THE MAHARASHTRA APPELLATE AUTHORITY FOR ADVANCE RULING FOR GOODS AND SERVICES TAX

(constituted under Section 99 of the Maharashtra Goods and Services Tax Act, 2017)

ORDER NO. MAH/AAAR/SS-RJ/07/2018-19 **Date- 04.09.2018**

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri Rajiv Jalota, MEMBER

GSTIN Number	27AAECN3445K1Z9
Legal Name of Applicant	M/s. Fermi Solar Farms Private Limited
Registered Address/Address provided while obtaining user id	Village Bodhare and Shivapur, Tehsil Chalisgaon, Jalgaon, Maharasthra, 424101
Details of appeal	Appeal No. MAH/AAAR/02/2018-19 dated 08.06.2018 against Advance Ruling No. GST-ARA-03/2017/B-03 dated 3rd March, 2018
Jurisdictional/Concerned officer	State Tax Officer,JAG-BCP-C-002, Jalgaon

PROCEEDINGS

(under Section 101 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the MGST Act.

The present appeal has been filed under Section 100 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by M/s Fermi Solar Farms Private Limited, (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-03/2017/B-03 dated 3rd March, 2018.

The impugned order was passed on 3 March, 2018. In terms of Section 100 of the MGST Act, 2017, the time period of filing the appeal is 30 days from the date of communication of the advance ruling. The time period of 30 days can be further extended up to period of 30 days in terms of provision to Section 100(2) of the CGST Act. However, it is stated by the appellant that they could not file the appeal before the Appellate Authority for Advance ruling, since it was not constituted in the State of Maharashtra at the prevalent time. Since the Appellate Authority was not formed, the appellant filed letters dated 2 April, 2018 and 26 April 2018 before the Commissioner of Central Tax and the Chief Commissioner of Central Tax, Mumbai Zone and Commissioner of State Tax, Maharashtra State for understanding the way forward so that the appellant's right to file an appeal is not adversely affected.

CONDONATION OF DELAY

The first issue relates to the issue of condonation of delay in filing the appeal as the Appellate Authority for advance Ruling was not formed in the State of Maharashtra during the period of limitation. The appellant has therefore prayed that in view of the above, the time period as mentioned in the Act should be calculated from the day of setting up the authority as no recourse was available before that. The Appellate authority was constituted through notification no. MGST-1018/C.R.38/Taxation-1 dt 10.5.2018 and the appellant applied through appeal dated 6.6.2018. As the appellant had filed letters within 30 days of the communication of the advance ruling, and it was only because the Appellate authority was not formed that he could not file an appeal as also because the appellant filed within one month of formation of the authority, the delay is condoned.

Brief Facts of the case

A. M/s. Fermi Solar Farms Private Ltd. (hereinafter referred to **'the Appellant'**) is engaged in operation of renewable energy power plant projects. These typically include operation of solar power plants set up across India for generation and distribution of electricity generated. The appellant is emerging as a leading builder of renewable energy projects. The Appellant is established under Independent Power Producer (hereinafter referred to as **'IPP'**) category for setting up and sale of power produced from Fermi's power plant to third party.

B. The Appellant filed an Application dated 4 December, 2017 for Advance Ruling (hereinafter referred to as **'the Application'**) for seeking clarification basis the draft contracts of the Appellant, in view of the provisions of 'composite supply' and the rate of tax provided for Solar Power Generating System under GST. The Appellant sought clarification in respect of the following:

   a. Whether in case of separate contracts for supply of goods and services for a solar power plant, there would be separate taxability of goods as 'solar power generating system' at 5% and services at 18%.
   b. Whether parts supplied on standalone basis (when supplied without PV modules) would also be eligible to concessional rate of 5% as parts of solar power generation system.
   c. Whether benefit of concessional rate of 5% of solar power generation system and parts thereof would also be available to sub-contractors

C. Subsequently, the Authority for Advance Ruling, Maharashtra (hereinafter referred to as **'the AAR'**) vide Advance Ruling No. GST-ARA-03/2017/B-03 dated 3rd March, 2018 (hereinafter referred to as '**Impugned Order**') observed as under:

   a. The intent of the purchaser according to the agreement is to purchase the solar power generating system with various components and not only the components.

b. The agreement has been entered into not merely for supply of equipment but also for design and engineering work before supply of equipment.
c. Supplier is involved in the project from the engineering and design stage.
d. The contract will be complete only after the system has been put in place and payment is linked to the successful completion of the project.
e. Hence, the agreement is for supply of SPGS as a whole because the responsibility of the supplier also includes execution and implementation of the project.

Basis the above observations, the Advance Ruling Authority passed the following order:

a. The agreement tendered in support of the transaction reveal that the impugned transaction is for setting up and operation of a solar photovoltaic plant which is in the nature of a 'works contract' in terms of clause (119) of Section 2 of the GST Act, and hence, should be taxable at the rate of 18%
b. In the absence of any documents, the AAR was not able to deal with the question regarding applicability of concessional rate of tax on parts of solar power generating system in the present proceedings.
c. With regard to the question whether benefit of concessional rate of 5% of SPGS and parts thereof would be available to sub-contractors it was held that no documents were provided and hence this question was not dealt with in the proceedings.

Being aggrieved by the Impugned Order, the Appellant prefers the present appeal on the following grounds amongst others to be urged at the time of hearing:

GROUNDS OF APPEAL

Case 1 – Where all goods are supplied by the contractor including PV modules

1. The proposed transaction is for composite supply of 'solar power generating system' ('SPGS') as a whole and hence the rate of GST should be at 5%

1.1. Rate of solar power generating system

Under GST regime, various rates have been prescribed for goods and services. Per, Notification No. 1/2017 – Integrated tax (Rate) (The notification is attached herewith as **Annexure – D)**, dated 28 June 2017, solar power generating systems and parts for their manufacture are taxable at 5%. The relevant entry reads as follows:

Chapter Heading	Description
84 Or 85 Or 94	Following renewable energy devices and parts for their manufacture a) Bio-gas plant b) Solar power based devices **c) Solar power generating system** d) Wind mills and wind operated electricity generator 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**

As per the above, concessional rate of 5% has been provided to the following (when covered under heading 84, 85 or 94):

- PV modules
- Solar power generating system – This term has not been defined under GST. However, a reference can be made as per paragraph 1.2 below
- Parts for manufacture of solar power generating system and PV modules – There is no restriction provided on what would qualify as parts and in such case all goods which qualify as 'parts' of solar power generating system would be eligible for concessional rate of tax

1.2. Wide ambit of term 'solar power generating system' ('SPGS')

1.2.1. The Appellant submits that the term 'solar power generating system' has not been defined under GST. Generally, solar power generating systems are the systems which absorb sunlight and convert it into electricity which can be put to further use.

1.2.2. Further, the term solar power system has been defined under Solar Power –Grid Connected Ground Mounted and Solar Rooftop and metering Regulation -2014 issued by State of Goa. Solar power system as per the regulation means 'a grid-connected solar generating station including the evacuation system up to the Grid inter-connection point'.

Typically the term system has a wide ambit. As per the Oxford Dictionary, the definition of the term 'system' is 'a complex whole, a set of things working together as a mechanism or interconnecting network'. Similarly, the system is defined in Chambers 20th Century Dictionary as 'anything formed of parts placed together or

adjusted into a regular and connected whole'. Hence, system typically includes various components/ parts which are manufactured/ assembled together for performing a function. In the present case, the term system should include all goods provided under the contract which help in end to end generation as well as transmission of electricity.

1.2.3. Furthermore, under erstwhile law also, solar power generating systems were not defined. However, under erstwhile excise law, various exemptions were extended to non-conventional energy devices which included solar power generating systems - List 8 of Notification no. 12/2012-Central Excise, dated 17 March 2012 (hereinafter referred to as '**Notification 12/2012**'), is reproduced below for ease of reference:

> '(1) Flat plate solar Collector (2) Black continuously plated solar selective coating sheets (in cut length or in coil) and fins and tubes (3) Concentrating and pipe type solar collector (4) Solar cooker (5) Solar water heater and system (6) Solar air heating system (7) Solar low pressure steam system (8) Solar stills and desalination system (9) Solar pump based on solar thermal and solar photovoltaic conversion **(10) Solar power generating system (11) Solar photovoltaic module and panel for water pumping and other applications** (12) Solar crop drier and system(13)Wind operated electricity generator, its components and parts thereof including rotor and wind turbine controller (14) Water pumping wind mill, wind aero-generator and battery charger (15) Bio-gas plant and bio-gas engine (16) Agricultural, forestry, agro-industrial, industrial, municipal and urban waste conversion device producing energy (17) Equipment for utilising ocean waves energy (18) Solar lantern (19) Ocean thermal energy conversion system (20) Solar photovoltaic cell (21) Parts consumed within the factory of production of such parts for the manufacture of goods specified at S. Nos. 1 to 20.'

Reference in this regard is made to the judgment of Delhi Tribunal in the case of **Rajasthan Electronics & Instruments Ltd. vs. Commr. Of C. Ex., Jaipur** wherein it was held that:

> '7. The adjudicating authority admitted the fact that Solar Photovoltaic Module is a Solar Power Generating System. We find that other parts are only panel housing consisting of controllers and switches. Hence the whole system is a Solar Power Generating System and is entitled for the benefit of notification. Therefore, the denial of benefit of notification by the adjudicating authority is not sustainable. The impugned order is set aside and the appeals are allowed'.

Further, in the judgement of Bangalore Tribunal in the case of **B.H.E.L. vs. Commissioner of Central Excise, Hyderabad** it was held that:

'In the present case, the appellants have claimed exemption in respect of "inverter charger card" as solar power generating system. The appellants actually manufactured SPV lantern. The above lantern required electricity for its working. It is possible to convert solar energy to electricity with the help of inverter charger manufactured by the appellants. The Dy. General Manager has certified that the inverter merger constitutes solar power generating system as it performs the function of generating the required high frequency AC power from Sun-light with, the help of SPV module and supplying it to the compact fluorescent lamp of a solar lantern. In view of the above, expert opinion, we hold that the impugned item can be considered as solar power generating system and is entitled for the benefit of the exemption Notification. Therefore, we allow the appeal with consequential relief.'

Furthermore, in M/s. **Phoenix Construction Technology vs. Commissioner of Central Excise and Service Tax, Ahmedabad-II [2017-TIOL-3281-CESTAT-AHM]** the question under consideration was whether the structures and parts of structures cleared for initial setting up of solar power plant are eligible for the benefit of Notification 15/2010 –CE. The point of dispute in the said case law was that whether the aforesaid goods would qualify as components of the solar power plant. Hon'ble CESTAT has decided that the items required for initial setting up of the plant would qualify as component, hence the benefit of exemption would extend to such items also as solar power generating system.

In **Jindal Strips Ltd. vs. Collector of Customs, Bombay [2002-TIOL-347-CESTAT-DEL-LB]** CESTAT has observed that component means a constituent part or element. It was also observed that "Component" means one of the parts or sub-assemblies or assemblies, of which a manufactured product is made up and into which it may be resolved and includes an accessory (or attachment).

Basis the aforesaid judgments, it can be deduced that the components of the solar power plant which are essential for setting up of the power plants would also be eligible for the benefits provided to the solar power plant.

Per the above, the Appellant submits that in the instant case where the contract is awarded for supply of solar power generating system, the entire contract should be taxable at the rate of 5%. This is in line with the concept of 'composite supply' in which case the taxability is as per the principal supply which, in the instant case, is the supply of SPGS.

The Appellant's submissions on the concept and taxability of 'composite supply' and thereby supply being made by the Appellant in the instant case being a composite supply of SPGS has been provided hereunder in detail.

1.3. Concept and taxability of composite supply

Concept under GST Laws:

1.3.1. The Appellant most humbly submits that, Section 2(30) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as '**the CGST Act**') defines composite supply to mean 'a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply'.

Further, principal supply is defined in Section 2(90) of the CGST Act to mean 'the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary'. Thus, principal supply refers to the supply which is the predominant element in a composite supply.

In this regard, the GST law provides an illustration - In case goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply.

Further, Section 8 of the CGST Act provides that a composite supply comprising two or more supplies, one of which is a principal supply will be treated as supply of such principal supply. The relevant para of Section 8 of the CGST Act provides as follows:

> *'8. Tax liability on composite and mixed supplies. – The tax liability on a composite or a mixed supply, shall be determined in the following manner, namely:-*
>
> *(a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply'*

Per the above, the essential conditions for a supply to qualify as composite supply can be highlighted as under:

a. 2 or more taxable supplies of goods or services or both
b. The taxable supplies should be naturally bundled
c. The taxable supplies should be supplied in conjunction with each other
d. One taxable supply should be a principal supply

In such case, the supply which is the principal supply is treated as the main supply and the entire transaction is taxed as per the principal supply.

Concept under erstwhile Service tax Laws:

1.3.2. The Appellant submits that the concept of composite supply under GST is identical to the concept of naturally bundled services prevailing in the erstwhile Service Tax regime.

Under Section 66F (3) of the Finance Act, 1994 ('the Finance Act') two rules have been prescribed for determining the taxability of such services. The rules prescribed are explained as under:

1. If various elements of a bundled service are naturally bundled in the ordinary course of business, it shall be treated as provision of a single service which gives such bundle its essential character'
2. If various elements of a bundled service are not naturally bundled in the ordinary course of business, it shall be treated as provision of a service which attracts the highest amount of service tax.

The concept of naturally bundled services was explained in the Education Guide issued by the CBEC in the year 2012 ('the Education Guide'). The relevant extract of the Education Guide is reproduced as under for ease of reference:

> *'Bundled service means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services. An example of 'bundled service' would be air transport services provided by airlines wherein an element of transportation of passenger by air is combined with an element of provision of catering service on board. Each service involves differential treatment as a manner of determination of value of two services for the purpose of charging service tax is different.'*

The Education Guide also clarifies that in cases of composite transactions, i.e. transactions involving an element of provision of service and an element of transfer of title in goods in which various elements are so inextricably linked that they essentially form one composite transaction then the nature of such transaction would be determined by the application of the dominant nature test.

Further, the following was provided in the Education Guide:

> '9.2.4 Manner of determining if the services are bundled in the ordinary course of business
>
> Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below –
>
> - The perception of the consumer or the service receiver. If large number of service receivers of such bundle of services reasonably expect such services to be provided as a package then such a package could be treated as naturally bundled in the ordinary course of business
> - Majority of service providers in a particular area of business provide similar bundle of services. For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines

- The nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of business. If the nature of services is such that one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service. For example service of stay in a hotel is often combined with a service or laundering of 3-4 items of clothing free of cost per day. Such service is an ancillary service to the provision of hotel accommodation and the resultant package would be treated as services naturally bundled in the ordinary course of business.
- Other illustrative indicators, not determinative but indicative of bundling of services in ordinary course of business are:
    - There is a single price or the customer pays the same amount, no matter how much of the package they actually receive or use
    - The elements are normally advertised as a package
    - The different elements are not available separately.
    - The different elements are integral to one overall supply – if one or more is removed, the nature of the supply would be affected.

Per the above, the following conclusions can be drawn:

- In case more than two supplies are supplied together wherein one of the supply is principal supply, the same would qualify as composite supply.
- Further, goods supplied under the composite supply are supplied in conjunction with each other. Also, such composite supply is supplied in the ordinary course of business.
- The composite supply would qualify as supply of the principal supply. Taxes would be applicable as on such principal supply.

It is worthwhile to note that the GST authorities have taken a cue from the erstwhile services tax laws and have explained the principle of composite supply under GST on the basis of similar principles as described above in in the GST flyer issued by the CBEC.

Global jurisprudence – Meaning of composite supply:

1.3.3. The concept of 'composite supply' is a global concept and has been discussed in various countries. Provided below is relevant extract from various countries regarding the same:

Australia

In terms of Goods and Services Tax Ruling 2001/8 issued under Australia, Composite Supply means a supply that contains a dominant part and includes something that is integral, ancillary or incidental to that part. Composite supply is treated as supply of one thing.

There have been various precedents in which the courts have defined a composite supply. Few are highlighted below:

- The Full Federal Court in the case of Luxottica found that while 'supply' is widely defined it 'invites a commonsense, practical approach to characterisation'. It was observed that while 'Supply' is defined broadly, it nevertheless invites a commonsense, practical approach to characterisation. An automobile has many parts which are fitted together to make a single vehicle. Although, for instance, the motor, or indeed the tyres, might be purchased separately there can be little doubt that the sale of the completed vehicle is a single supply. Like a motor vehicle, spectacles are customarily bought as a completed article and in such circumstances are treated as such by the purchaser. The fact that either the frame or the lenses may be purchased separately is not to the point. Similarly the fact that one component, the lenses, is GST-free or that one component is subject to a discount does not alter the characterization.

- In the case of Saga Holidays, Stone J focused on the 'social and economic reality' of the supply and found that there was a single supply of accommodation and the adjuncts to that supply (including the use of the furniture and facilities within each room, cleaning and linen services, access to common areas and facilities such as pools and gymnasiums and various other hotel services such as porterage and concierge) were incidental and ancillary to the accommodation part of the supply.'

Per the above, composite supply is taxed as supply of the dominant activity to which others are merely ancillary. In the present case also, the dominant supply is those of goods (which together constitute as solar power generating system) and hence should be taxable as supply of SPGS.

European Union

Per the European Union Directive, a composite supply is a transaction where supplies with different VAT treatments are sold together as one. The supplies with a composite supply may consist of parts that, if assessed separately, have different tax rates. Some have standard rates, reduced rates or are exempt from VAT.

The European Court of Justice ('ECJ') has delivered several judgements on the aspect of composite supply under European Union Value Added Tax laws ('EU-VAT').

In the case of Card Protection Plan Ltd. Vs. C & E Commrs [1994] BVC 20 , the ECJ held that 'a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied'.

Per the above principle, in the present case also, what the customer wishes or intends to obtain is the main supply of SPGS and all the various goods supplied under the contract are intended for setting up of the SPGS. Therefore the contract

should be treated as a composite supply for which the principal supply is that of SPGS.

United Kingdom

Under the UK VAT laws, a multiple supply (also known as a combined or composite supply) involves the supply of a number of goods or services. The supplies may or may not be liable to the same VAT rate.

If a supply is seen as insignificant or incidental to the main supply, then for the purposes of VAT it is usually ignored – the liability is fixed by the VAT rate applicable to the main supply (or supplies).

In the case of Tumble Tots (UK) Ltd v R & C Commrs [2007] BVC 179. Members of a playgroup received a T-shirt (children's clothing is potentially zero rated) and a magazine (potentially zero rated) as well as the right to attend classes which would be standard rated. The Court decided that there was a single standard rated supply of the right to belong to the playgroup and the T shirt and magazine were incidental to that main supply. No one who was not in the playgroup would have bought the T shirt or magazine separately.

Per the above, it is clear that globally also composite supply means a supply of more than one goods/services wherein one supply qualifies as principal supply. Therefore, taxes as applicable on the principal supply are applied on the whole composite supply.

Supply of all equipments, including the main equipment PV modules, required to set up SPGS is a composite supply

1.3.4. In the instant case the intention of the parties is to supply solar power generating system. A perusal of the draft agreement also proves that the intent of the parties is to supply SPGS wherein goods are supplied through onshore and offshore modes for the purpose of setting up SPGS. The relevant extract of the agreement is reproduced below:

> 'The Supplier shall perform or cause to be performed all actions as may be required in connection with the supply of the solar power generating system including the design, engineering, manufacturing, inspection, shop testing, packing, fabricating, procuring and delivering all the Equipment, Spare Parts and Materials which are integral part of the Plant, at the Plant Site(for onshore supplies)/destination port in India for off shore supply items (ICD, Airport, Seaport) as set out in detail in **Schedule E** as per the Specifications in accordance with the terms of this Agreement.
>
> The Equipment, Spare Parts and Materials shall be suitable and fit for its intended purpose as provided in this Agreement. All Equipments, Spare Parts and Materials supplied shall be new and without defects.'

'Separate prices are specified for different equipments which are supplied under the agreement for commercial convenience. However, as a general trade practice all the equipments which are being supplied under the agreement are supplied together for setting up a solar power generating system.'

Further, relevant paragraph of Schedule A of the draft contract for supply of equipments is reproduced below for ease of reference:

'**1.1.** *The broad scope of Supplies covered under this Agreement is described herein below. The scope for providing the solar project generating system shall include design, engineer, manufacture, inspection; shop testing, packing and shipment of Equipments, Spare parts and Materials forming part of solar power generating system. These are integral parts of the solar power generating system being provided and would not be used separately.*

1.2. *In respect of equipment and systems listed below, all items required to make the equipment and/or system complete in all respects are deemed to be included whether or not these items are specifically mentioned in the Agreement.*

.....

2. *Complete supplies required for the construction of the 60MW AC/81 MW DC Solar PV project shall be in the scope of the supplier. The major areas are covered here below. However, it is understood and agreed that any item not listed out below, but required for the completion of the project shall be in the scope.*

In addition to the supply of SPGS, the parties have also agreed for the supply of spare parts listed in Schedule-E. Spare parts are the goods/equipment required over and above the supply of main goods/equipments under the agreement for the seamless functioning and maintenance of the SPGS. Hence, it becomes clear that the parts or components form an integral part of the solar power generating system being supplied by the contractor.

1.3.5. The Appellant would like to submit that the AAR in its order has held that the contract for supply of all equipment also covers activities like engineering, designing etc., and hence, there is a clear intent to purchase the SPGS with various components and not the components merely. In this regard, it is submitted that the contract for supply of SPGS majorly covers supply of all equipments required for setting up of the SPGS including the spare parts, and also includes activities which are in relation to provision of such goods and are integral for setting up of the SPGS. It is imperative to note that such activities are integral to provision of SPGS and does not form substantial part of the contract. The contract should be understood as that of supply of SPGS which consists of various components such as PV modules, structures,

transmission lines etc. Even if the contract is said to be a composite contract, the principal supply in that case would still be that of SPGS, and hence, the entire contract should be taxable at the rate of 5%. As mentioned in the statement of facts above, it has been acknowledged by the AAR in its order itself that the Appellant is entering into wholesome contracts for supply of SPGS, and hence, the contract should be taxable as SPGS at the rate of 5%.

1.3.6. It is further submitted that Ministry of New and Renewable Energy (hereinafter referred to as **'MNRE'**) in various instances has also approved entire BOQ consisting of various parts e.g. cables, module mounting structures, spares, transmission lines etc. as essential to solar power generating system and hence the concessions applicable have been extended to all goods to be used in solar power plant. Drawing a corollary, concessional rate of 5% should be applicable on all the goods approved under BOQ by MNRE as well.

1.3.7. This is further substantiated by the fact that the main intent of the contract (as is evident from the clauses of the contract provided above) is provision of the SPGS as a whole which consists of various components such as PV modules, structures, inverter transformers, cables, SCADA, transmission lines, etc. The contract also includes certain activities which are incidental to provision of such goods and form an ancillary part of the contract.

1.3.8. Drawing reference to the provisions under the erstwhile law as well, the Appellant would like to point out that even the customer in the instant case perceives that the entire contract is for supply of solar power generating system as the intent of both the parties is supply of the goods/ system which would help in generation of electricity. Hence, all supplies under the contract are bundled and linked wherein the main intent is provision of the goods which constitute solar power generating system.

1.3.9. The Appellant reiterates that per the recitals of the agreement, the underlying scope of works include supply of solar power generating system along with all equipments, spare parts and materials which form an integral part of solar power generating system. Separate prices are specified for different equipment which are supplied under the agreement for commercial convenience such as movement of goods, claiming of payment or availing trade credit etc., however as a general trade practice all the equipment which are being supplied under the agreement are supplied together for setting up/supply of solar power generating system.

1.3.10. Additionally, the Appellant would like to submit that the MNRE has recently issued a clarification vide Circular issued under F.No. 283/11/2017 – GRID SOLAR dated 3 April, 2018 (hereinafter referred to as **'the MNRE Circular'**) to specified industry players wherein it has been categorically stated that 'structurals' as such do not qualify as immovable property and hence are outside the domain of works contract. Further, it has been highlighted that if the supplies under the contract can be treated

as 'composite supply' with supply of solar power generating systems as the principal supply, then such suppliers may be eligible for 5% GST rate as a whole. Relevant extracts of the MNRE Circular are reproduced below:

'Structurals, as such, do not qualify as immovable property and, hence, are outside the domain of 'works contract service'. Whether the EPC contracts qualify as composite supply (u/s 2(30) of the CGST Act) as supply of goods or services or both, naturally bundledor supplied in conjunction with each other in the ordinary course of business will depend on the facts of the case. If such (EPC contracts) supplies could be treated as 'composite supply' with supply of solar power generating systems as the principal supply, then such supplies may be eligible for 5% GST rate as a whole....'

Accordingly, in the instant case, since the contract is for supply of SPGS, the same should qualify as a composite supply wherein the principal supply is of SPGS and hence, entire contract should be taxable at 5%

1.3.11. Per the definition of composite supply and scope of work as defined in the agreement, the Appellant submits that the appellant has entered into an agreement for supply of SPGS and the entire agreement should qualify as a composite supply agreement wherein the principal supply is that of SPGS. Thus, the supply should be taxable at the rate of 5%.

1.3.12. It is interesting to note that the AAR in its order has acknowledged the fact that the contract has been entered into for supply of SPGS as a whole, however, the AAR has misinterpreted the provisions of works contract and has held that the contract is a works contract. The Appellant's detailed submissions on the concept and applicability of works contract in the Appellant's present case are provided in point 2 below.

1.4. <u>Alternatively, since PV module is also being supplied, it can be considered to be the principal supply, hence the contract should be taxable at 5% as supply of PV modules</u>

1.4.1. Without prejudice to the above and in the alternative, the Appellant would like to highlight that mounted Photovoltaic module (PV module) comprises around 60%-70% of the entire Solar Power Plant, and the rest of the components constitute for around 30-34% and are merely parts or sub parts which are required for panel housing or setting up the module such as controllers and switches. This is due to the fact that PV module is a packaged, connect assembly of typically 6x10 photovoltaic solar cells, which constitute the photovoltaic array of a photovoltaic system that generates and supplies solar electricity. In other words PV modules are nothing but an assembly of solar cells that helps in converting solar power into electricity. The fact that solar PV module constitutes 60-70% of the entire solar power plant can also be substantiated with the help of the clauses of the draft agreement which are reproduced below for ease of reference:

'a.Solar Modules, which are an assembly of solar cells that helps in converting solar power into electricity. Solar modules constitute more than 60% of the solar power generating system, hence, qualify as one of the most significant parts in the SPP – Delivered at Project Site directly by way of High Seas Sale.'

1.4.2. Hence, PV module is the most important component of solar power generating system and therefore, even if the contract is construed as a composite supply, PV modules can be the 'principal supply' as per the provisions of the GST law. Accordingly, it is submitted that the GST rate of PV modules which is 5% should be applicable on the whole of the contract.

1.4.3. The Appellant in this regard places reliance on the CERC Order dated 23 March, 2016 involving determination of Benchmark Capital Cost Norm for Solar PV Power Project for FY 16-17. In the said case also, the CERC, of the total cost of the project including land cost, PV Modules cost is considered as 62%.

1.4.4. Reliance in this regard can also be placed on the Chartered Engineer's Certificate (hereinafter referred to as **'CEC'**) which provides that the most critical component is PV modules both in terms of the value and functionality that such modules perform.

1.4.5. Reference in this regard is made to the judgment of Delhi Tribunal in the case of **Rajasthan Electronics & Instruments Ltd. vs. Commr. Of C. Ex., Jaipur** wherein a Solar Photovoltaic Module was held to be a Solar Power Generating System. Relevant extract of the judgement is reproduced below for ease of reference:

'7.The adjudicating authority admitted the fact that Solar Photovoltaic Module is a Solar Power Generating System. We find that other parts are only panel housing consisting of controllers and switches. Hence the whole system is a Solar Power Generating System and is entitled for the benefit of notification. Therefore, the denial of benefit of notification by the adjudicating authority is not sustainable. The impugned order is set aside and the appeals are allowed'.

1.4.6. Basis the above submissions, it is clearly evident that the PV Modules is the most important part of SPGS and hence qualifies as 'principal supply'. Hence the whole contract even if construed as composite supply should be liable to tax considering it to be supply of PV Modules, which is liable to GST at the rate of 5%.

1.4.7. In view of the above mentioned principles and submissions, the Appellant submits that the contract in question qualifies as a composite supply of SPGS, and hence should be taxable at the rate of 5%. The AAR in its order, though, has acknowledged that the contract for goods is a composite supply of SPGS as a whole, but has completely disregarded the facts and the Appellant's submissions in the matter and has grossly erred in holding that the contract relates to provision of both goods and services, which qualify to be works contract, as the setting up of SPGS results into an immovable property.

The Appellant's detailed submission with regards the fact that SPGS is not an immovable property has been provided below.

2. **Contract for supply of Solar power generating system does not constitute as works contract**

Concept of works contract

2.1. The Appellant humbly submits that the terms works contract is defined in Section 2(119) of the CGST Act to mean 'contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or 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'.

Further, in terms of Serial Number 6 of Schedule II to the CGST Act, works contract is treated as a supply of service and the general rate of tax applicable on works contract is 18%.

It is further submitted that in terms of the definition of works contract, installation and commissioning services can said to be works contract only if it is in relation to immovable property.

Essence of the contract and intention of the parties involved in the contract is clearly to supply SPGS

2.2. The Appellant submits that the intention of the parties entering into the contract is to procure/supply a solar power plant. The relevant extract of the draft contract is reproduced below for ease of reference:

'The Supplier shall perform or cause to be performed all actions as may be required in connection with the supply of the solar power generating system including the design, engineering, manufacturing, inspection, shop testing, packing, fabricating, procuring and delivering all the Equipment, Spare Parts and Materials which are integral part of the Plant, at the Plant Site(for onshore supplies)/destination port in India for off shore supply items (ICD, Airport, Seaport) as set out in detail in **Schedule E** as per the Specifications in accordance with the terms of this Agreement.

The Equipment, Spare Parts and Materials *shall be suitable and fit for its intended purpose as provided in this Agreement. All Equipments, Spare Parts and Materials supplied shall be new and without defects.'*

'Separate prices are specified for different equipments which are supplied under the agreement for commercial convenience. However, as a general trade practice all the equipments which are being supplied under the agreement are supplied together for setting up a solar power generating system.'

Further, relevant paragraph of Schedule A of the draft contract for supply of

equipment is reproduced below for ease of reference:

'1.1. The broad scope of Supplies covered under this Agreement is described herein below. The scope for providing the solar project generating system shall include design, engineer, manufacture, inspection; shop testing, packing and shipment of Equipments, Spare parts and Materials forming part of solar power generating system. These are integral parts of the solar power generating system being provided and would not be used separately.

1.2. In respect of equipment and systems listed below, all items required to make the equipment and/or system complete in all respects are deemed to be included whether or not these items are specifically mentioned in the Agreement.

....2. Complete supplies required for the construction of the 60MW AC/81 MW DC Solar PV project shall be in the scope of the supplier. The major areas are covered here below. However, it is understood and agreed that any item not listed out below, but required from the completion of the project shall be in the scope. The design, engineering and other services are essential to be performed for supply of equipments for solar power plant. The intention of the contractor is not to supply goods or services but to supply solar power system. Furthermore, the activities performed by the contractor under the contract for goods do not have substantial service element in them for the contract to qualify as a contract for both goods and services, and hence, on this ground alone, it can be said that the contract for goods is not a works contract.

The AAR has observed that the contract is for supply of solar power generating system and the supplier also has additional responsibility in respect of execution and implementation of the project. By relying on the judgement of the Hon'ble High Court in the case of **National Organic Chemicals Industries Ltd. Vs. State of Maharashtra [2012, SCC Online Bom 2128: (2012) 54 VST 271]** the AAR has held that a contract must be read as a whole and the contract will not become a contract for supply of equipments merely by including certain clauses that say that the supplier would supply only equipments.

In this regards, it is submitted that as is clear from the scope of the contract, the underlying intention of the parties is to supply SPGS, , and hence, should be taxable at the rate of 5%. As mentioned above, the underlying activities like design, engineering, commissioning etc. are integral for the contractor for providing SPGS under the contract, and hence, such activities are not substantial enough to make the contract as a works contract taxable at the rate of 18%.

<u>The Solar power generating system is movable in nature, and hence, is not an immovable property to qualify as works contract</u>

2.3. The Appellant submits that firstly, under the contract for supply of SGPS, the service element is so minimal that it cannot make the contract a works contract. However, AAR in the Impugned Order has grossly misinterpreted the facts and Appellant's submissions in the instant case and has passed an order on a pre-meditated assumption that typically SPGS is an immovable property and hence, contracts for SPGS would qualify to be works contract.

2.4. The Appellant would, therefore, like to reiterate that the SPGS, as proposed to be supplied by the Appellant is not an immovable property, and hence, cannot qualify to be works contract. However, interestingly, the AAR has held that merely because the impugned agreement involves activities like engineering, design, procurement and commissioning of the SPGS, it is a works contract. The AAR has not elaborated as to why SPGS is an immovable property and whether the activities involved under the contract qualify to be works contract.

2.5. It has been highlighted in various pronouncements by the judicial authorities that in cases where an object is installed/fastened to the land for better/improved efficiency running of the said object, and not for the benefit of land, such object will not be considered as immovable property. Further, it has been held that if fixing of a plant to a foundation is only for providing stability to the plant and where there is no intention to make such plant permanent, the foundation provided would not change the nature of the plant and make it an immovable property.

In a judgment by the Hon'ble Supreme Court in the matter of **Sirpur Paper Mills Ltd. v. Collector of Central Excise, Hyderabad** (1998 1 SCC 400), wherein in case of a paper making machine, it was held that merely because the machinery was attached to the earth for operational efficiency, it does not automatically become an immovable property. If the appellant wanted to sell such goods, it could always remove it from the base and sell it. Relevant extract from the judgment is reproduced below for ease of reference:

'The Tribunal held that the machine was attached to earth for operational efficiency. The whole purpose behind attaching the machine to a concrete base was to prevent wobbling of the machine and to secure maximum operational efficiency and also for safety. The Tribunal further held that the paper making was saleable and observed "if somebody to purchase, the whole machinery could be dismantled and sold to him in parts".

In view of this finding of fact, it is 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 tribunal has pointed out that it was for the operational efficiency of the machine that it was attached to earth. If the appellant wanted to sell the paper making machine it could always remove it from its base and sell it.

In view of that finding, we are unable to uphold the contention of the appellant that the machine must be treated as a part of the immovable property of the company. Just because a plant and machinery are fixed in the earth for better functioning, it does not automatically become an immovable property.'

Relying on the aforesaid judgment, the Hon'ble Supreme Court, in the matter of ***Commissioner of Central Excise v. Solid and Correct Engg Works & Ors.*** *(2010 (175) ECR 8 (SC)), held that Asphalt Drum/Hot Mix Plants were not immovable property as the fixing of the plants to a foundation was meant only to give stability to the plant and keep its operation vibration free. Further, it was held that the setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed. Hence, the said plants were held to be movable. Relevant extract of the judgement is reproduced as under for ease of reference:*

'Applying the above tests to the case at hand, we have no difficulty in holding that the manufacture of the plants in question do not constitute annexation hence cannot be termed as immovable property for the following reasons:

(i) The plants in question are not per se immovable property.

(ii) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.

(iii) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.

(iv) The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed.'

In furtherance to the aforesaid judgment, the Madras High Court in the case of **Board of Revenue, Chepauk, Madras v. K. Venkataswami Naidu** (AIR 1955 Mad 620, 1955 CriLJ 1369), held that if something is temporarily embedded in the earth, it cannot be termed as immovable property. The relevant extract of the judgement is reproduced as under:

'2. The answer to the question depends upon whether the equipment of the touring cinema would fall within the category of immoveable 'property. We have no hesitation in holding that it does not. In the question referred to us, the properties are described as collapsible and capable of being removed. In the very nature of things, properties of that nature cannot be immoveable property. The expression "permanently fastened" occurring in the question is a little misleading.

Actually some of the machinery or the poles of the tent may be imbedded in the earth, but they are imbedded only temporarily and not permanently, If they were permanently fixed, the equipment would not form part of a touring cinema.'

Further, it is worthwhile to note that the Madras High Court in the matter of **Sri Velayuthaswamy Spinning Mills v. The Inspector General of Registration and the Sub Registrar** (2013 (2) CTC 551), while deciding whether setting up of windmills can be treated as movable property for the purpose of payment of stamp duty, held that windmills were installed on the cemented platform on the land for running of windmills and not for the benefit of the land, and hence the same are to be considered as movable property. The judgment was passed on the basis of the principle that if, in the nature of things, the property is a movable property and for its beneficial use or enjoyment, it is necessary to imbed it or fix it on earth though permanently that is, when it is in use, it should not be regarded as immovable property for that reason.

Similar principles were also adopted in the matter of **Perumal Naicker v. T. Ramaswami Kone and Anr.** (AIR 1969 Mad 346), wherein the Madras High Court, while deciding whether the engine and pump set were an immovable property, held that the attachment of the oil engine to earth is for the beneficial enjoyment of the engine itself, and hence, such an attachment does not make the engine part of the land and as immovable property. Relevant extracts of the judgment are reproduced below for ease of reference:

> *'We find ourselves in agreement with the second part of these observations, which is apposite to the instant case. In the case before us, the attachment of the oil engine to earth, though it is undoubtedly a fixture, is for the beneficial enjoyment of the engine itself and in order to use the engine, it has' to be attached to the earth and the attachment lasts only so long as the engine is used. When it is not used, it can be detached and shifted to some other place. The attachment, in such a case, does not make the engine part of the land and as immovable property.*

In view of the aforesaid judgments, it is submitted that even assuming without admitting that the contractor is responsible for setting up the solar power plant, the same is commissioned and installed only for the beneficial enjoyment and for the purpose of better functioning of the plant and are capable of being removed and transferred from one place to another. Hence, the fact that the plant is installed but not permanently attached to the land means that the same is not an immovable property.

2.6. Further, the Impugned Order is not in line with the MNRE Circular vide which it has been clarified that structurals as such do not qualify as immovable property and hence are outside the domain of works contract. Even though the term 'structural' has not been defined under the Circular, a corollary can be drawn that the government acknowledges the fact that a certain level of construction related work is required in setting up of a solar power plant, however, the same would not change the nature of the contract to qualify as 'works contract'. Further, in the MNRE

Circular, it has also been clarified that if the supplies under the contract can be treated as 'composite supply' with supply of solar power generating systems as the principal supply, then such suppliers may be eligible for 5% GST rate as a whole. Relevant extracts from the MNRE Circular are reproduced above in paragraph 1.3.10. Hence, it is quite clear that the contract in question constitutes to be a supply of SPGS, as acknowledged and agreed by the AAR in its order as well, and hence, should be taxable at the rate of 5%.

2.7. Reliance in this regard is also placed on the Chartered Engineer Certificate (hereinafter referred to as **'CEC')** which clearly states that the SPGS proposed to be supplied by the Appellant can be easily shifted from one place to another and it is highly movable.

2.8. In this regard, the Appellant also submits, that the Central Board of Customs and Excise (hereinafter referred to as **'the CBEC'**), vide 37B Order No. 58/1/2002 – CX issued under F.No. 154/26/99 – CX4 dated 15 January, 2002 (hereinafter referred to as **'the Circular'**), issued the following clarifications with respect to plant and machinery assembled at site:

> '(v) 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 moveable and will, therefore, not be excisable goods.
>
> (vi) If any goods installed at site (example paper making machine) are capable of being sold or shifted as such after removal from the base and without dismantling into its components/parts, the goods would be considered to be movable and thus excisable. The mere fact that the goods, though being capable of being sold or shifted without dismantling, are actually dismantled into their components/parts for ease of transportation etc., they will not cease to be dutiable merely because they are transported in dismantled condition. ……'

A conjoint reading of the above along with the judicial precedents, clearly demonstrates that the solar power plant once installed is capable of being moved from one place to another without substantial damage, therefore the solar power plant cannot qualify as an immovable property, and the impugned AAR order should be set aside on this ground alone.

2.9. It is further submitted, that the AAR has not taken the aforesaid facts and judicial precedents into consideration before passing its order and has grossly erred in holding the contract for supply of equipments for solar power generating system as works contract based on the following observations, amongst others:

a. The intention of the buyer under the contract is to purchase the entire SPGS with various components and not only the components.
b. The responsibility of the supplier under the contract includes design and engineering work even before the supply of equipments.
c. The contract also includes within its scope implementation, operation, and maintenance as well and hence cannot be said to be a contract for merely equipments for supply of solar power generating system.
d. The contract would be said to be complete only after the solar power system is put in place and not on successful delivery of the equipments. Further, the risk and liabilities in relation to all equipments would remain with the supplier till completion of the project. Thus, the contract is a contract for supply of goods as well as services.
e. The payment under the contract is linked to successful completion of the project and not to supply of equipment.

In order to prove its case that SPGS is not an immovable property, the Appellant would like to make a reference to the definition of 'immovable property'. Immovable property is defined in Section 3(26) of the General Clauses Act, 1897 (hereinafter referred to as **'the General Clauses Act'**) as '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.'

As submitted above, various parts of solar power generating system is only installed together to the grid sub-station so that the same is capable of functioning as a system together. It is further submitted that though SPGS may be shifted from one place to another only in rare circumstances, the same is still capable of being removed and hence cannot, by any stretch of imagination, be said to be an immovable property.

The AAR in the Impugned order has failed to explain as to why the contract entered into by the Appellant for supply of SPGS would qualify to be an 'immovable property'. On the contrary, the AAR has baselessly assumed that contracts in relation to SPGS are commonly qualified as works contract.

In this regard, it is submitted that the intention of the parties to the contract is to procure SPGS and services like design and engineering work, implementation, operation and maintenance are essential for supplying the solar power system. The contract for supply of SPGS cannot be said to be a works contract only because of the fact that the supplier performs certain services to make the same available to the buyer.

2.10. It is further submitted that the AAR has wrongly relied on the judgement of the Hon'ble Supreme Court in the case of **T.T.G. Industries Vs. CCE, Raipur [(2004) 4 SCC 751]** wherein hydraulic mudguns and tap hole drilling machines required for blast

furnace were held to be immovable property on the basis of the finding that the said machine could not be shifted without first dismantling it and then re-erecting it at another site. It was also observed that even if the machines were attached to a concrete base just to prevent wobbling of the machine, it would be classified as immovable property.

In this regard, it is submitted that the AAR has grossly erred in relying on the decision of TTG Industries as the facts of the case are not applicable to our case. The level of construction work in case of TTG is intense. The relevant extracts of the judgement which shows that the level of construction is intense is reproduced below:

> *'9. In their reply to the show cause, the respondents explained the processes involved, the manner in which the equipments were assembled and erected as also their specifications in terms of volume and weight. It was explained that the function of the drilling machine is to drill hole in the blast furnace to enable the molten steel to flow out of the blast furnace for collection in ladles for further processing. After the molten material is taken out of the blast furnace, the hole in the wall of the furnace has to be closed by spraying special clay. This function is performed by the mudgun which is brought to its position and locked against the wall for exerting a force of 240-300 tons to fill up the hole in the furnace. The blast furnace in which the inputs are loaded is a massive vessel of 1719 m cubic metre capacity and the size of its outer diameter is 10.6 metres, and the height 31.25 metres. Hot air at 1200 degrees centigrade is fed into the blast furnace at various levels to melt the raw materials. With a view to protect the shell against heat, the blast furnace is lined with refractory brick of one metre thickness. Thus, the drilling machine has to drill a hole through one metre thickness of the refractory brick lining. The drilling machine as well as the mudgun are erected on a concrete platform described as the cast house floor which is in the nature of a concrete platform around the furnace. The cast house floor is at height of 25 feet above the ground level. On this platform concrete foundation intended for housing drilling machine and mudgun are erected. The concrete foundation itself is 5 feet high and it is grouted to earth by concrete foundation. The first step is to secure the base plate on the said concrete platform by means of foundation bolts. The base plate is 80 mm mild sheet of about 5 feet diameter. It is welded to the columns which are similar to huge pillars. This fabrication activity takes place in the cast house floor at 25 feet above ground level. After welding the columns, the base plate has to be secured to the concrete platform. This is achieved by getting up a trolley way with high beams in an inclined posture so that base plate could be moved to the concrete platform and secured. The same trolley helps in the movement of*

various components to their determined position. The various components of the mudgun and drilling machine are mounted piece by piece on a metal frame, which is welded to the base plate. The components are stored in a store-house away from the blast furnace and are brought to site and physically lifted by a crane and landed on the cast house floor 25 feet high near the concrete platform where drilling machine and mudgun has to be erected. The weight of the mudgun is approximately 19 tons and the weight of the drilling machine approximately 11 tons. The volume of the mudgun is 1.5 x 4.5 x 1 metre and that of the drilling machine 1 x. 6.5 x 1 metre. Having regard to the volume and weight of these machines there is nothing like assembling them at ground level and then lifting them to a height of 25 feet for taking to the cast house floor and then to the platform over which it is mounted and erected. These machines cannot be lifted in an assembled condition.'

From the above, it is apparently clear that the level of construction work involved in the installation of hydraulic mudguns and tap hole drilling machines is enormous and hence the machines were rightly held to be immovable property. However, the Appellant would like to draw the attention to the fact that the setting up of solar power plant does not require this degree of construction work and a perusal of the draft contract would suffice to prove that the activities undertaken under the contract are merely services in relation to supply of the goods. Further, in the instant case, the contract is merely entered into for supply of SPGS which cannot be said to be a works contract by any stretch of imagination. Hence, the aforesaid judgment relied upon by the AAR is completely out of place in the present set of facts of the Appellant.

2.11. Further, the AAR has also relied on the judgement of the Bombay High Court in the case **of M/s Bharti Airtel Ld. Vs. The Commissioner of Central Excise [2014 SCC online Bom 907 :(2015) 77 VST 434],** wherein Base Trans receiver System (hereinafter referred to as **'the BTS'**) was held to be immovable on the ground that the BTS system is not marketable. It was observed that in case the BTS site has to be relocated, all the equipments like BTS, microwave equipment, batteries, control panels, air conditioners, UPS, tower antennae etc. are required to be dismantled into individual components and then they can be moved from the existing site and reassembled at new site. It was held that the act of dismantling the system from the permanent site would render the goods non- marketable and hence the goods cannot said to be immovable property.

In this regards, it is submitted that the solar power generating system is capable of being moved from one place to another without substantial damage and hence cannot said to be immovable property. The fact that the solar power

generating system is capable of being moved without substantial damage can also be substantiated with the help of the CEC.

2.12. It is further submitted that the AAR has relied on the judgement of the Hon'ble Supreme Court, in the matter of **Commissioner of Central Excise v. Solid and Correct Engg Works & Ors.[(2010) 5 SCC 122]** and observed that the asphalt drum/hot mix plants were held to be movable property for the reason that the plant was not intended to be permanent at a given place and the plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed.

2.13. It is submitted that the AAR has ignored the fact that Asphalt Drum/Hot Mix Plants were held to be movable property as the fixing of the plants to a foundation was meant only to give stability to the plant and keep its operation vibration free and not with the intention of permanently affixing it to the ground. In the instant case also, the solar power plant is fixed at the site only for operational efficiency and not with the intention of permanently affixing the plant to the earth. The AAR has distinguished the aforesaid judgment on the basis that the plant was indeed moved after the road construction or repair project for which it is set up is completed. In this regard, it is submitted that the fact that something is capable of being moved shows that it is not immovable in nature. The fact whether it is actually moved or not, does not change the nature of the property, and hence, the AAR has misinterpreted the judgment in the instant case.

Reliance in this regard can also be placed on the judgement of the Hon'ble Supreme Court in the matter of Sirpur Paper Mills Ltd (supra) wherein in case of a paper making machine, it was held that merely because the machinery was attached to the earth for operational efficiency, it does not automatically become an immovable property. If the appellant wanted to sell such goods, it could always remove it from the base and sell it. Hence, in this case as well, there was no movement indeed, however, the machine was capable of being moved which was enough for the machine to not be classified as an immovable property. The AAR has failed to appreciate the judicial pronouncements relied upon by the Appellant and, hence, the Impugned order should be set aside.

In this regard, it is further submitted that the fact that something is capable of being moved shows that it is not immovable in nature. The fact whether it is actually moved or not, does not change the nature of the property. Further, the AAR has wrongly concluded on the basis of rulings that the solar power plant is an immovable property since it cannot be shifted without first dismantling it and then re-erecting it at another site. In this regard, the Appellant would like to submit that in fact, any equipment which is assembled and affixed to the ground has to be dismantled and then re-erected. However, this would not make the equipment immovable. The test to be applied is whether there is 'substantial' damage or loss to the property in such process. If not, the equipment would still qualify as movable, as

is the case in the Appellant's matter. Hence, the AAR has wrongly applied the principles settled by the Hon'ble Courts.

2.14. In view of the aforesaid submissions, it is clear that in the present case, supply of solar power plants cannot be said to be works contract. Hence, the same should be taxable as a composite supply of SPGS at the rate of 5%, as also acknowledged by the AAR in its order. This can be further substantiated by the fact that there is a separate contract for supply of services, wherein construction related services are undertaken, and hence, the contract for supply of SPGS should be taxable at the rate of 5%.

Case 2 – Where other parts and components are supplied by the contractor (not PV modules)

3. Supply of parts/components of solar power generating system should be taxable at the rate of 5% as supply of parts of solar power generating system

3.1. In certain cases, not all parts of solar power generating system are supplied by the contractors (as some parts may be procured separately). For example, PV modules may be procured by the Project Developer directly and only balance contract is awarded to the contractor for supply of remaining goods.

In such case, the parts supplied should be eligible to concessional rate of 5% as the entry covers 'Renewable energy devices and parts for their manufacture', which means parts of SPGS would also qualify for concessional rate of 5%.

3.2. A 'part' is essentially a section, which, when combined with other sections, make up a 'whole system/ product'. In the case of equipment, various parts would combine to make up the whole equipment, which has a specific function.

3.3. Compared to a 'part', an accessory is essentially a piece which enhances the functionality of equipment and adds to the function of the equipment. However, even without the accessory the equipment can function on its own.

3.4. In the present case, it is not the case that all other goods/ equipment are ancillary and the same are required essentially for functioning of the solar power plant and hence, should form part of the solar power generating system.

3.5. Per the above, our understanding is that supply of other parts (apart from solar power generating system) should also constitute as supply of 'parts of solar power generating system' which should attract concessional rate of 5% (provided they fall within Chapter 84, 85 or 94). Hence, benefit should be available even if standalone parts are supplied (and not supplied together with PV modules) as long as the same qualifies as part of solar power generating system falling under heading 84, 85 or 94.

3.6. Reference is made to the MNRE Circular as well wherein it has been suggested that parts falling under Chapter 84, 85 or 94 and used in SPGS would attract 5%

concessional GST rate. Relevant extract from the MNRE Circular has been reproduced below:

> '5% concessional rate has been prescribed for the specified renewable energy devices and parts for their manufacture, falling under Chapters 84, 85 or 94. Hence the goods falling unde Chapters 84, 85 or 94 and supplied for the manufacture of Solar Power Generating System would attract 5% concessional GST rate....'

3.7. Reference is also made to the erstwhile excise law, wherein various judgments have been pronounced in case of wind operated electricity generators where it has been held that specific goods supplied for such generators would also be eligible for the exemptions extended to the generators as 'wind operated electricity generator'

- In **Gemini Instratech Pvt. Ltd. Vs. Commissioner of Central Excise, Nashik [2014 (300) ELT 446 (Tri. - Mum)]** the issue involved was whether doors specifically designed to be used with tower on which wind operated electricity generators are installed be eligible for benefit of notification which provides exemption from payment of excise duty to wind operated electricity generators and its components and parts thereof. It was held that such doors would also be eligible for the exemption. This was also ratified by the **Supreme Court [2015 (315) ELT A82 (SC)]**
- In **Elecon Engineering Co. Ltd. Vs. Commissioner of Customs [1998 (103) ELT 395 (Tri)]** the issue involved in the case was whether power cables, earthing cables, wind farmer computer will be eligible for benefit of exemption under Notification No. 64/94 – Cus. The Tribunal held that power cables and control cables together form part of inside cabling of wind turbine controller. Since, control cables are eligible for exemption, the benefit of exemption has to be extended to power cables also
- In **Pushpam Forging Vs. CCE, Raigad [2006 (193) ELT 334 (Tri. - Mumbai)]**, the Tribunal held that flanges are parts of windmill tower which is inturn a part of Wind Operated Electricity Generators. Once tower is accepted and hled to be a part of WOEG, flanges of the tower will be a part of the whole Wind Operated Electricity Generator
- In **CCE Vs. Megatech Control Pvt. Ltd. [2002 (145) ELT 379 (Tri. - Chennai)]**, the Tribunal held that control panels are part of wind operated electricity generators and are meant specifically for wind mill and will be eligible for benefit

- **Vide Circular No. 1005/15/2015 - CX dated October 20, 2015**, the CBEC had clarified that tower, nacelle, rotor, wind turbine controller, nacelle controller and control tables will be treated as parts/components of wind operated electricity generators and will be eligible for exemption.
- In regard to the above, though there has not been any judgment with respect to components of solar power plants, on similar lines of the precedents discussed

above for wind power, the components of solar power generating system should also be covered under concessional rate of 5% under GST.

3.8. the Appellant further submits that in terms of Note 2 of Section XVI of the Customs Tariff (hereinafter referred to as **'Note 2'**), parts which are suitable for use solely with a particular machine, will be classified with the machine of that kind. The relevant extract of Note 2 is reproduced as under for ease of reference:

> '2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8546 or 8547) are to be classified according to the following rules:
>
> (b) other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8542) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of heading 8517 and 8525 to 8528 are to be classified in heading 8517;

3.9. The Appellant further places reliance on the judgement of the Hon'ble Supreme Court in the case of **Ballarpur Industries Ltd. vs Collector of Customs (Appeals) [1995 (56) ECR 646 (SC)]** wherein granite press roll was classified along with paper making machines as it was used primarily with that machine in accordance with Rule 1, 2(a), (b) and (c) of Section XVI. The relevant para of the judgement is reproduced as under:

> **'13 .** Coming to Rule (a) of Note 2 to Section XVI which is also excerpted by us already goods of a kind described in any of the Headings of Chapters 84 and 85 (other than Heading Nos. 84.65 and 85.28) are in all cases to be classified in their respective Headings. Then coming to Rule (b) of Note 2 to Section XVI, which is also excerpted by us already other part of goods of a kind described in amount of the Headings of Chapter 84, if suitable for use solely or principally with a particular kind of machine (described in Chapter 84) is required to be classified with machine of that kind mentioned in Chapter 84. Therefore, what has now to be examined is, when Heading No. 84.31 describes the goods (article) classified thereunder as "machinery for making or finishing cellulosic pulp, paper or paper-board" whether the goods or article "Granite Press Roll", which is held by CEGAT itself, to be a part of component of paper making machinery does warrant its classification thereunder. In our view, when Note 2 to Section XVI requires classification of parts of machines to be made according to rules given thereunder and when Rule (a) thereunder requires goods (part of machine) of a kind described in

any of the Headings of Chapters 84 and 85 (other than Nos. 84.65 and 85.28) under respective Headings, every machinery for making or finishing cellulosic pulp, paper or paper-board, requires to be classified under Heading 84.31. There coming to "Granite Press Roll' the imported article under consideration, being a part of machine of goods v Machinery for making or finishing cellulosic pulp, paper or paper-board' which is suitable for use solely or principally as machinery for finishing paper, it requires to be classified with the machine described in the Heading 84.31, as required by Rule (b) to Note 2 of Section XVI , inasmuch as, Granite Press Roll is described by CEGAT itself as part of machine of paper making machinery. Therefore, Granite Press Roll' imported article, in our view warrants its classification under Chapter Heading 84.31, as held by the Collector (Appeals). Thus, when classification of imported article-the Granite Press Roll-ought to have been made under tariff item No. 84.31 of Chapter 84, as is held by us, CEGAT has gone wholly wrong in classifying that article under import tariff item No. 68.01/16(1) of the 1st Schedule to the Customs Tariff Act, 1975, particularly when that article could not have been regarded as an article of stone, as such, to become an excepted item under Note 2 to Section XVI read with Note 1(a) to Chapter 84, warranting its classification under Heading in Chapter 68 and according to rules governing classification of materials or substances or their parts.

'14. Since 'Granite Press Roll' is an imported article, which is classified by us as Tariff item 84.31 of the 1st Schedule to the Customs Tariff Act, 1975 as it stood prior to its amendment on 28.2.1986, the import duty payable thereon is only 40% as provided thereunder.'

Further, reliance is placed on the decision of the High Court of Bombay in the case of **Sealol Hindustan Limited vs. Union of India [1988 (17) ECR 186 (Bombay)]** wherein mechanical seals specifically designed for centrifugal pumps or compressors were classified in the heading of the centrifugal pumps by virtue of Note 2(b) of Section XVI. The relevant para of the judgement is reproduced as under:

'**6.** Mechanical seals which are specifically designed by the petitioners for centrifugal pumps or compressors and can be used only with centrifugal pumps or compressors fall by virtue of Note 2(b) under the Heading 84.10(1) or 84.11(1). They are parts used in such pumps or compressors.'

3.10. From the aforesaid judgements, it can be inferred that parts of a machine which are specifically used in the particular machine are classified under the same tariff heading as that of the machine. In view of the above, the Appellant submits that the parts of solar power generating system can be used only in setting up of solar power generating system, thus the same should be classified as SPGS itself.

3.11. It is submitted that generation of power by way of solar energy is one of the key promoters for the Government's aspiration of 'Make in India'. The Government has set target of 175 GW of renewable power by 2022 which includes 100 GW of solar power. Per "Make in India" website set up by the Government of India, India's annual solar installations would grow four times by 2017. If the goods supplied under the contract for construction of solar power plants is taxed at separate rates applicable on the individual goods, it would lead to higher tax burden on the developer of the solar power plants. Please note that since electricity has been exempted from GST, GST payable on the input side would burden the developer and hence, would prove detrimental to the growth of solar power generating plants in the country. Accordingly, concessional rate of 5% should also be available to parts of solar power generating system supplied on standalone basis.

3.12. Basis the understanding, it can be deduced that the components which are essential for setting up of the solar power plant together will qualify as parts of solar power generating system (falling under Chapter 84,85 or 94) and hence, should be eligible for concessional rate of 5%.

4. <u>Whether benefit would also be available to sub-contractor</u>

4.1. In certain cases, the turnkey contractor engages various sub-contractors (manufacturers/ supplies/ sub-contractors) who further supply the goods to such contractor or engage in provisioning of certain portion of the turnkey contract.

4.2. Further, there may be cases wherein the Developer divides the contract between two separate Contracts of construction of solar power generation system.

4.3. Notification no. 1/2017-Integrated Tax (Rate), which provides concessional rate on solar power generating system does not specify the persons who would be eligible for concessional rate of 5% i.e. developer, contractor or manufacturer/ supplier/ sub-contractor.

4.4. Since the concessional rate of 5% is provided to renewable energy products and parts thereof, the same should be applicable to all suppliers providing such products as long as it can be established (through certification or otherwise) that these are to be used in solar power generation system. This would also be in line with practice under erstwhile excise law wherein benefit was extended to sub-contractors also through MNRE certification.

In view of the aforesaid, it is humbly submitted that the Impugned Order passed by the Advance Ruling Authority is based on erroneous reasoning, misinterpretation of the facts and hence is incorrect and bad in law.

<u>Case 3 –where only services are supplied</u>

5. <u>Taxability of contract for services</u>

5.1. A separate contract is awarded to the contractor for provision of services which consists of the following:

- Construction of complete buildings including control rooms and inverter rooms, roads and drainage system, boundary walls/ fencing, bore walls
- All civil and foundation works for switchyard, solar plant and all other equipment
- Site enabling facilities
- Leveling and grading
- Erection, commissioning and testing for solar modules, mounting structures, power transformers, inverters, SCADA, complete switchyard, inverter transformers, connectors, earthing lines etc.

Per clause 3.1 of the contract for supply of services, scope of supplies includes:

> 'The Contractor agrees that it shall, either on its own or, through one or more Subcontractors including Prime Subcontractor as may be appointed in accordance with this Clause 3.1, perform the entire Works, as per the Specification Manual and in accordance with the terms of this Agreement, to the satisfaction of the Owner. It is further clarified that the Owner will have a right to accept or reject a Affiliates or Subcontractor at its discretion and Owner's decision in this regards would be binding on the Contractor, provided such acceptance shall not be unreasonable withheld.'

In terms of Schedule III of the agreement, the scope of work includes design, engineering and studies, transportation, unloading, storage and site handling, installation and commissioning of equipments and material services. It further includes erection, testing and commissioning of solar power projects, erection testing and commissioning of solar modules, module mounting structures etc.

Under GST, service has been defined as anything other than goods and the general rate of services is 18%. The Appellant in this regards submits that such contract is a separate contract for services itself and hence has to be taxed on independent basis. In our understanding, the same should be analysed independent of contract for goods, and only the contract for services should be taxed as pure service agreement and be categorized as works contract liable to tax at the rate of 18%.

Hence, in view of the aforesaid submissions, the Appellant would like to reiterate that the AAR, in its order, has agreed to the point of the Appellant and has acknowledged that the contract in question are for supply of SPGS as a whole. However, the AAR has incorrectly assumed that the contracts which are in relation to supply of SPGS are generally in the nature of immovable property, and hence are works contract.

In this relation, the Appellant would like to submit that as per the detailed submissions made by the Appellant above, the contract is for supply of SPGS which is movable in nature and hence, cannot qualify as immovable property. The said submission has also been made clear by the authorities through the MNRE Circular (attached as Annexure G), wherein it has been categorically stated that 'structural' as such under SPGS

contracts do not qualify as immovable property, which means that supply of SPGS is not works contract. Further, it has been stated therein that contracts for contract for SPGS can qualify as composite supplies, wherein principal supply would be of SPGS, which is taxable at the rate of 5%. The Appellant would like to reiterate that this fact has been completely ignored by the AAR, in addition to the various judicial precedents referred to by the Appellant in its Advance Ruling Application, which has also been ignored by the AAR in its order. In furtherance, the CEC (certificate by charted engineer) also states that SPGS can be easily shifted from one location to another, which goes to prove that a contract for supply of SPGS is not a works contract. The CEC is also not considered by the AAR in its order.

Hence, the Appellant would like to plead that the contract for supply of SPGS, as rightly held by the AAR in its order, is a contract for supply of SPGS as a whole, and hence, should be taxable at the rate of 5%. The AAR's findings that the contract for SPGS is an immovable property, and hence, qualifies as works contract taxable at the rate of 18% is without any substance and is bad in law, and hence, the Impugned order should be set aside.

In addition, the Appellant would like to reiterate that as submitted above, parts used for setting up of SPGS should also be eligible for concessional rate of tax (if in heading 84, 85 and 94) and the said benefit should be available to sub-contractors as well.

Further, the contract for supply of services, is an independent contract for pure services, wherein the contractor is required to undertake services such as installation, civil works related activities etc. Hence, the said contract should be read and considered independent of the contract for supply of SPGS, and should be taxable at the rate of 18%.

ADDITIONAL SUBMISSIONS

6. At the outset, reference requires to be made to the charging provision under the Central Goods and Services Tax Act, 2017 ("**CGST Act**"), viz. **Section 9**.

> *9. (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.*

7. As per the charging provision, there are five essential ingredients which require to be satisfied in order to give rise to a liability to pay GST:

   (a) Supply of goods or services or both;
   (b) At such rates... as may be notified by the Government;
   (c) On the value determined under section 15;
   (d) And collected in such manner as may be prescribed;
   (e) And shall be paid by the taxable person.

8. The scope of "supply" is set out at **Section 7** of the CGST Act, which reads as under:

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

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

...

(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.

9. In terms of Section 7:

- The concept of "supply" under Section 7(1)(a) takes in supply of goods for a consideration, or a supply of services for a consideration.
- Separately, as per Section 7(1)(d), Schedule II to the CGST Act determines which activities as a supply of goods or a supply of services. Amongst the activities set out at Schedule II is a composite supply of "works contract", which is treated as a supply of service. The relevant entry is extracted below:

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; and

10. In terms of the applicable rates of GST, the rates for goods are prescribed vide Notification No. 1/2017-Central Tax (Rate) dated 28.06.2017 ("**Notification 1/2017**"), while the rates for services are prescribed vide Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 ("**Notification 11/2017**"). The said entries are extracted below for ease of reference:

Goods:

Sl. No.	Chapter / Heading / Subheading/ Tariff item	Description of goods
234.	84, 85 or 94	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

Services:

Sl. No.	Chapter, Section or Heading	Description of Service	Rate (per cent.)	Condition
	Heading 9954 (Construction services)	(ii) composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017.	9	-
		(xii) Construction services other than (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix), (x)and (xi) above.	9	-

11. **Section 8** of the CGST Act then prescribes the tax liability in case of inter alia a "composite supply", as follows:

8. The tax liability on a composite or a mixed supply shall be determined in the following manner, namely:—

(a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and

...

12. Relevant to the present matter, the definitions of the terms "composite supply", "principal supply", "goods", "services" and "works contract" under Section 2 of the CGST Act, are also set out below:

(30) "composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply

(90) "principal supply" means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary

(52) "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply

(102) "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged

(119) "works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or 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

It is also important to note that Section 2, which is the definition section, commences with the words "unless the context otherwise requires". Accordingly, a particular context may alter the definition of any particular term under Section 2.

The present case involves two separate supplies which are distinctly liable to tax:

13. In terms of the aforesaid scheme of provisions under the GST law, two separate transactions of supply for separate consideration would fall under Section 7(1)(a), and suffer two distinct levies of GST on the respective consideration for each supply, at the rates prescribed for goods/ services by way of notification. In the present case, under Section 7(1)(a), the Supply Agreement would be taxed qua the consideration mentioned therein, as a supply of goods at the rate of 5% under Notification 1/2017. The Services Agreement would be taxed as a supply qua the consideration mentioned therein as a supply of services at the rate of 18% under Notification 11/2017.

14. Furthermore, in terms of the settled principles for interpretation of contracts, the Hon'ble Supreme Court had held time and again that the Department cannot question the commercial wisdom of the parties entering into an agreement, and must proceed on the basis that what is stated in the contract reflects the true nature of the intent and transactions. It is therefore impermissible for the tax authorities to go behind the language of the contract or act contrary to it. Reliance in this regard is placed on the below decisions:

Union of India v. Mahindra and Mahindra [1995 (76) E.L.T. 481 (S.C.)]

"The collaboration agreement entered into between the parties is clear and it is not open to the revenue to construe it differently by reading into it something which is not there."

Mirah Exports Pvt. Ltd. vs. Collector of Customs [1998 (98) E.L.T. 3 (S.C.)]

" "Ordinarily the Court should proceed on the basis that the apparent tenor of the agreements reflect the real state of affairs" and what is to be examined is "whether the revenue has succeeded in showing that the apparent is not the real and that the price shown in the invoices does not reflect the true sale price." [See : Union of India v. Mahindra & Mahindra, (supra), at P. 487]."

15. In view of the aforesaid, in the present facts, the levy of GST is crystallised under Section 9 read with Section 7(1)(a). There is, therefore, no question of taking recourse either to Schedule II or to Section 8 of the CGST Act in order to determine taxability. The Supply Agreement is consequently taxable at 5% and the Services Agreement at 18%.

16. Without prejudice to the foregoing, to the extent that Section 8 dealing with composite supply is applicable, there can at best be said to be two separate composite supplies, viz.:

- A composite supply of goods and services under the Supply Agreement, with the principal supply clearly being the supply of goods, i.e. the PV module and other parts/ components to set up the SPGS. The said Agreement would therefore be taxed at 5%, per the rate for SPGS under Notification 1/2017.
- A composite supply of goods and services under the Services Agreement, with the principal supply clearly being the supply of services in the form of erection, commissioning and installation of the SPGS. The said Agreement would therefore be taxed at 18% per the rate under Notification 11/2017 for construction services (which includes installation services).

Fundamental interpretational error in the Impugned Order:

17. In the present case, the Impugned Order instead seeks to combine both the Supply Agreement and the Services agreement on the basis that both commonly address the setting up of a solar power plant, but have been executed by devising two agreements (refer Pg. 74 of the Appeal memo). The Impugned Order then proceeds to hold that:

- The two agreements, read together, constitute a "works contract" which is taxable at the rate of 18%, as the liability of the contractor does not end with the procurement of materials but extends till the successful testing and commissioning of the system (refer Pg. 63 of the Appeal Memo).
- The requirement that a works contracts must be for "immovable property" is met, as the solar power plant could not be shifted without first dismantling it and the re-erecting it at another site (refer Pg. 76 of the Appeal Memo).
- Once it has been determined that the transaction is a "works contract", there is no need to enter into any discussion as to the transactions involving a "composite supply" (refer Pg. 74 of the Appeal Memo).

18. It is submitted that the aforesaid findings under the Impugned Order are completely unsustainable and bad in law, as the same completely misread the provisions of: (i) Schedule II to the CGST Act pertaining to "works contract"; and (ii) the rate prescription for "works contract" under Notification 11/2017. Both as per Schedule II and Notification 11/2017, the contract in question must first be a composite contract and then it is to be determined whether it is a "works contract" or not. Hence, the appropriate sequence would be:

(f) Whether the contract is a composite contract or not?

(g) If yes to (a), whether the contract is a "works contract" or not.

(h) If yes to (b), then to the contract be taxed as a service.

19. If answer to (a) is "no", there is no question of treating the transactions as a "works contract" and consequently taxing as a service. In this regard, the observation in the Impugned Order (that once it has been determined that the transaction is a "works contract", there is no need to enter into any discussion as to the transactions involving a "composite supply"), is patently contradictory.

20. In the present facts, the agreements are separate supplies of goods and services under Section 7(1)(a), and cannot be said to be a composite supply (as there is no supply which consists of two or more elements of goods or services). There is no legal basis to go behind the agreements and treat them as one, especially since the pattern of separate agreement for goods and services has subsisted since 2007. The said contract structure is therefore a reflection of the true commercial intent of parties, and is in no manner a creation/ device timed with the introduction of GST. As per the settled law, there is no question of seeking to override the structure of the contracts and intent of parties, and the agreements must be read as they have been executed by the parties (viz. as separate agreements for separate supplies with distinct consideration). In this background, there can be no question of treating the supplies as a "works contract".

View taken in the Impugned Order frustrates the intent of the Legislature and renders the entry for SPGS otiose:

21. Without prejudice to the foregoing, it is submitted that under Section 9(1), the Government is enabled to issue notifications prescribing the rate qua "goods", "services" or "both". In the present case, as per S. No. 234 of Notification 1/2017, the Government has chosen to tax solar products in a particular manner:

Devices and parts Solar power generating system Photo voltaic cells	}	all at 5%

22. Hence, the clear legislative intent is that at all levels, from part to system, GST will be payable at 5%. In fact, the effective rate for such contracts even prior to GST was approx. 3%, and an application of the "equivalence principle" also affirms that the intent of the Government was never to tax the entirety of the goods and services in relation to setting up an SPGS at a significantly higher rate of 18%.

23. Furthermore, S.No. 234 covers a solar power generating "system", when it is well known that:

- A "system" would cover supply of goods and services necessary to create it;
- A "system" could be movable or immovable.

24. In this regard, the word "system" (which is undefined under GST) is to be understood as follows:

- Ordnance Factory vs. CCE, Nagpur [2013 (295) ELT 600 (Tri-Mum)]

  As per the Oxford Dictionary (Tenth Edition), the definition of the term 'system' is "a complex whole, a set of things working together as a mechanism or interconnecting network". Similarly, the system is defined in Chambers 20th Century Dictionary as "anything formed of parts placed together or adjusted into a regular and connected whole".

- P. Ramanatha Aiyar's Advance Law Lexicon (5th Edition)

  "System" means a set of inter-related or interacting elements

25. In terms of the aforesaid, given that S. No. 234 refers to the fully interconnected SPGS, the said entry refers to all of the parts/ components as well as the necessary services to achieve such interconnection.

26. Accordingly, the clear intention of the Legislature is that the "system" must be taxed at an aggregated level in whatever form it is, as a "system", where all the value elements which comprise the "system" must be taxed at 5%. It is well settled that in interpreting and applying a statute, no position can be adopted which would frustrate the intent of the Legislature or defeat the object and purpose for which the provision was enacted, and a purposive interpretation must be adopted (Coastal Paper Ltd. vs. CCE, Vishakapatnam [2015 (322) ELT 153 (SC)]; Commissioner of Trade Tax, UP vs. Varun Beverages Ltd. [2011 (267) ELT 147 (SC)]; South Eastern Coalfields Ltd. vs. CCE&C, M.P [2006 (200) ELT 357 (SC)]).

27. Even though Notification 1/2017 is qua "goods", relevant to the entry for "system", and likewise for other specified items at S. No. 234 (such as plants, wind mills etc.), the term "goods" in the context of its use under this entry of the Notification will have to be interpreted consistent with the coverage specified by the notification. Therefore, qua a supply of a "system", whether under one contract or more, irrespective of the form in which the "system" is, the levy of GST must be at 5%.

28. The interpretation adopted by the Impugned Order, that all contracts for supply and services qua SPGS must be treated as a "works contract" and taxed at 18% on the full value, will render the taxing entry of SPGS wholly otiose/ nugatory. As per the settled law, any such interpretation is always to be avoided (Oswal Agro Mills Ltd. vs. CCE [1993 (66) ELT 37 (SC)]; Akbar Badruddin Jiwani vs. CC [1990 (47) ELT 161 (SC)]).

29. In the present case, the clear intent of the Legislature/Government is to tax SPGS at 5%, being a source of renewable energy. Accordingly, no such interpretation can be adopted which would defeat this intention and place all SPGS contracts under the 18% rate bracket. However, the view taken in the Impugned Order will ensure that the intent of the Government to tax the solar power generating system at 5% is bypassed, and that the said system suffers tax at 18%, contrary to the clearly stated and manifested intention of the Government.

The findings in the Impugned Order that the SPGS is "immovable property" are

erroneous and unsustainable:

30. The Impugned Order proceeds on the basis that the SPGS is an "immovable property". The said findings are unsustainable in view of:

(i) The certificate provided by the expert (i.e. qualified Chartered Engineer) which clearly states that the SPGS is "highly moveable" as it is capable of being dismantled and re-assembled at another location (refer Pg. 157 of the Appeal Memo). The said expert evidence has not been controverted in any manner, the expert has not been cross-examined and no contrary evidence has been brought on record as well. It is well settled that expert evidence can only be countered with expert evidence and a judicial/ quasi-judicial authority cannot substitute his own views for that of the expert (Inter Continental (India) vs. Union of India [2003 (154) ELT 37 (Guj)] maintained in Union of India vs. Inter Continental (India) [2008 (226) ELT 16 (SC)]; Abraham J. Thakaran vs. CCE, Cochin [2007 (210) ELT 112 (Tri-Bang)] upheld in CCE vs. Innovative Foods Ltd. [2015 (236) ELT 20 (SC)]). Accordingly, the view of the expert on the movability of the SPGS ought to have been accepted.

(j) The Ministry of New and Renewable Energy (MNRE), which is the parent Ministry for solar projects, has also clarified, vide No. 283/11/2017-GRID SOLAR dated 03.04.2018 (refer Pg. 124 of the Appeal Memo), that the structurals in relation to SPGS are not in the nature of "immovable property". Being the governing Ministry qua solar projects, and having the relevant expertise on the subject matter, due credence ought to have been given to the said clarification, instead of adopting a divergent view de hors any technical understanding of the SPGS in the Impugned Order.

(k) As per the settled law in terms of a long line of judgements of the Hon'ble Supreme Court, the relevant test for determining whether a given item is movable or immovable is whether the affixation of the same is for the purposes of the beneficial enjoyment of the movable item (i.e. to ensure full functionality of the movable item by providing structural support, ensuring it is wobble-free etc.) or for the beneficial enjoyment of the immovable property (i.e. construction of a building/ structure to enjoy and utilize the land). In particular, it has been held that where the item can be dismantled and erected at another location without destroying or damaging the item, the said item would be movable and not immovable. Reliance in this regard is placed on the following:

- Sirpur Paper Mills vs. CCE, Hyderabad [1998 (1) SCC 400]
- CCE vs. Solid and Correct Engg Works & Ors. [2010 (175) ECR 8 (SC)]
- Board of Revenue, Chepauk, Madras vs. K. Venkataswami Naidu [AIR 1955 Mad 620]
- Sri Velayuthaswamy Spinning Mills vs. The Inspector General of Registration and the Sub Registrar [2013 (2) CTC 551]

- Perumal Naicker vs. T. Ramaswami Kone and Anr. [AIR 1969 Mad 346]
- CBEC Circular No. 58/1/2002-CX dated 15.01.2002

(l) It is submitted that the last judgment in the aforesaid line of decisions on the issue, which prescribed the overarching tests for determining whether an item is movable or immovable, is the judgment in Solid and Correct Engineering (supra). It is this judgment which requires to be followed and applied, as opposed to the strong reliance placed by the Impugned Order in TTG Industries Ltd. vs. CCE, Jaipur [2004 (167) ELT 501 (SC)] where a conclusion was reached that hydraulic mudguns were immovable based on the specific processes involved and the manner in which the equipments were assembled and erected. In fact, the decision in Solid and Correct (supra), while laying down the definitive tests on this movability/ immovability, has also distinguished the decision in TTG Industries (supra) at paragraph 32 on this factual basis.

(m) In this regard, it is also submitted that the various precedents have not laid down a requirement that the item must be capable of being moved as such to another location without dismantling. The relevant judgments only contemplate that the item must be capable of being dismantled and re-assembled at another location without being destroyed in the process. In this regard, the conclusion in the Impugned Order that the SPGS is "immovable property" as it could not be shifted without first dismantling it and the re-erecting it at another site, is wholly erroneous, and contrary to the test established by the Hon'ble Apex Court.

(n) It is further submitted that the test is not one of whether the items are, in fact, dismantled and moved by an assessee, but whether they are capable of being dismantled and moved from one to another (refer Quality Steel Tubes (P) Ltd. vs. CCE, U.P. [1995 (75) ELT 17 (SC)]; Triveni Engineering & Indus Ltd. vs. CCE [2000 (120) ELT 273 (SC)]).

(o) Even under GST (for the purposes of disallowing input tax credit under Section 17(5) of the CGST Act), a distinction has been drawn between "immovable property" and "plant and machinery". The term "plant and machinery" is defined to mean "apparatus, equipment, and machinery fixed to earth by foundation or structural support... and includes such foundation and structural supports". In this regard, it is also to be noted that for GST purposes, a telecommunication tower has specifically been treated as being in the nature of "immovable property", and not as "plant and machinery". It is, therefore, submitted that the decision in Bharti Airtel Ltd. vs. CCE [2014 SCCOnline Bom 907] is distinguishable on this basis under GST, in as much as the statute itself views telecommunication towers as being in a distinct category from plants (such as a solar power plant).

31 In view of the aforesaid, the SPGS is not in the nature of "immovable property", and, therefore, cannot qualify as a "works contract". Consequently, the agreements cannot be taxed as a service at 18%.

Without prejudice, even if the agreements are read combinedly, the transaction is not a "works contract", but is taxable per the principal supply, at a rate of 5%:

32. Without prejudice to the foregoing, even if (contrary to the clear intent of parties), the Supply Agreement and Services Agreement are read combinedly, a "works contract" will still not be constituted, as a "works contracts" by definition is a contract for construction which also involves a transfer of title/ ownership in goods. The predominant element is, therefore, that there must be a contract for rendition of services, viz. construction services. Accordingly, where the predominant element is supply of manufactured goods which are imported, or, locally procured, the definition of "works contract" will clearly not be satisfied.

33. Furthermore, works contract being a specie of composite contract (which determines taxability qua the principal supply), in order to be taxed as a service, it is a natural corollary that a "works contract" must principally be for the supply of services. In view thereof, in the instant case even if the two agreements are taken together, as service is not the principal supply, it cannot be treated as a "works contract".

34. Rather, the principal supply, in terms of both customer perception and as a value proposition, is clearly the supply of the goods (particularly, the PV module). On this basis, the entire supply would merit taxation at the rate of 5% under S. No. 234 of Notification 1/2017.

ISSUE NOS. (ii) & (iii):

35. All parts/ components supplied on a standalone basis or by sub-contractors are liable to GST at 5% as:

(ii) The entire solar power generating "system" is taxable at the rate of 5% as per S. No. 234. Accordingly, any and all goods required for the creation of the system would qualify for the 5% rate under this entry (refer submissions at paragraphs 23 to 28 hereinabove).

(iii) In any event, as per a plethora of precedents and CBEC clarification (largely in the context of solar projects and windmill projects), it is settled law that parts/ components of a system would equally merit the rate prescription for the "system":

- Rajasthan Electronics & Instruments Ltd. vs. CCE, Jaipur [2005 (180) ELT 481 (Tri-Del)]
- BHEL vs. CCE, Hyderabad [2008 (223) E.L.T. 609 (Tri. - Bang.)]
- Phenix Construction Technology vs. CCE, Ahmedabad-II [2017-TIOL-3281-CESTAT-AHM]

- Jindal Strips Ltd. vs. CC, Bombay [2002-TIOL-347-CESTAT-DEL-LB]
- Gemini Instratech Pvt. Ltd. vs. CCE, Nashik [2014 (300) ELT 446 (Tri-Mum)]
- Elecon Engineering Co. Ltd. vs. CC [1998 (103) ELT 395 (Tri)]
- Pushpam Forging vs. CCE, Raigad [2006 (193) ELT 334 (Tri-Mum)]
- CCE vs. Megatech Control Pvt. Ltd. [2002 (145) ELT 379 (Tri-Chennai)]
- Circular No. 1005/15/2015-CX dated 20.10.2015

(iv) Notification 1/2017 states that "The rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of this notification". In relation to the classification of the SPGS under S.No. 234, it would be relevant to refer to the Section Notes to Section XVI of the Customs Tariff, as reproduced below:

2. Subject to Note 1 to this Section, Note 1 to Chapter 84 and to Note 1 to Chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules :(a) parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;

(b) other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8525 to 8528 are to be classified in heading 8517

4. Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function.

In terms of the aforesaid Chapter Notes, it is submitted that:

- Under Note 2(a), parts which are goods covered under any heading are to be classified thereunder. As the SPGS (i.e. as a system) is covered under S. No. 234, all parts/ components necessary to create the said interconnected "system" would qualify for the 5% rate.
- Under Note 2(b), parts suitable for use solely or principally with the SPGS would be classified along with the SPGS, and would also be eligible for the 5% rate.

- Most importantly, where a series of individual components are intended to contribute together to a clearly defined function (in this case, solar power generation), the appropriate classification is under the entry relevant to that function. On this basis as well, all parts/ components which go to create the interconnection SPGS as a "system" would attract the 5% rate of GST.

In view of the foregoing, even a supply of standalone parts/ components or supply of such parts/ components by the sub-contractor would equally merit the 5% rate of GST.

HEARING

The appellants were heard on 02.07.2018 where the appellant reiterated the written submissions made in the appeal filed. The appellant also made additional written submissions on 02.07.2018 reiterating all the submissions made in the application and certain additional grounds also. Copy of the additional submission was enclosed to the appeal. Both the submissions of the appellant are kept on record.

ORDER PASSED BY THE ADVANCE RULING AUTHORITY:

36. It was held by the ARA that the agreements revealed that the impugned transaction of setting up an operation of Solar Photovoltaic Plant is in the nature of 'Works Contract' in terms of clause (119) of Section 2 of the GST Act read with Schedule (ii) (activity to treat as supply of goods or supply of services) treating Works Contract u/s.2(119) as supply of services. It was observed in the ARA that the though the appellant tendered two agreements – one for the supply of goods to be used in Solar Power Plant and other for the supply of services they are separate agreements, the buyer has expressed a clear intention to purchase the solar power generating system with the various components and the impugned contract is for supply of solar power generating system as a whole. After going through the various clauses of the Agreements, the ARA came to the conclusion that the buyer by devising certain clauses sought to bring about a splitting up of the intended purchases of the system, as a one whole, into purchases of goods and purchases of services. It is further observed that the agreement has been entered into not merely for supply of equipment but also for design and engineering work before supply of equipment and the Supplier is involved in the project from the engineering and design stage. Hence, the agreement is for supply of SPGS as a whole because the responsibility of the supplier also includes execution and implementation of the project. On the basis of the above observations, the Advance Ruling Authority passed the following order:

a. The agreements tendered in support of the transaction reveal that the impugned transaction is for setting up and operation of a solar photovoltaic plant which is in the nature of a 'works contract' in terms of clause (119) of Section 2 of the GST Act, and hence, should be taxable at the rate of 18%

b. In the absence of any documents, the AAR was not able to deal with the question regarding applicability of concessional rate of tax on parts of solar power generating system in the present proceedings.

c. With regard to the question whether benefit of concessional rate of 5% of SPGS and parts thereof would be available to sub-contractors it was held that no documents were provided and hence this question was not dealt with in the proceedings.

The ARA referred to Supreme Court and High Court judgments to understand the term 'movable property' and relying on the principles enunciating in the judgment. It came to the conclusion that the transaction results into transfer of immovable property.

FINDINGS

37. **WHETHER IN CASE OF SEPARATE CONTRACTS FOR SUPPLY OF GOODS AND SERVICES FOR A SOLAR POWER PLANT, THERE WOULD BE SEPARATE TAXABILITY OF GOODS AS 'SOLAR POWER GENERATING SYSTEM' AT 5% AND SERVICES AT 18%?**

38. It is seen that Agreement is proposed to be made in two parts. One is titled as '**AGREEMENT FOR SUPPLY OF SOLAR POWER GENERATING SYSTEM**' in which it is stated that 'the buyer desires to set-up solar photovoltaic plants with total capacity of 60 MW (AC)/81 MW (DC) and the other is titled '**ENGINEERING AND CONSTRUCTION AGREEMENT**' in which it is stated that 'the Owner desires to set up and operate solar photovoltaic plants with a total capacity of MA AC (81 MW DC). The agreement for SPGS (SOLAR POWER GENERATING SYSTEM) shows that the buyer desires to set up an operation of Solar Photovoltaic Plant with the total capacity of 60MW. The engineering and construction agreement shows that the buyer seeks to entrust the appellant for erection, testing and commissioning of certain equipment and certain services and material for the plant. From the above, it can be seen that the two agreements are proposed to be made for the supply of goods and the rendition of services for the purposes of setting up a '**SOLAR POWER GENERATING SYSTEM**'. The agreement for the supply of SPGS covers, amongst other, the supply of Solar Photovoltaic module which is a main component of the system. It also

includes the supply of various other parts such as invertor, battery, power transformer and certain services such as survey, design, transportation of the module and parts. The engineering and construction agreement covers the erection, installation, commissioning, civil work etc. Thus, it can be seen from the above that the two agreements are purported to be made and in both the agreements, one of them is for the supply of goods and the other is for supply of services. It is submitted by the appellant that the '**AGREEMENT FOR SUPPLY OF SOLAR POWER GENERATING SYSTEM**' is a composite supply wherein the principal supply is for SPGS and hence the entire contract should be taxable @ 5%. As for the '**ENGINEERING AND CONSTRUCTION AGREEMENT',** it is argued that it is an independent contract for pure services and hence the said contract should be read and considered independent of the contract for supply of SPGS and should be taxable @18%.

39. It is seen from the agreement that though the parties have entered into distinct and separate contracts, one for the transfer of material and other for supply of services, this is in effect a single instrument embodying the intention of the parties. In turnkey projects more particularly of the kind involved in this impugned issue the same person has been entrusted with the responsibility of procuring the material and of erection and installation of equipment. Though as per the contention of the appellant, goods formed a predominant part of the contract, the obligation of the appellant under both the contract ceases only after the turnkey project becomes operational and after the final payment is made both for supply of material and for erection of the system.

It is seen from the supply agreement ('B' of the beginning of the agreement) that **the 'buyer desires to purchase end to end solar power generating system with various integral components'**. As per 2.1.1 of the supply agreement the supplier is required to perform all the actions including the 'design, engineering, manufacturing, inspection, testing of the equipment'. As per 3.1 of the services agreement, the appellant is required to perform the entire works including erection, testing and the commissioning of the equipment. The works have to be done as per the specification

manual which is not given in the agreement. However, the schedule-III of the 'Services' agreement defines the scope of work which includes-

a) Land development activity.
b) Construction of necessary roads and drainage system, boundary wall fencing, Bore wells.
c) All Civil and foundation works for Switchyard, solar plant and all other equipment.
d) Site enabling facilities.
e) Levelling and grading.

It also includes erection, testing and commissioning of solar modules, power

transformer, invertor etc.

- As per Clause 13 of the Service agreement, the appellant has agreed that it shall be responsible for carrying out all the tasks and responsibilities associated with the successful completion and commissioning of the 'Plant' on or before the "Work Completion Deadline'. 'Plant' is defined as ' the 60 MW (AC) Solar PV Power Project'.
- As per Clause 13.2 of the Service agreement, upon completion of the plant and only when the plant is fully and properly interconnected and synchronized, can the appellant issue a notice of completion and call upon the buyer to check the plant. It is only upon the joint examination of the plant that the Owner (buyer) can deliver to the appellant a 'Work Completion Certificate'.
- As per Clause 13.6 of the service agreement, it is agreed that the liability of the appellant shall not terminate upon the commencement of the commercial operations and it shall continue to be liable to rectify if any defect in the plant and be liable and responsible for the works done till the expiry of the defects.
- Schedule B of the Supply Agreement, which contains the 'Terms of Payment" specifically makes it clear that 5% of the payment will be made only on the successful plant completion.

40. The aforesaid clauses show that while the contracts are ostensibly two separate contracts, one for supply of material and other for rendering works and services, they are in fact one single indivisible contract. The goods supplied to the owner by the appellant are specifically brought for the purpose of the erection of the system. The appellant is entrusted with the work mainly for their expertise in erection and installation of the plant in the execution of turnkey project. ***The function relating to the supply of material and the rendering of services of erection and installation are integrally connected and interdependent.*** The terms of supply clearly show that the implementation schedule is not only for supply but also for erection, testing and commissioning of the plant. Schedule A of the supply agreement part II makes it clear that the complete supplies required for the construction of the **60MW (AC/81 MW DC) Solar PV** project shall be in the scope of the supply.

41. Thus, from the above it is seen that the supply of the goods and the supply of works are inextricably linked with each other. It is not that the appellant has been assigned with the work of supply of goods only. But the appellant has been given the task of setting up the 'Solar generating system'. Thus, though the agreements are made separately, it is one indivisible contract for the setting up of the solar power generating plant.

42. Clause 2.2.1 of the '**AGREEMENT FOR SUPPLY OF SOLAR POWER GENERATING SYSTEM**' shows that the document of title of the equipment imported and supplied is directly transferred to the Owner by way of High Seas Sale for commercial convenience. However it is further stated in the clause that,''... However as per this agreement, the risk and liabilities accruing in relation to all those equipment shall remain with the Supplier till the completion of the Project. After the completion of the project, the risk and liabilities are shifted to the lead Contractor. After the completion of the project, the risk and warranties are shifted to the Owner''. This shows that the risk and warranties are not shifted immediately to the Owner as it happens in a case of a pure supply of goods. The risk only shifts after the completion of the project. This shows that both the agreements though made distinctly, are intertwined and interdependent.

43. Clause 11.2 of the '**AGREEMENT FOR SUPPLY OF SOLAR POWER GENERATING SYSTEM**' says that the Supplier shall bear the risk of physical loss or destruction of or damage to the Equipment, Spare Parts and Material, regardless of whether the Buyer has title thereto until the date of Final Acceptance. If there is any loss or damage of the Equipment and Material till the date of Final Acceptance all amounts recoverable under the insurance shall be paid over to the buyer.'' The 'Final Acceptance' is defined in the Agreement as ''the date of commencement of commercial operations of the Plant, provided that if at any point with respect to the supply items are pending as on the date of commencement of commercial operations, the Final Acceptance shall be the date on which all pending supplies are completed in accordance with the terms of this Agreement, which date shall be intimated in writing by the Buyer to the Supplier.'' Thus, it is clear from the above clause that the insurance is ***incumbent upon the date of commencement of commercial operations and not on delivery of goods***. This also proves that the said Agreement is not an agreement of pure supply of goods as it is sought to be portrayed. It is not that the appellant is appointed by the buyer only for buying equipment but he is given the contract for setting up the plant. The letter sent by the appellant mentions the website as 'www.canadiansolar.com'.The Internet shows that Canadian Solar is one of the three biggest solar power companies in the world. Thus, what the appellant brings to the project is his expertise in procurement as well as erection/setting up /installation of the plant.

44. We would also like to refer to certain observations made by the Advance Ruling Authority in the instance case. The Authority has referred to Schedule A of the '**AGREEMENT FOR SUPPLY OF SOLAR POWER GENERATING SYSTEM**' and has observed that the Supplier (appellant) is appointed not merely to supply equipment but there is design and engineering work. Schedule J says that 'Specifications/Design basis for various equipment shall be mutually agreed between Supplier and Buyer

during the early engineering period'. Thus, the involvement of the appellant is from the engineering stage. The definition of 'Other Contractors' is also touched upon. This is defined as 'other contractors engaged by the Supplier to implement, operate and maintain the Plant'. We agree with the observations of the Advance Ruling Authority that this clause shows that the Supplier (appellant) would implement, operate and maintain the plant and thus the agreement does not stop at supply but extends to implementation, operation and maintenance as well.

45. An useful reference can be made to the Andhra High Court judgement in the case of M/s Larsen And Toubro Ltd (14 September, 2015 Nos. 22960 of 2007). In the case, all the petitioners had executed turnkey projects for different customers. They claimed that the goods supplied by them, for being used in the turnkey projects, were subsequent sales exempt from tax under Section 6(2) of the CST Act, import sales under Section 5(2) of the CST Act, and the respondents lacked jurisdiction to subject these transactions to tax under the AP VAT Act treating them as intra-state sales. The assessing authority also examined the question whether there can be a sale in transit, or a sale in the course of import, in a transaction of works contract. He held that, from the nature of the contracts awarded, it could be seen that the petitioner was required to supply the goods as per the supply contract; they were also required to execute the works themselves; the intention of both the contractor and the contractee was completion of the works involving supply of goods as well as labor and therefore the transaction is a 'works contract. The Court observed-

.. "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 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."

It further referred to a specific clause in the agreement as below-

.. "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'.

The Court concluded-

. "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''.

The above observations of the Hon'ble High court are clearly applicable in the present case. The functions relating to the supply of goods and the installation thereof are clearly inter-dependent and though distinct agreements are made they are linked to each other and are indivisible.

46. This brings us to the issue of whether the contract for the setting up of the solar power generation plant is a 'composite supply'. The term 'composite supply' is given under clause 30 of Section 2 of the CGST Act.

"composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

Illustration.— Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;

It is important to see the definition of 'principal supply' and goods along with the same.

"principal supply" means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;

A reading of the definition of 'composite supply' shows that there should be-

a. Two or more taxable supplies;
b. Of goods or services or both;
c. Or in combination thereof;
d. Which are naturally bundled and supplied in conjunction with each other;
e. In the ordinary course of business.
f. One of which is a principal supply.

47. The Contracts are two - one for the supply of goods and the other for the supply of services. The contract or the agreement fulfills the conditions of the 'composite supply'. There is supply of goods and services. They are naturally bundled in the sense that both the goods and services may require to fulfill the intention of the buyer in giving the contract. The supply of goods and services are provided as a package and the different elements are integral to flow of supply i.e. one or more is removed, the nature of the supply would be affected. Thus, we hold that though there are two agreements made one for the supply of goods and the other for the supply of services, what can be easily gathered from the tenor of both the agreements is that the buyer has given a contract for setting up SPGS to the appellant and therefore it is a single indivisible contract which involves element of two supplies- one for the supply of goods and other for the supply of services. By making two separate agreements – one for the supply of goods and the other for the 'supply for services' what is purported to be done is an artificial division of contracts which though done, cannot take away the true and inherent nature of the contract. It is a single supply of a **'SOLAR POWER GENERATING SYSTEM'** consisting of two or more taxable supplies.

This is clearly a case of composite supply of goods and installation thereof. The entire transaction of providing the goods and the services are naturally bundled- it is natural and also a practice to expect that a contractor who will supply the goods may also supply the services along with it.

48. The appellant has referred to certain decisions which have held that the Department cannot question the commercial wisdom of the parties entering into an agreement and must proceed on the basis that what is stated in the contract reflects the true nature of the intent and transaction and that it is therefore impermissible for the tax authorities to go behind the language of the contract or act contrary to it. Reliance in this regard is placed by the appellant on the decisions in the case of ***Union of India v. Mahindra and Mahindra [1995 (76) E.L.T. 481 (S.C.)] and Mirah Exports Pvt. Ltd. vs. Collector of Customs [1998 (98) E.L.T. 3 (S.C.)]***. In this respect we refer to the Supreme Court judgement in the case of **Bhopal Sugar Industries Ltd vs Sales Tax Officer, Bhopal on 14 April, 1977 (Equivalent citations: 1977 AIR 1275, 1977 SCR (3) 578).** The Apex Court has observed the following-

"It is well settled that while interpreting the terms of the agreement, the Court has to

look to the substance rather than the form of it. The mere fact that the word 'agent' or 'agency' is used or the words 'buyer' and 'seller' are used to describe the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that the said status would be conferred. Thus, the mere formal description of a person as an agent or buyer is not conclusive, unless the context shows that the parties clearly intended 'to treat a buyer as a buyer and not as an agent."

It is clear from the observations made by this Court that the true relationship of the parties in Such a case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the said relationship."

Thus, what the Supreme Court says above is that the form of the agreement is not important. it is rather the substance which has to be seen. The parties may use any words they like to suit their intention and it is therefore imperative that the agreement may not be taken as it is but its nature/substance has to be seen to arrive at the correct conclusions.

WHETHER IMMOVEABLE PROPERTY

49. Now, though, we have come to the conclusion that the same is a composite supply, we have to decide the issue about what would be the principal supply and whether it would be a supply of services or supply of goods. The ARA has held that the impugned transaction for setting up and operation of a solar photovoltaic plant which is in the nature of a 'works contract' in terms of clause (119) of Section 2 of the GST Act, and hence, should be taxable at the rate of 18%. The moot question, therefore, is whether the agreement before us is a 'works contract' as defined in clause (119) of section 2 of the CGST Act or otherwise. The definition of works contract is reproduced below.

(119) "works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or 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;

Clause 6 of the Schedule II lists the two composite supplies which shall be treated as supply of services. Clause 6(a) of Schedule II of the CGST Act states that Works Contract as defined in Clause (119) of Section 2 of the CGST Act shall be treated as 'supply of services'. .

From the definition it is clear that it defines only those supplies as works contract which are contracts for building, construction, fabrication etc of any immovable property. Whether the erection of the 'Solar Power Generating System' amounts to

erection of immovable property? In order to answer this question, we have to go through the clauses given in the agreement brought before us.

50. It can be seen from the definition that works contract involves activities of building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or 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. However, these activities should be in respect of immovable property. In order to decide whether the transaction is a works contract it is for us to decide whether it is in respect of immovable property. The term 'immovable property' has not been defined under the GST Act. The appellant has submitted certain judgments in his favour in defining the term and after going through same, we find that the following principles emerge:-

- If a machine is attached for operational efficiency, it does not become immoveable property.
- "The degree and nature of annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land." The English law attaches greater importance to the object of annexation which is determined by the circumstances of each case. One of the important considerations is founded on the interest in the land wherein the person who causes the annexation possesses articles that may be removed without structural damage and even articles merely resting on their own weight are fixtures only if they are attached with the intention of permanently improving the premises. 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.
- If the fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free then it cannot be called as 'Immoveable property'. .
- If the setting up of the plant itself is not intended to be permanent at a given place and if the plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed, then also it cannot be termed as 'Immoveable property'.

51. So, what to be seen above is that in deciding whether a property is movable property or otherwise, we have to see what is the mode of necessary annexation and the object of annexation. If object is so annexed that it cannot be removed without causing damage to the land then it gives a reasonable ground for holding that it was

intended to be annexed in perpetuity. Also whether the intention of the parties while erecting the system was that the plant has to be moved from place to place in the near future would also make a difference. We have to see by relying upon the above principles i.e. 1) mode of object of annexation 2) mode of annexation whether the plant was installed merely to make it wobble free or it is affixed to the earth. Also, it needs to be seen whether '***the setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the project for which it is set up is completed."***

Now, that we have discussed the above judgments, we shall see whether the present issue i.e. erection of the SPGS would be termed as immovable property. This needs to be done by criteria given by the various judgements.

52. Let us first understand what is meant by a Solar Power Generating System. The main equipment which as a whole constitutes a solar power generating system are solar panel consisting of solar cells (known as solar PV module), strings (series of multiple PV modules), string inverters, inverter to convert from DC power to AC power, Switchgears, Transformers and transmission lines etc. The entire mechanism of a SPGS is that solar panels/PV modules are connected together to create a solar array. Multiple panels are connected together both in parallels and in series to achieve higher current and higher voltage. The electricity produced by solar array is direct current, and therefore, inverters are required to convert Direct Current into Alternating Current and connection to utility grid is made through High Voltage Transformer.

The appellant has submitted in the write up that in setting up of a solar power generation plant, the following steps are involved:

- Soil and Topo Survey
- Plant coordinate fixing, Boundary fencing and Plant layout
- T/L Survey, Piling, Building Construction
- Structure erection, inverter erection, equipment foundation
- Charging transmission, DC system erection, module mounting
- DC cabling
- Commissioning of the solar power plant.

As part of the services contract, various services are provided including the following:

- Construction of complete buildings including control rooms and inverter rooms, roads and drainage system, boundary walls/ fencing, bore wells
- All civil and foundation works for switchyard, solar plant and all other equipment
- Site enabling facilities
- Leveling and grading

- Erection, commissioning and testing for solar modules, mounting structures, power transformers, inverters, SCADA, complete switchyard, inverter transformers, connectors, earthing lines etc.

53. There are generally two types of Solar Power System 1) Roof mounted 2) Ground mounted. The Solar Polar Generating System in the present case is a ground mounted or ground based Solar Power system. A simple ground mounted system (for a home), requires a customized positioning at the perfect angles for absorbing sunlight. In a ground mounted system, good planning is a big part of placing solar panel ground mounts as the installer has to choose a location that receives the ideal amount of daily sunlight and uses space effectively. Installing ground-mounted solar panels always starts with building a stable base. Traditional ground-mount systems, essentially all work the same—systems anchor to the ground and hold a large number of stacked panels, often two but sometimes three or four panels high. Two rails usually support each panel, whether oriented in landscape or portrait. The anchoring to the ground is the tough part of these installations, as there are many different **types of foundations.** If the soil is clear of debris, steel beams are driven into the ground and the racking system is attached to the beams. If ground conditions are not suited for smoothly driven beams, anchor systems may be used—helical piles, ground screws. These can take more time to install as they have to power through boulders and other large debris. It is usually a more complicated installation process than putting solar panels on a roof. When you have a roof installation, half of the structure is already built. All one has to do is to install racking and the solar array. However, with a ground mounted system, you essentially have to build the structure of the roof from scratch, so the solar panels have something to sit on. This means looking into or a deep examination of certain soil types, strict building codes, and earthquake risk. In that case, a soil engineer would look at the soil to determine its type and make adjustments to the foundation size and requirements of the design.

Once the foundation is ready, then one can start building pole mount systems and metal framing to hold the panels and other components. After building a frame and checking the foundation work, the panels are installed. The panels have to be carefully positioned. Finally, panels are wired to the inverter, trenches are dug and connections between the system and the property's electrical panel or solar home battery is buried.

54. What is described above is a solar power system for a home. What we have in the instance is a 'WHOLE SOLAR POWER GENERATION SYSTEM.' One look at the Agreements gives an idea of the scope of the work. The array of goods includes Solar PV Modules ,Inverters and Inverter Transformer, Tracker Components, Module Mounting Structure, Switchyard Supply, Transmission Line Supply, AC/DC Cables

,Chain Link Fencing ,Battery Charger, Power Transformer, LD Switchgear and complete switchyard, Inverter transformers and auxiliary transformers, Battery and battery charger, SCADA system, Module cleaning system, Illumination and ventilation system, Earthing system ,Site enabling facilities and Mandatory spares. The initial steps include the drawings and detailing of the system. As per Annexure A of the Services agreement, the list of drawings includes drawings of the site map which shows the solar equipment/switchyard/site office/access, the Solar Plant Layout showing the module and string layout/inverters/major cables/switchyard equipment evacuation point and transmission line, the Earthing layout, the Electrical diagrams/documents and drawings , the construction drawings which include the solar panel foundation arrangement/layout and detail of roads and drains, Architectural details and finishing schedule, building layout and details of foundations, trenches, grade slab, plinth beam, equipment foundations, roof etc. and drawings of the module supporting structures. **The above itself shows the huge work and detailing of the project.** The payment milestones shown in Schedule IV amongst others shows 5% against drawing submissions, **15% on completion of civil works, 15% against transmission line.** The Engineering and Construction Agreement ("**Services Agreement**") covers:

(a) the erection, installation and commissioning of the SPGS;

(b) **the civil works services in terms of construction of the foundation, roads and drainage, sub-station etc.**

All of the above (quoted from the details given by the appellant) goes to show that the erection of the solar power generating system is not as simple or movable as it is made out to be. It is an entire system comprising a variety of different structures which are installed after a lot of prior work which involves detailed designing, ground work and soil survey. As said earlier, the amount of drawings done indicates the magnitude of the work done. Solar systems tend to be tailored specifically to fit the dimensions and orientation of the needs of the project. It is not easy to move them from one place to the other. Rather moving them from one place to other would be imprudent. Moving them to a new location would mean retrofitting the system on to a property they simply weren't designed for, meaning that they would be much less efficient. It would not be in the interest of the buyer to move it from one place to the other. Thus, the project fulfills both the conditions of an immoveable property – The mode of annexation shows that the groundwork, being the necessary foundation, is an important part of the project. The object of annexation, as said earlier, cannot be to make it movable from one place to the other. It simply cannot be equated to the Asphalt mix (the issue in Solid &Concrete Engg case) which was intended to be moved from one place to another. In the present case, we have seen that the detailing of the system being what it is, it cannot be called a 'simple machine' by any stretch of imagination. The PV module may be an important part of the system but what is intended to be bought is not the PV module but an entire system. Thus, we

affirm the conclusion drawn by the ARA that the Agreements made lead to the erection of a Solar Power generating System.

55. We shall refer to certain judgments in this regard. The Advance Ruling Authority has referred to the Supreme Court judgment in the case of M/S. T.T.G. Industries Ltd., vs Collector Of Central Excise, ... on 7 May, 2004 Appeal (civil) 10911 of 1996. The contract here was for the design, supply, supervision of erection and commissioning of four sets of Hydraulic Mudguns and Tap Hole Drilling Machines required for blast furnace and the issue was whether the same is immoveable property. The Apex Court observed-

.. " Keeping in view the principles laid down in the judgments noticed above, and having regard to the facts of this case, we have no doubt in our mind that the mudguns and the drilling machines erected at site by the appellant on a specially made concrete platform at a level of 25 feet above the ground on a base plate secured to the concrete platform, brought into existence not excisable goods but immovable property which could not be shifted without first dismantling it and then re-erecting it at another site. We have earlier noticed the processes involved and the manner in which the equipments were assembled and erected. We have also noticed the volume of the machines concerned and their weight. Taking all these facts into consideration and having regard to the nature of structure erected for basing these machines, we are satisfied that the judicial member of the CEGAT was right in reaching the conclusion that what ultimately emerged as a result of processes undertaken and erections done cannot be described as "goods" within the meaning of the Excise Act and exigible to excise duty."

In the above case, the Supreme Court took note of the fact that the various components of the Mudguns and the Drilling machines are mounted piece by piece on a metal frame, and the components are lifted by a crane and landed on a cast house floor 25 feet high. The volume and weight of these machines are such that there is nothing like assembling them at ground level and then lifting them to a height of 25 feet for taking to the case house floor and the to the platform over which it is mounted and erected. It observed that the machines cannot be lifted in an assembled condition and after taking note of these facts, it concluded that the same is immoveable property. ***The Court further held that it cannot be disputed that such Drilling Machine and Mudguns are not equipment which are usually shifted one place to another nor it is practicable to shift them frequently***. The court also referred to its own judgments in the case of Quality Steel Tubes (P) Ltd. 75 ELT 17 (SC) and Mittal Engineering Works (P) Ltd. 1996 (88) ELT 622 (SC). In the case of Quality Steel Tubes (cited supra), the court held that goods which are attached to earth and thus become immovable did not satisfy the test of being goods within the

meaning of the Act. It held that tube mill or welding head is immovable property. In the case of Mittal Engineering Works, the issue was whether mono vertical crystallisers is goods (in which case it would be excisable or immovable property). The mono vertical crystallisers is fixed on solid RCC Slab. It consists of bottom plates, tanks, coils, drive frames, supports etc. It is a tall structure rather like a tower with a platform. It was decided by the Court that the said product has to be assembled, erected and attached to the earth by a foundation and therefore not goods but immovable property.

56. We shall also refer to the Supreme Court decision in the case of Duncans Industries Ltd vs State Of U.P. & Ors on 3 December, 1999 where the SC had to decide whether the 'plant and machinery' in the fertilizer is 'goods' or 'immoveable property. The Apex Court held that the same is immoveable property and observed the following-

.. *"The question whether a machinery which is embedded in the earth is movable property or an immovable property, depends upon the facts and circumstances of each case. Primarily, the court will have to take into consideration the intention of the parties when it decided to embed the machinery whether such embedment was intended to be temporary or permanent. A careful perusal of the agreement of sale and the conveyance deed along with the attendant circumstances and taking into consideration the nature of machineries involved clearly shows that the machineries which have been embedded in the earth to constitute a fertiliser plant in the instant case, are definitely embedded permanently with a view to utilise the same as a fertiliser plant. The description of the machines as seen in the Schedule attached to the deed of conveyance also shows without any doubt that they were set up permanently in the land in question with a view to operate a fertilizer plant and the same was not embedded to dismantle and remove the same for the purpose of sale as machinery at any point of time. The facts as could be found also show that the purpose for which these machines were embedded was to use the plant as a factory for the manufacture of fertiliser at various stages of its production. Hence, the contention that these machines should be treated as movables cannot be accepted."*

Thus, what can be seen from the above is that when machines are embedded with no visible intention to dismantle them and they are intended to be used for a fairly long period of time, they are 'immoveable property'.

57. The appellant has produced a certificate from a Chartered Engineer stating that the 'Solar Power Plant is made of equipment which are largely moveable in nature, if required, the equipment can be moved from one land parcel to another. This may happen in cases where there is a requirement to shift the whole Solar Power Plant

from one area to another area or is being sold to a party who intends to install/set it up in another area, the equipment installed can be dismantled and reassembled at the new land parcel with material'. It may be true that the Solar power plant can be moved from one place to other but for the enjoyment of the equipment or for the smooth generation of electricity the panel is required to be affixed to the earth. Also of paramount importance here is the 'object of annexation'. Is there an intent to move the plant from one place to other? Of course, not. There is no feasibility in moving the plant from one place to another. There can be no intention of both the parties to move the plant from one place to another. The fact that it can be moved is immaterial.

58. The appellant has also produced a letter from the 'Ministry of New and Renewable Energy' dt 3.4.2018. However, the same denotes the understanding of the Ministry regarding the GST treatment for solar sector and cannot be taken as legal advice/opinion. The letter itself clarifies in the end that the same is not a legal advice or an opinion. The issue of classification or determination of the agreements have to be done with respect to the laws and relevant provisions which are certainly not in the domain of Ministry of New and Renewable Energy.

59. The appellant has also produced order of the CBEC under Section 37B (Order No 58/1/2002 –CX dt 15.1.2002). The order gives directions as to what would be excisable goods and what would not (immoveable property).The clarification says in Para 5 (i) that 'Turnkey projects like Steel plants, Cement Plants , Power plants etc involving supply of large number of components , machinery, equipment, pipes and tubes etc for their assembly /installation/ erection/integration/inter-connectivity on foundation/civil structure etc at site will not be considered as excisable goods for imposition of central excise duty =the components would be dutiable in normal course.'' The clarification therefore holds the erection of plants as immoveable property and not goods.

The appellant has submitted that under Section 9(1), the Government is enabled to issue notifications prescribing the rate *qua* "goods", "services" or "both". In the present case, as per S. No. 234 of Notification 1/2017, the Government has chosen to tax solar products in a particular manner:

Devices and parts Solar power generating system Photo voltaic cells	}	all at 5%

Hence, the clear legislative intent is that at all levels, from part to system, GST will be payable at 5%. In fact, the effective rate for such contracts even prior to GST was approx. 3%, and an application of the "equivalence principle" also affirms that the

intent of the Government was never to tax the entirety of the goods and services in relation to setting up an SPGS at a significantly higher rate of 18%.

The said notification is reproduced below:

Sl. No.	*Chapter / Heading / Subheading/ Tariff item*	*Description of goods*
234.	*84, 85 or 94*	*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*

The above description in the notification shows the description of goods as 'Following renewable energy devices and parts for their manufacture'. The term 'devices' is very important here. A device means an object. The Oxford dictionary defines 'device' as 'an object or a piece of equipment that has been designed to do a particular job'. The 'solar power generating system' described in the entry is used in the sense of a device. Also, we have decided the instant case on the facts and circumstances of the case. After going through the entire contract/agreement we have come to the conclusion that the agreement leads to an erection of a 'solar power generating system' which is immoveable property. Therefore, merely because a schedule entry is provided for the same does not mean that the product would be classified in the same.

60. **WHERE OTHER PARTS AND COMPONENTS ARE SUPPLIED BY THE CONTRACTOR (NOT PV MODULES), WHETHER THEY WOULD ALSO BE ELIGIBLE TO CONCESSIONAL RATE OF 5% AS PARTS OF SOLAR POWER GENERATION SYSTEM?**

61. The Advance Ruling Authority had not given any ruling on the above on the following grounds, ' In the absence of any document before us, we would not be able to deal with this question in the present proceedings.'

62. The Appellant has not produced any document or agreement before us incorporating such a situation. In the absence of any written agreement showing the terms and conditions, it would be both difficult as well as incorrect for us to determine the same. The situation now is the same as it was before the Advance ruling authority. There being no change in situation, there is nothing we can add. Also, as an 'appellate authority' we can decide issues already decided and appealed against. There being no decision given by the advance ruling authority, we cannot give any decision in appeal.

63. **WHETHER BENEFIT OF CONCESSIONAL RATE OF 5% OF SOLAR POWER GENERATION SYSTEM AND PARTS THEREOF WOULD ALSO BE AVAILABLE TO SUB CONTRACTORS?**

64. The Advance Ruling Authority had not given any ruling on the above on the following grounds,' In the absence of any document before us, we would not be able to deal with this question in the present proceedings.'

65. This is also a situation where the facts and circumstances are not clearly delineated. We do not have any document/agreement which would show what solar parts are supplied by the sub-contractors. Also, it is not known as to whether a complete system is purported to be sold or the parts thereof. Therefore, in the absence of any documents we cannot give any decision in the said case Also, as an 'appellate authority' we can only decide issues already decided and appealed against. There being no decision given by the advance ruling authority, we cannot give any decision in appeal.

66. **JUDGEMENTS QUOTED BY THE APPELLANT-**

Apart from the judgements already discussed above, we also discuss here the other judgements quoted by the appellant.

- **Rajasthan Construction-** The judgement is given under the provisions of the Central Excise Law. Also, there was no case of any agreements made which had to be decided on the touchstone of law but a case of classification.
- **Phoenix Construction Technology (2017 TIOL-3281-CESTAT-AHM).** The question here for consideration was whether the structures and parts of structures are parts of solar power plant and eligible for the benefit of Notification. This issue is also different from the issue before us.
- **Jindal Strips (2002-TIOL-347-CESTAT-DEL-LB)-**This decision is on the classification of components and not germane to the issue before us.

- **Sri Velayuthaswamy Spinning Mills (2013 (2) CTC 551) Perumal Naicker vs T Ramaswami Kone (AIR 1969Mad 346)-** In the Velayuthaswamy case the issue was whether setting up of windmills can be treated as movable property for the purpose of payment of stamp duty. It was decided that windmills were installed on the cemented platform on the land for running of windmills and not for the benefit of the land and hence the same are to be considered as movable property. In the Perumal Naicker case the issue was whether the engine and pump set were an immoveable property. We have discussed in detail with reference to judgements and the principles enunciated therein as to how the 'Solar Power Generating System' would be an immoveable property. Also, the facts in these cases are different. There is no case of a foundation in the instant case nor is there is any case of merely an engine/pump installed.
- **Gemini Instratech Pvt. Ltd. Vs. Commissioner of Central Excise, Nashik [2014 (300) ELT 446 (Tri. - Mum)Elecon Engineering Co. Ltd. Vs. Commissioner of Customs [1998 (103) ELT 395 (Tri)] Pushpam Forging Vs. CCE, Raigad [2006 (193) ELT 334 (Tri. - Mumbai)] CCE Vs. Megatech Control Pvt. Ltd. [2002 (145) ELT 379 (Tri. - Chennai) Ballarpur Industries (1995 (56)ECR 646)SC) Sealol Hindustan Ltd (1988 (17) ECR 186 (Bombay)** All these cases are quoted with respect to the 2nd question posed by the appellant .As we have not given any decision in the said case in the absence of arguments, we do not feel the need to discuss the cases.

Accordingly, we pass the following order:

ORDER

In view of the above discussions and findings and in terms of Section 101(1) of the CGST Act 2017 and MGST Act 2017, we hold that-

67. **WHETHER IN CASE OF SEPARATE CONTRACTS FOR SUPPLY OF GOODS AND SERVICES FOR A SOLAR POWER PLANT, THERE WOULD BE SEPARATE TAXABILITY OF GOODS AS 'SOLAR POWER GENERATING SYSTEM' AT 5% AND SERVICES AT 18%?**

The agreements tendered in support of this question are for setting up and operation of a solar photovoltaic plant and are in the nature of a 'works contract' in terms of clause (119) of section (2) of the GST Act. Schedule II (Activities to be treated as supply of goods or supply of services) treats 'works contract' u/s 2 (119) as supply of services .Depending upon the nature of supply, intra-state or inter-state , the rate of tax would be governed by the entry no 3(ii) of the Notification No 8/2017-Integrated Tax (rate) under the Integrated Goods and Services Tax Act, 2017 (IGSTAct) or the Notification no 11/2017 Central Tax/State Tax (Rate)under the CGST

Act and MGST Acts. The rate of tax would be 18% under the IGST Act and 9% each under the CGST Act and the MGST Act, aggregating to 18% of CGST and MGST Act.

68. **WHERE OTHER PARTS AND COMPONENTS ARE SUPPLIED BY THE CONTRACTOR (NOT PV MODULES), WHETHER THEY WOULD ALSO BE ELIGIBLE TO CONCESSIONAL RATE OF 5% AS PARTS OF SOLAR POWER GENERATION SYSTEM?**

The Appellant has not produced any document or agreement before us incorporating such a situation. In the absence of any written agreement showing the terms and conditions, it would be both difficult as well as incorrect for us to determine the same. The situation now is the same as it was before the Advance ruling authority. There being no change in situation, there is nothing we can add. Also, as an 'appellate authority' we can decide issues already decided and appealed against. There being no decision given by the advance ruling authority, we cannot give any decision in appeal.

69. **WHETHER BENEFIT OF CONCESSIONAL RATE OF 5% OF SOLAR POWER GENERATION SYSTEM AND PARTS THEREOF WOULD ALSO BE AVAILABLE TO SUB CONTRACTORS?**

The Appellant has not produced any document or agreement before us incorporating such a situation. In the absence of any written agreement showing the terms and conditions, it would be both difficult as well as incorrect for us to determine the same. The situation now is the same as it was before the Advance ruling authority. There being no change in situation, there is nothing we can add. Also, as an 'appellate authority' we can decide issues already decided and appealed against. There being no decision given by the advance ruling authority, we cannot give any decision in appeal.

RAJIV JALOTA
(MEMBER)

SUNGITA SHARMA
(MEMBER)

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