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/08/2018-19 **Date- 05.09.2018**

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri Rajiv Jalota, MEMBER

GSTIN Number	27AACCE0525D1Z8
Legal Name of Applicant	Giriraj Renewables Private Limited
Registered Address/Address provided while obtaining user id	C-11, Sector 65, Noida – 201307
Details of appeal	Appeal No. MAH/AAAR/03/2018-19 against Advance Ruling No. GST-ARA-01/2017/B-01 dated 17 February, 2018
Concerned officer/Jurisdictional officer	State Tax Officer, MUM-VAT-C-709, Nodal Division – Mumbai – 7

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 Giriraj Renewable Private Limited , (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-01/2017/B-01 dated 17 February, 2018.

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. Appellant enters into contracts with various Developers who desire to set up and operate solar photovoltaic plants for supply of power generated. In various cases, the Appellant also is a Project developer wherein it is engaged in operation of renewable energy power plant projects.

B. Typically a contract is entered into by the Appellant to do end to end setting up of a solar power plant which includes supply of various goods (such as modules, structures, inverter transformer etc.) as well as complete design, engineering and transportation, unloading, storage and site handling, installation and commissioning of all equipments and material, complete project management as well as civil works/construction related services for setting up of a functional solar power plant.

C. Accordingly, the contract entered into by the Appellant includes end to end activities i.e. supply of various goods and services and hence is for the supply of solar power generating system.

D. The intent of the contract is that the entire contract would be undertaken by the Appellant for supply and setting up of the solar power plant which includes supply of both goods and services as well as setting up of transmission lines for transmission of the electricity generated up to the storage or the GRID.

E. There may be a single lump sum price for the entire contract for supply of both goods and services and payment terms may be defined depending on agreed milestones.

F. The Appellant filed an Application dated 24 November, 2017 for Advance Ruling for seeking clarification basis draft contracts of the Appellant, in view of the provisions of 'composite supply' and the rate of tax provided for 'solar power generating system' (hereinafter referred as **'SPGS'**) under GST, the Appellant sought clarification in respect of the following:

   a. Whether contract for supply of/construction of a solar power plant wherein both goods and services are supplied can be construed to be a composite supply in terms of Section 2(30) of the Central Goods and Services Tax Act, 2017.
   b. If yes, whether the principal supply in such case can be said to be of 'solar power generating system' which is taxable at 5% GST.
   c. Whether benefit or concessional rate of 5% of solar power generation system and parts thereof would also be available to sub-contractors.

G. The Authority for Advance Ruling, Maharashtra (hereinafter referred to as **'the AAR'**) vide Advance Ruling No. GST-ARA-01/2017/B-01 dated 17 February,2018 passed the following order:

   a. The Contract for construction of SPGS wherein both goods and services are supplied is a 'works contract'.

b. Since the transaction is treated as works contract and not composite supply, there arises no question of determining what would be the principal supply in the impugned transaction.

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.

GROUNDS OF APPEAL

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) 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 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.'

Per the above, the Appellant submits that in the instant case where the contract is awarded as a whole for supply of solar power generating system consisting of various components (as highlighted above) as well as services, the entire contract should qualify as supply of solar power generating system 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 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 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.

<u>*Global jurisprudence – Meaning of composite supply:*</u>

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 characterisation.*

- 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 constitutes solar power generating system') and services is merely incidental to provision of such goods.

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 principal, in the present case also, what the customer wishes or intends to obtain is the main supply of solar power generating system and services are only a means to enjoy the same and hence, services are incidental to the main supply of goods.

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 SPGS is a composite supply:

1.3.4. The Appellant most humbly submits that in the instant case, since the scope of work of the Appellant includes provision of both, goods and services, the entire contract would qualify as composite supply of SPGS. It is further submitted that the supply of SPGS should form the principal supply and the entire contract should be taxed as supply of SPGS itself since service portion of the contract including civil works is only ~6% and is only incidental to supply of goods. Therefore, principal supply in such case is provision of SPGS and hence, the entire contract (including the services portion) should be taxable at the rate of 5%.

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. Further, as highlighted above, services being incidental to such supply should also get covered as composite supply and taxable at rate applicable to principal supply of 'solar power generating system'.

This is further substantiated by the fact that the main intent of the contract 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 services like civil installation and commissioning as well as construction which are incidental to provision of such goods and form an ancillary part of the contract.

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, the entire contract (both goods and services) are bundled and linked wherein the main intent is provision of SPGS.

Further, the Appellant would like to make a reference to the Draft Contract for supply of 60Mw Solar Power Plant (hereinafter referred to as **'the Draft Contract'**). Clause B and E of the Draft Contract reads thus:

> *'B. Owner has appointed the Contractor for supply of the Solar Power Plant which includes engineering, design, procurement, supply, development, testing and Commissioning of the Plant as per scope defined in relevant schedule of this Contract, as per Applicable Law and Technical Specifications'*

E. The Owner has undertaken an independent due diligence of the Contractor andbased on such due-diligence, agreed to award this Contract for the Supply of Equipment (which in common trade parlance, are supplied together for setting up of solar power generating plant) and performance of Works so as to complement such Supply naturally bundled to provide an effective operating solar power generating system, in accordance with the terms and conditions set out herein, on a lump sum fixed price basis.

Further, scope of the contract can be understood with the help of Clause 3 of the Draft Contract which reads as under:

'The Contractor shall Supply all the Equipment as per the terms of this Contract and in accordance with the Execution Schedule, to the Plant Site and complete development, installation and Commissioning of the Works in accordance with Technical Specifications, Applicable Law, Applicable Permits and the terms of this Contract, in addition to the detailed drawings/ documents finalized during engineering. The detailed Scope of the Contract (including the Supply of Equipment and the performance of Works) is set out under Schedule 1.'

Reference is also made to Schedule I of the Draft Contract which defines the scope of work to be executed by the Appellant. The said schedule clearly outlines the entire scope to be undertaken and provides that the Appellant would be responsible for supply of solar power generating system. Schedule I of the Draft Contract reads as under:

'The Contractor would be responsible for Supply of Equipment and undertake all necessary activities ancillary to such supplies (such as erection, civil work etc) to ensure complete supply of Solar Power Plant....'

In view of the aforesaid clauses, it is submitted that the said contract is entered into for supply of 'solar power generating system' which involves supply of equipment and undertaking certain services. 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.

1.3.5. 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, the contract should qualify as a composite supply wherein the principal supply is of solar power generating system and hence, entire contract should be taxable at 5%.

1.3.6. In view of the above mentioned principles and submissions, the Appellant submits that the Draft Contract qualifies as a composite supply of SPGS, and hence should be taxable at the rate of 5%. The AAR in its order has completely disregarded the facts and the Appellant's submissions in the matter and has grossly erred in holding that the impugned Draft Contract relates to provision of both goods and services, which qualify to be works contract, as the SPGS once installed becomes permanent in nature and hence is an immovable property.

2. <u>Solar power generating system cannot be said to be an immovable property and hence the contract does not constitute as 'works contract'</u>

<u>Concept of works contract</u>

2.1. The Appellant humbly submits that the term '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 <u>of any immovable property</u> 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%.

Therefore, in order to determine whether the supply made by the Appellant is of works contract, it is imperative to understand:

(i) the essence of the contract and the intention of the parties involved in the contract to determine whether the parties intend to undertake works contract or supply of solar power plant and

(ii) whether the activities are undertaken on an immovable property for the contract to qualify as works contract.

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 supply SPGS wherein the. Appellant undertakes end to end responsibility of supply of equipment for solar power plant including designing, engineering, supply, installation, testing and commissioning of the solar power plant. The relevant clauses of the Draft Contract which indicate the intention of the parties entering into the contract are reproduced below for ease of reference:

'B. Owner has appointed the Contractor for supply of the Solar Power Plant which includes engineering, design, procurement, supply, development, testing and commissioning of the Plant as per scope defined in relevant schedule of this Contract, as per applicable law and technical specifications.'

Further, the scope of the work is defined in Schedule 1 of the Draft Contract in the following terms:

'The contractor would be responsible for supply of equipment, and undertake all necessary activities ancillary to such supplies (such as erection, civil works etc.) to ensure complete supply of solar power plant.

Both parties agreed that of the total supplies, the most critical part of the plant are the supply of the mounted PV module which constitutes 60-70% of the total contract value. Further, it is also agreed that the contractor is responsible for the whole of the contract that is for setting up/supply of the plant.

For the purpose of undertaking compliances under laws constituted in India, the parties may agree to define prices of the equipment to be supplied as part of the contract. The same shall not in any manner exceed lump sum price agreed between the parties and also does not in any manner dilute the responsibility of the contractor.'

Hence, as also discussed in point 1 above, it is amply clear that the intention of the parties is to supply/procure a completely functional SPGS, and the intention is not to undertake any activity which will create an 'immovable property'. The Appellant's detailed submissions in this regard are provided below.

The solar power generating system is movable in nature, and hence, is not an immovable property to qualify as works contract

2.3. The Appellant submits the AAR 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 such contracts (as proposed to be entered into by the Appellant) qualify to be works contract. The Appellant would 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.

2.4. 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 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 of the Hon'ble Supreme Court in the matter of **Sirpur Paper Mills Ltd. v. Collector of Central Excise, Hyderabad** *(1998 1 SCC 400),* 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 in the instant case, the solar power plants supplied by the Appellant is commissioned and installed only for *the beneficial enjoyment* and for the purposes 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 affixed to the land means that the same is not an immovable property.

Further, the AAR nowhere distinguishes the above referred case of **Sri Velayuthaswamy Spinning Mills v. The Inspector General of Registration and the Sub Registrar**, wherein it was held that windmills qualify as movable property. The AAR in the Impugned Order held that if a thing is embedded in the earth or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property. If the attachment is made for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed. Since the windmills are mounted on a civil structure to ensure that they operate efficiently doesn't make windmills an immovable property. The AAR has failed to appreciate and has in fact overlooked the aforementioned judicial precedents and has given a finding that the Draft Contract would qualify to be an immovable property, is perverse.

2.5. The Appellant further submits that the fact that solar power plant is capable of being moved from one place to another without damage to the plant can be further substantiated by making a reference to Clause 4.1(xiii) of the Draft Contract, which contemplates possibility of transferring the plant:

> *'(xiii) Any costs incurred by the Contractor for any changes made in the land/premises of the owner, while development of plant, due to the requirement of transferring the plant to another location, would be borne by the owner. Such costs incurred would be charged by the contractor from owner separately and does not form part of the Contract price highlighted in Schedule 3 of the contract. The amount to be charged due to the changes will be mutually decided between the parties.'*

2.6. Further, the Impugned order is not in line with the MNRE 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 1.3.5 .Hence, it is quite clear that the contract in question constitutes to be a supply of SPGS and not works contract, and hence, should be taxable at the rate of 5%.

2.7. Reliance in this regard is also placed on the Chartered Engineer's 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.

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 solar power generating system as works contract based on the following observations, amongst others:

> *'1. There is a definition of **"SPP"** – 'means 60MWAC/81MWDC Solar Power Plant to be supplied, installed and commissioned at the plant site by the contractor, which is forming part of the solar power generating system'. The contract would be to develop a 60MAC/81MWDC solar power plant for onward sale of power to its consumers. It is a big project and has a permanent location. Such a plant would, therefore, have an inherent element of permanency.*
>
> *2. Further, here the output of the project i.e. the power would be available to an identifiable segment of the consumers. Thus, this output supply would involve an element of permanency for which it would not be possible and*

prudent to shift base from time to time or locate the plant elsewhere at frequent intervals.

3. The project would be using goods which would be imported. Are such high end equipments frequently dislocated? Would there not be damage to the materials if moved places frequently and if so, would it perform as effectively as it would have when without damage? The questions itself would give the answers.

*4. The definition of the word **'Commissioning'** as found in the agreement brings out the enormity of the scale of operations and how the transaction would fall in the scope of an immovable property –*

'Commissioning' permanent means the functional operation of plant (including each unit thereof), following the installation and energization of evacuation infrastructure to grid substation and installation and energization of the plant to the evacuation infrastructure, subsequently and the evacuation of power is possible from the plant to the grid substation.

*5. The agreement clauses also refer to a definition of **'GO'** – means government order issued by Karnataka Renewable Energy Development Limited for development of the plant. Such a renewable energy project would invariably have an essential element of permanency. There is also involvement of other agencies, as well [Karnataka Renewable Energy Development Limited and Karnataka Power Transmission Company Limited]. This means that the project would be established under government rules and regulations. It is most unlikely that a project would be moved from place to place once it has been put into place after obtaining the essential permits and licenses.*

6. The upshot of being a renewable energy project to generate electricity for consumers would be connected to the grid. And we find the definitions in the agreement clauses thus

***'Grid'** means grid substation to which plant is to be connected for commercial operations;*

***'Grid Substation'** shall mean 110/33kV government substation situated at and in the state of Karnataka, India*

Thus, it can be seen that the plant would be connected to the grid substation for the purposes of the commercial operations. After having established and commissioned such a project which is connected to a grid substation, who would be taking the project to a different location. It would be farfetched an argument that the project could be shifted to a different location just to prove that the project is movable.

7. The owner has also to obtain approvals and permits (asper applicable law) required for commissioning and operation of the plant. Do such permits and documents have a frequent changeover in terms of the place, the owner and

project name being constant? Such permission definitely have an element of permanency.

8. Under the clause about 'obligations of the contractor', we find that the contractor is responsible for the construction of civil structures or buildings as per Schedule 2. The construction of a civil structure is a part of the project, the transaction to be executed by the applicant. A civil structure cannot be moved. It has to be demolished. Does one still have to offer the argument that the transaction results into movable property?

9. Any provision in the agreement to the effect that any costs incurred by the contractor for any changes made in the land/premises of the owner, while development of plant, due to the requirement of transferring the plant to another location, would be borne by the owners. Would by no means amount to making the impugned transaction, a works contract resulting into movable property. Such type of clauses fall in the precautionary nature of clauses in legal documents.'

In this regard, the Appellant would like to submit that the AAR has completely misinterpreted the provisions of law and the settled judicial precedents in this regard and has disregarded the facts of the Appellant's specific case.

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 installation and commissioning work involved in setting up of SPGS would qualify to be 'immovable property' '. On the contrary, the AAR has baselessly assumed that the SPGS has element of permanence and hence, is incapable of being removed. It is Appellant's submission that the installation and commissioning work done by the Appellant does not qualify as immovable property, as the same is capable of being moved.

Reliance in this regard is also placed on the judgement of the Delhi Tribunal in the case of **I.G.E. (India) Ltd. Vs. CCE [1991 (53) ELT 461]** wherein it was held that if by nature of things, property is movable, and it is necessary to imbed or fix the property to the earth for beneficial enjoyment of the property, it does not become immovable property. Relevant extract of the judgement are reproduced below for ease of reference:

'50. From the above it follows, by nature, if the property is movable and for its beneficial use or enjoyment it is necessary to fix it on earth though

permanently i.e. when it is in use, it is not immovable property. In the instant case the components/parts both essential and non-essential are fixed to earth for its beneficial enjoyment and by fixing it to the earth it does not become part of the earth, and therefore, it is not immovable property. It is also not disputed that X-ray equipment can be dismantled and shifted. From the records we find that the dismantling charges were also collected from one of the customers.

51. Therefore, we are of the view that X-ray equipment is not immovable property.'

In view of the aforesaid, it is clear that even if it is necessary to fix something on earth permanently till it is in use, it cannot be said that it is an immovable property if the nature of the same is movable. Hence, relying on the aforesaid, it is submitted that SPGS is movable in nature and hence, does not qualify to be works contract.

Further, as discussed above, there are various judicial precedents which clearly lay down that even in case of dismantling of a property, if the damage is not substantial and the same can be moved, the said property cannot be held to be an immovable property. The AAR has clearly failed to appreciate the Appellant's submissions and has passed the Impugned order on baseless assumptions that the SPGS is set up through civil works and hence is an immovable 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.

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 the Appellant's case. The level of construction work in case of TTG (supra) 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.

In the case of solar power plant, 'commissioning' is done only for setting up various equipments which constitute a solar power generating system so that they become a system and function together. The construction work/civil work comprises only around 6% of the total contract value and hence it cannot be said to be substantial construction so as to classify the same as immovable property. In fact, it is submitted that in case of the Appellant, the civil work is only done in order to assemble all the parts of the SPGS together for better functioning of the plant. The level and intensity of construction work described in the aforesaid judgment cannot be equated with the present set of facts by any stretch of imagination. The AAR has again assumed that the term 'commissioning' *brings out the enormity of the scale of operations*, however, as per the facts of the present case, the level and scale of commissioning work done by the Appellant is minimal only so that the SPGS can function together and there is no intention to make the SPGS permanent.

2.11. 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 regard, 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 distinguished the judgment 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]* relied upon by the Appellant, 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 was 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 to the earth 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 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.

2.14. Further, the Appellant would like to submit that the government orders/permits/ approvals etc., as mentioned by the AAR in the Impugned order, required to set up a

SPGS plant, do not change the nature of the contract or the property, and hence, reliance by the AAR on the same to say that SPGS is an immovable property is baseless.

2.15. In view of the aforesaid submissions, it is clear that in the present case, the solar power plants supplied by the Appellant is commissioned and installed only for the purpose of better functioning of the plant and are capable of being removed and transferred from one place to another. Hence, SPGS is not an immovable property, therefore the same should be taxable as a composite supply of SPGS at the rate of 5%

3. <u>Alternatively, PV module is the principal supply, hence the contract should be taxable at 5%</u>

3.1. Without prejudice to the above and in the alternative, the Appellant submits 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 modules constitutes 60-70% of the total contract can also be substantiated with the help of the Draft Contract which is reproduced below for the ease of reference:

> *'Both parties agree that of the total supplies, the most critical part of the Plant are the supply of the mounted PV Module which constitute 60%-70% of the total contract value. Further, it is also agreed that the Contractor is responsible for the whole of the contract that is for setting-up/ supply of the Plant.'*

3.2. 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.

3.3. The Appellant in this regard places reliance on the Central Electricity Regulatory Commission ("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%.

3.4. Reliance in this regard can also be placed on the Chartered Engineer's Certificate which provides that the most critical component is PV modules both in terms of the value and functionality that such modules perform.

3.5. Further, the Appellant would like to make reference to Schedule I of the Draft Contract which provides as below:

> *'The contractor would be responsible for Supply of Equipment and undertake all necessary activities ancillary to such supplies (such as erection, civil work etc.) to ensure complete supply of solar power plant.*
>
> *Both parties agree that of the total supplies, the most critical part of the Plant are the supply of the mounted PV module which constitutes 60%-70% of the total contract value. Further, it is also agreed that the Contractor is responsible for the whole of the contract that is for setting up/supply of the Plant.*
>
> *For the purpose of the undertaking compliances under Laws constituted in India, the parties may agree to define prices of the equipment to be supplied as part of the contract. The same shall not in any manner exceed the lump sum price agreed between the parties and also does not in any manner dilute the responsibility of the Contractor...'*

3.6. The Appellant would also like to highlight the definition of 'Major Equipment' as provided in Clause 1.1.67 of the Draft contract which provides:

> *'Major Equipment(s) means PV solar modules which is an assembly of solar cells that helps in converting solar power into electricity and all other Equipments specified in Schedule 3 (Contract Price and Payment Milestones) for facilitation of Payment under the Contract;'*

3.7. 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'.

3.8. In the present case, the intention of both the parties is to supply the whole of solar power generating system in totality which consists of various goods and services incidental to provision of such goods. What the customer wants is a functional solar power system and services such as erection, commissioning etc. are only a means to provide the main supply of the goods.

3.9. Basis the above submissions, it is clearly evident that the PV Modules 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%.

4. <u>WHETHER BENEFIT WOULD ALSO BE AVAILABLE TO SUB-CONTRACTOR</u>

4.1. In certain cases, the 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 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/ sun-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.

Hence, in view of the aforesaid submissions, the Appellant would like to reiterate that the AAR, in its order, 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 conclude 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 fact has also been made clear by the authorities through the MNRE Circular wherein it has been categorically stated that 'structurals' 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 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 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 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. Alternatively, even if the contract under question qualifies as a composite supply, the principal supply can be said to be that of PV modules (forming 60-70% of the contract value and being the most critical component of a SPGS), which is taxable at the rate of 5%

In addition, the Appellant would like to reiterate that as submitted above, the benefit of concessional rate of tax should be eligible to sub-contractors as well.

In view of the above, the appellant prayed that --

a. Set aside/modify the impugned advance ruling passed by the Authority for Advance Ruling as prayed above;
b. Pass any such further or other order(s) as may be deemed fit and proper in facts and circumstances of the case.

Additional SUBMISSIONS:

ISSUE NO. (i):

Relevant provisions:

5. 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.*
>
> ...

6. 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.

7. 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.

8. 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

...

9. 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*
3	*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*	-

10. **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

...

11. 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.

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

12. 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%

13. 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%.

14. 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.

15. 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

16. 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.

17. 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)]).*

18. 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%.

19. 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)]).*

20. 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.

Fundamental interpretational error in the Impugned Order:

21. In the present case, the Impugned Order has held that:

- Such type of contracts are commonly understood to be works contracts involving supplies of goods as well as services. Hence, the first issue to be looked as is the aspect of works contract or composite supply. *(refer Pg. 64 of the Appeal Memo).*
- In such contracts, 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. 68 of the Appeal Memo).*
- The requirement that a works contracts must be for "immovable property" is met, as: (a) the size of the project gives it an element of permanency; (b) it would not be possible or prudent to shift the plant from time to time; (c) the words "commissioning" in the Agreement brings out the scale of operations; (d) the project would be connected to the grid and is unlikely to be shifted *(refer Pg. 77-78 of the Appeal Memo).*
- Once it has been determined that the transaction is a "works contract", it would be taxable as a "works contract". Since we have elaborately discussed and observed that the impugned transaction is a "works contract" u/s 2(119) of the GST Act, we need not even enter into the discussion as to whether the impugned transaction is a 'composite supply' u/s 2(3) of the GST Act. *(refer Pg. 78 of the Appeal Memo).*

22. 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.

23. 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. When the Impugned Order itself has held that the scope under the Agreement does not constitute a "composite supply", there can be no question of the transaction qualifying as a "works contract".

The findings in the Impugned Order that the SPGS is "immovable property" are erroneous and unsustainable:

24. 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. 139 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. 109 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 judgement 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 judgement in *Solid and Correct Engineering (supra)*. It is this judgement 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 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 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).

25. 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, the transaction is in any event not a "works contract", but is taxable per the principal supply, at a rate of 5%:

26. Without prejudice to the foregoing, 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.

27. 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".

28. 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):

29. 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.

30. In view of the foregoing, even a supply of 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 submission made in the application filed before the Advance Ruling Appellate Authority. 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.

FINDINGS

We have heard both the parties and have gone through the entire case records and written and oral submissions made by the appellant as well as by the respondent. The main issue to be decided is (i) Whether contract for supply of/construction of a solar power plant, wherein both goods and services are supplied, can be construed to be a composite supply in terms of Section 2(30) of the Central Goods and Services Tax Act, 2017 as claimed by the appellant or the same is works contract services as per the ruling made by the AAR. The other two issues raised by the appellant in this present appeal will be decided in terms of the findings of the above said issue.

31. It is seen that there is a single contract for supply of '60 MW/81 MW Solar Power Plant' in the State of Karnataka and the owner has appointed the appellant for supply of the 'Solar Power Plant' which as per (B) of the agreement includes 'engineering, design, procurement, supply, development, testing and commissioning of the Plant' as per Scope defined in the Schedule of the Contract.

32. As per (3) of the Agreement which defines the **'SCOPE OF THE CONTRACT'**, the following is given:-

.."The Contractor shall supply all equipment as per the terms of the contract and in accordance with the execution schedule to the plant site and complete development, installation and commissioning of the Works in accordance with Technical Specification, Applicable law, Applicable terms and the terms of this contract, in addition to the detail drawings finalised during engineering.

33. The total scope of the contract is set out under schedule-1 which says the following:

.."The contractor would be responsible for Supply of Equipment and undertake all necessary activities ancillary to such supplies (such as erection, civil work etc.) to ensure complete supply of Solar Power Plant."

34. As per Clause 4.2, which defines the **'Obligations of the Contractor'**, the contractor is required to do the following,-

i) Design and engineering of the plant as per Schedule-2 (Technical specification).

ii) Procure the equipment as per the Schedule-4 (Execution schedule).

iii) Construction of civil structure or building.

iv) Insurance required during the transportation of equipment, supplies by the contractor and insurance required for its representative, engineers and labors until commissioning.

v) Supply of such items and materials which are needed for installation, commissioning and normal operation of the plant.....

.....

vii) The Contractor is also responsible for providing or causing the provision of skill personnel, skill and unskilled labor....., technician, material equipment required for execution and completion of the scope of the contract and all equipment, machinery, items, materials as required for the safe development and Commissioning of the works.

35. Clause 6.1 of the contract says the following:-

6.1. Contract Price and Advance

(iii) The Contract Price shall be paid by the Owner in accordance with the Payment Milestones specified in the Schedule 3 (Contract Price and Payment Milestones); and shall include all costs and charges incurred towards performance of the Scope of the Contract and all obligations as set out under this Contract.

36. Clause 15.5 of the Agreement deals with the 'Commissioning' aspect of the Agreement.

Clause 15.5. *Commissioning*

(i) Upon being ready for Commissioning, the Contractor shall provide the Owner or the Owner's Representative, 5 (five) Business Days' written notice for being present at the Commissioning ("Notice of Commissioning"). In this regard, the ***following shall be the pre-requisites for achievement of Commissioning:***

(a) ***successful installation, testing and Commissioning including generation of electrical energy and charging of 100% DC capacity of Relevant MW size of the Plant;***

(b) the Plant is mechanically and electrically completed meeting minimum functional, technical and safety requirements;

(c) the data acquisition system has been commissioned and able to log data as required by the utility;

(d) ***that the Plant has been continuously running for a minimum period of 3days except for minor faults and Grid non- availability.***

37. Let us also see the clause 20 about the Risks and liabilities.

20. RISKS AND LIABILITIES

20.1. ***The risk and liabilities pertaining to all the equipment provided and to the development, design, procurement, supply, development, construction, testing and commissioning of the Plant shall be borne by the Contractor till the completion of the Plant. This is notwithstanding the fact that the document in title of the equipment imported and supplied is directly transferred to the Owner by way of High Seas Sale, or the other equipment domestically supplied by the Contractor are priced separately under this contract for commercial convenience, but the risk and liabilities accruing in relation to all those equipment shall remain with the Contractor till the completion of the Plant.***

38. As per the Appellant, since the Scope of work includes the provision of goods and services the entire contract is one turnkey EPC contract and hence would qualify as a 'composite supply' within the definition of the term as given under Section 2(30) of the CGST Act. It is also their contention that the principal supply in such case is the provision of goods and hence the entire contract should be taxable @ 5%.

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.

39. The contract fulfills the condition of composite supply. There is a supply of goods and services. They are naturally bundled in the sense that the goods and services may be required to fulfill the intention of the buyer in giving the contract. The supply of goods and services are provide 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, from a reading of the entire contract as well as from the definition of composite supply what can be easily gathered is that the buyer has given a contract for setting up Solar Power Generating Supply to the appellant and therefore it is single composite supply of goods and services and installation thereof.

40. In order to understand the scope of a 'composite supply' and also to know what may be the criteria to judge a supply as a 'composite supply', the CBIC has published an e-flier on the subject. As per the e-filer, 'Composite supply' entails the concept of 'naturally bundled supply', and whether services are bundled in the ordinary course of business would depend upon the normal or frequent practice followed in the area of business. It also says that in order to qualify for a composite supply one of the characteristic would be that 'none of the individual constituents are able to provide the essential character of the service'. What is the normal frequent practice in the trade can be ascertained from the following indicators,-

- The participation 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 provider in a particular area of business provide similar bundled of services.
- 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.
    - The other instructive indicators can be the following:-
        a) There is a single price or the customers pays the same amount.
        b) No matter how much of the package the actually received.
        c) The elements are normally advertised as a package.
        d) The different elements are not available separately.

41. From the application of the above indicators we hold that the contract for providing the design, procurement, supply, development, testing and commissioning of the Plant which includes the supply of both goods and services is a composite supply as per the definition in the Act. There are two taxable supplies- one of goods and the other of services and they both are naturally bundled and it is natural and also a practice to expect that the contractor who will supply the goods will also supply the services alongwith it. In the business of contracts for the Solar Power Generating System, it is a practice to provide a Plant as a whole along with the supply of services. We differ with the order of the Advance Ruling Authority in this respect.

42. WHETHER IMMOVEABLE PROPERTY

42.1 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 is therefore is whether the agreement before us is a 'works contract' as defined in clause (119) of section 2 of the CGST Act. 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.

42.2. 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 terms of immovable property. In order to decide whether the transaction is a works contract it is for us to decide whether it is in terms of immovable property. The term 'immovable property' has not been defined under the GST Act. The appellant has submitted certain judgements in his favour and after going through them, 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'.

42.3 So what to be seen above is that in deciding whether a property is movable property 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 road construction or repair 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.

42.4 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.

42.5 There are generally two types of Solar Power Systems 1) Roof mounted 22) 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.

42.6 **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 includes the drawings and detailing of the system.

- The activities given in Schedule-1 (Scope of work) shows that the Obligation of the Contractor amongst other things includes Plant information and 'Plant Information' in turn includes works relating to 'Plant land' which in turn includes identification of land, legal due diligence, registration of land, fencing of land, storage yard for storing the materials etc. and module mounting structure.
- The works relating to 'Module Mounting Structure' includes soil testing, contour survey, levelling of land, laying of foundation, drilling of holes for foundation and erection of the MMS i.e. Module Mounting Structure. It also includes erection and installation of solar side module and solar inverter which forms the core of the SPGS.
- As far as works relating to solar inverter is concerned, it is not only restricted to include the procurement of invertor but also entails construction of inverter room, selection of underground cables, laying of cables etc.
- The Scope of work includes fine detail regarding the electrical work involved. The electrical work is not only limited to the procurement of the equipment but also includes laying of cables, digging of trenches for laying of cables and earthing system. Further the Scope of work extends to laying down of the OHT line which includes line survey, procurement of materials and erection of poles.
- Item 10 of the Schedule-1 shows that lot of approval and permissions are required not only for transportation of materials but also for payment of land related taxes, approval from local bodies, environmental clearance, NOC from utilities, final occupancy approval and commissioning certificate as well as their requisite approval from KPTCL and other government agencies. The above itself shows the huge work and detailing of the project.
- Clause 4.2 refers to the 'Obligation of Contractor'. The Obligation of the contractor include amongst other things design and engineering of the Plant, procurement of the equipment, construction of the civil structure or obtaining of the necessary approval for land labour etc.
- Clause 5 of the contract delineates the scope of designing and engineering. It details that the contractor shall design the Plant and also submit the drawing layouts, specification and calculations for the approval of the owner.

- Clause14 which pertains to 'Schedule and Extension of Time' says that ' the Owner and the Contractor agrees that the time is of essence of this Contract and subject to the terms of this Contract, the Contractor shall execute the entire scope of Works to achieve Commissioning as per the below schedule'." 'Commissioning 'means the functional operation of Plant ,following the installation and energization of Evacuation Infrastructure to Grid Substation and Installation and energization of the Plant to the Evacuation Infrastructure , subsequently and the evacuation of power is possible from the Plant to the Grid Substation'.
- Clause 15.5 refers to the details regarding the commissioning of the project. The requirement for achievement of Commissioning includes the following:-
    a) Successful installation, testing and commissioning including generation of electrical energy.
    b) The Plant is mechanically and electrically completed meeting the functional, technical and safety requirement.
    c) The data acquisition system has been commissioned.
    d) The Plant has been continuously running for minimum period of 3 days.
- Clause 20 which refers to liabilities provided that all the risk and liabilities shall be borne by the Contractor till the completion of the Plant. It is only of the completion of the Plant that the risk and liabilities are shifted to the owner.

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) 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.

42.7 We shall refer to certain judgements in this regard. The Advance Ruling Authority has referred to the Supreme Court judgement 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.

42.8 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'.

42.9 The Authority for Advance Ruling has also referred to certain clauses and argument in support of the finding that the contract leads to erection of immovable property. We agree with them when they say that the definition of Solar Power Plant - *"mean 60MWAC/ 81MWDC Solar Power Plant to be Supplied, installed and Commissioned at the Plant Site by the Contractor, which is forming part of the solar power generating system"*. The contract would be is to develop a 60 MWAC/ 81 MWDC solar power plant for onward sale of power to its consumers. It is a big project and has a permanent location. Such a plant would, therefore, have an inherent element of permanency. Further, here the output of the project i.e the power would be

available to an identifiable segment of consumers. Thus, this output supply would involve an element of permanency for which it would not be possible and prudent to shift base from time to time or locate the Plant elsewhere at frequent intervals.

43. 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.

43.1 The applicant 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.

43.2 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 are 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.

43.3 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 } all at 5%
Photo voltaic cells

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.

Question 2

If the transaction is treated as a 'composite supply',whether the Principal Supply in such case can be said to be 'solar power generating system' which is taxable at 5% GST?

We have treated the transaction as a 'Composite supply' and a works contract falling u/s. 2(119) of the CGST Act, 2017 and Para 6 of SCHEDULE II [ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES] treats "works contracts" u/s 2(119) as supply of 'services'. In view thereof, there arises no occasion to go into the issue of 'principle supply'.

Question 3

Whether benefit of concessional rate of 5% of solar power generation system and parts thereof would also be available to sub-contractors?

The ARA has held that no details were brought before them and therefore in the absence of documents they have expressed their inability to deal with the question. As no fresh documents were produced before us and also there being no original ruling of the ARA, we hold that we will not deal with the question in the present proceedings.

44. JUDGEMENTS QUOTED BY THE APPELLANT

Apart from the judgements already discussed in the 'FINDINGS' part of this order, 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 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)]** In **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.

In view of the extensive deliberation as held above, we pass an order as follows:-

ORDER

Q.1 Whether supply of turnkey Engineering, Procurement and Construction ('EPC') Contract for construction of a solar power plant wherein both goods and services are supplied can be construed to be a Composite Supply in terms of Section 2(30) of the Central Goods and Services Tax Act, 2017?

A.1. The Appellant poses before us to decide if the Engineering, Procurement and Construction contract falls within the definition of 'composite supply' as found in the GST Act. The question is answered in the positive as supply of the said turnkey EPC contract is a 'composite supply' u/s.2(30) of the CGST Act, 2017.The said composite supply falls within the definition of works contract u/s.2(119) of the CGST Act, 2017.

Q.2. ***If yes, whether the Principal Supply in such case can be said to be 'solar power generating system' which is taxable at 5% GST?***

Ans. We have treated the transaction as a 'Composite supply' and a works contract falling u/s. 2(119) of the CGST Act, 2017 and Para 6 of SCHEDULE II [ACTIVITIES TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES] treats "works contracts" u/s 2(119) as supply of 'services'. In view thereof, there arises no occasion to go into the issue of 'principle supply'. We proceed to the third question.

Q.3. Whether benefit of concessional rate of 5% of solar power generation system and parts thereof would also be available to sub-contractors?

A.3 In the absence of any documents before us, we would not be able to deal with this question in the present proceedings.

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

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

7. Office copy