

Athena Knowledge Sharing: AKS | 2024

Safari Retreats: Hon'ble Supreme Court

A. Outcomes of the Judgment

1. Summary of the Principles laid down by the Hon'ble Apex Court

- i. A Building can be said to be a 'plant' for availment of ITC, if the construction of the said building is essential for carrying out the activity of supplying services such as renting or giving on lease or other transactions in respect of the building or a part thereof.
- ii. Construction cannot be said to be on a taxable person's "own account" if it is intended to be sold or given on lease or license.
- iii. Functionality test will have to be applied to decide whether the construction of an immovable property is a "plant" in the facts of each case.
- iv. A mall, warehouse or any building other than a hotel or a cinema theatre can be classified as a 'plant' within the meaning of the expression "plant **or** machinery" used in clause (d) of Section 17(5) by considering-
 - a. factual position in each case,

- b. business of the registered person, and
- c. the role of the mall/warehouse/building in the said business.

Author's Comment & Suggestive Way Forward

- i. *Readers of this update from Real Estate Organisations can seek Author's Comment & suggestive way forward.*
- ii. *E-mail at pawan@athenalawassociates.com with name of organization & designation.*

B. Detailed Analysis of the Judgment

2. Issues involved

- i. Interpretation of the term “plant **OR** machinery” used in clause (d) of sub-section (5) of Section 17.
- ii. Meaning of the word “plant”.
- iii. Constitutional Validity of Section 17(5) (c) & (d) and Section 16(4) of CGST Act.

3. Facts

- i. The first respondent is engaged in construction of a shopping mall for the purpose of letting out premises in malls to different tenants. Vast quantities of material, inputs and services are required for construction of malls in the form of cement, sand, steel, aluminium, wires, plywood, paint, lifts, escalators, air-conditioning plants, electrical equipment, transformers, building automation systems etc., along with consultancy services, architectural services, legal and other professional services, engineering services and other services including the services of a special team of international designers specialised in the construction of malls.
- ii. The letting out of units in the shopping mall by the first respondent attracts GST based on the rent received by the first respondent since it amounts to the supply of service under CGST Act.
- iii. Therefore, the first respondent was desirous of availing the Input Tax Credit (ITC) accumulated against the rental income received on letting out the mall premises.

4. Analysis of Clauses (c) and (d) of Section 17(5) by the Hon'ble Apex Court

I. Interpretation of the term "Plant OR Machinery" used in clause (d)

- i. There is hardly any similarity between clauses (c) and (d) of Section 17(5). The only similarity is that, both apply to construction of an immovable property.

- ii. Clause (c) uses the expression “plant **and** machinery”, which is specifically defined in the explanation whereas Clause (d) uses the expression “plant **or** machinery”, which is not specifically defined.
- iii. The legislature has intentionally used the expression “plant **or** machinery” in clause (d) as distinguished from the expression “plant **and** machinery” used in several places.
- iv. The expression “plant **and** machinery” and “plant **or** machinery” cannot be given the same meaning.
- v. When the legislature uses the expression “plant **and** machinery,” only a plant will not be covered by the definition unless there is an element of machinery or vice versa. This expression cannot be read as “plant **or** machinery”.
- vi. The expression “plant **or** machinery” has a different connotation. It can either be a Plant **or** Machinery.
- vii. The very fact that the expression “immovable property other than plant **or** machinery” is used, shows that there could be a plant that is an immovable property.
- viii. As the word ‘plant’ has not been defined under the CGST Act or the rules framed thereunder, its ordinary meaning in commercial terms will have to be attached to it.
- ix. The Court has earlier-
 - laid down the functionality test.
 - held that whether a building is a plant, is a question of fact.

- held that if it is found on facts that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance.
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- x. The word 'plant' used in a bracketed portion of Section 17(5)(d) cannot be given the restricted meaning provided in the definition of "plant **and** machinery", which excludes land, buildings or any other civil structures. Therefore, in a given case, a building can also be treated as a plant, which is excluded from the purview of the exception carved out by Section 17(5)(d) as it will be covered by the expression "plant **or** machinery".
 - xi. To give a plain interpretation to clause (d) of Section 17(5), the word "plant" will have to be interpreted by taking recourse to the functionality test. Therefore, if a building qualifies to be a plant, ITC can be availed against the supply of services in the form of renting or leasing the building or premises.
 - xii. Renting or leasing immovable property is deemed to be a supply of service, and it can be taxed as output supply. Therefore, if the building in which the premises are situated qualifies for the definition of plant, ITC can be allowed on goods and services used in setting up the immovable property, which is a plant.
 - xiii. A developer may construct a mall predominantly to sell the premises therein, after obtaining an occupation certificate. Therefore, it will be out of the purview of clause 5(b) of Schedule II. Each case will have to be tested on merits as the question whether an immovable property or a building is a 'plant', is a factual question to be decided.
 - xiv. Functionality test will have to be applied to decide whether a building is a plant. Therefore, by using the functionality test, in each case, on facts, in the light of what the Court has held earlier, it will have to be decided whether the construction of an immovable property is a "plant" for the purposes of clause (d) of Section 17(5).

- xv. The matter has been remanded back for the limited purpose to decide on facts, whether the mall in question satisfies the functionality test so that it can be termed as a ‘plant’ within the meaning of bracketed portion in Section 17(5)(d). The same applies to warehouses or other buildings except hotels and cinema theatres.
- xvi. While deciding these cases, no final adjudication has been made on the question whether the construction of immovable property carried out by the petitioners in Writ Petitions amounts to ‘plant’, and each case will have to be decided on its merit by applying the functionality test in terms of this judgment. The issue must be decided in appropriate proceedings in which adjudication can be made on facts. The petitioners are free to adopt appropriate proceedings or raise the issue in appropriate proceedings.

II. Interpretation of term “on his own account” used in clause (d)

- i. Construction is said to be on a taxable person’s “own account” when it is,
 - a. made for his personal use and not for service; *or*
 - b. to be used by the person constructing it, as a setting to carry out its business.
- ii. However, construction cannot be said to be on a taxable person’s “own account” if it is intended to be sold or given on lease or license.

III. Scope of Clause (c)

- i. There is no scope to give any other meaning to clause (c) of Section 17(5), than its plain and natural meaning.

- ii. The expression “plant and machinery” has been specifically defined in the explanation to Section 17.
- iii. The Court cannot add or subtract anything from clause (c).
- iv. ITC is a creation of legislature. Therefore, legislature can exclude specific categories of goods or services from ITC.
- v. Exclusion of the category of works contracts by clause (c) will not *per se* defeat the object of the CGST Act.

5. Constitutional Validity

- i. The Hon’ble Apex Court has held that the challenge to the constitutional validity of clauses (c) & (d) of Section 17(5) and Section 16(4) of the CGST Act is not established.

C. INTERPRETATION OF TAXING STATUTES

6. Principles governing the Interpretation of Taxation Statutes as summarised by the Hon’ble Apex Court in *para 25* of the Judgment

- i. A taxing statute must be read ‘*as it is*’ with no additions and no subtractions on the grounds of legislative intendment or otherwise;
- ii. If the language of a taxing provision is plain and the consequence of giving effect to it may lead to some absurd result, it is not a factor to be considered when interpreting the provisions. It is for the legislature to step in and remove the absurdity;

- iii. While dealing with a taxing provision, the principle of strict interpretation should be applied;
- iv. If two interpretations of a statutory provision are possible, the Court ordinarily would interpret the provision in favour of a taxpayer and against the revenue;
- v. In interpreting a taxing statute, equitable considerations are entirely out of place;
- vi. A taxing provision cannot be interpreted on any presumption or assumption;
- vii. A taxing statute has to be interpreted in the light of what is clearly expressed. The Court cannot imply anything which is not expressed. Moreover, the Court cannot import provisions in the statute to supply any deficiency;
- viii. There is nothing unjust in the taxpayer escaping, if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly;
- ix. If literal interpretation is manifestly unjust, which produces a result not intended by the legislature, only in such a case can the Court modify the language;
- x. Equity and taxation are strangers. But if construction results in equity rather than injustice, such construction should be preferred;
- xi. It is not a function of the Court in the fiscal arena to compel the Parliament to go further and do more;
- xii. When a word used in a taxing statute is to be construed and has not been specifically defined, it should not be interpreted in accordance with its definition in another statute that does not deal with a cognate subject. It should be understood in its commercial

sense. Unless defined in the statute itself, the words and expressions in a taxing statute have to be construed in the sense in which the persons dealing with them understand it, i.e., as per the trade understanding, commercial and technical practice and usage.

D. Words of wisdom by the Hon'ble Apex Court for Good Advocacy

- i. Brevity is the hallmark of good advocacy.
- ii. The Judges and lawyers are humans and sometimes, bulky compilations & submissions can be counterproductive.

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