



## INDIRECT TAX ALERT

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### Supreme Court Clarifies ITC Eligibility on Construction of Immovable Property Under GST: Safari Retreats Case Remanded to High Court

The Hon'ble Supreme Court in the case of **Chief Commissioner of Central Goods and Services Tax & Ors. Vs. M/s. Safari Retreats Private Limited & Ors. [Civil Appeal No. 2948 of 2023, dated October 3, 2024]**, upheld the validity of Sections 17(5)(c) and 17(5)(d) of the CGST Act, 2017. The Court clarified that "plant or machinery" in Section 17(5)(d) cannot be interpreted the same as in Section 17(5)(c). It held that whether a building qualifies as a 'plant' depends on the nature of the registered person's business activity. The court remanded the case to the High Court for further factual analysis.

#### FACTS OF THE CASE

- M/S Safari Retreats Pvt. Ltd. & Ors. ("the Company") is engaged in the construction of shopping malls with the purpose of leasing premises to various tenants. The Company uses vast quantities of materials, inputs, and services for mall construction, including cement, sand, steel, aluminum, wires, plywood, paint, lifts, escalators, air-conditioning systems, electrical equipment, transformers, building automation systems, as well as consultancy, architectural, legal, professional, and engineering services.
- The company has accumulated input tax credit (ITC) amounting to more than Rs. 34 crores from the purchases and supply of goods and services used in the construction of the shopping mall.



- The rent received by the Company from letting out of units in the shopping mall attracts GST as it amounts to the supply of service under the CGST Act, 2017. Accordingly, the Company is desirous of availing the input tax credit (ITC) accumulated against the rental income from leasing premises in the mall.
- On the other hand, the CGST department maintained that Section 17(5)(d) of CGST Act., 2017 explicitly restricts ITC for the construction of immovable property. The Company had filed writ petition before the Hon'ble High Court of Orissa which ruled in favor of Safari Retreats, stating that Section 17(5)(d) should not be interpreted in a way that prevents businesses from claiming legitimate input tax credits.
- Following the High Court's decision, the CGST department appealed to the Supreme Court, seeking further clarification on whether the ITC could be claimed under these circumstances.
- Section 17(5) outlines a list of blocked input tax credits under GST, with clauses (c) and (d) specifically addressing the eligibility of claiming input tax credit on the construction of immovable property, as follows:
- Sub-section 5 of Section 17 reads as under : Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

.....

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

**Explanation.-** For the purposes of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;

.....

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

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

(ii) Telecommunication towers; and

(iii) Pipelines laid outside the factory premises.



## ISSUES BEFORE THE HON'BLE SUPREME COURT

- An important question that has been raised before the Hon'ble Apex court, inter alia, is to examine the constitutional validity of clauses (c) and (d) of Section 17(5) of the CGST Act, 2017 and to determine whether these provisions need to be read down?
- Another significant issue pertains to the definition of "Plant and Machinery" provided in the explanation to Section 17 of the CGST Act, 2017, which raises the question of whether this definition can also be applied to the expression "Plant or Machinery" as mentioned in clause (d) of Section 17(5) of the said Act?
- If it is determined that the explanation does not extend to "Plant or Machinery," the next issue is to define the meaning of the term "Plant"?

## DECISION OF THE HON'BLE SUPREME COURT

- The Hon'ble Supreme Court held the following in its judgment:
- Section 17(5)(c) and 17(5)(d) of the CGST Act applies when works contract services for construction of immovable property and services for construction of an immovable property are supplied respectively. The definition of "works contract" under Section 2(119) is extensive. Thus, in the case of works contract services supplied for the

construction of immovable property, the benefit of ITC is not available. However, there are exceptions to Section 17(5)(c):

(i) When goods or services, or both, are received by a taxable person for the construction of "plant and machinery", as defined in the explanation.

(ii) Where the works contract service supplied for the construction of immovable property is an input service for further supply of the works contract.

- Similarly, ITC is not available for supplies used by a taxable person for construction of an immovable property. However, restrictions u/s 17(5)(d) carves out two exceptions:

(i) Where goods or services or both are received by a taxable person for construction of "plant or machinery" and

(ii) Where goods and services or both are received by a taxable person for the construction of an immovable property made not on his own account.

- The Construction is considered to be on a taxable person's "Own Account" when:-

(i) It is made for his personal use and not for services or

(ii) It is to be used by the person constructing as a setting in which business is carried out. However, said construction cannot be considered to



be on a taxable person's "own account" if it is intended to be sold or given on lease or license.

- The expression "plant or machinery" used in Section 17(5)(d) cannot be given the same meaning as the expression "plant and machinery" defined by the explanation to Section 17. Thus, expression "plant and machinery" which excludes land, buildings or any other civil structure shall not be relevant for the purpose of construing the restriction u/s 17(5)(d).
- Since the expression "plant or machinery" has not been defined in the CGST Act, their ordinary meaning of the expression "plant" as well as "machinery" in commercial contexts will have to be applied.
- Held that the question whether 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 Section 17(5)(d) is a factual question which has to be determined keeping in mind the business of the registered person and the role that building plays in the said business. If the construction of a building was 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, which are covered by clauses (2) and (5) of Schedule II of the CGST Act, the building could be held to be a plant. Then, it is taken out of the exception carved out by clause (d) of Section 17(5) to sub-section (1) of

Section 16. 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 we have 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).

- Further, the challenge to constitutional validity of clauses (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act was not established. The right of ITC is conferred only by the Statute. Therefore, unless there is a statutory provision, ITC cannot be enforced. It is a creation of a statute, and thus, no one can claim ITC as a matter of right unless it is expressly provided in the statute. It cannot be disputed that the legislature can always carve out exceptions to the entitlement of ITC under Section 16 of the CGST Act. Section 17(5)(c) and (d) cannot be considered discriminatory, as these restrictions appear to have been implemented to uphold the objective of respecting the State's legislative powers under Entry 49 of List II (concerning the taxation of land and buildings). The given restrictions are therefore constitutional.
- The Hon'ble Supreme Court, in setting aside Civil Appeal Nos. 2948 and 2949 of 2023, remanded the writ petitions to the High Court of Orissa for an evaluation of the factual and business activities of the company to determine whether the shopping mall qualifies as a "plant" under Section 17(5)(d) of the CGST Act, 2017. The Court refrained



from making a final ruling on whether the construction of immovable property by the petitioners constitutes a "plant," stating that each case must be decided on its merits, applying the functionality test as outlined in this judgment.

## COMMENTS

- This landmark judgment interprets Section 17(5)(d) of the CGST Act, 2017 which could significantly impact how businesses claim Input Tax Credit (ITC) for the construction of immovable properties like shopping malls, commercial complexes, and office buildings.
- If the construction of an immovable property is classified as a "plant," ITC is permitted. However, the term "plant" as used in Section 17(5)(d) is not explicitly defined in the CGST Act,
- This judgment establishes an important precedent for the application of the functionality test, which helps determine whether a property qualifies as a 'Plant', thereby making it eligible for ITC. However, the specific criteria for applying the functionality test remain open. Each case must be evaluated based on the nature of the business activity and the role of immovable property in the business.
- The judgment further clarified that Input Tax Credit (ITC) is not a fundamental or constitutional right but rather a statutory right granted to taxpayers, subject to specific conditions.
- The decision aligns with the broader GST objective of enabling seamless credit flow and preventing tax cascading, supporting tax neutrality by allowing ITC on properties used for taxable supplies.
- Businesses in the real estate sector should reassess their tax positions. If their properties are essential to their supply of services, they may now be eligible to claim ITC on construction costs.
- Although the Constitutional validity of Section 17(5)(c) and Section 17(5)(d) has been settled by the judgment, the question of what constitutes a "plant" remains unresolved and will need to be determined based on the facts and circumstances of each individual case.





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