MAHARASHTRA AUTHORITY FOR ADVANCE RULING

(constituted under section 96 of the Maharashtra Goods and Services Tax Act, 2017)

BEFORE THE BENCH OF

(1) Shri B. V. Borhade, Joint Commissioner of State Tax
(2) Shri Pankaj Kumar, Joint Commissioner of Central Tax

GSTIN Number, if any/ User-id		27AACCE0525D1Z8
Legal Name of Applicant		Giriraj Renewables Private Limited
Registered Address/Address provided while obtaining user id		Unit No 406, 4th Floor, Hubtown Solaries, N.S Phadke Road, Saiwadi, near Gokhle Flyover Bridge, Andheri (E), Mumbai 400 069
Details of application		GST-ARA, Application No. 01 Dated 24.11.2017
Concerned officer		MUM-VAT-C-709, NODAL DIVISION - MUMBAI-7.
Nature of activity(s) (proposed / present) in respect of which advance ruling sought		
A	Category	Works Contract
B	Description (in brief)	The applicant is an EPC contractor and enters into contract with various Developers who desire to set up and operate solar photovoltaic plants for supply of power generated. Typically the contracts are for supply of goods as well as services.
Issue/s on which advance ruling required		(v) determination of the liability to pay tax on any goods or services or both
		(vii) whether any particular thing done by the applicant with respect to any goods and/or services or both amounts to or results in a supply of goods and/or services or both, within the meaning of that term
Question(s) on which advance ruling is required		As reproduced in para 01 of the Proceedings below.

PROCEEDINGS

(under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

NO.GST-ARA-01/2017/B- 01 **Mumbai, dt.** 17/02/2018

The present application has been preferred under section 97 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 Giriraj Renewables Private Limited, the applicant, seeking an advance ruling in respect of the following questions :

- *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*
- *If yes, whether the Principal Supply in such case can be said to be 'solar power generating system' which is taxable at 5% GST.*
- *Whether benefit of concessional rate of 5% of solar power generation system and parts thereof would also be available to sub-contractors.*

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 provision under the MGST Act. Further to the earlier, henceforth for the

purposes of this Advance Ruling, a reference to such a similar provision under the CGST Act / MGST Act would be mentioned as being under the "GST Act".

02. FACTS AND CONTENTION - AS PER THE APPLICANT

The submissions, as reproduced verbatim, could be seen thus-

[A] AS SUBMITTED ALONGWITH APPLICATION

Statement of the relevant facts having a bearing on the aforesaid clarification(s)/ transaction(s)

1. "The Applicant is an EPC contractor and enters into contract with various Developers who desire to set up and operate solar photovoltaic plants for supply of power generated. In various cases, the Applicant also is a Project developer wherein it is engaged in operation of renewable energy power plant projects.
2. Typically a turnkey contract is entered into by the Applicant 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 studies transportation, unloading, storage and site handling, installation and commissioning of all equipments and material, complete project management as well as supply and construction related to various other packages for complete PV plants.
3. Accordingly, the contract entered into by the Applicant includes end to end activities i.e. supply of various goods and services intended for setting up, operation and maintenance of a solar power plant.
4. The intent of the contract is that the entire contract would be undertaken by the Applicant for supply of both goods and services and setting up of the solar power plant as well as transmission lines for transmission of the electricity generated up to the storage or the GRID.
5. 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 various milestones.
6. A diagrammatic illustration of a solar power system is provided.

Statement containing the applicant's understanding of rate of tax/ exigibility in respect of the aforesaid clarification(s)/transaction(s)

The Applicant prefers to present the application before this Hon'ble Authority on the following, among other, grounds, each of which is taken in the alternative and without prejudice to the others:

1. Legal provisions and applicability

1.1 Rate of solar power generating system

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

Chapter Heading	Description	
84 0r 85 0r 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**

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
- 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 should be eligible for concessional rate of tax

1.2 Concept of composite supply and mixed supply

Section 2(30) of CGST Act defines composite supply to mean 'a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply'.

Section 2(90) defines principal supply as "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'.

Further, mixed supply has been defined under the Act as "mixed supply" means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply". Hence, for mixed supply there should be a single price and entire contract gets taxed at the supply with highest rate of tax.

1.3 Concept of works contract

Works contract has been defined under Section 2 (119) of CGST Act as follows:

"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."

Works contract has been deemed to be a service under GST – Schedule II of GST law specifies that composite supply of works contract would be deemed to be a service. The general rate of works contract service is 18%.

1.4 Our understanding in present context

Per the above legal provisions, we understand that in present case, since the scope of work of the Applicant includes provision of both goods and services, the entire contract is one turnkey EPC contract and hence, would qualify as a composite supply. The principal supply in such case is provision of the solar power generating system and hence, the entire contract (including services portion) should be taxable at 5%.

2. Ambit of composite supply

2.1. Wide ambit of term 'Composite Supply'

Composite Supply has been defined in Section 2(30) of the Central Goods and Services Tax Act, 2017 as '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;'

Further, Principal Supply has been defined in Section 2(90) of the CGST Act as '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'

Thus, principal supply refers to the supply which is the predominant element in a composite supply.

Illustration as provided in GST law is that 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, in terms of Section 8 of the CGST Act, it has been clarified 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.

In the present case, the Applicant would like to submit that the main intent of the contract is provision of the solar power generation system which consists of various components such as modules, structures, inverter transformers, cables, SCADA, transmission lines, etc. Services like civil construction are merely incidental to provision of such goods and form an ancillary part of the contract.

It is submitted that service portion of the contract is only ~10 to 15% and balance is supply of goods. This also substantiates the fact that provision of services is incidental to supply of goods and hence, the supply of goods should form the principal supply and the entire contract should be taxed as supply of goods itself. It is submitted that the entire contract including goods supplied used in AC electrical, DC electrical, transmission lines as well as other ancillary parts/ goods and services should get covered as composite supply and be taxable as principal supply of 'solar power generating system'.

It is further submitted that Ministry of New and Renewable Energy ('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'.

2.2. Wide ambit of term 'solar power generation system'

The term 'solar power generating system' has not been defined under GST. Solar power generating system generally are the systems which absorb sunlight and convert it into electricity which can be put to further use. 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.

Further, under erstwhile law also, solar power generating systems have not been 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.

Reference 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 case 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."

Please find attached the aforesaid judgments as **Annexure – B.**

Per the above, where a contract is awarded as a whole for supply of solar power generation system consisting of various components (as highlighted above) as well as services, the entire contract should qualify as a solar power generating system. This is in line with the concept of 'composite supply' in which case the taxability is as per the principal supply which is the solar power generating system.

2.3. Reference to Education Guide issued under service tax regime

It is to be noted that the concept of composite supply under GST is identical to the concept of naturally bundled services prevailing in the erstwhile Service Tax regime.

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 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.

Drawing reference to the above, it is submitted that the customer perceives 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) and bundled and linked wherein the main intent is provision of the goods which constitute solar power generating system.

2.4. Global Jurisprudence – Meaning of Composite Supply

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:

2.4.1. 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.

2.4.2. 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.

2.4.3. 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.

3. Intention of parties

As discussed above, section 2(30) of CGST Act states that supply of two or more taxable supplies of goods or services or both or combination of both which are naturally bundled and are supplied in conjunction with each

other in ordinary course of business, one of which is a principal supply will be considered as a composite supply.

Further, in terms of Section 2(90) of CGST Act, principal supply means the supply of goods or services which constitutes predominant element of a composite supply. Further, as per Section 8, in case of composite supply, the taxes applicable on principal supply would be applicable on the composite supply.

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 are 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 goods.

4. **Contract does not constitute works contract**

It is submitted additionally that works contract is also defined as a composite contract and includes 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 our case that the intent of the contract executed by the Applicant are not in the nature of erection, commissioning or fitting out, etc. Instead the contract is entered for provisioning of solar power generating system and the main intent of parties is to procure a solar power generating system to which the activity/ services of erection/ commissioning etc are only incidental.

In the present case, even if the contract qualifies as composite contract, the principal supply would be that of provision of solar power generating system and not provision of works contract services. This is because as highlighted above, the principal supply or dominant intent is provision of goods as solar power generating system and hence, entire contract should be taxable as the principal supply itself.

5. **Whether benefit would also be available to sub-contractor**

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

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

5.2 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, EPC contractor or manufacturer/ supplier/ sun-contractor.

5.3 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.

6. **Conclusion**

- As per Section 2(30) of the CGST Act, in case more than one goods are supplied which are bundled together in the ordinary course of business, such supply would be considered as composite supply. Further, per Section 8 of the CGST Act, a composite supply comprising two or more supplies, one of which is a principal supply will be treated as supply of such principal supply. Therefore, GST applicable on the principal supply would be applied on such composite supply.
- In view of the above, a position can be taken that the Applicant engaged in the business of EPC contracts of supply of solar power generating system providing services, erection, testing and commissioning of solar power projects, should qualify as composite supply wherein the supply of the solar power generating system constitutes the principal supply. Other services, erection, testing and commissioning of solar power plants are ancillary to the supply of solar power generating system and hence, entire contract (including all goods as well as services) should qualify as solar power generating system taxable at 5%.
- Concessional rate of 5% for supply of solar power generating system or its parts should also be available to sub-contractors."

[B] AS SUBMITTED DURING HEARING

"1.5. Without prejudice and in addition to the submissions already made, the Applicant hereby make the following additional submissions.

The Proposed transactions/ Contract is one for supply of 'Solar Power Generating System' as a whole and hence the rate of GST should be 5%.

1.6. It is submitted that the intent of the parties is always for supply of Solar Power Generating system as a whole

1.7. Reference is made to the draft contract (annexed herewith as Annexure A), which is a Contract for Supply of 60Mw Solar Power Plant. Further, Clause B of the draft Agreement provides as following:

"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"

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1.8. Additionally, reference can be made to the Schedule I of the agreement defines the scope of work to be executed by the Contractor ie the Applicant. The said schedule clearly outlines the entire scope to be undertaken and provides that the Applicant would be responsible for supply of Solar Power Plant.

"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..."

1.9. Typically 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 credits 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 a solar power generating system.

<u>Contract does not constitute works contract</u>

1.10. It is submitted additionally that works contract is defined as a composite contract and includes 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.

1.11. Therefore, in order to determine whether the supply made by the Applicant 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.

1.12. *<u>Essence of the contract and intention of the parties involved in the contract is clearly to supply</u>*

1.12.1. As explained above, the intention of the parties entering into a contract with the Applicant, is to procure a completely functional solar power plant wherein the Applicant 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 intention of the parties is not to undertake any activity on an immovable property, but to supply Solar power plant.

1.13. *<u>Solar power plant is not an immovable property</u>*

1.13.1. It is submitted that 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 running of the said object, and not for the benefit of land, such object will not be considered as immovable property. Further, it has been held that if fixing of a plant to a foundation is only meant to give stability to the plant and where there is no intention to make such plant permanent, the foundation would not change the nature of the plant and make it an immovable property.

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

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

In view of this finding of fact, it is not possible to hold that the machinery assembled and erected by the appellant at its factory site was immovable property as something attached to earth like a building or a tree. The tribunal has pointed out that it was for the operational efficiency of the machine that it was attached to earth. If the appellant wanted to sell the paper making machine it could always remove it from its base and sell it.

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

1.13.3. Relying on the aforesaid judgment, the Hon'ble Supreme Court, in the year 2010, 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.'

1.13.4. 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.'

1.13.5. 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.

1.13.6. 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.....'

A copy of all the judgements is collectively marked and attached as **Annexure – B.**

1.13.7. In view of the aforesaid judgments, it is submitted that in the instant case, the solar power plants supplied by the Applicant 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, the fact that the plant is firmly but not permanently attached to the land means that the same is not an immovable property.

1.13.8. Reference can be made to Clause 4.1(xiii) of the draft agreement, 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.

1.13.9. Reliance is also placed on the Chartered Engineer Certificate which clearly provides that Solar Power Plant if required can be shifted to another location and is highly moveable. The same is annexed herewith as **Annexure C**.

1.13.10. The Central Board of Customs and Excise ('CBEC'), vide 37B Order No. 58/1/2002 – CX issued under F.No. 154/26/99 – CX4 dated 15 January, 2002 ('the Circular'), after realizing the anomaly in case of plant and machinery assembled at site, issued the Circular clarifying the following:

(iv) 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 copy of the circular is marked and attached as **Annexure – D.**

Relying on the aforesaid circular, in the case of Applicant, considering the solar power plant, once installed, is capable of being removed and transferred from one place to another without substantial damage, the same should qualify as movable property.

1.13.11. In the instant case, the service portion of the contract constitutes a meagre 6% of the entire contract, solely for the purpose of operation of the solar power plant. The solar power plant can be easily transferred to another location in case required. Hence, it is abundantly apparent that the activity of erection, commissioning and installation is for the beneficial enjoyment of the solar power plant, and hence, solar power plant should not be considered as an immovable property.

Without prejudice to the above and in the alternative, even if the agreement is construed as a Composite Supply, the most critical compo Major component of Solar Power System – Solar Photovoltaic module

1.14. Section 2(30) of CGST Act defines composite supply to mean *'a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply'.*

1.15. Section 2(90) defines principal supply as "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'.*

1.16. Further, in terms of Section 8 of the CGST Act, it has been clarified 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'*

1.17. 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.

1.18. The Applicant would like to highlight that mounted Photovoltaic module (PV module) comprises around 60%-70% of the entire Solar Power Plant, and the rest of the components constitute for around 30-34% and are merely parts or sub parts which are required for panel housing or setting up the module such as controllers and switches. This is due to the fact that PV module is a packaged, connect assembly of typically 6x10 photovoltaic solar cells, which constitute the photovoltaic array of a photovoltaic system that generates and supplies solar electricity. In other words PV modules are nothing but an assembly of solar cells that helps in converting solar power into electricity. Hence, PV module is the most important component of solar power generating system and therefore, would squarely qualify as the 'principal supply' as per the provisions of the GST law.

1.19. Accordingly, it is submitted that the GST rate of PV modules which is 5% should be applicable on the whole of the contract.

1.20. Reference can be made to the CERC Order dated 23 March 2016 involving determination of Benchmark Capital Cost Norm for Solar PV Power Project for FY 16-17. In the said case also, the CERC, of the total cost of the project including land cost, PV Modules cost is considered as 62%. A copy of the said order is annexed herewith as **Annexure E**.

1.21. Reliance can also be placed on Chartered Engineer Certificate which provides that the most critical component is PV Modules both in terms of the value and the functionality that such Modules perform.

1.22. Even in the draft agreement, reference can be made to Schedule I of the scope of work 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 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.

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 the lump sum price agreed between the Parties and also does not in any manner dilute the responsibility of the Contractor..."

1.23. Further, there is a definition in the draft agreement, "Major Equipment" [1.1.67] which clearly identifies PV Modules as the Major Equipment

*"**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 this Contract;*

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

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

1.25. Basis the above submissions, it is clearly evident that the PV Modules qualifies as 'principal supply' and 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%.

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

2.1. 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.

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

2.3. 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.

2.4. 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.

3. <u>Conclusion</u>

In view of the aforesaid submissions, the Applicant reiterates the following:

3.1. The Applicant reiterates that the Applicant is engaged in the business of supply of 'solar power generating system' and the same should be liable to tax at 5%.

3.2. The Applicant further prays that solar power generating system should not qualify as immovable property

3.3. Alternatively, even if the agreement is construed as a composite supply, the principal supply would be the supply of PV Modules which again are liable to tax @5%.

3.4. Hence, the Applicant submits that the proposed agreement with its customers should be taxable @5% GST, and the same should be applicable to sub-contractors as well.

03. CONTENTION - AS PER THE CONCERNED OFFICER

The submission, as reproduced verbatim, could be seen thus-

"In support to their claim that EPC contract for construction of solar power plant is purely a Composite Supply and it should not be treated as works contract, they have submitted draft agreement, various case laws. In this connection, I am submitting by submission as under :

A) M/s Giriraj Renewables Pvt Ltd is engaged in the work of construction of a solar power plant. This work is taken on Engineering, Procurement and Construction (EPC) basis. The dictionary meaning of ECP contract is "**Engineering, Procurement, and Construction**" (**EPC**) is a particular form of contracting arrangement used in some industries where the EPC Contractor is made responsible for all the activities from design, procurement, construction, to commissioning and handover of the project to the End-User or Owner."

B) Section 2(119) of GST Act defines works contract as "a contract for building construction fabrication, completion, **erection, installation, fitting out**, improvement, modification, repair, maintenance, renovation, alteration or commissioner of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved into the execution of such contract.". Thus in the works contract transfer of property in goods involved into the execution of contract, is very essential aspect. Transfer of property can take place by imbedding movable goods into immovable property.

M/s Giriraj Renewables Pvt Ltd undertakes works of installation testing and commissioning of Solar power plant. The solar power system is designed to meet the demands of the buyer. The goods are procured as per the requirement, installed, tested and after commissioning the ownership of solar power plant is handed over to the buyer. So it is not the something sold out of shelf.

As per Supreme Court decision in case of Larsen and Toubro V/s State of Karnataka

i) A contract may involve both, a contract for work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work or services is virtually diminished.

ii) The term "Works Contract" is broad and includes all obligations and all types of contracts. Even if some obligations are imposed in addition to supply of goods and materials and performance of services, such contract is still a "works contract".

iii) Works contract is a contract for undertaking or bringing into existence some works."

Once there is a composite contract for supply and installation it has to be treated as works contract as it is not chattel sold as chattel. The solar power system cannot be shifted to any other place without dismantling the same. Further it is tailor-made system, which cannot be sold as it is to the other person.

In the chapter 99 Service Code 995426 specifies the Services Description as "General Construction services of Power Plants and its related infrastructure". It does not specifies the type of power plants. So it is applicable to all type of power plant.

The draft contract provided by the dealer specifies that principal supply is of photovoltaic module at around 60 to 70% of entire solar power plant. However submission given by the dealer is not supported by documents, such as estimate, etc. Therefore this artificial bifurcation arrived by the dealer is not acceptable.

So it is submitted that as per Section 2(119) of GST Act, the EPC contract for solar power plant comes under the purview of works contract.

It is also submitted that since it is works contract, question of principal supply does not arises and so GST tax rate of Solar Power Generating system is not applicable to EPC contract.

As the principal contract is treated as works contract, applicability of concessional rate of tax to the subcontractor does not arise."

04. HEARING

The case was taken up for hearing on dt.17.01.2018 and on dt.12.02.2018 when Sh. Prashant Agarwal (Partner, PricewaterhouseCoopers Pvt. Ltd.) attended and reiterated the contention as made in the written submission. During the hearing on dt.12.02.2018, a sample copy of the agreements in such types of contracts was submitted and our attention was invited

to various clauses therein. Sh. Pravin Chavan, the concerned officer holding the post of State Tax Officer was also present during both the hearings. He requested time till dt.15.02.2018 to give a written submission in the matter.

05. OBSERVATIONS

We have gone through the facts of the case. The issue put before us is the classification of a future transaction which would be effected on the lines of a sample agreement copy as tendered during hearing. It has been submitted by the applicant that the sample agreement is customarily the way in which transactions of the nature as is before us are effected.

As we go through the submission, we find that the applicant has been stressing that the impugned contract is not a 'works contract' but be treated as a 'composite supply'. As we cursorily understand the issue, even before we look into the details of the agreement, a thought cannot be stifled when we look at the sentence ***"Owner has appointed the Contractor for supply of the Solar Power Plant which includes engineering, design, procurement, supply, development, testing and Commissioning (as defined later) of the Plant as per scope defined in relevant schedule of this Contract....."***. Such type of contracts are commonly understood to be works contracts involving supplies of goods as well as services. However, it is equally true that since we would have to see these contracts from the perspective of the new Goods and Service Taxation regime. Hence, it would not be proper to even cursorily disregard the contention of the applicant before looking into the provisions of the GST Act. We feel that we proceed with the issue by first looking into this aspect of 'works contract' or a 'composite supply'. 'Works contract' is defined in clause (119) of section 2 of the GST Act as -

"works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of <u>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;

It can be seen that works contract involves activities of ***building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning***. However, these activities are in terms of an immovable property. This is the highlight in the definition. We have known a 'works contract' in the Sales Tax regime to be activities as *building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning* of any movable or immovable property. Thus, activities in relation to movable and immovable property were covered earlier whereas the GST regime requires it to be restricted to immovable property only. It is with this distinctive difference that the applicant puts before us the contention that the transaction of supply of the Solar Power Plant ("SPP" as would be henceforth referred to) does not result into transfer of an 'immovable property' as the SPP is a 'movable property'. With this background, we proceed to see the clauses of the agreement :

"WHEREAS:

A. ***Owner intends to develop a 60 MWAC/ 81 MWDC solar power plant*** *("Plant"/ "Plant") in ___________, Karnataka ("Plant Site"), for onward sale of power to its consumers.*

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

C. *The* ***Contractor is an entity involved in the business of supply and setting up of complete solar power generating system*** *in various states of India.*

D. *The document in title of the equipment imported and supplied is directly transferred to the Owner by way of High Seas Sale for commercial convenience and in order to avail benefit of concessional customs duty as the benefit of concessional rate of customs duty is only available to the Owner. However, as per this agreement,* ***the risk and liabilities accruing in relation to all those equipment shall remain with the Contractor till the completion of the Plant. After the setting up/ supply of the Plant, the risk and liabilities are shifted to the Owner.***

E. ***The Owner has*** *undertaken an independent due diligence of the Contractor and based 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.***

1.1. Definitions

1.1.18. "Contract" means this contract along with general conditions, the appendices and Schedules annexed hereto;

1.1.20. "Contract Price" shall have its meaning under Clause 6.1;

1.1.22. "Commissioning" 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;

1.1.23. "Commissioning Certificate" shall have its meaning under Clause 15.5;

1.1.24. "Completion Certificate" shall have its meaning under Clause 15.4;

1.1.39. "Equipment" shall mean and include all the equipment and Major Equipment (as defined later) along with its associated accessories, conductors, electrical cables, instruments, apparatus and other items/ equipment required to be supplied by the Contractor for completing and integrating the SPP, as per the Technical Specification, excluding Free Issue Equipment;

1.1.43. "Execution Schedule" means the schedule of Supply of Equipment, construction, installation and Commissioning of the SPP as elaborated under the Schedule 4 (Execution Schedule);

1.1.67. "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 this Contract;

1.1.77. "Plant" shall have its meaning under Recital B;

1.1.78. "Plant Site" shall have its meaning under Recital B;

1.1.80. "Punch List" shall have its meaning under Clause 15.6;

1.1.81. "Punch List Completion" shall have its meaning under Clause 15.6;

1.1.87. "SPP" shall 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;

1.1.88. "Supply" means supplying of Equipment to the Plant Site in accordance with the Technical Specification and the terms of this Contract, for the purposes of installation, testing and Commissioning as part of the Works; and the term "Supplied" shall be construed accordingly;

1.1.96. "Works" mean the work to be performed by the Contractor including mainly (not limited to) supply of the equipment and also ancillary activities of installation, testing and Commissioning of the Plant, as per the terms of this Contract;

3. SCOPE OF THE CONTRACT

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.

4.2. Obligations of Contractor

The Contractor shall be obligated under this Contract in respect of the following:

(i) ***design and engineering of the Plant*** *as per the Schedule 2 (Technical Specifications);*

(ii) ***procure the Equipment's*** *as per the Schedule 4 (Execution Schedule) and the terms of this Contract;*

(iii) ***construction of civil structures or buildings as per the Schedule 2*** *(Technical Specifications) approved/agreed between the Parties;*

(vii) *The Contractor shall be responsible for providing or causing the provision of skilled Personnel, skilled/unskilled labour, specialists/experts (in addition to provision of personal protective equipment and other facilities for health, safety and security to such persons, as per the Applicable Laws and Prudent Utility Practices, in addition to the training required by such persons for the performance of obligations), technicians, material, equipment, machinery, cranes, tools and tackles, etc., required for the execution and completion of the Scope of the Contract*

and all equipment, machinery, items, materials, consumables, accessories, components, etc. as required for the safe development and Commissioning of the Works.

(viii) The Contractor shall provide all required tools and instruments for installation, testing and Commissioning of the Plant.

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.

6.5. Effect of Payment

No payment of the Contract Price or part thereof made by the Owner, shall be deemed to constitute acceptance by the Owner of the performance of (any part or whole) of the Scope of Contract by the Contractor, and shall not relieve the Contractor of any of its obligations under this Contract, solely on the basis of such aforesaid payments *being made by the Owner.*

6.6. Final Payment

The Contractor expressly agrees that the ***final payment shall be released by the Owner only upon completion of the necessary obligations*** *as set out in the final Payment Milestone as set out under Schedule 3 (Contract Price and Payment Milestones).*

7.4. Performance Bank Guarantee

Upon Commissioning of the Plant, the Contractor shall provide an unconditional and irrevocable performance bank guarantee *to the Owner for 5% (five percent) of the Contract Price from a nationalized or scheduled commercial bank ("PBG"), with respect to the Contractor's Defects Liability obligations under this Contract, which shall be valid for a period of 1 (one) year from the date of Commissioning of the Plant. The Performance Guarantee shall be immediately payable on demand and the Owner shall have the right to drawdown the PBG to recover any amounts due and payable by the Contractor in accordance with the terms of this Contract.*

8. LETTER OF CREDIT

8.1. The Owner shall furnish an LC for the payments agreed under the Payment Milestones as per the timeline specified below.

Sl. No	Milestone Payment	Due Date for furnishing LC
1	Prior to dispatch of Major Components from Ex-Works on a pro-rata basis (40%)	15 days prior to dispatch of 1st lot of material to site
2	Delivery of major components at the Plant Site on a pro-rata basis (40%)	15 days prior to dispatch of 1st lot of material to site
3	Commissioning of Relevant MW Size of Plant (4%)	15 days prior to SCOD
4	Punch List Completion of Plant (1%)	15 days prior to SCOD

9. FREE ISSUE EQUIPMENTS

9.1. The Owner___agree to provide Free Issue Material as___agreed between the Parties. The said material would be over and above the Plant being supplied by the Contractor under this contract. The Parties would identify and define such Free issue Material in an annexure as and when such case arises and the same would form part of this Contract

12. SUB-CONTRACTING

12.1. The Contractor shall have right to sub-contract part of its obligations under this Contract, with the approval from the Owner, provided, if the vendors sub-contracted is not reflecting in the list set out in Schedule 13 (List of Approved Vendors). In this regard, the Contractor ____ ***only sub-contract its obligations (in respect of Supply of Equipment)*** *under this Contract to one of the pre-approved Sub-Contractors as set out under Schedule 13 (List of Approved Vendors).*

14.1. Time Schedule

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 ("Scheduled Commercial Operation Date/ SCOD"):

(a) 20 MW by on or before ________; and
(b) 40 MW by on or before ________

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.***

(ii) Upon receipt of the Notice of Commissioning, the Owner or Owner's Representative shall remain available for witnessing Commissioning. Upon inspection of the Commissioning, the Owner shall either:

(a) endorse the commissioning certificate ("Commissioning Certificate") certifying that the Works (or the Works in respect of any particular unit of the Plant) is Commissioned, as per the format in Schedule 9; or

(b) notify the Contractor in writing, detailing the shortfall or Defect and/or deficiencies within 5 (five) days thereof.

(iii) In the event that if the Owner discovers any Defect during the Commissioning of the Plant and furnishes a notice as per Clause 15.5(ii)(b), Contractor shall, promptly correct/ rectify the Defects detailed in Owner's notice by repairing or rectifying the said Defects within 5 (Five) days and notify the Owner detailing the corrective or remedial actions undertaken with respect thereto. The Owner____ within 5 (five) days of receipt of such notice, re-inspect such Commissioning and:

(i) approve the milestone relating to Commissioning or the SPP; or (ii) in case of the Owner finding that the earlier discovered Defect is not been repaired/rectified effectively, provide another notice to the Contractor with respect to the defect, in which case the Contractor shall accept such Defect, correct/ rectify the Defect and which processes shall continue to apply mutatis mutandis until such Commissioning of SPP is approved by the Owner.

(iv) If Owner or its representative is not available for inspection at the Plant Site within the said notice period or fails to communicate as per Clause 15.5(ii),(b) above or the Grid is not available for Commissioning the SPP:

(i) 50% of the milestone payment shall be due within 7 days and balance 50% of the milestone payment shall be due on 30th ______, in such event, the Contractor shall issue a self-endorsed Commissioning Certificate ("Deemed Commissioning Certificate"), as per the Schedule 9 for facilitating the milestone payment under the LC. However, Deemed Commissioning Certification shall not relieve the Contractor from its Obligations for Commissioning of SPP as per Technical Specification

15.6. ***Punch List and Completion***

(i) Parties shall within 15 (fifteen) Business Days from the date of Commissioning of the Entire SPP, jointly prepare a punch list of the outstanding items/works to be performed by the Contractor as per the Technical Specification ("Punch List"). The Contractor shall perform all the Punch List within 30(thirty) Business Days of the finalising the Punch List or the timeline mutually agreed and notify the Owner of such rectification and/or completion ("Punch List Completion"). It is hereby clarified that the Punch List shall not comprise any such items or Works the lack of completion of which would prevent the operation and function of the Plant as envisaged under the terms of this Contract and/or which would prevent the achievement of Functional Guarantees.

(ii) The Owner shall within 10 (ten) Business Days of receipt of notice under Clause 15.6 (i) from the Contractor, inspect and verify that all items in the Punch List have been duly completed by the Contractor as per Technical Specifications and terms of this Contract. In the event that the Owner notifies any Defect or any failure in implementing any Punch List item, then the Contractor shall promptly rectify such Defect or carry out the item so that it confirms to Technical Specification and terms of this Contract. If that the Punch List items have been rectified and/or completed, the Owner shall within 7 (seven) Business Days thereafter endorse the punch list completion certificate ("Punch List Completion Certificate"), as per the format in Schedule 10. The date of endorsement of the Punch List Completion Certificate shall be the date when the SPP is finally accepted by the Owner ("Final Acceptance Date"). However, if the Punch List items have not been completed within the aforesaid time period, the Contractor shall be required to complete the same within 15 (fifteen) Business Days of a notice to this effect issued by the Owner detailing the deficiencies in completion of the Punch List items by the Contractor.

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(iii) If the Owner fails to inspect the relevant Punch List after rectification or fails either to endorse the Punch List Completion Certificate or provide Contractor with the list of Punch List items not rectified within the period of 15 (fifteen) Business Days as per the Clause 15.5(i) or the Grid is not available for Commissioning the SPP on or before ______, in such event, the Contractor shall issue a self-endorsed Punch List Completion Certificate ("Deemed Punch List Completion Certificate") as per the Schedule 10 for facilitating the relevant milestone payment under the LC. However, Deemed Punch List Completion Certification shall not relieve the Contractor from its Obligations for resolving and closing the Punch List with the Owner.

16.1. ***Delay Liquidated Damages***

(a) ***In the event of delay in achievement of Commissioning*** *by the SCOD, the Contractor shall pay Liquidated Damage at the rate 0.25% (zero point two five percent) of the Contract Price, exclusive of Taxes, of the delayed MW per week, till___. However, if the SCOD of the SPP is not achieved on or before___, Contractor shall be liable to pay a onetime Liquidated Damage of 5% of the total Contract Price, exclusive of Taxes ("Delay Liquidated Damages/ DLD").*

16.4. ***Contractor's Obligations***

The payment of Liquidated Damages by the Contractor in terms of this Clause does not in any way relieve the Contractor from any of its duties, obligations and responsibilities under this Contract *and shall be without prejudice to any other rights available to the Owner under this Contract.*

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.

20.2. After the completion of the Plant, the risk and liabilities shall shift to the Owner after completion certificate is duly issued.

*22.1. **Risk, Custody and Care***

All risk of the Contractor in the Equipment's, Work and SPP shall stand transferred to the Owner from and upon Commissioning of the Relevant MW size of the Plant. However, Contractor shall be responsible for any damage in Equipment (excluding Free issue Material), Work and Plant due to any act by the Contractor or its representatives till Punch List Completion.

*22.2. **Title Transfer***

All the risk and title of the Contractor in the Equipment and the Plant** (forming part of the Supply), including every proprietary interest in the Equipment, **shall be transferred to the Owner upon Commissioning of the Plant.

SCHEDULE I

SCOPE OF WORK

*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 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.***

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 the lump sum price agreed between the Parties and also does not in any manner dilute the responsibility of the Contractor.

As can be seen, the owner expects the contractor i.e the applicant to perform all activities from engineering, design to procurement of the materials and also perform the testing and commissioning. In contracts of such a nature, the liability of the contractor doesn't end with the procuring of materials but it extends till the successful testing and commissioning of the system. The transaction is a 'works contract' but it is for us to decide whether it is a 'works contract' in terms of the GST Act. So, we come to the crux of the issue and which is as to whether the transaction results into any immovable property. The term 'immovable property' has not been defined under the GST Act. However, there are a plethora of judgments of the Hon. Supreme Court and the Hon. High Courts which have helped understand the term 'immovable property'. One such decision is of the ***T.T.G. Industries Ltd. v. CCE,* (2004) 4 SCC 751**. We would first reproduce the facts of this case, as identified by the Hon. Court -

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*"**2.** The facts of the case are not in dispute. The appellant Company pursuant to the acceptance of its tender, entered into an agreement with M/s SAIL, Bhilai Steel Plant for design, supply, supervision of erection and commissioning of four sets of hydraulic mudguns and tap hole-drilling machines required for Blast Furnaces Nos. 4 and 6 of Bhilai Steel Plant. For this purpose, it imported several components and also manufactured some of the components at their factory in Marai Malai Nagar, Chennai. These components were transported to the site at Bhilai where the manufacture and commissioning of the aforesaid machines took place. It is undisputed that duty was paid in respect of the components manufactured at its workshop in Chennai, but no duty was paid on manufacture of the aforesaid mudguns and drilling machines which were erected and commissioned on site."*

We can now look at how the judgment has been delivered -

*"**8.** 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-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 a 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 storehouse 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 have 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 × 4.5 × 1 metre and that of the drilling machine 1 × 6.5 × 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.

***10.** The judicial member noticing these facts observed that it is a physical and engineering impossibility to assemble mudguns or the tap hole-drilling machines elsewhere in a fully assembled condition and thereafter erect or install the same at a height of 25 feet on the cast floor of the blast furnace. She found that even the adjudicating authority conceded the fact that the equipments have to be assembled/erected on the base frame projection of the furnace. She also accepted the submission urged on behalf of the appellant that if the machines are to be removed from the blast furnace, they have to be first dismantled into parts and brought down to the ground only by using cranes and trolley ways considering the size, and also considering the fact that there is no space available for moving the machines in assembled condition due to their volume and weight. She considered the authorities on the subject and came to the conclusion that erection of mudgun and tap hole-drilling machine results in erection of immovable property. She noticed the judgment of this Court in Narne Tulaman Manufacturers (P) Ltd. [(1989) 1 SCC 172 : 1989 SCC (Tax) 64 : (1988) 38 ELT 566 : 1988 Supp (3) SCR 1] and also noticed the judgment of the Tribunal in Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. CCE [(1993) 65 ELT 121 (cegat)] which held that the issue of immovable property was never raised before the Supreme Court in Narne Tulaman Manufacturers (P) Ltd. [(1989) 1 SCC 172 : 1989 SCC (Tax) 64 : (1988) 38 ELT 566 : 1988 Supp (3) SCR 1] She found support for her conclusion in the decision of this Court in Municipal Corpn. of Greater Bombay v. Indian Oil Corpn. Ltd. [1991 Supp (2) SCC 18] and held that the twin tests laid down by this Court to determine whether assembly/erection would result in immovable property or not were fully satisfied in the facts of this case. She concluded:*

"The test laid down by the Supreme Court is that if the chattel is movable to another place as such for use, it is movable but if it has to be dismantled and reassembled or re-erected at another place for such use, such chattel would be immovable. In the present appeal, even according to the finding of the Collector, mudguns and tap hole-drilling machines have to be dismantled and disassembled from the cast floor before being erected or assembled elsewhere. We have also arrived at the same conclusion independently, in para 10 above. Accordingly applying the test laid down by the Supreme Court we hold that the erection and installation of mudguns and tap hole-drilling machines result in immovable property. In the light of the ratio of the above case-law, we hold that the mudguns and tap hole-drilling machines do not admit of the definition of goods and, therefore, excise duty is not leviable thereon."

18. The core question that still survives for consideration is whether the processes undertaken by the appellant at Bhilai for the erection of mudguns and drilling machines resulted in the emergence of goods leviable to excise duty or whether it resulted in erection of immovable property and not "goods".

***21.** The appellant has placed considerable reliance on the principles enunciated and the test laid down by this Court in Municipal Corpn. of Greater Bombay [1991 Supp (2) SCC 18] to determine what is immovable property. In that case the facts were that the respondent had taken on lease land over which it had put up, apart from other structures and buildings, six oil tanks for storage of petrol and petroleum products. Each tank rested on a foundation of sand having a height of 2 feet 6 inches with four inches thick asphalt layers to retain the sand. The steel plates were spread on the asphalt layer and the tank was put on the steel plates which acted as bottom of the tanks which rested freely on the asphalt layer. There were no bolts and nuts for holding the tanks on to the foundation. The tanks remained in position by their own weight, each tank being about 30 feet in height, 50 feet in diameter, weighing about 40 tons. The tanks were connected with pump house with pipes for pumping petroleum products into the tank and sending them back to the pump house. The question arose in the context of ascertaining the rateable value of the structures under the Bombay Municipal Corporation Act. The High Court held that the tanks are neither structure nor a building nor land under the Act. While allowing the appeal this Court observed: (SCC p. 33, para 32)*

"32. The tanks, though, are resting on earth on their own weight without being fixed with nuts and bolts, they have permanently been erected without being shifted from place to place. Permanency is the test. The chattel whether is movable to another place of use in the same position or liable to be dismantled and re-erected at the latter place? If the answer is yes to the former it must be a movable property and thereby it must be held that it is not attached to the earth. If the answer is yes to the latter it is attached to the earth."

22. Applying the permanency test laid down in the aforesaid decision, counsel for the appellant contended that having regard to the facts of this case which are not in dispute, it must be held that what emerged as a result of the processes undertaken by the appellant was an immovable property. It cannot be moved from the place where it is erected as it is, and if it becomes necessary to move it, it has first to be dismantled and then re-erected at another place. This factual position was also accepted by the adjudicating authority.
23. The technical member, however, held that the aforesaid decision was of no help to the appellant inasmuch as a leading international manufacturing firm had offered such machines for export to different parts of the world. He further observed that though on account of their size and weight, it may be necessary to shift or transport them in parts for assembly and erection at the site in the steel plant, they must nevertheless be deemed as individual machines having specialised functions. ***We are not impressed by this reasoning, because it ignores the evidence brought on record as to the nature of processes employed in the erection of the machine, the manner in which it is installed and rendered functional, and other relevant facts which may lead one to conclude that what emerged as a result was not merely a machine but something which is in the nature of being immovable, and if required to be moved, cannot be moved without first dismantling it, and then re-erecting it at some other place. Some of the other decisions which we shall hereafter notice clarify the position further.***
24. In Quality Steel Tubes (P) Ltd. v. CCE [(1995) 2 SCC 372 : (1995) 75 ELT 17] the facts were that a tube mill and welding head were erected and installed by the appellant, a manufacturer of steel pipes and tubes, by purchasing certain items of plant and machinery in market and embedding them to earth and installing them to form a part of the tube mill and purchasing certain components from the market and assembling and installing them on the site to form part of the tube mill which was also covered in the process of welding facility. After noticing several decisions of this Court, the Court observed that the twin tests of exigibility of an article to duty under the Excise Act are that it must be a goods mentioned either in the Schedule or under Item 68 and must be marketable. The word "goods" applied to those which can be brought to market for being bought and sold and therefore, it implied that it applied to such goods as are movable. It noticed the decisions of this Court laying down the marketability tests. Thereafter this Court observed: (SCC p. 376, para 5)
"The basic test, therefore, of levying duty under the Act is twofold. One, that any article must be goods and second, that it should be marketable or capable of being brought to market. Goods which are attached to the earth and thus become immovable and do not satisfy the test of being goods within the meaning of the Act nor it can be said to be capable of being brought to the market for being bought and sold. Therefore, both the tests, as explained by this Court, were not satisfied in the case of appellant as the tube mill or welding head having been erected and installed in the premises and embedded to earth ceased to be goods within meaning of Section 3 of the Act."
25. In Mittal Engg. Works (P) Ltd. v. CCE [(1997) 1 SCC 203 : (1996) 88 ELT 622] this Court was concerned with the exigibility to duty of mono vertical crystallisers which are used in sugar factories to exhaust molasses of sugar. The material on record described the functions and manufacturing process. A mono vertical crystalliser is fixed on a solid RCC slab having a load-bearing capacity of about 30 tons per square metre. It is assembled at site in different sections and consists of bottom plates, tanks, coils, drive frames, supports, plates, etc. The aforesaid parts were cleared from the premises of the appellants and the mono vertical crystalliser was assembled and erected at site. The process involved welding and gas-cutting. The mono vertical crystalliser is a tall structure, rather like a tower with a platform at its summit. This Court noticed that marketability was a decisive test for dutiability. It meant that the goods were saleable or suitable for sale, that is to say, they should be capable of being sold to consumers in the market, as it is, without anything more. The Court then referred to the decision in Quality Steel Tubes [(1995) 2 SCC 372 : (1995) 75 ELT 17] and distinguished the judgment in Narne Tulaman [(1989) 1 SCC 172 : 1989 SCC (Tax) 64 : (1988) 38 ELT 566 : 1988 Supp (3) SCR 1] holding that the contention that the weighbridges were not goods within the meaning of the Act was neither raised nor decided in that case. After considering the material placed on the record it was held that the mono vertical crystalliser has to be assembled, erected and attached to the earth by a foundation at the site of the sugar factory. It is not capable of being sold as it is, without anything more. This Court, therefore, concluded that mono vertical crystallisers are not "goods" within the meaning of the Act and, therefore, not exigible to excise duty. In Triveni Engg. & Industries Ltd. v. CCE [(2000) 7 SCC 29 : (2000) 120 ELT 273] a question arose regarding excisability of turbo alternator. In the facts of that case, it was held that installation or erection of turbo alternator on a concrete base specially constructed on the land cannot be treated as a common base and, therefore, it follows that installation or erection of turbo alternator on the platform constructed on the land would be immovable property, as such it cannot be an excisable goods falling within the meaning of Heading 85.02. In reaching this conclusion this Court considered the earlier judgments of this Court in Municipal Corpn. of Greater Bombay [1991 Supp (2) SCC 18], Quality Steel Tubes [(1995) 2 SCC 372 : (1995) 75 ELT 17] and Mittal Engg. Works (P) Ltd. [(1997) 1 SCC 203 : (1996) 88 ELT 622] as also the earlier judgment of this Court in Sirpur Paper Mills Ltd. v. CCE [(1998) 1 SCC 400 : (1998) 97 ELT 3]. This Court observed: (SCC pp. 35-36, para 14)

"14. There can be no doubt that if an article is an immovable property, it cannot be termed as 'excisable goods' for purposes of the Act. From a combined reading of the definition of 'immovable property' in Section 3 of the Transfer of Property Act, Section 3(26) of the General Clauses Act, it is evident that in an immovable property there is neither mobility nor marketability as understood in the excise law. Whether an article is permanently fastened to anything attached to the earth requires determination of both the intention as well as the factum of fastening to anything attached to the earth. And this has to be ascertained from the facts and circumstances of each case."
26. It was also held that the decision of this Court ***in Sirpur Paper Mills Ltd.[(1998) 1 SCC 400*** *: (1998) 97 ELT 3] must be viewed in the light of the findings recorded by CEGAT therein,* ***that 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 safety. **In view of those findings it was not possible to hold that the machinery assembled and erected by the appellant at its factory site was immovable property as something attached to the earth** like a building or a tree.*
*27. 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 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. We find considerable similarity of facts of the case in hand and the facts in Mittal Engg. [(1997) 1 SCC 203 : (1996) 88 ELT 622] and Quality Steel Tubes [(1995) 2 SCC 372 : (1995) 75 ELT 17] and the principles underlying those decisions must apply to the facts of the case in hand. **It cannot be disputed that such drilling machines and mudguns are not equipments which are usually shifted from one place to another, nor is it practicable to shift them frequently.** Counsel for the appellant submitted before us that **once they are erected and assembled they continue to operate from where they are positioned till such time as they are worn out or discarded.** According to him they really become a component of the plant and machinery because without their aid a blast furnace cannot operate. It is not necessary for us to express any opinion as to whether the mudguns and the drilling machines are really a component of the plant and machinery of the steel plant, but we are satisfied that having regard to the manner in which these machines are erected and installed upon concrete structures, they do not answer the description of "goods" within the meaning of the term in the Excise Act.*

Thus, it can be seen that the Hon. Supreme Court while holding the machines as immovable property took into account facts such that the machines could not be shifted without first dismantling it and then re-erecting it at another site. It was also sought to distinguish as to how a concrete base meant just to prevent wobbling of the machine would not place the machine in the category of 'immovable property' as something attached to the earth.

We would also look at the decision of the Hon. Supreme Court in the case of Commissioner of Central Excise, Ahmedabad v. Solid and Correct Engineering Works [(2010) 5 SCC 122]. The facts in this case were thus –

"3. M/s Solid and Correct Engineering Works, M/s Solid Steel Plant Manufacturers and M/s Solmec Earthmovers Equipment are partnership concerns engaged in the manufacture of parts and components for road and civil construction machinery and equipments like asphalt drum/hot mix plants and asphalt paver machines, etc. M/s Solex Electronics Equipments is, however, a proprietary concern engaged in the manufacture of electronic control panel boards. It is not in dispute that the three partnership concerns mentioned above are registered with the Central Excise Department nor is it disputed that the proprietary concern is a small-scale industrial unit that is availing exemption from payment of duty in terms of the relevant exemption notification.
4. M/s Solidmec Equipments Ltd. (hereinafter referred to as "Solidmec", for short), the fifth unit with which we are concerned in the present appeals is a marketing company engaged in the manufacture of asphalt drum/hot mix plants at the sites provided by the purchasers of such plants. It is common ground that Solidmec advertises its products and undertakes contracts for supplying, erection, commissioning and after-sale services relating thereto. It is also admitted that all the five concerns referred to above are closely held by Shri Hasmukhbhai, his brothers and the members of their families.
5. An inspection of the factories of the respondents by a team of officers from the Central Excise, Preventing Wing, Headquarters, Ahmedabad, led to the issue of a notice dated 30-11-1999 to the four manufacturing units as well as to Solidmec calling upon them to show cause why the amounts mentioned in the said notice be not recovered from them towards Central excise duty. The notice accused the four manufacturing units of having wrongly declared and classified parts and components being manufactured by them as complete plants/systems, even when they were merely parts and components and not machines or plants functional by themselves. The erroneous classification and declaration was, according to the notice, intended to avoid payment of higher rate of duty applicable to parts of such plants and machinery at the material point of time. The notice also pointed out that the units manufacturing parts and components of the plants had availed benefit of exemption wrongly and in breach of the provisions of Rules 9(1) and 173-F and other rules regulating the grant of such benefit.
6. Insofar as Solidmec marketing company was concerned, the show-cause notice alleged that Solidmec was engaged in the manufacturing of asphalt batch mix and drum mix/hot mix plants by assembling and installing the parts and

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components manufactured by the manufacturing units of the group. According to the notice the process of assembly of the parts and components at the site provided by the purchasers of such plants was tantamount to manufacture of such plants as a distinct product with a new name, quality, usage and character emerged out of the said process. Resultantly, the end product, namely, asphalt drum/hot mix plants became exigible to Central excise duty, which duty Solidmec had successfully avoided. The notice also proposed to levy penalties upon all the five concerns under appropriate provisions of the Central Excise Act."

The Hon. Court has very elaborately dealt with the issue and it would be useful to go through the observations -

*"**22.** Section 3 of the Transfer of Property Act, 1882 does not spell out an exhaustive definition of the expression "immovable property". It simply provides that unless there is something repugnant in the subject or context, "immovable property" under the Transfer of Property Act, 1882 does not include standing timber, growing crops or grass. Section 3(26) of the General Clauses Act, 1897 similarly, does not provide an exhaustive definition of the said expression. It reads:*

> *"3. (26) **'immovable property' shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;"***

***23.** It is not the case of the respondents that plants in question are per se immoveable property. **What is argued is that they become immovable as they are permanently imbedded in earth in as much as they are fixed to a foundation imbedded in earth** no matter only 1= feet deep. That argument needs to be tested on the touch stone of the provisions referred to above.*

***24.** Section 3(26) of the General Clauses Act includes within the definition of the term "immovable property" things attached to the earth or permanently fastened to anything attached to the earth. The term "attached to the earth"; has not been defined in the General Clauses Act, 1897. Section 3 of the Transfer of Property Act, however, gives the following meaning to the expression "attached to the earth":*

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

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

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

***25.** It is evident from the above that the expression "attached to the earth" has three distinct dimensions, viz. (a) rooted in the earth as in the case of trees and shrubs (b) imbedded in the earth as in the case of walls or buildings or (c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached. Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1= feet deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above. That is because attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not synonymous to embedding in earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be detached without demolition. Imbedding of a wall in the earth is also in no way comparable to attachment of a plant to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation. So also the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it **must be for permanent beneficial enjoyment of that to which the plant is attached.** It is nobody's case that the attachment of the plant to the foundation is meant for permanent beneficial enjoyment of either the foundation or the land in which the same is imbedded.*

***26.** In English law the general rule is that what is annexed to the freehold becomes part of the realty under the maxim quicquid plantatur solo, solo cedit. This maxim, however, has no application in India. Even so, the question whether a chattel is imbedded in the earth so as to become immovable property is decided on the same principles as those which determine what constitutes an annexation to the land in English law. The English law has evolved the twin tests of degree or mode of annexation and the object of annexation.*

***27.** In Wake V. Halt (1883) 8 App Cas 195 Lord Blackburn speaking for the Court of Appeal observed:*

"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."

***28.** 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.*

***29.** 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. There are cases where machinery installed by monthly tenant was held to be moveable property as in cases where the lease itself contemplated the removal of the machinery by the tenant at the end of the tenancy. The mode of annexation has been similarly given considerable significance by the courts in this country in order to be treated as fixture. Attachment to the earth must be as defined in Section 3 of the Transfer of Property Act. For instance a hut is an immovable property, even if it is sold with the option to pull it down. A mortgage of the super structure of a house though expressed to be exclusive of the land beneath, creates an interest in immovable property, for it is permanently attached to the ground on which it is built.*

30. The courts in this country have applied the test whether the annexation is with the object of permanent beneficial enjoyment of the land or building. Machinery for metal-shaping and electro-plating which was attached by bolts to special concrete bases and could not be easily removed, was not treated to be a part of structure or the soil beneath it, as the attachment was not for more beneficial enjoyment of either the soil or concrete. Attachment in order to qualify the expression attached to the earth, must be for the beneficial attachment of that to which it is attached. Doors, windows and shutters of a house are attached to the house, which is imbedded in the earth. They are attached to the house which is imbedded in the earth for the beneficial enjoyment of the house. They have no separate existence from the house. Articles attached that do not form part of the house such as window blinds, and sashes, and ornamental articles such as glasses and tapestry fixed by tenant, are not affixtures.

31. 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:

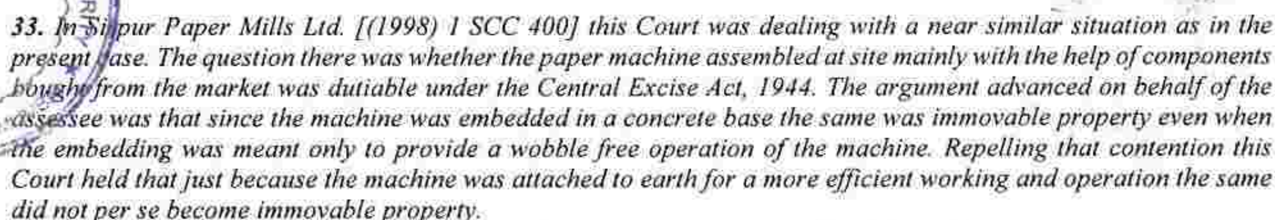
(i) The plants in question are not per se immovable property.

(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."

It can be seen that the Hon. Supreme Court has reiterated the same principles as were seen in the earlier decision of ***T.T.G. Industries Ltd. v. CCE*** (cited supra). The Hon. Court observed that the expression "attached to the earth" has three distinct dimensions - *(a) rooted in the earth as in the case of trees and shrubs (b) imbedded in the earth as in the case of walls or buildings or (c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached.* It has been categorically observed that the attachment of the plant to the foundation at which it rests does not fall in the third category [*attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached*], for the reason that an attachment to fall in the third category it must be for permanent beneficial enjoyment of that to which the plant is attached. The Hon. Court even went on to distinguish and record with approval earlier decisions on the issue of 'immovable property'. We may have a look at the same, too.



33. In Sirpur Paper Mills Ltd. [(1998) 1 SCC 400] this Court was dealing with a near similar situation as in the present case. The question there was whether the paper machine assembled at site mainly with the help of components bought from the market was dutiable under the Central Excise Act, 1944. The argument advanced on behalf of the assessee was that since the machine was embedded in a concrete base the same was immovable property even when the embedding was meant only to provide a wobble free operation of the machine. Repelling that contention this Court held that just because the machine was attached to earth for a more efficient working and operation the same did not per se become immovable property.

34. The Court observed: (Sirpur Paper Mills Ltd. case [(1998) 1 SCC 400] , SCC p. 402, para 5)

> *"5. Apart from this finding of fact made by the Tribunal, the point advanced on behalf of the appellant, that whatever is embedded in earth must be treated as immovable property is basically not sound. For example, a factory owner or a householder may purchase a water pump and fix it on a cement base for operational efficiency and also for security. That will not make the water pump an item of immovable property. Some of the components of the water pump may even be assembled on site. That too will not make any difference to the principle. The test is whether the paper-making machine can be sold in the market. The Tribunal has found as a fact that it can be sold. In view of that finding, we are unable to uphold the contention of the appellant that the machine must be treated as a part of the immovable property of the Company. Just because a plant and machinery are fixed in the earth for better functioning, it does not automatically become an immovable property."*

38. Reliance was placed by Mr Bagaria upon the decision of this Court in Quality Steel Tubes (P) Ltd. v. CCE [(1995) 2 SCC 372 : (1995) 75 ELT 17] and Mittal Engg. Works (P) Ltd. v. CCE [(1997) 1 SCC 203 : (1996) 88 ELT 622]. In Quality Steel Tubes (P) Ltd. case [(1995) 2 SCC 372 : (1995) 75 ELT 17] this Court was examining whether "the tube mill and welding head" erected and installed by the assessee for manufacture of tubes and pipes out of duty-paid raw material was assessable to duty under residuary Tariff Item 68 of the Schedule being excisable goods. Answering the question in negative this Court held that tube mill and welding head erected and installed in the premises and embedded to earth ceased to be goods within the meaning of Section 3 of the Act as the same no longer remained movable goods that could be brought to market for being bought and sold.

39. We do not see any comparison between the erection and installation of a tube mill which involved a comprehensive process of installing slitting line, tube rolling plant, welding plant, testing equipment and galvanising,

etc. referred to in the decision of this Court in Quality Steel Tubes case [(1995) 2 SCC 372 : (1995) 75 ELT 17] with the setting up of a hot mix plant as in this case. As observed by this Court in Triveni Engg. & Industries Ltd. case [(2000) 7 SCC 29 : (2000) 120 ELT 273], the facts and circumstances of each case shall have to be examined for determining not only the factum of fastening/attachment to the earth but also the intention behind the same.

40.** In Mittal Engg. Works (P) Ltd. case [(1997) 1 SCC 203 : (1996) 88 ELT 622] this Court was examining whether the mono vertical crystallisers erected and attached by a foundation to the earth at the site of the sugar factory could be treated as goods within the meaning of the Central Excise Act, 1944. This Court on facts noted that mono vertical crystallisers are fixed on a solid RCC slab having a load bearing capacity of about 30 tonnes per square metre and are assembled at site with bottom plates, tanks, coils, drive frames, supports, plates, distance places, cutters, cutter supports, tank ribs, distance plate angles, water tanks, coil extension pipes, loose bend angles, coil supports, railing stands, intermediate platforms, drive frame railings and flats, oil trough, worm wheels, shafts, housing, stirrer arms and support channels, pipes, floats, heaters, ladders, platforms, etc.* ***The Court noted that the mono vertical crystallisers have to be assembled, erected and attached to the earth on a foundation at the site of the sugar factory and are incapable of being sold to the consumers in the market as it is without anything more.

***41.** Relying upon the decision of this Court in Quality Steel Tubes (P) Ltd. case[(1995) 2 SCC 372 : (1995) 75 ELT 17], the erection and installation of mono vertical crystallisers was held not dutiable under the Excise Act. This Court observed that: [Mittal Engg. Works (P) Ltd. case [(1997) 1 SCC 203 : (1996) 88 ELT 622], SCC p. 208, para 10]*

> ***"10. … The Tribunal ought to have remembered … that mono vertical crystallisers had, apart from assembly, to be erected and attached by foundations to the earth and, therefore, were not, in any event, marketable as they were."***

This decision also, in our opinion, does not lend any support to the case of the assessee in these appeals as we are not dealing with the case of a machine like mono vertical crystallisers which is permanently embedded in the structure of a sugar factory as was the position in Mittal Engg. Works (P) Ltd. case [(1997) 1 SCC 203 : (1996) 88 ELT 622]. The plants with which we are dealing are entirely over ground and are not assimilated in any structure. They are simply fixed to the foundation with the help of nuts and bolts in order to provide stability from vibrations during the operation.

42. So also in T.T.G. Industries Ltd. v. CCE [(2004) 4 SCC 751 : (2004) 167 ELT 501], the machinery was erected at the site by the assessee on a specially made concrete platform at a level of 25 ft height. Considering the weight and volume of the machine and the processes involved in its erection and installation, this Court held that the same was immovable property which could not be shifted without dismantling the same.

43. It is noteworthy that in none of the cases relied upon by the assessee referred to above was there any element of installation of the machine for a given period of time as is the position in the instant case. The machines in question were by their very nature intended to be fixed permanently to the structures which were embedded in the earth. The structures were also custom-made for the fixing of such machines without which the same could not become functional. The machines thus becoming a part and parcel of the structures in which they were fitted were no longer movable goods. It was in those peculiar circumstances that the installation and erection of machines at the sites were held to be by this Court to be immovable property that ceased to remain movable or marketable as they were at the time of their purchase. Once such a machine is fixed, embedded or assimilated in a permanent structure, the movable character of the machine becomes extinct. *The same cannot thereafter be treated as movable so as to be dutiable under the Excise Act. But cases in which there is no assimilation of the machine with the structure permanently, would stand on a different footing.*

44.** In the instant case all that has been said by the assessee is that* ***the machine is fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth but because a foundation was necessary to provide a wobble free operation to the machine. An attachment of this kind without the necessary intent of making the same permanent cannot, in our opinion, constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently. *In that view of the matter we see no difficulty in holding that the plants in question were not immovable property so as to be immune from the levy of excise duty. Our answer to Question 1 is accordingly in the affirmative.*

Thus, we see how the Hon. Courts have evolved the term 'immovable property' when faced with the question of what constitutes movable and immovable property. It is seen that the applicant, too, has referred to this decision but has failed to appreciate the decision in the correct sense.

Though not issued for the purposes of the GST Act, we may as well mention herein the reference by the Hon. Bombay High Court in M/s. Bharti Airtel Ltd. (Earlier known as Bharti Tele-Ventures Ltd.) *v.* The Commissioner of Central Excise **(2014 SCC OnLine Bom 907 : (2015) 77 VST 434)** with regard to a Circular being issued by the Central Board of Excise & Customs in a decision of the same Hon. Bombay High Court -

"(i) In the decision of the Division Bench of this Court in the case of "Commissioner of C.Ex, Mumbai-IV v. Hutchison Max Telecom P. Ltd., (2008 (224) E.L.T 191 (Bom.)", the issue which fell for consideration of the Division Bench inter alia was pertaining to transmission tower set up by the assessee and whether the setting up of the towers amounted to manufacture as the towers being a new product with a distinct name, characteristics and use and is distinct from the components used in the manufacture as contended on behalf of the Revenue. The Division Bench after making the following observations in paragraphs 7 to 9 held that the towers being not moveable, saleable and marketable, they would not be subject to excise duty. Paragraphs 7 to 9 reads as under:-

"7. It is, therefore, clear that the goods must be excisable or that the goods covered having the attributes of excisable goods as understood in Excise Law which includes marketability. The real question, therefore, that arises is whether, the Transmission Apparatus is goods and secondly if even so whether they are marketable. The Commissioner noting the various equipments held that the transmission apparatus meets the test of manufacture. The Commissioner further noted the various equipments installed at the BTS site room.

The following equipments/apparatus were found to be installed in BTS site room:-

a) Microwave Antennas

b) Base station controller/Base Transreceiver station.

c) Microwave Terminal.

d) GSM Antennas

e) Power supplement with rechargeable battery back up.

f) Air conditioners.

g) Transmission tower was erected at the top of the building.

h) The tower was fitted with microwave antennas.

i) The BTS/BSC was installed in prefabricated building object.

Based on this material the Commissioner held that what emerges is a new commodity. The argument advanced that only "Base station controller/Base trans-receiver station, cell site/Mobile Switching centre" were connected with the transmission and reception signals and other equipments were not part of the same, the argument was held as not acceptable as without the tower, UPS, Cable trays, AC., etc., the BTS would not be in a position to function as transmitting and receiving apparatus. The contention of the assessee that various equipments installed at site were individual machine was rejected. The Commissioner further held that with the assembly of various equipment installed what emerges is a commodity with a distinct name, identity, character and use; distinct from inputs and classifiable under chapter 8525 of Central Excise Tariff and the same is distinct and separate from the various equipments which have gone into manufacture of the above transmission apparatus. The argument that after installation of BTS of cell site it becomes immovable properly was rejected. The statement of Narayan in his statement dated 28/1/2004 was partly relied upon to hold it was not immovable property.

8. The Learned Tribunal re-examining the various aspects of what is described as determination of levy of duty of base station, noted that the appellant is engaged in providing Mobile Telecommunication Service (MTS) and is based on global system for mobile communication (GSM). The infrastructure for GSM is similar to other networks. The Tribunal then set out the various infrastructure required for GSM and noted that GSM Architecture consists of Radio Station Sub Systems (constitution of MS, BTS, & BSCs) which are networked with the operation support subsystem (constitued MSCs) which networked with the Public network. The entire sub systems of BTSs and BSCs or MSCs and the number of constituents would depend on the Geographical area covered by the Cellular Network and there is no fixed designation numbers to constitute a component of transmission apparatus. It is not necessary to set out the other facts in detail considering the the Tribunal has in extenso set out the facts. The Tribunal relying on para 20 in the case of Triveni Engineering & India Ltd. (supra) on the test of marketability, held that the so called BTS/BSC site erected, installed and commissioned by the contractors of the company cannot be construed as marketable goods manufactured by the appellant since they cannot go to the market as such BTS/BSC site are not marketable. It also held that the test of marketability would also not be satisfied for another reason being, that for the installation of every BTS/BSC, licence from WPC/SACFA a wing of Department of Telecommunications, Government of India has to be obtained which invariably is user specific and site specific, meaning thereby if one wishes to sell the site to another user, it is not permissible under law, as the approval granted by the aforesaid authority for the frequency allocation and the site is for the user only and the purchaser would have to reapply for the license for that site. It cannot be sold/purchased marketed unattended and be equated to marketable goods. BTS/BSC site, therefore, are neither marketable nor capable of being marketed. The learned Tribunal also held that the appellants are not manufacturers and they are engaged in providing cellular mobile services by virtue of a license granted by the Government of India under the provisions of section 4 of the Indian Telegraph Act, 1885. Thus, their activity is purely service oriented. The Tribunal held that in such circumstances, the activity of installing and commissioning cell site cannot be an activity of either manufacture and no marketable goods arise. For the aforesaid reasons, the appeal was allowed and accordingly, the orders were set aside.

9. It is not necessary for us to answer the issue as to whether the activities is purely service and consequently, the appellants are not manufacturers. We proceed on the footing that what has been assembled and installed is a new commodity having a distinct name from the components from which it was assembled. The question is whether this new commodity is marketable. We have already considered the test of marketability as laid down by the Supreme Court in Triveni Engineering & India Ltd. (supra) and also Moti Laminates Pvt. Ltd. (supra). At this stage, we also note that we proceed on the footing by ignoring the second finding of marketability recorded by the Tribunal namely that BTS/BSC is not marketable as licence is required from the Department of Telecommunication, Government of India. The facts on record would indicate that the equipments erected are embedded in the earth or on a building. The Tribunal noted that revenue does not contest or dispute the fact that whenever BTS/BSC site has to be relocated, all the equipments like BTS/BSC, Microwave Equipment, batteries, control panels, air conditioners, UPS, tower antennae are required to be dismantled into individual components, then they are to be moved from the existing site and reassembled at new site. This involves damages to certain parts like cable trays, etc. which are embedded/fixed to the Civil structure as also the BTS microwave equipment itself. All the components of the new product cannot be shifted as an illustration the room housing the equipment. ***This act of dismantling from the permanent site would render such goods not marketable. Apart from that the goods cannot be re-erected as in the previous place as the requirement of each place is different.*** *Further, from the statement of Narayan as set out in the order of the Commissioner, it may be noted that he had stated that regarding installation of BTS the designing team after survey identified the location as per the requirements of the local coverage needs,*

determining the shelter location, fabrication of I-beam and pole location. It may be possible for us to agree that by installing or erecting, a new product comes into being with a different name in the market from its components. However, as discussed the test of marketability is not satisfied. ***The product cannot be shifted without damage. Apart from that various items and components are embedded in the earth. The product, therefore, is immovable. The order dated 15/1/2002 of Central Board of Excise & Customs, New Delhi itself regards items assembled and erected on the site and attached to the foundation on earth which cannot be dismantled without substantial damage to their components and thus, cannot be reassembled, as non excisable. The new product would not be considered as movable and, therefore, will not be an excisable good.*** *Para 6 of the said circular will not apply to the facts of this case. In our opinion, therefore, though a new product comes into existence, yet as it is not movable, saleable and marketable, it would not be subject to excise duty."*

The principles laid down in the judgments discussed above stand good under all statutes unless any specific definition is available under the statute. What we want to say is that these principles cannot be circumscribed to any particular statute. An elaborate reproduction of the principles as laid down in the judgments alongwith their facts has made things clearer for us. The principles when seen in the light of the facts of the present case help us see thus –

1. There is a definition of "**SPP**"– *"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 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.
2. 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.
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 Governmental Rules and Regulations. It is most unlikely that a project would be moved

CHAIRMAN, ADVANCE RULING AUTHORITY, MAHARASHTRA STATE, MUMBAI

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 a connection to the Grid. And we find the definitions in the agreement clauses thus -

*"**Grid**" means Gird 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 (as per 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 permissions 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 the *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 a moveable 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.

An overview of all above makes us observe that the impugned transaction for ***supply of the Solar Power Plant which includes engineering, design, procurement, supply, development, testing and Commissioning*** is a "works contract" in terms of clause (119) of section 2 of the GST Act.

The case laws cited by the applicant in support of the argument that the transaction is not related to 'immovable property' need not be dealt with as we have so elaborately discussed the very case law in Solid and Correct Engineering Works (cited supra) on which reliance has been placed by the applicant. And we have observed earlier that the applicant has not understood the case law in the correct sense. Further, we have to observe that each judgment has to be understood in terms of the facts as available therein. The applicant has not appreciated the case laws in the sense in which they should have been understood. Like in Solid and Correct

Engineering Works (cited supra), the Hon. Court has held the product as 'movable property' for the reason that the plant was not intended to be permanent at a given place and the plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed. Such are not the facts of the instant case as has been explained above. We see that the applicant has not come up with any decision which overrules the laws laid down by the decisions of the Hon. Courts that we have discussed. Nor have we come across any adverse case laws.

Having seen that the impugned transaction is a "works contract" in terms of clause (119) of section 2 of the GST Act., we find that para 6, as reproduced below, 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' -

> ***"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;"***

In view of "works contracts" u/s 2(119) being deemed to be a supply of services, the impugned transaction would be a supply of "services". The impugned transaction is not a supply to the Government. It would fall in the entry at sr. no.3 (ii) [Heading 9954 (Construction services)] for "composite supply of works contract as defined in clause 119 of section 2 of Central / Maharashtra Goods and Services Tax Act, 2017" as has been specified in the notification issued under section 9 of the GST Act.

Having seen thus, we would now look at each of the three questions posed before us -

Question 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?

The applicant poses for us to decide if the Engineering, Procurement and Construction ('EPC') Contract falls within the definition of 'composite supply' as found in the GST Act. Since we have elaborately discussed and observed above that the impugned transaction is a "works contract" u/s 2(119) the GST Act, we need not even enter into the discussion as to whether the impugned transaction is a 'composite supply" u/s 2(30) the GST Act. In view thereof, we are constrained, with reasons, to answer the first question in the negative. We move on to the second question.

Question 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?

This question arises from the assumption of the applicant that the impugned transaction is a transaction of supply of 'goods'. We have elaborately dealt with earlier as to how the impugned transaction is a 'works contract' u/s 2(119) the GST Act and further that, that 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 visit the entries prescribing tax rates for 'goods'. Since the transaction is treated as a "works contract" and not as a "composite supply", there would be no relevance of "principal supply". And therefore, there arises no occasion to answer the question as to what would be the "principal supply" in the impugned transaction. We proceed to the third question.

Question 3

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

We find that the applicant has informed that 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. It is also informed that there may be cases wherein the Developer divides the contract between two separate contracts of construction of solar power generation system. In this regard, the applicant argues that since the concessional rate of 5% [as clarified to be under Notification no. 1/2017-Integrated Tax (Rate)] 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.

The applicant has laid claim to sr. no.234 of Schedule I of Notification No.1/2017-Central / State Tax (Rate) which states thus –

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

As can be the seen, the above entry is under the notification prescribing the tax rate on 'goods'. We have to observe that the facts of the transactions have to be seen in terms of what the sub-contracting agreement says, what has been supplied, whether the item supplied is a part. Such and many other questions have to be answered. No details have been brought before us. If the transaction is a supply of "goods" then the applicable Schedules (exempt or taxable) would have to be seen. In the absence of any documents before us, we would not be able to deal with this question in the present proceedings.

05. In view of the extensive deliberations as held hereinabove, we pass an order as follows :

CHAIRMAN, ADVANCE RULING AUTHORITY, MAHARASHTRA STATE, MUMBAI

ORDER

(under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

NO.GST-ARA-01/2017/B- 05 **Mumbai, dt.** 17/02/2018

For reasons as discussed in the body of the order, the questions are answered thus -

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 question is answered in the negative.

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?

A.2 Since the transaction is treated as a "works contract" and not as a "composite supply", there would be no relevance of "principal supply". And therefore, there arises no occasion to answer the question as to what would be the "principal supply" in the impugned transaction.

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.

PLACE - Mumbai
DATE - 17/02/2018

-sd-
B. V. BORHADE
(MEMBER)

-sd-
PANKAJ KUMAR
(MEMBER)

Copy to:-

1. The applicant
2. The concerned Central / State officer
3. The Commissioner of State Tax, Maharashtra State, Mumbai
3. The Jurisdictional Commissioner of Central Tax

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