon'ble Allahabad High Court in the matter of New Okhla Industrial Development Authority V/s Chief Commissioner Of Income Tax, Meerut Camp & Others following the above decision held that after 1.4.2003, New Okhla Industrial Development Authority (Noida) is not a local authority within the meaning of section 10(20) of the Income Tax Act, 1961.

Definition of Local Authority under Service Tax

If we analyses the definition of "Local Authority" under the Service Tax Regime, the definition of "Local Authority" as provided under clause (31) of section 65B of Finance Act 1994 was as follows:

"local authority" means—

(a) a Panchayat as referred to in clause (d) of article 243 of the Constitution;

(b) a Municipality as referred to in clause (e) of article 243P of the Constitution;

(c) a Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund;

(d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006 (41 of 2006);

(e) a regional council or a district council constituted under the Sixth Schedule to the Constitution;

(f) a development board constituted under article 371 of the Constitution; or

(g) a regional council constituted under article 371A of the Constitution;

AAR Holding Development Authority as Governmental Authority and not Local Authority-Specific Entry Prevailing over General or Contrary to Apex Court Order

-V.K. Building Service (P.) Ltd. [2019] 110 taxmann.com 198 (AAR - KARNATAKA)- **Bangalore Development Authority** is a Government Authority as per the provisions of the GST Law

-Dr. Amin Controllers (P.) Ltd. [2019] 102 taxmann.com 36 (AAR - TAMILNADU)-M/s. **Chennai Metro Water Supply and Sewerage Board (CMWSSB) and M/s. Tamil Nadu Water Supply and Drainage Board (TWAD)** is a 'Governmental Authority' as defined under 2(zf) of the Notification No. 12/2017-CT (Rate) as amended.

-PDCOR Ltd. [2018] 97 taxmann.com 458 (AAR- RAJASTHAN)-Jaipur Development Authority (JDA) is a Government Authority.

-Amaravathi Metro Rail Corporation Ltd. [2018] 99 taxmann.com 104 (AAR - ANDHRA PRADESH)- AMRCL is a Government Authority as per Notification 12/2017-CT (Rate), dated 28.06.2017.

-Tirupati Construction [2021] 131 taxmann.com 125 (AAR - GUJARAT)-Ahemdabad Urban Development Authority is a Governmental Authority.

-Maha Mumbai Metro (M3) Operation Corporation Limited (GST AAR Maharashtra)-MMRDA is clearly covered under the definition of 'Government Entity' as can be seen from the definition of a 'Government Entity'.

243G. Powers, authority and responsibilities of Panchayats.

Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as may be specified therein, with respect to-

(a) the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

ELEVENTH SCHEDULE (Article 243G)

1. Agriculture, including agricultural extension.
2. Land improvement, implementation of land reforms, land consolidation and soil conservation.
3. Minor irrigation, water management and watershed development.
4. Animal husbandry, dairying and poultry.
5. Fisheries.
6. Social forestry and farm forestry.
7. Minor forest produce.
8. Small scale industries, including food processing industries.
9. Khadi, village and cottage industries.
10. Rural housing.
11. Drinking water.
12. Fuel and fodder.
13. Roads, culverts, bridges, ferries, waterways and other means of communication.
14. Rural electrification, including distribution of electricity.
15. Non-conventional energy sources.
16. Poverty alleviation programme.
17. Education, including primary and secondary schools.
18. Technical training and vocational education.
19. Adult and non-formal education.
20. Libraries.
21. Cultural activities.
22. Markets and fairs.
23. Health and sanitation, including hospitals, primary health centres and dispensaries.
24. Family welfare.
25. Women and child development.
26. Social welfare, including welfare of the handicapped and mentally retarded.
27. Welfare of the weaker sections, and in particular, of the Scheduled Castes and the Scheduled Tribes.
28. Public distribution system.
29. Maintenance of community assets.

243W. Powers, authority and responsibilities of Municipalities, etc

Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow-

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to-

(i) the preparation of plans for economic development and social justice;

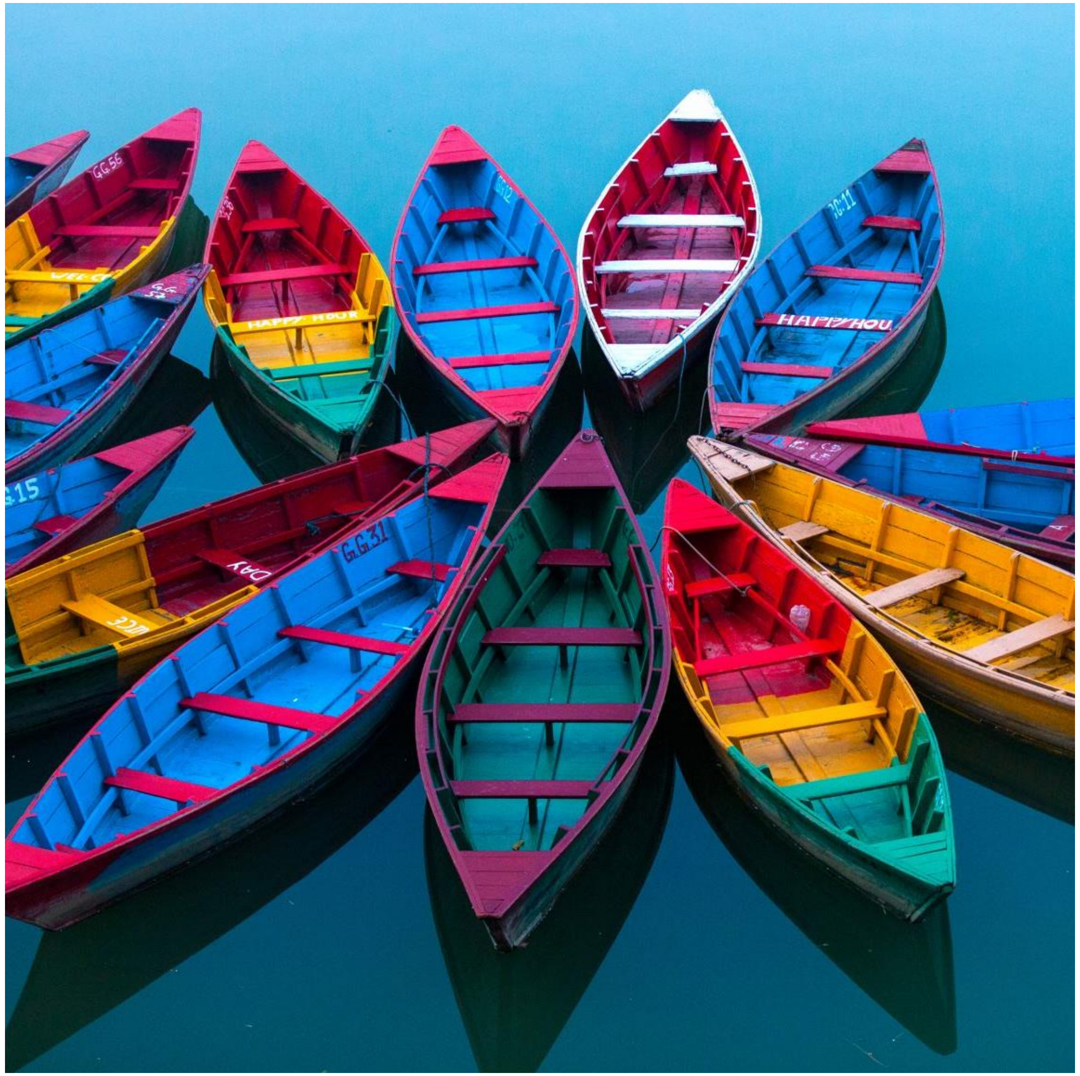
(ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule.

Twelfth Schedule (Article 243W)

1. Urban planning including town planning.
2. Regulation of land-use and construction of buildings.
3. Planning for economic and social development.
4. Roads and bridges.
5. Water supply for domestic, industrial and commercial purposes.
6. Public health, sanitation conservancy and solid waste management.
7. Fire services.
8. Urban forestry, protection of the environment and promotion of ecological aspects.
9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
10. Slum improvement and upgradation.
11. Urban poverty alleviation.
12. Provision of urban amenities and facilities such as parks, gardens, playgrounds.
13. Promotion of cultural, educational and aesthetic aspects.
14. Burials and burial grounds; cremations, cremation grounds; and electric crematoriums.
15. Cattle pounds; prevention of cruelty to animals.
16. Vital statistics including registration of births and deaths.
17. Public amenities including street lighting, parking lots, bus stops and public conveniences.
18. Regulation of slaughter houses and tanneries.

Cross Fall Breach Clause



Hon’ble Andhra Pradesh High Court in the matter of M/S. Larsen And Toubro Ltd vs State Of Andhra Pradesh Rep. By ... on 14 September, 2015

In turn-key projects, more particularly of the kind involved in this batch of Writ Petitions, the same person has been entrusted with the responsibility of procuring material, and of erection and installation of equipment. While in-built safeguards are provided in all the contracts to ensure quality of the material, and effective performance of the erection contract, the supply contracts, in substance, do not absolve the petitioners-contractors of their obligations of erection and installation of equipment after the goods are sold by them to the owner. The petitioners- contractors obligations, under both the supply and erection contracts, cease only after the turn-key project becomes operational, and after final payment is made both for supply of material and for erection and installation of equipment. While a dual role is not impermissible in execution of turnkey projects, its relevance, in determining whether or not the subject contracts are indivisible works contracts, is insignificant. While we see no reason to burden this judgment with a reference to all the relevant clauses in each of the agreements, it is useful to note some of them.

Hon’ble High Court referred to the various clauses of the agreements of the petitioners and reproduced the same in their judgement

Payment under clause 4.2.2 of the Alstom GVK and Alstom Goutami supply contract is conditional on performance acceptance under the services contract. Clause 14.4 of the Alstom

GVK and the Alstom Gautami Supply Contract stipulates that, if the services contract is terminated by the owner, the owner shall have the right to terminate the supply contract. Likewise Clause 15.4 of the erection contract between Alstom GVK and Alstom Goutami enables the employer to terminate the erection contract if the supply contract has been terminated. Para 1.1 (v) of Appendix B thereof provides for 5% of the price of supplies to be made on the occurrence of the provisional performance acceptance of the facility in accordance with Clause 4.2.2 of the agreement.

Clause 14.2.1(c) of the L & T - Konaseema Supply Contract enables the supply contract to be terminated by the owner in the event of termination of the owners other contracts (erection contract). Clause 1.3 of Appendix I provides for payment for supplies, and for discharge of the obligations to supply, after test of the material at the facility site. Clause 1.4 of Appendix-B provides for part payment for the supply to be made on issuance a site test certificate i.e., after completion of erection.

Appendix-H of the L & T Vemagiri supply agreement stipulates that 5% of the price shall be paid on successful test for the identified packages as per the pricing and technical specifications; 5% of the price on provisional acceptance; and 5% of the price on final acceptance. Provisional acceptance is defined under the supply agreement to mean the achievement of provisional acceptance as defined in the civil works and erection agreement, and in accordance with the terms thereof. It is evident, therefore, that 10% of the payment under the supply agreement is required to be made only after provisional and final acceptance as stipulated under the erection agreement.

Hon’ble High Court then referred to the Judgement of Hon’ble Apex Court in the matter of Indure Limited Vs CTO wherein as well although lump sum price was quoted but two agreements were entered into by between the contractor and the awarder-

The aforesaid clauses show that termination of the supply contract would enable the employer to terminate the erection contract and vice-versa. In Indure Ltd. v. CTO, the bidder was required to quote a lump sum price in its proposal for the entire scope of the work covered under the bid documents. The total contract was agreed to be divided into two separate contracts, (i) supply contract, and (ii) erection contract, with a cross-fall breach clause wherein breach of either of the contracts entitled the employer/owner/contractee (NTPC) to cancel the other contract also. NTPC awarded two contracts to Indure Ltd. for performing the work of erection of the plant on a turnkey basis. The Supreme Court, in Indure Ltd75, held that, even though two contracts were entered into between the parties, it was only one contract for the reason that NTPC kept a right with it with regard to the cross-fall breach clause, meaning thereby that default in one contract would tantamount to default in another, and the whole contract was liable to be cancelled.

Existence of a cross-fall breach clause, or a clause which enables the owner to terminate the supply contract for breach of the erection contract and vice-versa, would mean that, while the contracts are ostensibly two separate contracts one for supply of material and the other for rendering works and services, they are, in fact, one single indivisible contract. The goods supplied to the owner, under the supply contracts, are tailor made goods, and cannot be bought off the shelf. Such goods cannot, ordinarily, be sold to another except for its use in turnkey projects of a similar nature. The petitioners have been entrusted with the work mainly for their expertise in erection and installation of plants in the execution of turn-key projects. As they were entrusted with the work of erection and installation, the petitioners-contractors have also been entrusted with the task of procuring material therefor. The functions relating to the supply of material, and rendering services of erection and installation, are integrally connected and are inter-dependent.

In some of these cases, the contractors were required to submit a single bid both for supply of material, and for erection and installation of equipment for the turn-key project. Clause 3.2 of the letter of award of the work issued by Power Grid Corporation of India Ltd (Power Grid for short) to Siemens Limited stipulates that the contract shall be construed as a single source responsibility contract, and any breach in any part of the contract shall be treated as a breach of the entire contract. Clause 2.3 of the Seimens Power Grid agreement stipulates that the work, under the letter of Award, shall be performed by the Contractor strictly in line with the bidding documents. Clause 2.3(ii) of the Siemens - Power Grid Supply Contract stipulates that breach, under the erection contract, would automatically be deemed as a breach of the supply contract and any such breach or occurrence would give Power Grid the right to terminate the erection contract and the supply contract. An identical clause is found in clause 2.3(ii) of the Siemens - Power Grid erection contract also. Clause 3.3 of the Siemens Power Grid supply contract stipulates that the total ex-works prices for the items are on a lumpsum/lot/set basis. Clause 6.1(iii)(c) of the supply contract stipulates that 10% of the ex-works price component shall be paid on successful completion of erection, testing and commissioning of the sub-station and issuance of taking over certificate. The

Siemens - Power Grid supply contract also prescribes an implementation schedule not only for supply but also for erection, testing and commissioning of the power plant.

The tender notice issued by the Rashtriya Ispat Nigam Limited (RINL) shows that both supply and erection fall within the scope of the very same work. Clause 5.1 of the bidding document of RINL stipulates that the work comprises of design and engineering, manufacture and supply of plant and equipment, erection work, testing, start-up and commissioning etc. Clause 4.1 prohibits the contractor from transferring or assigning the contract or any part thereof without the written consent of the employer. The correspondence between Siemens and RINL shows that the subject composite work was awarded to Siemens Limited for a lumpsum amount. Clause 23.2 of the bidding document stipulates that the prices to be quoted are intended to provide for all works duly and properly completed in accordance with the General Conditions of Contract and Special Conditions of Contract, if any, and are required to include the cost of delivery of the equipment. Clause 23.2.2 stipulates that payment against supplies would be released only on receipt and acceptance of material as per payment terms referred to in the General Conditions. Article 8 of the Seimens RINL agreement stipulates that, in consideration of the payment to be made by the customer (owner) to the contractor, the contractor covenants with the customer to design, manufacture & supply the plant and equipment as per the contract specification and other documents of the contract. A consolidated price is stipulated as the total contract price combining the contract prices of the individual agreements. **It is evident that, while the form of the contracts indicate that they are two separate contracts, in substance they are one single indivisible works contract for supply of material and for erection and installation of equipment. Existence of a bailment clause or a free issues clause does not alter the situation.**

Similar Judgement on Cross Fall Breach Clause in GST

- ✓ Cable Corpn. of India Ltd., In re [2018] 100 taxmann.com 210 (AAR – MAHARASHTRA)
- ✓ Order No. GST-ARA-36/ 2017-18/ B-43 dated 04-06-2018 in case of Shri Dinesh Kumar Agarwal
- ✓ Skipper Ltd [2018] 100 taxmann.com 90 (AAR-WEST BENGAL)
- ✓
- ✓ Siemens Limited (GST AAAR Maharashtra) Appeal Number : Advance Rulings No. MAH/AAAR/SS-RJ/4/2019-20 Date of Judgement/Order : 23/08/2019
- ✓ IAC Electricals Pvt Ltd (GST AAR West Bengal) Appeal Number : Order No. 05/WBAAR/2018-19 Date of Judgement/Order : 28/05/2018
- ✓ EMC Ltd (GST AAR West Bengal) Appeal Number : Advance Ruling No. 07 of 2018 Date of Judgement/Order : 11/05/2018

Relevant Entries- Notification No. 11/2017- CT Rate

Entry No. 3(iii) of Notification No. 11/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

(iii) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, supplied to the Central Government, State Government, Union territory or a local authority by way of **construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,—**

(a) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);

(a) canal, dam or other irrigation works;

(a) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal.

Above entry does not includes building, fabrication, improvement and modification out of the definition of the works contract.

Entry No. 3(iv) of Notification No. 11/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,—

(a) a road, bridge, tunnel, or terminal for road transportation for use by general public;

(b) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awas Yojana;

(c) a civil structure or any other original works pertaining to the "In-situ redevelopment of existing slums using land as a resource, under the Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana (Urban);

(d) a civil structure or any other original works pertaining to the "Beneficiary led individual house construction/enhancement" under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana;

(da) a civil structure or any other original works pertaining to the "Economically Weaker Section (EWS) houses" constructed under the Affordable Housing in partnership by State or Union territory or local authority or urban development authority under the Housing for All (Urban) Mission/ Pradhan Mantri Awas Yojana (Urban);

(db) a civil structure or any other original works pertaining to the "houses constructed or acquired under the Credit Linked Subsidy Scheme for Economically Weaker Section (EWS)/Lower Income Group (LIG)/Middle Income Group-1 (MIG-1)/Middle Income Group-2 (MIG-2)" under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana (Urban);

(e) a pollution control or effluent treatment plant, except located as a part of a factory; or

(f) a structure meant for funeral, burial or cremation of deceased.

Provided that during the period beginning from the 14th June, 2021 and ending with the 30th September, 2021, the central tax on service of description as specified in clause (f), shall, irrespective of rate specified in column (4), be levied at the rate of 2.5 per cent.

(g) a building owned by an entity registered under section 12AA or 12AB of the Income-tax Act, 1961 (43 of 1961), which is used for carrying out the activities of providing, centralised cooking or distribution, for mid-day meals under the mid-day meal scheme sponsored by the Central Government, State Government, Union territory or local authorities.

Above entry does not includes building, fabrication, improvement, modification out of the definition of the works contract.

Entry No. 3(v) of Notification No. 11/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

(v) **Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, supplied by way of construction, erection, commissioning, or installation of original works pertaining to,—**

(a) railways, including monorail and metro;

(b) a single residential unit otherwise than as a part of a residential complex;

(c) low-cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;

(d) low cost houses up to a carpet area of 60 square metres per house in a housing project approved by the competent authority under—

(1) the "Affordable Housing in Partnership" component of the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana;

(2) any housing scheme of a State Government;

(da) low-cost houses up to a carpet area of 60 square metres per house in an affordable housing project which has been given infrastructure status vide notification of Government of India, in Ministry of Finance, Department of Economic Affairs vide F. No. 13/6/2009-INF, dated the 30th March, 2017;

(e) post-harvest storage infrastructure for agricultural produce including a cold storage for such purposes; or

(f) mechanised food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages.

Above entry does not includes building, fabrication, completion, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration out of the definition of Works Contract.

Entry No. 3(vi) of Notification No. 11/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

(vi) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above], provided to the Central Government, State Government, Union territory or a local authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of—

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

(b) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment; or

(c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in paragraph 3 of the Schedule III of the Central Goods and Services Tax Act, 2017.

Explanation—For the purposes of this item, the term 'business' shall not include any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities.

Above entry does not includes building, fabrication, installation, improvement, modification out of the definition of works contract.

The term "original works" has been defined in clause (zs) of para 2 of Notification No. 12/2017 - Central Tax (Rate), dated 28-6-2017 as under:'(zs) "original works" means - all new constructions;

(i) All types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(ii) Erection, commissioning or installation of plant, machinery or equipment or structures, whether prefabricated or otherwise;'

Entry No. 3(vii) of Notification No. 11/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

vii) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, involving predominantly earth work (that is, constituting more than 75 per cent of the value of the works contract) provided to the Central Government, State Government, Union territory or a local authority.

Entry No. 3(viii) of Notification No. 11/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

(viii) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 and associated services, in respect of offshore works contract relating to oil and gas exploration and production (E&P) in the offshore area beyond 12 nautical miles from the nearest point of the appropriate base line.

Entry No. 3(ix) of Notification No. 11/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

(ix) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 provided by a sub-contractor to the main contractor providing services specified in item (vii) above to the Central Government, State Government, Union territory or a local authority.

Entry No. 3(x) of Notification No. 11/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

(x) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 provided by a sub-contractor to the main contractor providing services specified in item (vii) above to the Central Government, State Government, Union territory or a local authority.

Entry No. 3(xi) of Notification No. 11/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

(xi) Services by way of house-keeping, such as plumbing, carpentering, etc. where the person supplying such service through electronic commerce operator is not liable for registration under sub-section (1) of section 22 of the Central Goods and Services Tax Act, 2017.

Entry No. 3(xii) of Notification No. 11/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

(xii) Construction services other than (i), (ia), (ib), (ic), (id), (ie), (if), (iii), (iv), (v), (va), (vi), (vii), (viii), (ix), (x) and (xi) above.

Entry No. 38 of Notification No. 11/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

38. Service by way of construction or engineering or installation or other technical services, provided in relation of setting up of following,—

(a) Bio-gas plant
(b) Solar power based devices
(c) Solar power generating system
(d) Wind mills, Wind Operated Electricity Generator (WOEG)
(e) Waste to energy plants / devices
(f) Ocean waves/tidal waves energy devices/plants

Explanation—This entry shall be read in conjunction with serial number 201A of Schedule II of the notification No. 1/2017- Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 673(E), dated 28th June, 2017.

Above entry does not includes building, fabrication, completion, erection, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning out of the definition of works contract.

Entry No. 234 of Notification No. 1/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

Following renewable energy devices & parts for their manufacture

(a) Bio-gas plant
(b) Solar power based devices
(c) Solar power generating system
(d) Wind mills, Wind Operated Electricity Generator (WOEG)
(e) Waste to energy plants / devices
(f) Solar lantern / solar lamp
(g) Ocean waves/tidal waves energy devices/plants
(h) Photo voltaic cells, whether or not assembled in modules or made up into panels

Explanation: If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 11/2017- Central Tax (Rate), dated 28th June, 2017 [G.S.R. 690(E)], the value of supply of goods for the purposes of this entry shall be deemed as seventy per cent of the gross consideration charged for all such supplies, and the remaining thirty per cent of the gross consideration charged shall be deemed as value of the said taxable service.

Relevant Entries- Notification No. 12/2017-CT Rate

Entry No. 3 of Notification No. 12/2017-Central Tax Rate Dated 28th June 2017 (as amended from time to time)

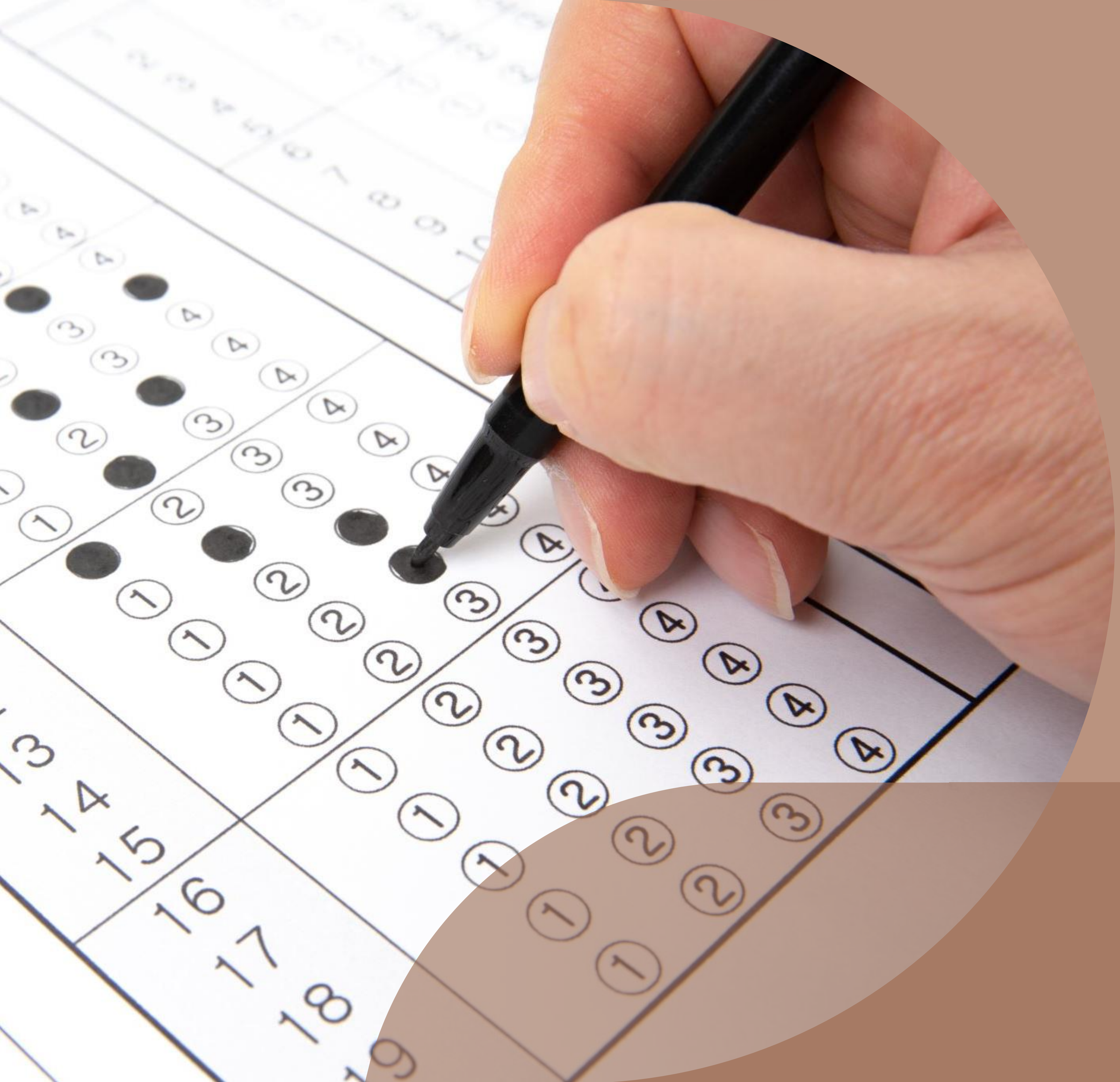
3. Pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Central Government, State Government or Union territory or local authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.

3A. Composite supply of goods and services in which the value of supply of goods constitutes not more than 25 per cent of the value of the said composite supply provided to the Central Government, State Government or Union territory or local authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.

10. Services provided by way of pure labour contracts of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a civil structure or any other original works pertaining to the beneficiary-led individual house construction or enhancement under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana..

10A. Services supplied by electricity distribution utilities by way of construction, erection, commissioning, or installation of infrastructure for extending electricity distribution network upto the tube well of the farmer or agriculturist for agricultural use

11. Services by way of pure labour contracts of construction, erection, commissioning, or installation of original works pertaining to a single residential unit otherwise than as a part of a residential complex.



Compilation of Few Cases on the subject of Tax Rate on Works Contract

Pure Services

Transmission Corporation of Telangana Ltd.[2021] 132 taxmann.com 191 (AAR- TELANGANA)

a) Further, it is evident from the entry 3 of Notification 12/2017 CT (R) dated 28 June 2017 that only pure services which do not involve any works contract involving supply of goods or other composite supply involving supply of goods are exempted from tax under CGST/SGST. As seen from the above abstract of estimate of supply to GHMC, the applicant has executed works contract services for GHMC involving supply of goods. As the applicant has not made supply of pure services but has made supply of works contract services they are covered by exception to the exemption given under entry (3) of the above notification.

b) This entry does not cover other works contract services under service head 9954 which include long-distance underground/overland/submarine pipe lines, communication and electric power lines (cables); pumping stations and related works; transformer stations and related works i.e., General construction services.

Arinem Consultancy Services (P.) Ltd.[2021] 133 taxmann.com 428 (AAR- UTTAR PRADESH)

a) DPR services rendered by the Applicant under the contract with SUDA, and for PMAY are in relation to functions entrusted to Municipalities/Panchayats under Article 243W/243G of the Constitution of India.

b) DPR services mentioned in the contract would qualify as Pure Service (excluding works contract service or other composite supplies involving supply of any goods) as provided in Sl. No. 3 of Notification No. 12/2017- Central Tax (Rate), dated 28 June, 2017 issued under Central Goods and Services Tax Act, 2017 ('CGST') and corresponding Notifications No. — KA.N.I.-2-843/X1- 9 (47)/17-UP. Act-1 - 2017 - Order - (10) - 2017 Lucknow, dated June 30, 2017 issued under Uttar Pradesh Goods and Services Tax Act, 2017 ('UPGST Act').

Scope of Entry 3(iii)/3(ix)-Benefit only available to sub-contractor to main contractor

Kababhai Popatbhai Savalia (Shreeji Earth Movers) [2021] 132 taxmann.com 160 (AAR - GUJARAT)

It is only the main contractor supplying subject service to Government and the sub contractor of the said main contractor who will merit entry at Sr no 3(*iii*) and sr no 3(*ix*) of said NT 11/2017-CT(R) respectively. We hold that if condition of Notification was only that composite supply of works contract to be supplied by way of irrigation works, irrespective of the recipient being Government or not, then sub-sub contractor is also eligible for said entry in Notification. But the Notification lays down the condition that supply should be provided to Government by main contractor and only sub contractor to said main contractor enjoys the benefit of being covered under cited entries of said NT. As said applicant is sub-sub contractor and supplies service to M/s Radhe sub contractor and not to M/s JSIW main contractor, the conditions of said entry 3(*iii*)/3(*ix*) to said Notification is not satisfied.

Construction of Road-Benefit available to sub-contractor

Core Construction (Yatin Manoj Mora)[2022] 136 taxmann.com 335 (AAR - MAHARASHTRA)

We find that, the aforesaid entry at serial No. 3(iv) does not specify that it should be made applicable only to a contractor and not a sub-contractor. In the absence of such specification, we are of the opinion that the said entry should apply to the services provided by sub-contractor also. Further, we observe that, the abovementioned entry (iv) is based on a project and not based on the nature of the contractor/Contractee/recipient of service, etc.

Scope of the term Earthwork

Mahalakshmi BT Patil Honai Construction (JV)[2022] 137 taxmann.com 270 (AAR - MAHARASHTRA)

Citing the various dictionary meanings of the word "Earthwork", the Appellate Authority, in the SMJV case, has held that Earthwork includes both, Excavation and Fortification. Further the Appellate Authority has also observed that the concerned Work Order in the SMJV case, deals with excavation of earth and depositing it on the sides.

5.7.6 The Appellate Authority further has mentioned that, a reading of Entry No. 3 of Notification No. 31/2017 - CTR dated 13-10-2017, 'says that the Composite Supply should have earthwork forming more than 75% of the contract by value. The Appellate Authority has also observed that, "it is very much clear from the wording that the contract maybe for something else - be it construction of building, canal, road, and in these contracts, if the earthwork constitutes more than 75% then it qualifies for the Entry No. 3 of Notification No. 31/2017 - CTR dated 13-10-2017. If the intention of the Legislature was to cover only pure contract of earthworks in it, then a qualifying condition of more than 75% by value would not have been provided:

5.7.7 Hence, the Appellate Authority held that the supply in the SMJV case was covered under Entry 3 (vii) of Notification No. 11/2017-CTR dated 28-6-2017 as amended by of Notification No. 31/2017 - CTR dated 13-10-2017.

5.8 In the subject case we find that the applicant, vide the impugned Contract/Work Order, is inyolved in activities consisting of Earth Work such as Excavation for Tunnel, removing of excavated stuff, fabrication, transporting, providing steel support, rock bolting, reinforcement, fixing of chain link, cement concerting, providing drainage arrangement etc. wherein as per the submissions of the applicant, the total earth work is approximately 91% and construction work is approximately 9% wherein transfer of property is involved. Thus, we find that the impugned activity is a Composite supply of works contract as defined in clause (119) of section 2 of the CGST Act, 2017, where such supply is to a Governmental Entity, i.e. GMIDC. Further, we also find that, the impugned supply is to a Government Entity, i.e. GMIDC and as discussed above, the said work has been procured by GMIDC in relation to work entrusted to it by the State Government of Maharashtra.

Scope of Entry 3(iii)/3(ix)-Benefit only available to sub-contractor to main contractor

Bindu Projects & Co [2021] 130 taxmann.com 372 (AAR - KARNATAKA)

It is only the main contractor supplying subject service to Government and the sub contractor of the said main contractor who will merit entry at Sr no 3(*iii*) and sr no 3(*ix*) of said NT 11/2017-CT(R) respectively. We hold that if condition of Notification was only that composite supply of works contract to be supplied by way of irrigation works, irrespective of the recipient being Government or not, then sub-sub contractor is also eligible for said entry in Notification. But the Notification lays down the condition that supply should be provided to Government by main contractor and only sub contractor to said main contractor enjoys the benefit of being covered under cited entries of said NT. As said applicant is sub-sub contractor and supplies service to M/s Radhe sub contractor and not to M/s JSIW main contractor, the conditions of said entry 3(*iii*)/3(*ix*) to said Notification is not satisfied.

Hadi Power Systems [2021] 127 taxmann.com 569 (AAR - KARNATAKA) - Entry 3(iii)

Hence as per the notification, any sub contractor providing services to Main contractor by executing the works mentioned in the serial number 3 of clause (iii) and clause (vi) which is exclusively covered under the clause (ix) of serial no. 3 of Notification No. 11/2017- Central Tax (Rate) dated 28-6-2017 (as amended from time to time) will be exempted from payment of GST subject to M/s Karnataka Neeravari Nigam Limited is qualified to be called as a Government Entity. In the present case, it is M/s Shaaz Electricals who is the sub-contractor who is covered under the said entry. As there is no privity of contract between the applicant and M/s Ocean Constructions (India) Private Limited and the contract is between the applicant and M/s Shaaz Electricals, the services provided by the applicant is not covered under the said entry.

Labour Services are not works contract sevices

Shakil Sikandar Gavandi[2022] 136 taxmann.com 218 (AAR - GOA)

5. In view of above facts, we find that, "works contract" is a composite supply and it is composition of activities of building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repairs, maintenance, renovation, alteration or commissioning carried out on an 'immovable property' and transfer of property (whether in form of goods or in some other form) must essentially take place with such activities. The supply of "works contract" is to be treated as supply of service but it is combination of supply of service and supply of goods. Transfer of property in goods (whether as goods or in some other form) is an essential component of supply to be treated as "works contract" service.

5.1 In the matter of case at hand, we find that there is no transfer of property from the applicant to the main contractor (M/s. MVR) while performing the work of dumping of soil from one place to other place or while activity of excavation. The applicant is merely performing labour work. Therefore, the activities carried out by the applicant cannot be treated as "works contract".

Cross Fall Breach Clause

Suez India (P.) Ltd.[2022] 136 taxmann.com 132 (AAR-WEST BENGAL)

Cross Fall Breach Clause - It appears that the scope of work includes inter alia supply, laying, installation and commissioning of distribution network with HDPE pipe (noted in para 2.6) along with operation and maintenance. We find that the contract has been divided into two phases i.e., (i) Design & Construction Phase and (ii) O&M Phase. However, completion of first phase of the contract i.e., Design & Construction Phase shall entitle the contractor to apply for certificate of sectional completion only as referred to in clause 32.1 of the GCC. We also find that para 33.1 of GCC speaks about Taking Over Certificate" wherein it is stated that "At the end of the O&M Phase, the Contractor may give notice to that effect to the Engineer, accompanied by a written undertaking to finish with due expedition any outstanding work during the Defects Liability Period. Such notice and undertaking shall be deemed to be a request by the Contractor for the Engineer to issue a Taking-Over Certificate in respect of the Works and Services". Based on the aforesaid terms and conditions of the contract, we are of the view that the instant contract is to be treated as a single contract for composite supply of DB and O&M which qualifies as "works contract" as defined in clause (119) of section 2 of the GST Act. Further, as per Para 6 (a) of Schedule II to the GST Act, works contracts as defined in clause (119) of section 2 shall be treated as a supply of services. So, the instant supply shall be treated as supply of services.

Meaning of Pure Services - Moreover, though the term "pure services" has not been defined under the Act, a bare reading of the description of services as specified in the aforesaid entry denotes that supply of services which does not involve any supply of goods can be regarded as pure services. We like to mention here that the scope of work in respect of O&M contract, as per bidding documents, includes major and minor repairs, install meters to measure consumption which essentially involves transfer of materials in goods. Thus, the O&M contract, if it were treated to be an independent supply, wouldn't qualify as pure services rather the same shall be held as works contract as defined in clause (119) of section 2 of the GST Act.

The applicant has made the instant composite supply of works contract to Kolkata Municipal Corporation which is a local authority in terms of definition under clause (69) of section 2 of the GST Act. Further, the works contract, as it appears from the scope of work, involves installation and maintenance of pipeline for water supply. We therefore find that the instant composite supply of works contract gets covered under entry serial number 3(iii) of the Notification No. 20/2017- Central Tax (Rate) dated 22-8-2017 and therefore shall attract tax @ 12% (Central Tax @ 6% + State Tax @ 6%). (Rate and Entry relevant for old entry)

Bindu Projects & Co [2021] 130 taxmann.com 372 (AAR - KARNATAKA) - Meaning of "Original Works"

10.3 The term "original works" has been defined in clause (zs) of para 2 of Notification No. 12/2017 - Central Tax (Rate), dated 28-6-2017 as under:'(zs) "original works" means - all new constructions;

(i) All types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(ii) Erection, commissioning or installation of plant, machinery or equipment or structures, whether prefabricated or otherwise;'Though this definition is given in relation to the Notification No. 12/2017 - Central Tax (Rate), the same can be adopted in relation to Notification No. 11/2017 - Central Tax (Rate) also.

10.4 On careful examination of the above definition, it is seen that only **"additions or alterations made to abandoned or damaged structures on land that are made to make them workable" are treated as original works and not all repairs and maintenance services.**

10.5 The works carried out by the applicant are analyzed and found that they involve two types of works - one being new construction and other being repairs of old structures. In as far as construction of new structures are concerned which are constructed where nothing existed before would definitely fall under the realm of "original works".

10.6 **But in case of constructions which are made where the structures already existed, the same can be classified as under:**

(a) where the additions and alterations are made to the abandoned structures on land or damaged structures on land to make them workable

(b) repairs of already existing structures which are in working condition and

(c) construction services on structures not on land.

It is pertinent to note that only those works contract services covered under (a) above are to be treated as "original works" and not those covered under related to (b) and (c). The meaning of the words "structures on land" needs to be analysed as only these qualify for the reduced rate of tax.

11. According to Cambridge Dictionary, "structure" means "something that has been made or built from parts, especially a large building" or "something built, such as a building or a bridge". Both the contextual meaning in relation to railways is the structure should be something which is built from parts, i.e. a building, or other constructed ones. Secondly, these constructed structures should be on land to be covered under the scope of the entry. All these point to the scope of the entry that the structures which are directly on the land are included. Further, these structures must be damaged to the extent that the same cannot be used and the activity of works contract services, if executed to make these unusable structures reusable, would cover under this entry for reduced rate of tax.

To a question whether all repairs made to buildings constitute "original works", the answer is "no". It is only those services executed to make an unusable building usable again is covered under "original works".

Tirupati Construction [2021] 132 taxmann.com 10 (AAR - GUJARAT)- Entry 3(vi)(a)

- Thus we find merit to classify the subject supply of Fish Market (a composite works contract) to the Valsad Panchayat (a local authority) and this activity is undertaken by the Valsad Panchayat engaged as public authority and the activity squarely falls under the entry no 22- 'Markets and Fairs' of the Eleventh Schedule of our Constitution. In light of the explanation inserted w.e.f 27-7-18 to Serial No. 3(vi) of said NT, which reads: 'business' shall not include any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities', we hold that subject matter falls within the ambit of 'predominantly meant for use other than for commerce, industry, or any other business or profession'

Scope of Government Entity

11.1 The term "government entity" is defined in clause (zfa) in paragraph 2 of Notification No. 12/2017- Central Tax (Rate), dated 29-6-2017 as amended by Notification No. 32/2017-Central Tax (Rate), dated 13-10-2017 and the same reads as under:

"(zfa) "Government Entity" means an authority or a board or any other body including a society, trust, corporation:

(i) set up by an Act of Parliament or State Legislature; or

(ii) established by any Government, with 90 per cent or more participation by way of equity or control, to carry out a function entrusted by the Central Government, State Government, Union territory or a local authority."

11.2 The above definition clearly states that the following conditions needs to be satisfied by the applicant to be covered under the definition of "government entity":

a) It must be a body set up by an Act of Parliament or State Legislature or it must be established by any Government;
b) The body should have been set up or established, as the case may be, to carry out a function entrusted by the Government or local authority;
c) The body should have more than 90% participation of the Government or local authority by way of equity or control.

11.3 It is clear from the submissions made that the applicant is a society registered under the Societies Registration Act, 1860 and hence is a society.

11.4 The applicant has not established whether the applicant society has been set up by an Act of State Legislature or established by the Government. He has only stated that the Nirmiti Kendra is promoted, monitored, overseen and guided by Karnataka Rajya Nirmana Kendra (KARNIK) which itself was registered on 11-6-1991 under the Societies Act and the applicant is registered under the Karnataka Societies Registration Act, 1960 (Karnataka Act, 17 of 1960) from 2-4-2008. Nowhere he has established that it was established by the Government.

11.5 In view of the above, the applicant cannot be covered under the definition of "Government Entity" and hence the entry No. 9C of Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017 as amended by Notification No. 32/2017-Central Tax (Rate), dated 13-10-2017 is not applicable to the applicant.

Damodar Valley Corporation [2021] 127 taxmann.com 605 (AAR-WEST BENGAL)

From the documents and evidences placed before us, we observe the issue raised by the applicant as follows:

a) Damodar Valley Corporation has been set up under the Damodar Valley Corporation Act'1948 which was passed by the Central Legislature.

b) Sub-section (1) and (1A) of section 4 of the DVC Act, as amended, states as under:

(1) The Corporation shall consist of—

- a) a Chairman;
- b) a member (technical) and a member (finance);
- c) one representative from the Central Government;
- d) two representatives one each from the State Government of Jharkhand and West Bengal;
- e) three independent experts one each from the field of irrigation, water supply and generation or transmission or distribution of electricity; and
- f) a Member-Secretary.

(1A) The Chairman and members under clauses (a), (b), (d) and (f) of sub-section (1) shall be appointed by the Central Government in consultation with the State Governments concerned while the members under clauses (c) and (e) shall be appointed by the Central Government, by notification in the Official Gazette.

c) It has already been stated in Para 2.9 that section 51 of the DVC Act empowers the Central Government to remove any member from the corporation.

d) It has also been observed in Para 2.6 that the participating Governments hold 100% of equity control of the applicant.

e) Section 11 of the DVC Act envisages that the Corporation shall carry out such function and exercise such power which the Central Government may, after consultation with the Provincial Governments by notification in the official Gazette, directs the Corporation.

It, therefore, appears that Damodar Valley Corporation fulfils the criterion laid down for "Government entity" as per Notification No. 31/2017 –Central Tax (Rate)/32/2017- Central Tax (Rate) both dated 13.10.2017 since it has been set up by an Act of Parliament with 100% control to carry out the function entrusted by the Government.

PSK Engineering Constructions & Co. [2021] 127 taxmann.com 196 (AAR - TAMILNADU)

Scope of the term “Government Entity

8.3 'Government Entity is defined vide Notification No. 31/2017-Central Tax (Rate) dated 13.10. 2017 (which amends Notification No. 11/2017 ibid) and vide Notification No. 32/2017- C.T(Rate) dated 13-10-2017 (which amends Notification No. 12/2017 ibid) as under:"Government Entity" means an authority or a board or any other body including a society, trust, corporation,

(i) set up by an Act of Parliament or State Legislature; or

(ii) established by any Government,with 90 per cent, or more participation by way of equity or control, to carry out a function entrusted by the Central Government, State Government, Union Territory or a local authority.

It is seen that TANGEDCO Ltd is established by Government of Tamilnadu vide G.O. Ms.No.94 Energy (B2) Department dated 16-11-2009 with the primary object to function as generation and distribution utility in terms of the provisions of Electricity Act 2003. It is a public company wherein 99 percent shares are held by TNEB, the Holding Company, which is established by Government of Tamilnadu with more than 90 percent equity shares and control. The appointments of the directors to TANGEDCO are by the Government. Thus, TANGEDCO is a Public Limited Company established by Government of Tamilnadu with more than 90 percent control for the purposes of generation and distribution of electricity. Hence, TANGEDCO Ltd is a Government Entity. It is further pertinent to note that the Authority for Advance Ruling in the case of Tamil Nadu Generation and Distribution Corporation Ltd., In re [2020] 117 taxmann.com 732 (AAR - Tamilnadu) has viewed that TANGEDCO is a Government Entity. Therefore, the condition at 8.1 (b) above is satisfied.

Scope of the term “predominantly for use other than for commerce, industry or any other business or profession

“8.4 The next condition to be satisfied is the works undertaken should be predominantly for use other than for commerce, industry or any other business or profession". It is imperative to refer to the definition of 'business' under section 2(17) of the CGST Act, which is as follows:

As per the above definition, any trade, commerce or similar activity whether or not it is for pecuniary benefit itself is termed as business. TANGEDCO is involved in generation and distribution of electricity for which revenue is collected for the Energy consumed by the consumers. Revenue collection is based on tariff charged to different category of consumers. TANGEDCO as a state generation and distribution utility and deemed licensee is dependent on the collection of revenue for its operation, maintenance & investigation for future growth. It is evident from the above facts that TANGEDCO is involved in the business of selling electricity to the consumers and collecting charges from them which is their predominant activity.

PSK Engineering Constructions & Co. [2021] 127 taxmann.com 196 (AAR - TAMILNADU)

The Profit & Loss Account of TANGEDCO specifies income generated as "Income from Sale of power" and the entity running without generating any surplus would not amount to their activities being of public interest without commercial implications. Thus, it is seen that TANGEDCO has been established on commercial principles in as much as Section 61 of the Electricity Act 2003 stipulates the guiding principles for determination of tariff by the Tamilnadu Electricity Regulatory Commission and mandates that the Tariff should progressively reflect cost of supply of electricity, reduce cross subsidy and recover the cost of electricity in a reasonable manner. Hence, the supply of works contract services as per the applicant's contract cannot be considered as that meant predominantly for use other than for commerce, industry, or any other business or professional purposes. In this connection, it is pertinent to note that in a similar case involving the works undertaken for Kerala State Electricity Board, the Appellate Authority for Advance Ruling, Kerala in the case of R.S. Development & Construction (P.) Ltd., In re [2021] 123 taxmann.com 30/84 GST 729 has observed as under:

"11. The concessional rate of GST of 12% wider SI. No. 3(vi)(a) of Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017 is applicable only for composite supply of works contracts as defined in clause (119) of Section 2 of the CGST Act, 2017 supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of, - (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession. The concessional rate under this entry is not applicable for the works contract sennces provided as per the above work order as Kerala State Electricity Board Ltd. has been established for carrying out the business of generation, transmission and distribution of electricity in the State of Kerala on commercial principles as is evident from the provisions of Sections 61 and 62 of the Electricity Act, 2003 regarding tariff regulation and determination of tariff. Therefore, the supply of works contract sennces as per the above work order cannot be considered as meant predominantly for use other than for commerce, industry, or any other business or profession."

BG Elevators & Escalators (P.) Ltd. [2021] 125 taxmann.com 380 (AAR - KARNATAKA)- Installation of Lifts

9. The applicant sought advance ruling in respect of the rate of GST applicable on erection and commissioning of lifts/elevators (escalators) for domestic use. The applicant has not raised any question with regard to supply of the said lifts/elevators, in the instant application.

10. In view of the above we proceed to examine the classification of the impugned services and the GST rate thereon. In this regard we invite reference to the Explanatory Notes to the Scheme of Classification of Services which stipulates that the SAC 995466 deals with Lift and escalator installation services and includes installation services of lifts, escalators, travelators (moving sidewalks) etc. Thus the impugned service is clearly covered under SAC 995466.11. Now we proceed to examine the applicable rate of GST. Notification 11/2017-Central Tax (Rate) dated 28-6-2017, as amended, stipulates the rate of GST on the services covered under 995466 at 18%, in terms of SI. No. 3(xii). Further the said GST rate is irrespective of the place of installation i.e. at the residence or at the mall or shopping complex and also irrespective of the intended usage of the lifts/escalators either for domestic use or commercial us

URC Construction (P.) Ltd [2021] 127 taxmann.com 778 (AAR-ODISHA)

Scope of the term "predominantly for use other than for commerce, industry or any other business or profession"

Since the scope of work includes construction of medical institute and super speciality hospital, such work would certainly come under construction of clinical establishment and gets classified under entry (b) which provides for construction of a structure meant predominantly for use as a clinical establishment. Further, construction of such structure for M/s. SAIL, Rourkela for use as a clinical establishment cannot said to be used for commerce, industry, or any other business or profession. **Therefore, we agree with the contention of the applicant that construction of medical institute and super speciality hospital is for the medical care and welfare of the people of Odisha at large, without any profit motive. Having gone through the tender documents, letter of award and other relevant documents, we come to a conclusion that the instant supply is a 'Composite Supply of Works Contract Service' provided or to be provided in relation to construction of civil structure meant predominantly for use as a clinical establishment and hence, 1st pre-requisite for the supply to qualify for the notified exemption is satisfied/fulfilled.**

Status of the Executing Agency in GST

4.7 On going through the relevant documents, we found that work order has been issued by M/s NBCC in their own capacity and the applicant has signed agreement with M/s. NBCC for construction of Ispat Post Graduate Medical Institute and Super Specialty Hospital at Rourkela Steel Plant for SAIL. When the contract is made between M/s. NBCC and M/s. URC Construction (P.) Ltd. (the applicant), it is necessary for us to see the legal status of M/s. NBCC. From the contract/agreement deed, it is obvious that M/s. NBCC is a public limited company incorporated and registered under the Companies Act, 1956 and having its registered office at NBCC Bhawan, Lodhi Road, New Delhi-110003. Thus M/s. NBCC is a company and not State Government/Central Government or Union Territory or any Government Entity. The status of M/s. NBCC is therefore not disputed. Further, we also see that M/s. NBCC had invited a tender for construction of Ispat Post Graduate Medical Institute and Super Speciality Hospital at Rourkela Steel Plant for SAIL and the applicant had been selected in the tender and awarded the contract by M/s NBCC. Thus, as per the Contract, the Supply is being made to M/s. NBCC which is a body corporate and not to any Government or Government Entity. Admittedly, M/s SAIL, RSP, Rourkela is the ultimate service beneficiary but Entry at Sl No.3 (vi) of the notification No. 11/2017 is very specific and it cannot be stretched or construed otherwise. Thus, the commercial Supply by the applicant is not to Government/Government Entity but to M/s. NBCC, a separate distinct entity and thereby the second pre-requisite is not fulfilled to merit classification under serial no. 3(vi) (a) or (b) of Notification No. 11/2017-Central Tax (Rate) dated 28-6-2017, as amended from time-to-time.

Whether covered under 3(ix)

4.8 However, the applicant further pleaded that services undertaken by them would fall under Serial No. 3(ix) of Notification No. 11/2017 as amended by Notification No. 1/2018, which provides 12% GST on sub-contractor providing services specified in item (vi) to a Government Entity. We would like to mention here that M/s. NBCC is the main contractor and the applicant is a sub-contractor who is providing services to M/s. NBCC. Further, as per the applicant, ultimate service beneficiary is M/s. SAIL, RSP a Government Entity.

Shapoorji Pallonji & Company (P.) Ltd. [2021] 130 taxmann.com 344 (AAR - ANDHRA PRADESH)

Greater Visakhapatnam Smart City Corporation Limited (GVSCCL) is a Special Purpose Vehicle (SPV) created by the Government of Andhra Pradesh vide G.O.MS.No.43, Municipal Administration & Urban Development (UBS) Department, Government of A.P. dated 17-2-2016. GVSCCL is a limited company incorporated under the Companies Act, 2013 in which the Andhra Pradesh State Government and the Greater Visakhapatnam Municipal Corporation are the promoters having 50:50 equity shareholding, which substantiates more than 90% of participation of the Government. With reference to the 'control' wielded by the shareholders, all the directors of the board are public authorities. Initially the board was constituted with the Principal Secretary for Municipal Administration and Urban Development, Govt. of A.P., (under promoter category) as chairman. The District Collector and Commissioner, GVMC (under Promoter Category) and other 11 members were nominated by the Authorities in the State Government, ULB and Central Government as per the said G.O. The SPV is owned by the Government of A.P. and GVMC ON 50:50 ratio and is governed by a Board of Directors answerable to the Government of A.P., Government of India and GVMC. The Government of A.P. and GVMC are the shareholders in the GVSCCL.

Accordingly the GVSCCL rightly fits into the definition of the 'Government Entity' as per the said notification. The functions carried out by the said GVSCCL are the functions which were entrusted by the Central Government, State Government and Local Authority i.e. of Municipal Administration.

Furthermore, the service provided by the applicant is Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, provided to a Government Entity by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession. The same is classifiable under the Heading 9954 Entry at Serial No. 3(vi)(a) of the Notification No. 11/2017 Central Tax (Rate) dated 28-6-2017 as amended from time to time and liable to tax @12% (6% CGST + 6 % SGST).

Surya Roshni LED Lighting Projects Ltd [2021] 124 taxmann.com 58 (AAR-ODISHA) Section 2(119)- Definition of Works Contract

4.9 In order to examine the fulfilment of these requirements, it is imperative to examine the contract/agreement under which the supplies are made. The applicant has submitted that they are under an obligation to supply and install equipment such as LED Luminaire, feeder panels, poles, outreach arms, cables/wires with holding arrangement for overhead supply cables, in respect of both, the Greenfield Public Street Lighting System as well as the Centralized Control & Monitoring System. It was also submitted that the applicant shall be responsible for the supply, installation and commissioning of the following.

I. Street light poles of 8 to 9 meters in height (above ground) along with outreach arms, LED Luminaires, feeder panels and overhead cables. The poles will be buried up to 1.8 meters underground depth and base plates will be welded to the bottom of the poles. All the poles shall be connected with earthing electrodes installed at every fifth pole. The poles shall be designed and installed in such a manner as to withstand wind speeds of 150 km/hr.

II. Central Control and Monitoring System & automation system comprised of wireless central automation controller, server cluster, control centre, enterprise middleware system, enterprise management information system and call centre. The entire street lighting system should be capable of being controlled from the Central Control and Monitoring System.

4.10 The applicant further submitted that the street light poles and feeder panels are attached to the earth permanently and the LED Luminaires, outreach arms, etc. are also permanently fastened to the street light poles for their use. Thus, the Greenfield Street Lighting System qualifies as an immovable property. It was also stated that at the end of the term of the Agreement (7 years), the Applicant is under the obligation to transfer all the rights, interests and property in the equipment installed by it, including any goods used in providing the operation and maintenance services. Further, after the Greenfield Public Street Lighting System has been commissioned, the Applicant is then required to undertake the Operation and Maintenance of the system till the end of the term of the Agreement. The applicant has also explained what a Greenfield Public Street Lighting System & central control, monitoring system and automation system is, in their case and also the processes involved in the subject case. The applicant has tried to establish that the supply made by them qualities as a supply of 'works contract service'.

4.11 The salient features of the agreement indicate that the obligation on the applicant is in relation to the effective installation and functioning of the goods supplied by them and thereafter, they would undertake the activities of 'operation and maintenance' of the same. The contract governing their supplies does not relate to building, construction, and fabrication etc. of any immovable properties, as envisaged in the definition of 'works contract'. Their supplies are in the nature of movable property i.e. supply of goods which involves ancillary services such as installation, commissioning etc. All these services which are supplied to the clients are nothing but ancillary activities with the main activities of supply of goods. The primary activity of the applicant is therefore, 'supply of goods' and not 'supply of services'. Further, the activity performed by the applicant is not related to the immovable property at any point of the time and hence the said activity does not qualify to be a 'works contract'. The applicant in support of their contention has cited some rulings pronounced by different Advance Ruling Authorities which are not applicable to the present case inasmuch as the facts and circumstances of those cases are distinguishable from the applicant's case.

Building Roads Infrastructure & Construction (P.) Ltd. [2021] 130 taxmann.com 499 (AAR - ANDHRA PRADESH)

Works contract services pertaining to construction, erection, commissioning and completion of bridges and roads provided by applicant as a sub-contractor to main contractor who has been awarded construction contract pertaining to construction/widening of roads by Government entity (NHAI), falls under Serial No. 3(iv) of Notification No. 11/2017 and rate of tax applicable is 12 per cent (CGST 6 per cent + SGST 6 per cent)

R. S. Development & Constructions (P.) Ltd. [2021] 123 taxmann.com 30 (AAAR-KERALA)

Scope of Governmental Authority and Government Entity

10.1 As regards condition of the said notifications as stated in para 8.1 (b) above, the appellant has claimed that KSEB squarely falls under the definition of Government authority.

10.3 Kerala State Electricity Board Ltd is a company incorporated under the Companies Act, 1956 by the Government of Kerala for carrying out the business of Generation, Transmission and Distribution of electricity in the State of Kerala. It is the successor entity of the Kerala State Electricity Board which was constituted by the Government of Kerala by Order No. EL1- 6475/56/PW dated 7-3-1957 under the Electricity (Supply) Act, 1948 for carrying out the business of Generation, Transmission and Distribution of electricity in the State of Kerala.

10.4 Consequent to the enactment of the Electricity Act, 2003, Kerala State Electricity Board continued as transmission utility and distribution licensee till 24-9-2008 as per provisions of Section 1 72 (a) of the Electricity Act, 2003.

10.5 Later, the Government of Kerala in exercise of powers conferred under section 131 of the Electricity Act, 2003 issued Notification GO (Ms).37/2008/PD dated 25-9-2008 vesting all functions, properties, interest, rights, obligations and liabilities of Kerala State Electricity Board with the State Government till re-vested in a corporate entity.

10.6 Consequent to the incorporation of the Kerala State Electricity Board Ltd under the Companies Act, 1956, the State Government notified the Kerala Electricity Second Transfer Scheme (Re-Vesting), 2013 by GO (P) No. 46/2013/PD dated 31-1-2013 re-vesting all the assets, liabilities, rights and obligations of the erstwhile Kerala State Electricity Board, which were vested in the State Government by the first transfer scheme dated 25-5-2008, to Kerala State Electricity Board Ltd.

R. S. Development & Constructions (P.) Ltd. [2021] 123 taxmann.com 30 (AAAR-KERALA)

10.7 From the above discussion, it is evident that the Kerala State Electricity Board Ltd is incorporated under the Companies Act, 1956 with 90 per cent or more participation by way of equity or control of the Government of Kerala to carry out the business of generation, transmission and distribution of electricity in the State of Kerala and is a "State Transmission Utility" within the meaning of Section 2 (67) of the Electricity Act, 2003.

10.8 On the basis of above stated facts Kerala State Electricity Board Ltd cannot be considered as that constituted/established by the Government of Kerala to carry out any function entrusted to a Municipality under article 243W or a Panchayat under article 243G of the Constitution. Therefore, Kerala State Electricity Board Ltd does not fall under the definition of "Government Authority" as defined in Para 2(zf) of Notification No. 12/2017 Central Tax (Rate) dated 28-6-2017 as amended. However, Kerala State Electricity Board Ltd is also a Board constituted by the State Government with share of 90% or more of the State Government. Hence, Kerala State Electricity Board Ltd squarely falls under the definition of "Government Entity" under Para 2 (zfa) of Notification No. 12/2017 Central Tax (Rate) dated 28-6-2017 as amended. Thus the condition of the said notification as stated in para 8.1 (b) of this order is also satisfied.

Supply of works contract services to KSEB as per the above work order cannot be considered as that meant predominantly for use other than for commerce, industry, or any other business or profession. Thereby, the condition mentioned in para 8.3 is not fulfilled.

ARG Electricals (P.) Ltd. [2021] 124 taxmann.com 531 (AAAR-RAJASTHAN)

Applicant entered into contracts with AVVNL which provides electricity infrastructure for erection of lines, erection of single phase 11 KV sub-station and release of BPL domestic connections. Supply of materials/equipments and erection, testing and commissioning of materials/equipments in building of rural electricity infrastructure is a composite supply of works contract and it is not covered under Entry No. 3 (vi)(a) of Notification No. 11/2017 - CT (Rate), dated 28-6-2017 and liable to tax at rate of 18 per cent

THANK YOU

CA DR ARPIT HALDIA

WWW.GST-ONLINE.COM