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/16/2019-20Date- 11.11.2019

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER
(2) Shri RajivJalota, MEMBER

GSTIN Number	27AAAFN0812H1ZP
Legal Name of Appellant	Nikhil Comforts
Registered Address	1003,Sampada, Arunodaya Nagar, Mulund (East) Mumbai 400 081
Details of appeal	Appeal No. MAH/GST-AAAR-16/2019-20dated 13.08.2019against Advance Ruling No. GST-ARN-127/2018-19/B- 59 Dated 24.05.2019
Jurisdictional Officer	Dy. Commr. of SGST, (E-623), LTU-II, Mumbai

PROCEEDINGS

(Under Section 101 of the Central Goods and Services Tax Act, 2017 and the MaharashtraGoods 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 **Nikhil Comforts**(herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARN-127/2018-19/B- 59 dated 24.05.2019.

Brief Facts of the Case

A. M/s Nikhil Comforts is a Partnership Firm, registered under the Indian Partnership Act, 1932 and having its registered office at 1003,Sampada, Arunodaya Nagar, Mulund (East) Mumbai 400 081 and sales office at Ground & 1st floor, Mulund Utkarsha CHS Ltd., Sajjan Wadi, Mithagar Road, Mulund (East), Mumbai 400 081. The firm is registered under the GST Act having GSTIN No. 27AAAFN0812H1ZP.

B. M/s Nikhil Comforts entered into an agreement with Goa State Infrastructure Development Corporation Ltd. (in short GSIDC) for execution of**Additional Air-conditioning work for the New building of Director of Education at Porvorim, Goa.**" GSIDC desires to get air-conditioning work for new building of Directorate of Education at Goa and Nikhil Comforts has agreed to do the works of supply of goods and services for agreed price.

C. **Goa State Infrastructure Development Corporation Limited (GSIDC)**is a wholly owned Government Company of the Government of Goa registered under the Companies Act, 1956, with the Registrar of Companies, Panaji-Goa. The Registrar of Companies has allotted Certificate of Incorporation No.U75112GA2001SGC002954 (CIN) dated 20/02/2001. GSIDC has been floated by the Government of Goa as a Special Purpose Vehicle (SPV) for speedy implementation of all the Infrastructural Projects, envisaged by the Government like Roads, Bridges, Fly-Overs, Bus-Stands, Hospitals, Tourism related Projects, etc., all over the State on the similar lines of similar Corporations in other States. This would help in development of infrastructural facilities all over the State of Goa. This Corporation would act as a coordinating agency for implementing all the projects.

D. **The appellant has sought advance ruling through GST-ARN application no 127 dated 26/02/2019 to determine the nature of transaction and rate of tax under SGST Act/CGST Act the question framed are as follows:**

Question No 1: The transaction would be classifiable to cover under the definition of "works contract" liable to CGST/SGST/IGST covered under Sr. No. 3 item no 3 of notification no. 20/2017(Central tax rate) dated 22/08/2017.

OR

Question No 2: The transaction is Composite supply liable to tax @ 14% being principal goods involved is Air Conditioner which falls to cover under schedule IV, Sr. No 119 of notification No. 1/2017 (Central tax rate) dated 28/06/2017

E. The Advance Ruling Authority has answered the question No 1 negative and the question no 2 positive i.e. the Advance Ruling Authority has held the activity of the appellant as "Composite Supply". Aggrieved by the order of the ARA dated 24/05/2019, this present appeal is filed.

F. AGREEMENT FOR PROVIDING AIR CONDITIONING SYSTEM:

1. Goa State Infrastructure Development Corporation Ltd has floated tender notice No. GSIDC/ENGG/NIT-13/2018-2019 dated 19th April 2018. Nikhil Comforts is selected as the successful bidder. GSIDC has issued letter of acceptance through letter no GSIDC/Engg /Works/450/Elect/1281/dated 24th May 2018. In pursuant of which your appellant M/s Nikhil Comforts entered into an agreement with GSIDC dated 21/08/2018. [copy of acceptance letter, copy of agreement and copies of tender documents are attached]
2. Clause (1) of the agreement reveals that " In this Agreement the words and expressions used shall have the same meaning as are respectively assigned to them as mentioned in the general conditions of the contract in tender documents of "Additional Airconditioning work for the new building of Directorate of Education at Prorvorim, Goa" and shall be deemed to form and read and construed as part of this Agreement"
3. Clouse 6 of the Agreement read thus-

   "The following documents shall be deemed to form and be read and construed as part of this Agreement viz.

   i) Tender Documents for "Additional Airconditioning work for the new building of Directorate of Education at Porvorim,, Goa" Volume I
   ii) Tender Documents for "Additional Airconditioning work for the new building of Directorate of Education at Porvorim, Goa" Volume II
   iii) Tender Documents for "Additional Airconditioning work for the new building of Directorate of Education at Porvorim,, Goa" Volume III
4. **Clause GCC 16 of tender document Volume – I speaks about PART OF PERMANENT WORK DESIGNED BY THE CONTRACTOR (pg. 29 -30 of VOL -I)**

The Contractor shall design part of permanent work, wherever Contract provides, and submit to the Engineer for approval. The cover drawings, calculations, Specifications, operation and maintenance manuals and other information as shall be necessary to satisfy the Engineer as to the suitability and the adequacy of the design. Approval by the Engineer under this clause shall not relieve the Contractor of any responsibilities under this Contract.

5. **Clause GCC 48 of tender document Volume – I speaks about MATERIAL AND WORKMANSHIP (pg. 38 Vol -I)**

A) Manner of Execution

All Materials to be supplied shall be manufactured and all Works to be done shall be executed, in the manner set out in the Contract. Where the manner of manufacture and execution is not set out in the Contract, the Works shall be executed in a proper, workmanlike and careful

manner with properly equipped facilities and non-hazardous materials and in accordance with recognized good practice.

B) Delivery to Site

The Contractor shall be responsible for procurement, transportation, receiving, unloading and safekeeping of all materials, Contractor's equipment and other things required for the completion of the Works

6. **GCC54 TESTS ON COMPLETION (pg 41 of Vol -I)**

A) Contractor's Obligation

The Contractor shall carry out the tests on completion, if any, in accordance with this clause and the Clause GCC 48 (D)'Testing', after providing the documents in accordance with Clause SCC 8 "As-Built Drawings" and Clause 41 (E) "Operation and Maintenance Manual". The Contractor shall give, the Engineer, 21 days' notice of the date after which the Contractor will be ready to carry out the Tests on completion. Unless otherwise agreed, such Tests shall be carried out within 14 days after this date, on such day or days as the Engineer shall instruct. In considering the results of the test on completion, the Engineer shall make allowances for the effect of any use of the Works by the Employer on the performance or other characteristics of the Works. As soon as the Works, have passed the tests on completion, the Contractor shall provide the Engineer and the Employer with a certified report of the result of all such tests.

B) Delayed Tests

If the tests on completion are being unduly delayed by the Contractor, the Engineer may by notice require the Contractor to carry out such tests within 21 days after the receipt of such notice. The Contractor shall carry out such tests on such day or days within that period as the Contractor may fix and of which he shall give notice to the Engineer. If the Contractor fails to carry out the tests on completion within 21 days, the Engineer may himself proceed with such tests. All such Tests so carried out by the Engineer shall be at the risk and cost of the Contractor. These tests on completion shall then be deemed to have been carried out in the presence of the Contractor and the results of such tests shall be accepted as accurate.

7. **Clause 2.2.2 of vol. I of tender document (page-16) defines SCOPE OF THE WORK**

The Scope of the Work is defined as "The scope of a "Additional Air Conditioning work for the new building of Directorate of Education at Porvorim, Goa." as defined in BOQ. (page no 16 of the tender document Vol. I)

8. **The scope of work as per Bill of Quantity (BOQ) is as below**:

Item 1.

EQUIPMENTS

Supply, Installation, Testing and Commissioning (SITC) of the following Indoor and Outdoor units of the VRF/VRV System consisting of Inverter/Fixed scroll compressor. The outdoor unit shall have minimum two scroll compressors with at least One Inverter scroll compressor out of the mand shall be with environment friendly R410 A refrigerant. It should include anti-vibration pads, mounting arrangement, freight, lifting, shifting and positioning of Indoor and Outdoor units at respective locations.

Item 2
COPPER REFRIGERANT PIPING

Supply, Installation, Testing and Commissioning of Hard Copper Refrigerant Piping including insulation. The insulation for all suction pipes shall be with19 mm thick and all liquid pipes shall be with 13mm thick Nitrile Rubber Foam in sleeve form.

Item 3
DRAIN PIPING

Supply and fixing of Hard UPVCD rain piping for the indoor units with Insulation of Nitrile Rubber pipe section thickness of 6 mm as per specification and suitable for following pipe sizes:

Item 4.1
ELECTRICAL WORKS

Supplying and Erecting approved make 160 kVA,3 phase, 50c/s Oil immersed and naturally cooled outdoor type, Copper wound transformer with Energy Efficiency Level -2, BIS Standard with delta connected. on HV side & star connection on LV side with additional neutral brought out on load side, Temp rise should not Exceeding 4000 C by the rmo meter in oil and 4500C by the resistance in winding at full load rating, voltage rating 11/ 0.433 kV with HV tapping(with off load tap changer) Tappings on Transformer For Off Load +5 to -10 in Steps of 2.5% ,with standard accessories complete with Test Certificate with losses below 670 watts at 50% load, 1950 watts at 100% load as per IS:1180 - 2014Level II as per specification No SS-TR. with necessary permission of Electrical Inspector

Item 5.1
EARTHING

Earthing with GI earth plate 600 mmx600 mmx6mm thick including accessories and providing masonry enclosure with CI/RCC cover having locking/Lifting arrangement and watering pipe etc. (but without charcoal or coke and salt) as required as per the Earthing Drawing provided by the Engineer-In charge. The scope of work includes the following: a) Excavation of pit of size1.0x1.0x3.0 mtrs. (min) and disposal of excavated soil. c) Watering GI pipe, 20mm, Class B, with funnel as per specs. d) Charcoal/salt as per specs (paid separately). e) Refilling the pit of size 1.0x1.0x3.0mtrs (min) with soft black agriculture soil of minimum resistivity/transportation. e) Masonry chamber with proper foundation, cover plate and locking arrangement. f) Testing of earth value with earth megger and certification so fits

value. Aluminum tag with embossed ear thing value to be attached to the pipe. g) watering arrangement (plumbing will be paid separately). (a)Insoilystrata

Item 5.2

Earthing with copper earth plate 600mmx600mmx3mm thick including accessories and providing masonry enclosure with CI/RCC cover having locking/lifting arrangement and watering pipe etc. (but without charcoal or coke and salt)as required as per the Earthing Drawing provided by the Engineer-In charge. The scope of work includes the following: a)Excavation of pit of size 1.0x1.0x3.0 mtrs(min) and disposal of excavated soil. c) Watering GI pipe, 20 mm Class B,with funnel as per specs. d) Charcoal/salt as per specs(paid separately). e) Refilling the pit of size 1.0x1.0x3.0 mtrs (min) with soft black agriculture soil of minimum resistivity/transportation. e) Masonary chamber with proper foundation, cover plate and locking arrangement. f) Testing of earth value with earth megger and certifications of its value. g)watering arrangement(plumbing will be paid separately). (a) in soil strata

Item 6.1

MISCELLANEOUS

Supplying and erecting Iron, sheet metal work consisting of CR CA Sheets, Various sections of iron, Plates, Chequered Plates, Rods, Bars, MS pipes, etc. for panel board or any other purposes complete with bending, cutting, drilling and welding complete erected at the position with necessary materials duly painted with one coat of red oxide and two coats of enamel paint to match the switchgears or as per directions by the authority.

The summery and the cost of above items as per the BOQ is as under:

Name of Project: - "Additional Air Conditioning work for the new building of Directorate of Education at Porvorim, Goa."		
BILL OF QUANTITIES - VOLUME III		
Name of Bidder		**Nikhil Comforts**
Item No.	**Description**	**As per PO**
		Amount (Rs.)
1	EQUIPMENTS	2887872
2	COPPER REFRIGERANT PIPING	305645
3	DRAIN PIPING	62869
4	ELECTRICAL WORKS	2015037
5	EARTHING	224882
6	MISCELLANEOUS	33250
	GRAND TOTAL IN FIGURES RS.	**5529555**

G. BRIEF DETAILS OF WORK OF AIR CONDITIONING:

- The VRF system of each premise is unique in terms of configurations and the sizing and selection of various components. Depending on the interior layout and the orientation of the building, the indoor and outdoor units are selected. The refrigerant piping path is decided as per the site condition. Based on this configuration and path, the refrigerant piping and the branching joints vary from site to site. The refrigerant pipes and branching joints are joined by brazing and are insulated. Thus, the entire VRF system is a network of indoor and outdoor units connected by refrigerant piping and branching

joints, suitably sized as described above. This entire network is tested for leakages and then vaccumised and charged with a specifically calculated quantity of gas. The entire network is controlled by microprocessors in indoor and outdoor units which communicate with each other through interconnecting communication cables. The commissioning process involves addressing of various components of network which is unique to each site.

- This VRF system cannot be used and installed at any other site as it is, since the configuration of the new site will be different in terms of various components of the system. The system will need to be dismantled, de-gassed and modified significantly and re-erected for use at another location. Many of the components of this system will either get damaged during dismantling or will not be suitable at the new site and will need to be replaced with components of different capacity and size. Hence, this qualifies as a plant and cannot be compared with a simple split air-conditioner.
- This is 60 TR (72HP) AC plant as per tender BOQ which includes outdoor units and multiple indoor units with specific copper pipe sizes and predetermined pipe route. This system is efficient replacement of Chiller, Air handling units, chilled water piping and ducting etc. With the advent of new technology, Chiller plant is being replaced by VRF system / plant.

H. FOLLOWING IS THE SEQUENCE OF ACTIVITIES IN A CHRONOLOGICAL ORDER DURING EXECUTION OR COMPLETION OF AN AIR-CONDITIONING PROJECT –

- **STUDY OF TENDER DOCUMENTS AND SITE SURVEY –** Tender documents and drawings are thoroughly studied by HVAC design and planning engineer. The physical site survey is done by the design engineer and draftsman team and taking all the site details like area to be air conditioned, Orientation of building, exposed glasses, walls and its area, beam locations and its height beam, drain locations, outdoor unit locations etc.
- **HEAT LOAD ESTIMATION –** Based on tender Design Basis Report and actual site survey, a fresh Heat-Load estimation is prepared and submitted to consultant for their further approvals. These heat-load calculations is different for different sites and depends upon application, building orientation, exposed glass area, wall thickness, number of people in the building, lighting and equipment heat generation.
- **PREPERATION AND APPROVAL OF SHOP DRAWINGS –** As per approved heat-load estimation, type and capacities of VRF Air-conditioning equipment are selected. Selection of equipment shall also in line with better efficiency, site constraint, it's performance, appropriate space for maintenance and best suitable for hassle free, safe installation.
- **The selected machines differ from room to room in terms of capacity and type.**

Once machine selections are approved by the consultant, detailed Shop drawing (AutoCAD format) is prepared with selections of various ancillaries.
Shop drawing includes Indoor locations, outdoor locations, equipment installation details, the size and route of interconnecting copper pipes, Indoor Y-branches, Outdoor T-Branches, The size and route of cable trays, The size and route of drain pipes, the size and route of interconnecting communication cables and power cables. These layouts are approved by the HVAC consultant, Architect and client.

- **PREPERATION AND APPROVAL OF TECHNICAL SUBMITTALS –** With reference to the approved tender makes and specifications, technical submittals are prepared. The technical submittals include the technical specifications of the material / product to be installed. These also differ from project to project. The HVAC consultant / Client provide the approval for procurement of material.
- **QUANTIFICATION AND PROCUREMENTS OF MATERIAL-** The approved shop drawing is used to estimate / count the material / machines to be required to execute the project. Based on the estimation material procurement request were sent by planning team to purchase departments and further procurement takes place.
- **DELIVERY OF MATERIAL AT SITE –** Based on the project requirement the material can be delivered in multiple phases. This are typical based on the site development and storage space available at site. For example, supporting media like anchor fasteners, nut-bolt, angles are installed prior to installation of cable tray, copper pipes, machines etc. The site manager verifies the material specification and quantity at the time of delivery.
- **INSTALLATION** - Before commencement of any installation work, the project manager, engineer and site supervisor study the approved shop drawing thoroughly.
- The markings are done for indoor unit locations, outdoor unit locations, copper pipes, cable trays and cabling as shown in approved shop drawings.
- As per marking, the respective supports are installed for indoor unit, copper pipes, cable trays and drain piping. These supports are permanently fastened to the slab by means of female anchor fasteners, full threaded rod and angles. The supporting activity involves the drilling work in slabs / walls, fabrication works like cutting, welding angles/ full threaded rods. Since supports vary in sizes as well as the entity to be supported.

- The back plate of hi-wall unit is properly / rigidly fixed to the wall. Similarly, cassette units are fixed from slab with the help of female anchor fastener and full threaded rod.
- Outdoor units are installed on MS Platform / stand which permanently fastened to Concrete foundation with the use Male Anchor Fastners.
- IN VRF systems multiple indoor units are connected to bank of outdoor units. The interconnection pipe size and Y-Branch sizes are software generated. The output containing main header copper pipes, branching pipes and Y-branch sizes differ for different combination of indoor units, their sequence. These software outputs are project specific to the project. The change in pipe sizing will affect the working as well as performance of the entire VRF system. Hence it is highly important to follow the shop drawing and software output while installation of copper pipes. The hard copper pipes are cut to exact lengths and bent by using copper elbows and joined by using copper coupling with the help of brazing process to make a continuous one single pipe for suction and other single pipe for liquid gas. The Y branching joints to split the copper piping and take it to next indoor unit. The pictorial view of the piping network is attached herewith. Proper precautions have to be taken while joining the Elbows, Socket couplings, reducers and offset pipes. The route of the piping to be strictly followed while execution.
- The installation of cable trays requires more fabrication work in terms of cutting the cable trays in accurate lengths, fixing of branch trays, elbow and intermediate tray joints. The Cable trays are fastened to the slab or wall by fastening Female Anchor Fasteners to slab and then joined by using full threaded rods and supported by MS angle.
- Drilling, fixing of saddle screw for the laying of communication and power cable. As per requirement for laying of conduit trenching required through wooden and civil opening, Gypsum or Core cut etc. Cable is passed and later the affected area to be finished and make it concealed. Communication Cable cutting is done as per drawing and site requirement measurement.
- As per shop drawing and selection of machine, the dia and length of drain pipe is decided. Accordingly cutting and bending of the drain pipe is done. Insulation of the drain pipe is done as per approved specification. As per the requirement at site condition, trenching is done in the wall and / or civil opening is made and drain piping is laid.Later they are made concealed. The joining of the drain pipes is done using Adhesive or fusion joint so that there shall not be leakage of water. Once drain line is fixed and joints are concealed it cannot be removed.

I. **TESTING AND COMMISSIONING OF SYSTEM –**

- After the completion of Installation of the machines/Units and before closing of ceiling, pressure testing of the copper piping, Intermediate connections, Y- branching joints is carried out by using Nitrogen gas.
- Apply test pressure in the system as per the OEM Requirement.
- Pressure testing is done by holding the pressure for 24 hours and doing soap bubble test for any leakage at the joints. Removal of the insulation at the location of leakage detection. Post which brazing and other process is follow.
- Vacuumization of entire VRF Refrigeration system.
- Start Commissioning procedure for VRF unit as per OEM guidelines
- Check for visual damage to the external casing of the unit or damage to the internal parts.
- Confirm room is in a condition fit for commissioning to commence. Room cleaned and free of dust, secure with doors installed.
- Start Commissioning procedure for VRF unit as per OEM guidelines
- Release Refrigerant gas from outdoor unit. Charge additional refrigerant gas as per the copper pipe sizes and overall length.
- Room wise temperature reading is prepared on hourly basis.

J. It is summarized that supply/installation/erection and assembly of complete Air Conditioning plants were procured by the company and various equipment/components/material/parts and accessories were brought to the site of the customers GSIDC. The plant is installed /assembled mainly comprising of VRF 4-way Cassette units, VRF Hi wall units, VRF Outdoor units, electrical work,drain pump, interconnecting soft & hard copper pipes, cable tray, sheet metal ducts are fabricated at site and installed along with grills and diffusers. The ducts and piping are insulated at site and the plant as a whole is to be handed over to the customer.

K. DRAWINGS AND PHOTOGRAPHS

a. HVAC LAYOUT for GROUND floor, FIRST floor and SECOND floor, COMMUNICATION LAYOUT and ELECTRICAL LAYOUT is attached herewith and marked as exhibit "A"," B","C"," D" and "E" to understand the nature of installation of Air Conditioning plant. The layout drawings would be sufficing to demonstrate that the work undertaken by the appellant is "Air Conditioning Plant" fit to

cover as immovable being come into existence only by assembly and connection of various components and parts.

b. Photo copies of the actual work done is attached herewith which are capable to show that the "Air Conditioner Plant" is an assembly mainly of VRF 4 way Cassette units, VRF Hi wall units, VRF Outdoor units, electrical work, Drain pump, interconnecting soft & hard copper pipes, cable tray, sheet metal ducts which are fabricated at site and installed along with grills and diffusers. The ducts and piping is insulated at site and the plant as a whole is to be handed over to the customer.

GROUNDS OF APPEAL

1. The Advance Ruling Authority (in short the Authority) has erred in considering the nature of transaction as Composite supply,

2. The Authority has erred in applying the "marketability" and "permanency" test erroneously though the assembly of Air conditioning system is immovable,

3. The Authority has erred in not considering the order of Government of India Ministry of Finance Department of Revenue Central Board of Excise & Customs bearing number 37B/ 58/1/2002-Cx dated 15th January 2002 where in instructions were issued at para 5(iii) that-"Refrigeration/Air conditioning plants - These are basically systems comprising of compressors, ducting, pipings, insulators and sometimes cooling towers etc. They are in the nature of systems and are not machines as a whole. They come into existence only by assembly and connection of various components and parts. Though each component is dutiable, the refrigeration/air conditioning system as a whole cannot be considered to be excisable goods. Air conditioning units, however, would continue to remain dutiable as per the Central Excise Tariff."

4. The Authority has failed to appreciate the distinction between "Air- conditioner" and Air Conditioning Plant". While "Air-conditioner" is movable item like Refrigerator, Air-cooler etc. "Air-conditioning plant" is immovable item. Totality of the plant cannot be shifted from one place to another, once it is installed at a particular place. It can be shifted only after dismantling the plant, which cannot be called "Air-conditioning plant" after it, is dismantled.

5. The Authority has erred making following statement that " we find their submission and agreement that the contract is considering clear demarcation of goods & services to be provided by the applicant" without considering conjoint reading of the all clauses of agreement, Tender document, Bill of quantity and also over looked the drawings and photographs submitted before the proceedings.

6. Your appellant craves to add, to amend, to alter, to delete any ground or grounds of appeal

PRAYER

Appellant prays to modify the impugned order suitably to cover under the definition of 'works contact' under sub section 119 of section 2 of the Maharashtra Goods and Service Tax Act liable to CGST/SGST/IGST covered under Sr. no 3 item no 3 of notification No 20/2017 (Central tax rate) dated 22/08/2017

SUBMISSION

7. The applicant- Company pursuant to the acceptance of its tender, entered into an agreement with M/s Goa State Infrastructure Development Corporation Limited (GSIDC)for design, supply, Installation, testing & commissioning ofVRF Indoor and Outdoor Units suitable for R-410 Gas, refrigerant piping with insulation, drain piping with insulation, MS stands, Cabling, Additional Refrigerant and associated electrical works etc. At the site of GSIDC.

8. For supply/installation/erection and assembly of complete Air Conditioning plants were procured by the company and various equipment/components/material/parts and accessories were brought to the site of the customers GSIDC. The plant is installed /assembled mainly comprising of VRF 4-way Cassette units, VRF Hi wall units, VRF Outdoor units, drain pump, interconnecting soft & hard copper pipes, cable tray, sheet metal ducts are fabricated at site and installed along with grills and diffusers. The ducts and piping are insulated at site and the plant as a whole is to be handed over to the customer.

9. On conjoint reading of the provisions of agreement, tender documents and bill of quantity it is evident that the supply of goods and services passes in an immovable property.

10. Section 2(119) defines "works contract" to mean a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein the transfer of property in goods (whether as goods or in some other forms) is involved in execution of such contract. The intention of the legislature which is abundantly clear from the above definition is that the works contract under the GST should mean only the contracts in relation to immovable property.

11. Under the Central Excise Act 1944, if an article is an immovable property, it cannot be termed as excisable goods. In catena of decisions it is mentioned that to have been "manufactured" as contemplated under Section 2(f) of the Central Excise Act and to have been mentioned under the

Tariff, the goods must necessarily answer the test of marketability affirmatively for being held to be excisable. Classification is only for determining the applicable rate of duty under the Tariff Act, while marketability is the conclusive test for settling the broader issue of excisability of the goods under the Central Excise Act.

12. From the provisions of GST Act, it is clear that the works contract should mean only the contracts in relation to immovable property i.e. in a contract of supply, where the property in goods passes in immovable, the nature of transaction would be "Works Contract". Similarly, under the Central Excise Act where the property in goods passes in immovable there would be no excisablity. Considering the similarity in both the statutes it would be safe to refer to the decisions and authorities under the excise statute for determining the nature of activity whether property passes in immovable or not. To have the attributes of excisable goods as understood in the Excise Law. They are mobility and marketability. The article in question should be capable of being brought and sold in the market a test which is too well established by series of decisions of the Court. There can be no doubt that if an article is an immovable property, it cannot be termed as excisable goods for purposes of that Act. From a combined reading of the definition of immovable property in Section 3 of the Transfer of Property Act, Section 3(25) of the General Clauses Act, it is evident that in an immovable property there is neither mobility nor marketability as understood in the Excise Law. Whether an article is permanently fastened to anything attached to the earth require determination of both the intention as well as the factum of fastening to anything attached to the earth. It also required to see that the test of permanency; if the chattel was movable to another place of use in the same position or liable to be dismantled and re-erected at the later place, if the answer to the former is in the positive it must be a movable property but if the answer to the latter part is in the positive then it would be treated as permanently attached to the earth.Thus, test of "marketability" and test of "permanency" is the twin tests laid down by the Court to determine whether assembly/ erection would result in immovable property or not. Reference can be made to following judgments-

Court in Municipal Corporation of Greater Bombay &Ors. Vs. The Indian Oil Corporation Ltd. (1991) Supp. (2) SCC 18; and held that the twin tests laid down by the Court to determine whether assembly/ erection would result in immovable property or not were fully satisfied in the facts of this case. The court has observed that-

"The test laid down by the Supreme Court is that if the chattel is movable to another place as such for use, it is movable but if it has to be dismantled and reassembled or re-erected at another place for such use, such chattel would be immovable. In the present appeal, even according to the finding of the Collector, mud guns and drill tap hole machines have to be dismantled and disassembled from the cast floor before being erected or assembled elsewhere. We have also arrived at the same conclusion independently, in para 10 above.

Accordingly applying the test laid down by the Supreme Court we hold that the erection and installation of mud guns and drill tap hole machines result in immovable property. In the light of the ratio of the above case law, we hold that the mud guns and tap hole drilling machines do not admit of the definition of goods and, therefore, excise duty is not leviable thereon".

In Quality Steel Tubes (P) Ltd. Vs. Collector of Central Excise, UP 1995 (75) ELT 17 (SC); the court observed that-

"The basic test, therefore, of levying duty under the Act is twofold. One, that any article, must be goods and second, that it should be marketable or capable of being brought to market. Goods which are attached to the earth and thus become immoveable do not satisfy the test of being goods within the meaning of the Act nor it can be said to be capable of being brought to the market for being bought and sold. Therefore, both the tests, as explained by this Court, were not satisfied in the case of appellant as the tube mill or welding head having been erected and installed in the premises and embedded to earth they ceased to be goods within meaning of Section 3 of the Act".

In Mittal Engineering Works Pvt. Ltd. Vs. CCE 1996 (88) ELT 622 (SC); the Court was concerned with the exigibility to duty of mono vertical crystallizers which are used in sugar factories to exhaust molasses of sugar. After considering the material placed on the record it was held that the mono vertical crystallizer has to be assembled, erected and attached to the earth by a foundation at the site of the sugar factory. It is not capable of being sold as it is, without anything more. This Court, therefore, concluded that mono vertical crystallizers are not "goods" within the meaning of the Act and, therefore, not exigible to excise duty.

In Triveni Eng.& Industries [2000 (120) E.L.T. 273 (S.C.)], the question was whether a Turbo-Alternator was excisable or not. The Tribunal had held the item to be excisable. The Apex Court set

aside the Tribunal's decision, observing that the Tribunal's conclusion was not justified by its own finding. The Apex Court held that the marketability test required that the goods should be in a position to be taken to the market and sold. In that case, as found by the Tribunal, the Turbo-Alternator had to be separated into its components viz. Turbine and Alternator for being taken to the market. The Apex Court, therefore, held that the marketability test was erroneously applied by the Tribunal. In the instant case, the factual position is analogous to that of Triveni Eng.& Industries. Even the Revenue has no case that the CAP was capable of being taken as such to the market for sale. It required to be disassembled or dismantled into its components for the purpose of removal from its site, but then, certain parts would be damaged beyond repair and what could be taken to the market would be only the remaining parts, which would not make a CAP. The marketability test laid down by the Apex Court in Triveni Eng.& Industries is, therefore, not satisfied in the instant case.

Blue Star Ltd. vs Commissioner of Central Excise [2002 (143) ELT 391 Tri Del] In that case the issue before the Central Excise Tribunal was, taxability of Central Air conditioner plant, under excise statute. The facts of that case, in brief are that the appellants engaged in the manufacture, assembly, at site of customers of Central Air-conditioning Plantsand rest of the material/components such as GI sheets for ducting, GI/MS pipes, Electrical Control panels, cables, pumps, motors, valves, grills/diffusers, thermocole of PUF, Aluminum or GI cladding, aluminum foils for insulation of piping, ducting and AHU rooms, etc., were purchased from various vendors. All the equipment/ materials/components and parts were brought to the site of the customers. That the appellants undertook the work of design, fabrication, supply assembly, erection, testing and commissioning of the CAP at site of various customers against a contracted price which resulted into a distinct and excisable product which is apart from the equipment/component/ material/parts and accessories that have gone into the manufacture of CAPs. This is identifiable as CAPs in the market and is bought and sold as CAPs as is evident from the contract entered into between the appellant and the customers. This distinct product is not embedded in the ground like a tree or building, at the most some of its equipment/components are fixed by bolting, using nuts and bolts, to secure maximum operational efficiency and safety of the plant as a whole.

13. The case is decided by majority holding that it is immovable by saying that I am unable to accept this logic for holding the CAPs to be movables capable of being marketed. It is the independent function of the department, as held by the Apex Court in the case of Triveni Engineering and Industries Ltd. v. CCE [2000 (120) E.L.T. 273 (S.C.) , to establish the marketability of any goods

before subjecting them to levy of duty of excise and the same has got to be discharged by placing on record independent cogent evidence. In the instant case, the department has not been able to establish that the CAPs were capable of being taken as such to the market for being sold. Thus, the majority has held that Central Air conditioner plant fixed in the contract is immovable.

Thus, as per the decision of the majority the transaction is of the nature which may fall to cover under the definition of 'works Contract'[section 2 sub-section (119)]

14. It submitted that the Air conditioning plant in the present case emerges by assemblage of various components procured from open market and erection and installation of the system in the customer's premises as per the specifications of the customer.The contract isrelating to commissioning of air-conditioning plants as per terms and conditions of the contract and such plants are commonly known as air-conditioning system or facility or plant. It undertakes air conditioning contracts where the contracts cover the design, supply, installation, testing and commissioning of the entire air-conditioning plants and-such plants are extended a guarantee for the performance of satisfactory functioning. The air-conditioning plant is supposed to deliver certain desired comfort to its users, which depends on temperature, relative humidity and cleanliness. Such plant includes all machineries, accessories and parts, which are required to make the plant functional.

15. "Air-conditioner" is different than "Air-conditioning plant". While "Air-conditioner" is movable item like Refrigerator, Air-cooler etc."Air-conditioning plant" is immovable item. Totality of the plant cannot be shifted from one place to another, once it is installed at a particular place. It can be shifted only after dismantling the plant, which cannot be called "Air-conditioning plant" after it is dismantled.

16. It is the case that Air conditioning plant cannot be taken as such to the market for sale and, they did not satisfy the test of marketability. It has also submitted that, even if it be assumed that the Air conditioning plant could be disassembled into components and taken to the market for sale, all the components which had gone into the assembly of Air conditioning plant would not be available for sale as some essential components and accessories would have been damaged beyond repair and become unfit for being used again for reassembly. It is submitted that the ducts and pipes with their insulations and other accessories were an essential part of the Air conditioning plant and the same would be irretrievably damaged in any dismantling or disassembly of the Air conditioning plant. If at

all any dismantled Air conditioning plant could be taken to the market for sale that would be only an assortment of some components viz. VRF 4 -way Cassette units, VRF Hi wall units, VRF Outdoor units etc. but never the Air conditioning plant as a whole. Therefore, it is submitted that since the Air conditioning plant as a whole is not capable of being taken to the market for sale, it was not a marketable item. If the items assembled or erected at site and attached to earth/wall cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as movable.

17. It is also pertinent to refer to the order of Government of India Ministry of Finance Department of Revenue Central Board of Excise & Customs through its order no 37B Order 58/1/2002-Cx dated 15th January 2002 has issued instructions at para 5 (iii) that-

"Refrigeration/Air conditioning plants - These are basically systems comprising of compressors, ducting, pipings, insulators and sometimes cooling towers etc. They are in the nature of systems and are not machines as a whole. They come into existence only by assembly and connection of various components and parts. Though each component is dutiable, the refrigeration/air conditioning system as a whole cannot be considered to be excisable goods. Air conditioning units, however, would continue to remain dutiable as per the Central Excise Tariff."

18. The Department had issued these directions treating Refrigeration/Air conditioning plants are immovable. The taxing authorities under excise Act, following these directions have treaded Air conditioning plants as immovable since 2002. It is therefore submitted that there would not be any different view as is followed continuously for years together under Excise Act.

19. In central air-conditioning system, fabrication has to be undertaken which requires preparation of plant, etc. and, therefore, central air-conditioning system should be treated differently from room air-conditioner or window air-conditioner, etc. In case of supply of air-conditioning plant, what is done by the contractor is to install a complete unit by itself, which is functional in all respects. Central Air-Conditioning Plant erected at the site of the client and by using different refrigeration equipment are not bought and sold like room/window machines or even splits or package units and cannot be installed like room/split air-conditioners. In the air-conditioning industry, these are undertaken as projects or AC jobs or works contract.

20. **In the case of Voltas Ltd. vs State Of Gujarat decided on 4 September, 2006 by Gujarat High Court, the Court while deciding the issue rate of tax on** works contract for fabrication and installation of air-conditioning plants falls under Entry 2 and, liable to tax at the rate of 15% or under

Entry 5 under which it is taxable at the rate of 5%, of the Schedule to the notification dated 18-10-93 issued under Section 55A of the Gujarat Sales Tax Act, 1969has observed that -

"It would be relevant to ascertain as to what is the meaning of words installation of air-conditioners and A.C. Coolers and for repairs thereof. It is well settled that for interpreting the meaning of the words used in entries of taxing statute, trade meanings as well as dictionary meanings are required to be considered. In the light of dictionary, meanings of the words 'air-conditioner', 'air-conditioning' etc.

9.2. As per the Webster's Encyclopedic Unabridged Dictionary of the English Language, the word 'air-condition' means (1) to furnish with an air-Page 1979 conditioning system; (2) to treat (air) with such a system; the word ***'air-conditioner'means an air-conditioning device and the word 'air-conditioning' means (1) a system or process for controlling the temperature, humidity and sometimes the purity of the air in an interior, as of an office, theatre, laboratory, house, or the like;*** *(2) an air-conditioning system or unit. As per The New Shorter oxford English Dictionary on Historical Principles, edited by Lesley Brown, Volume 1 A-M, 1993, the word 'air-conditioned' means having air-conditioning. The* ***word 'air-conditioner' means an apparatus for air-conditioning****. The word* ***'air-conditioning'means the process of cleaning air and controlling its temperature and humidity before it enters a room, building, etc****. 9.3Again, as per The Free Encyclopedia Wikipedia, the* ***'air-conditioner'*** *is* ***an appliance****, system or mechanism designed to extract heat from an area using a refrigeration cycle. The construction of a complete system of heating, ventilation, and* ***air conditioningis referred to as HVAC****. Some refer to air conditioner or air conditioning as AC or A/C for short. An air-conditioning system equipment may be (1) window or through-wall units; (2) evaporation coolers; (3) absorptive chillers; (4) portable air-conditioners; and, (5) central air-conditioning. The central air-conditioning commonly referred to as central air (US) or air-con (UK) is an air conditioning system which uses ducts to distribute cooled and/or dehumidified air to more than one room, or uses pipes to distribute chilled water to heat exchangers in more than one room, and which is not plugged into a standard electrical outlet. With a typical split system, the condenser and compressor are located in an outdoor unit; the evaporator is mounted in the air handling unit (which is often a forced air furnace). With a package system, all components are located in a single outdoor unit that may be located on the ground or roof. Central air conditioning performs like a regular air conditioner but may have several added benefits. When the air handling turns on, room air is drawn in from various parts of the house through return-air ducts. This air is pulled through a filter where airborne particles such as dust and lint are removed. Sophisticated filters may remove microscopic pollutants as well. The filtered air is routed to air supply ductwork that carries it back to rooms. Whenever the air conditioner is running, this cycle repeats continually. Because the central air conditioning unit is located outside the home, it offers a lower level of noise indoors than a free-standing air conditioning unit. Thus, there is no manner of doubt that by executing the works contract relating to installation of air-conditioning plant, what is provided is central air conditioning system/device. Air-conditioning systems are succinctly explained in paragraph 23 of the decision in Collector of Central Excise v. Subros Ltd. (supra)."*

The High court has clearly made distinction between "Air conditioner" and "Air conditioning";*'air-conditioning'* means (1) a system or process for controlling the temperature, humidity and sometimes the purity of the air in an interior, as of an office, theatre, laboratory, house, or the like;

21. **In the case of Collector Of C. Ex. vs Subros Ltd. on 7 June, 1989Equivalent citations: 1989 (24) ECR 219 Tri Delhi, 1989 (43) ELT 543 Tri Del** at para 23 Customs and Central excise Tribunal Delhi has given distinction between "Air Conditioner Plant" and "window Air condition machine or Split Air conditioner.

"23 Before we come to any conclusion, we would like to refer to McGraw-Hill Encyclopaedia of Science and Technology Vol. I, 5th Division. Relevant extracts from pages 201 and 202 are reproduced below: -

"Air conditioning systems. - A complete air-conditioning system is capable of adding and removing heat and moisture and of filtering dust and odorants from the space or spaces it serves. Systems that heat, humidify, and filter only, for control of comfort in winter, are called winter air-conditioning systems; those that cool, dehumidify, and filter only are called summer air-conditioning systems, provided they are fitted with proper controls to maintain design levels of temperature, relative humidity, and air purity.

"Design conditions may be maintained by multiple independent subsystems tied together by a single control system. Such arrangements, called split systems, might consist, for example, of hot-water baseboard heating convectors around a perimeter wall to offset window and wall heat losses when required, plus a central cold-air distribution system to pick up heat and moisture gains as required and to provide filtration for dust and odor.

"Air-conditioning systems are either unitary or built-up. The window or through-the-wall air-conditioner (Fig.2) is an example of a unitary summer air-conditioning system; the entire system is housed in a single package which contains heat removal, dehumidification, and filtration capabilities. When an electric heater is built into it with suitable controls, it functions as a year-round air-conditioning system. Unitary air-conditioners are manufactured in capacities as high as 100 tons (1 ton of air-conditioning equals 12,000 Btu/hr) and are designed to be mounted conveniently on roofs, on the ground, or other convenient location, where they can be connected by ductwork to the conditioned space.

"Built-up or field-erected systems are composed of factory-built sub-assemblies interconnected by means such as piping, wiring, and ducting during final assembly on the building site. Their capacities range upto thousands of tons of refrigeration and millions of Btu per hr of heating. Most large buildings are so conditioned.

"Another important and somewhat parallel distinction can be made between incremental and central systems. An incremental system serves a single space; each space to be conditioned has its own, self-contained heating-cooling-dehumidifying-filtering unit. Central systems serve many or all of the conditioned spaces in a building. They range from small, unitary packaged systems to serve single-family residences to large, built-up or field-erected systems serving large buildings.

"When many buildings, each with its own air-conditioning system which is complete except for a refrigeration and a heating source, are tied to a central plant that distributes chilled water and hot water or steam, the interconnection is referred to as a district heating and cooling system. This

system is especially useful for campuses, medical complexes, and office complexes under a single management.

"Conditioning of spaces. - Air temperature in a space can be controlled by radiant panels in floor, walls, or ceiling to emit or absorb energy, depending on panel temperature. Such is the radiant panel system. However, to control humidity and air purity and in most systems for controlling air temperature, a portion of the air in the space is withdrawn, processed, and returned to the space to mix with the remaining air. In the language of the engineer, a portion of the room air is returned (to an air-handling unit) and, after being conditioned, is supplied to the space. A portion of the return air is spilled (exhausted to the outdoors) while an equal quantity (of outdoor air) is brought into the system and mixed with the remaining return air before entering the air handler.

"Typically, the air-handling unit contains a filter, a cooling coil, a heating coil, and a fan in a suitable casing (Fig. 3). The filter removes dust from both return and outside air. The cooling coil, either containing re-circulating chilled water or boiling refrigerant, lowers air temperature sufficiently to dehumidify it to the required degree. The heating coil, in winter, serves a straightforward heating function, but when the cooling coil is functioning, it serves to raise the temperature of the dehumidified air (to reheat it) to the exact temperature required to perform its function, in micro-cosm, in room units in each space, as part of a self-contained, unitary air-conditioner, or it may be a huge unit handling return air from an entire building."

The Tribunal has made a distinction that "Air conditioner" or "split air conditioner" are used in a room by individual control for each unit whereas "Air conditioner system/Plant" iscentral cold-air distribution system.

23. Caryaire Equipment India Ltd. vs Ministry Of Finance on 29 September, 2003Equivalent citations: 2005 (99) ECC 626, 2005 (179) ELT 522 All - while deciding the issue of excisablity the grills used with the air-conditioning machine/systems fall under Chapter 84.15 or that the air-conditioning systems/machine erected at the site/building are not movable goods and hence would not be termed as goods liable for excise duty under the Central Excise Act.

At para 14 of the judgment the court has reproduced the contention of the petitioner –"The petitioner has relied on the decision of the Supreme Court in Triveni Engineering and Industries Ltd. v. Commissioner of Central Excise, 2000 (120) E.L.T. 273 in which it was held that fixing of steam turbine, alternators, coupling and aligning them in a specified manner and installation and erection of turbo alternator on the platform would be immovable property, and as such it cannot be excisable goods. On the same reasoning, the air-conditioning system, the chilling machine, cooling towers, air treatment unit (air handling units), ducting, piping, insulation, pumps and electric panels and grills, diffusers, dampers, fire dampers, etc. are installed/fixed/erected in with each other to form an air-conditioning system or project and hence becomes immovable property and cannot be called as excisable goods. Even the department has not raised any demand or excise duty on such air-conditioning system to any job worker involved for erection of these systems/projects. The grills manufactured by the petitioner are used in air-conditioning systems, ventilation systems, basements, car parking, kitchens, industrial sheds, evaporative coolers and dummy grills for interior decoration in rooms/buildings. However, they cannot be used in the air-conditioning machines, room/split air-conditioners as these are not designed for use therein."

After detailed deliberation court has allowed the petition by observing that-

"These buyers are job workers engaged in erection/installation of air-conditioning systems, air-cooling systems, heating systems and air ventilation systems etc. These grills bought from the petitioner are fixed in the immovable properties like various rooms, industrial sheds, car parking, toilets, kitchens, etc. for ventilation or for covering the opening of ducts of the air-conditioning systems. After fixing the grills on the buildings they become a part of the building. Many grills are fixed on the walls as dummy grills for beautification and interior decoration of the rooms, which are not used even for passing of the air either in the ventilation system or in the air-conditioning system. It is alleged that air-conditioning systems/projects are different from the air-conditioning machines. The grills manufactured by the petitioner are not part of air-conditioning machines but are accessories of the air-conditioning systems/projects as these are fixed on the ceilings or walls of the building. Hence they are not classifiable under Chapter 8415 of the Central Excise Tariff Act, as they are not attached with any machine nor do they form integral and inseparable part of air-conditioning machine nor change any temperature or humidity."

24. Keeping in view the principles laid down in the judgments and authority noticed above, and having regard to the facts of this case, it is submitted that the Air Conditioning Plant brought into existence is immovable property which could not be shifted without first dismantling it and then re-erecting it at another site and satisfies the test of permanency and non-marketability, therefore is immovable hence will cover under the definition of "works contract" under the GST statute, cover under the definition of 'works Contract'[section 2 sub-section (119)],liable to CGST/SGST/IGST covered under Sr. no 3 item no 3 of notification No 20/2017 (Central tax rate) dated 22/08/2017.

Respondent's submissions

25. The applicant has submitted a copy of agreement dated 21.08.2018 entered with Goa State Industrial Development Corporation (GSIDC) by which he has undertaken a contract for supply, installation, testing and commissioning of YRF indoor and outdoor Units (Air-conditioning).

26. On perusal of the scope of work as mentioned by the applicant, it is observed that the applicant used to supply YRF 4-way Cassette Units, YRF Hi Wall Units, VRF outdoor Units, soft and hard drain pipes and MCB's. The applicant undertakes installation and commissioning of all these units and execute Additional Air-condition work for the new building of Director of Education, at Porvorim, Goa.

27. The issue oftaxability and availability of input credit on goods/ services involved where supply and installation activity is involved are discussed by various courts but I want to discuss the following case; -

(i) Vodafone Mobile Services Limited v Commissioner of Service Tax, Delhi (2018- VIL-506-DEL-CE), dated 31 October 2018.

The petitioners are telecom operators. They availed CENV AT credit of central excise duty paid on telecom towers, parts thereof, and shelters/ pre-fabricated buildings which house transmission equipment used for providing cellular telephone services. The revenue authorities disputed the availment of the credit on the ground that the telecom towers and shelters were immoveable in nature and consequently did not qualify as 'input', as defined under the CENV AT Credit Rules, 2004 (CCR). Further, the said goods did not fall within the specified tariff heading and therefore did not qualify as 'capital goods', as defined under CCR.

(ii) Observation of the court on the question of telecom tower as immoveable property: -

- The 'permanency test', as established by the Supreme Court in the case of Commissioner of Central Excise, Ahmedabad v Solid and Correct Engineering Works &Ors. (2010 (5) SCC 122) (Solid and Engineering Works), is to be used to determine whether the equipment qualifies as immoveable property or not. If the machinery or equipment is permanently fastened or embedded to the earth, it qualifies as immoveable property. However, if the machine is fastened merely to provide a 'wobble free operation', it would not qualify as immoveable property.

- In the present case, the entire tower and shelter is fabricated in the factory of the manufacturer and is supplied in a Completely Knocked Down (CKD) form. The equipment is fastened to the civil foundation for a 'wobble free operation' and to provide greater stability. A fixation which does not involve assimilation of the property and is necessary for a 'wobble free operation' cannot be considered as an immovable property by applying 'permanency test'.

- The tower/shelter may be unbolted and reassembled without any damage to any other location. There is no intent to annex the equipment to the earth permanently for the beneficial enjoyment of the land owner.

Hon'ble Supreme Court in following paras has held, -

37. On an application of the above tests to the cases at hand, this court sees no difficulty in holding that the manufacture of the plants in question do not constitute annexation and hence cannot be termed as immovable property for the following reasons:

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

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

38. A machine or apparatus annexed to the earth without its assimilation by fixing with nuts and bolts on a foundation to provide for stability and wobble free operation cannot be said to be one permanently attached to the earth and therefore, would not constitute an immovable property. Thus, the tribunal erred in relying on the Bombay High Court in Bharti Airtel Ltd (supra). It is also important to understand that when the matter was carried out in the Bombay High Court and the judgment was delivered, the whole case proceeded on the presumption that these are immovable properties. The tribunal failed to appreciate the, permanency test" as laid down by the Supreme Court in Solid and Correct Engineering (supra).

28. In present case also the test of permanency is required to be applied to see whether the machinery or equipment after installation is permanently fastened or embedded to the earth, so that the activity would be treated as "works contract "under GST.

29. The applicant carries out activity of supply/installation/erection and assembly of complete Air Conditioning plants on a building. It is required to ascertain that, merely by piping, drilling, grilling and fixing of the set of Air-conditioners with series pipe and ducts by which a structure like 'Plant' is formed. can this would result into immovable property?

30. In the present case, the fundamental issue which needs to be decided is whether the towers and shelters are movable or immovable property. In this regard, it would be useful to refer to the relevant statutory provisions to examine, what would constitute as moveable or immovable property. The expression "moveable property" has been defined in Section 3(36) of the General Clauses Act, 1897 as under:

"Section 3(36): "movable property" shall mean property of every description, except immovable property.

31. It is obvious that the answer to the question whether installation of Air conditioners and ducts, pipes in question are movable property, would depend upon whether they are immovable property. That is because anything that is not immovable property is by its definition "moveable" in nature. Section 3 of the Transfer of Property Act, 1882 does not spell out an exhaustive definition of the expression "immovable property". It simply provides that unless there is something repugnant in the subject or context, 'immovable property' under the Transfer of Property Act, 1882 does not include standing timber, growing crops or grass. Section 3(26) of the General Clauses Act, 1897, similarly does not provide an exhaustive definition of the said expression. It reads:

"Section 3(26): "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."

32. A plain a reading of Section 3 (26), shows that it defines "immovable property" as things attached to the earth or permanently fastened to anything attached to the earth. The term "attached to the earth" has not been defined in the General Clauses Act, 1897. Section 3 of the Transfer of Property Act, however, gives the following meaning to the expression "attached to the earth":

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls and buildings;

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

33. In the activities conducted by the applicant the principle of Permanency occurs first. i.e. at the time of fixing of different goods used by the applicant in the activity of removing or destroying the Plant. The principle of permanency is required to be followed as at the time of transfer of property the incidence of tax is occurred and the activity of dismantling could not prove the test of fixation. As the activities carried out by the applicant does not involve assimilation with the property and the work carried out by the applicant is only making for a 'wobble free operation'. And thus, activity undertaken by the applicant cannot be considered as an immovable property by applying permanency test'. The issue is permanency is already decided by Hon'ble Supreme Court in case of Commissioner of Central Excise, Ahmedabad v solid and Correct Engineering works &Ors (2010(5)

SCC 122.). Therefore, it is requested to follow the same ratio in present case. If the ratio of Commissioner of Central Excise, Ahmedabad v Solid and correct Engineering Works &Ors (2010(5) SCC 122.) is followed the activity of the applicant will be considered as supply of goods and being a natural bundle of goods+ services the activity would be considered as Composite supply and the rate of tax of principle supply will be applicable. Therefore, it is requested that the activity vide agreement dated 21.08.2018 as referred by the applicant would be termed as composite supply.

PERSONAL HEARING

34. A personal Hearing in the matter was conducted on **04.11.2019**, which was attended by Sanjay M. Gadkari, on behalf of the Appellant, wherein they reiterated the written submissions previously filed before us. The aforesaid hearing was also attended by Shri P.P. Sawant in the capacity of the Jurisdictional Officer in the instant appeal matter, who also reiterated the written submissions, filed before us.

Discussions and Findings

35. **We** have gone through the submissions of the appellant and the jurisdictional officer and the records of the appellant. The appellant has submitted that they have entered into an agreement with Goa State Infrastructure Development Corporation Ltd (GSIDC) for execution ofÁdditional Air conditioning work for the New building of Director of Education at Porvorim,Goa.'The agreement is dated 21 August 2018, is for supply, installation, testing and commissioning of VRF Indoor & Outdoor Units suitable for R-410 Gas, refrigerant piping with insulation, drain piping with insulation, MS stands, cabling, Additional Refrigerantand associated electrical works etc. Thus, we find that they will be supplying various VRF Indoor and Outdoor units, stands, cables etcwhich will be installed by them. After installation of the said equipment, testing will be conducted to see whether the Air conditioning work has been done properly and after successful testing the commissioning would start.

The basic questions related to the following two questions as raised in the grounds of appeal: -

1. Whether the transaction would be classifiable under the definition of 'works contract 'liable to CGST/SGST/IGST covered under Sr. no 3 Item no 3 of Notification No 20/02017 /Central tax ratedated 22.08.2017?

2. Whether the transaction is composite supply liable to tax at the rate applicable to Air Conditioners which are the principal goods involved in the transaction under Schedule IV , Sr. No 119 of Notification No 1/2017 (Central Tax Rate) dated 28/06/2017?

36. After reading the submissions and the facts of the case, we cannot but agree with the ruling reached by the AAR for the following reasons"-

37. First let us quote the definition of 'works contract' under the CGST Act"-

Section 2 (119) of the CGST defines 'works contract'to mean a contract for building, construction , fabrication, 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.

38. The question raised by the appellant has therefore to be decided on the basis of the above definition. What stands out from the above is that a contract shall be a works contract only if, amongst other things, it leads to building and erection of immoveable property.

39. The scope of the work is defined as Air Conditioning work for the building. IT is nothing but providing air conditioners on an extensive basis and the same does not change the essential nature of the work which is that of installation of air conditioners. The work is providing ofIndoorOutdoor units of the VRF/VRV system which is nothing but installation of air conditioners in the premises with the additional requirements concomitant with that of a larger area.In the submissions, it is stated by the appellant that the selected machines differ from room to room in terms of capacity and type. This happens even in case of installation of a single Air conditioner unit in a room where the capacity of the AC depends on the size of the room. Also, much emphasis has been laid by the appellant on the fact that the unit is installed on the basis of shop drawings and a study of site. The markings are done for indoor unit locations, outdoor unit locations, copper pipes, cable trays and cabling. However, we find that the fact that a study of the site done before the installation of the unit does not make any installation a part of the property or an immoveable property. This cannot be a distinguishing factor as such studies are done even before installation of an air conditioner unit which also involves a study of the size of the room, the location of the window, laying down the piping etc.

40. It is argued by the appellant that the contract is for immoveable property because the Air Conditioning plant cannot be taken as such to the market for sale and totality of the plant cannot be shifted from one place to another, once it is installed at a particular site. It can be shifted only after dismantling the plant which cannot be called Áir conditioning plant'after it is dismantled. This takes us to the Supreme Court judgement in the case of Sirpur Paper Mills Ltd vs The Collector Of Central Excise, ... on 11 December, 1997 where the main issue before the Court was to decide whether a paper making machine is an immoveable property or not. The court while deciding whether the issues decided that it is not an immoveable property on the basis of the following observations-

"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 papermaking was saleable and observed "if somebody had 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.

Apart from this finding of fact made by the Tribunal, the point advanced on behalf of the appellant, that whatever is embedded in earth must be treated as immovable property is basically not sound. For example, a factory owner or a house-holder may purchase a water pump and fix it on a cement base for operational efficiency and also for security. That will not make the water pump an item of immovable property. Some of the components of the water pump may even be assembled on site. That too will not make any difference to the principle. The test is whether the paper making machine can be sold in the market. The Tribunal has found as a fact that it can be sold. 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.

A further argument is made that the entire machinery cannot be bought and sold as it is because the machinery will have to be dismantled before being sold. The Tribunal has pointed out that the appellant had himself bought several items and completed the machinery. It had purchased a large number of components and fabricated a few and manufactured the paper making machine at the site. If it is sold it has to be dismantled and reassembled at another site. We do not find any fault with the reasoning of the Tribunal on this aspect of the matter.

Lastly, it was contended that the paper making machine was not really manufactured by the appellant. Various components and parts were purchased and a few of the parts were fabricated at the factory and the assessee ultimately assembled various parts of the machine. We are unable to uphold this argument also because it has to be seen whether a final product is something distinct and apart from the components that have gone into its production. What the appellant has erected in its factory is a paper making machine. It may have purchased various components to make the machine but nonetheless what has been produced is something quite different from the components that had been purchased. A new marketable commodity has emerged as a result of the manufacturing activity of the appellant.

Marketability being a question of fact, we are of the view there is no scope for interference with the order passed by the Tribunal. It cannot be said that the Tribunal has overlooked any material fact or its decision is perverse.

42. By the application of the above tests laid down by the Supreme Court it cannot be said that the said transaction is a contract for immoveable property. It is seen from the arguments ofthe appellant that he has nowhere denied that the system cannot be dismantled. It is only argued that the plant can be shifted only after dismantling the plant. However, in the above judgement the Court has observed *that just because the system needs to be dismantled before it is re-erected does not make it an immoveable property.The system has to be dismantled but it can be re-erected at any other site.*

43. 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. We have already

discussed the principle while discussing the SC judgement in the case of M/s Sirpur Paper Mills(cited supra).A similar view has been taken by the SC in the case of *CCE vs. Solid and ConcreteEngg Works &Ors. [2010 (175) ECR 8 (SC)]*as also the following cases:-

- *Board of Revenue, Chepauk, Madrasvs. 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]*

43. In the case of Solid and Concrete Engineering (cited supra) the SC applied the following tests while holding that 'asphalt hot mix plants 'are not immoveable property:-

(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.

44. We find ourselves that the observations, apply to the instant case. In the case before us, the fixation of the air conditioner units along with the pipes, though it is undoubtedly a fixture, is for the beneficial enjoyment of the units and in order to use them for cooling, it has' to be attached to the ceiling. The attachment, in such a case, does not make the air conditioning units a part of the land and as immovable property. The instant judgement prescribes the overarching tests for determining whether an item is movable or immovable, and it is this judgement and the judgement in Sirpur Mills (cited supra) which is required to be followed and applied, as opposed to the reliance placed by theappellant on the judgement in the case of M/s Blue Star (2002 (143) ELT which essentially is on the test of marketability which is no more a valid law and is no longer a material test for deciding issues like the one in the instant case.Also the CBEC circular (15.1.2002) is not binding on us and is not in line with the observations of the SC in the above cases. Also, this circular and the various judgments quoted by the appellant, are on the tests of marketability which though relevant under the Central Excise Law are not applicable under the CGST Act. The judgement in the case of Voltas quoted by the appellant which distinguishes between an air conditioner and an air conditioning system is not relevant here especially as the issue is whether the contract leads to creation of immoveable property or not.

45. 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 judgements 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 stand taken by the appellant that the air conditioning system 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.

46. It is also to be noted 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)]*). Therefore, the reliance placed by the appellant on these cases in fact are in favour of the revenue.

47. The total contract is for Rs 55,29,555 out of which the value of equipment is Rs 28,87,782 and the value of copper piping, drain piping is around Rs 3 lakhs. This shows a preponderance in favor of goods in the total value. So this shows that installation and the entire fabrication is not a key factor in the valuation. Even though there might be works involved in the air conditioning system, the balance tilts considerably in favour of goods.

48. From the discussion made above, we have come to the conclusion that the contract submitted is not immoveable property. Also, it is seen that the major part of the contract is supply of goods i.e. VRF Indoor and outdoor units, refrigerant piping, drain piping with insulation, MS parts, cabling etc. The appellant delivers these goods to the site of the client and using these goods the appellant provides services of installation, testing and commissioning of the system. Both the supply of goods and services are dependent on each other and are naturally bundled and done in the course of the business.

49. The AAR has also concluded that this is a composite supply and the principal supply is of goods in the instant case. We agree with the same. The supply of goods and services are conjoint to each other and inter dependent. Moreover, it is an established practice to supply air conditioner units and also provide the installation and therefore it can be construed asnaturally bundled and therefore a composite supply, where, needless to say the principal supply is that of goods,which is the air conditioner units. Air Conditioners units fall under Chapter 8415 and are taxable @ 28% and are covered under Schedule IV, Sr no 119 of notification No 1/2017 (CV.T rate) dated 28/06/2017. Hence the principal supply in the composite supply being goods, the appellant is liable to pay GST @ 28% on the whole contract.

50. For the reasons described herein, we hold that the contract in the impugned case is though a composite supply not for immoveable property, and therefore does not fall under the definition of 'works contract' . The principal supply in the case is of Air conditioning units and the entire contract is taxable @ 28% as explained in the preceding paragraphs.

ORDER

We uphold the order of the Advance Ruling Authority on both the questions

(Rajiv Jalota)
Member

(Sungita Sharma)
Member

Copy to- 1. The Appellant

2. The AAR, Maharashtra

3. The Pr. Chief Commissioner, CGST and C.Ex., Mumbai

4. The Commissioner of State Tax, Maharashtra

5. The Jurisdictional Officer

7. The Web Manager, WWW.GSTCOUNCIL.GOV.IN

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